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Via Overnight Mail

April 25, 2013

Mr. Jeff Derouen, Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, Kentucky 40602

Re: Case No. 2013-00144

Dear Mr. Derouen:

Please find enclosed the original and ten (10) copies each of KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC's RESPONSE IN OPPOSITION TO KENTUCKY POWER'S PETITION FOR CONFIDENTIAL TREATMENT for filing in the above-referenced docket.

By copy of this letter, all parties listed on the Certificate of Service have been served. Please place this document of file.

Very Truly Yours,



Michael L. Kurtz, Esq.

Kurt J. Boehm, Esq.

Jody Kyler Cohn, Esq.

BOEHM, KURTZ & LOWRY

MLKkew
Attachment

cc: Certificate of Service
Quang Nyugen, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by mailing a true and correct copy via electronic mail (when available) and regular U.S. Mail to all parties on this 25th day of April, 2013.



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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF APPLICATION OF KENTUCKY	:	
POWER COMPANY FOR APPROVAL OF THE TERMS	:	
AND CONDITIONS OF THE RENEWABLE ENERGY	:	Case No. 2013-00144
PURCHASE AGREEMENT FOR BIOMASS ENERGY	:	
RESOURCES BETWEEN THE COMPANY AND	:	
ECOPOWER GENERATION HAZARD LLC	:	
AUTHORIZATION TO ENTER INTO THE	:	
AGREEMENT; GRANT OF CERTAIN DECLARATORY	:	
RELIEF; AND GRANT OF ALL OTHER REQUIRED	:	
APPROVALS AND RELIEF	:	

RESPONSE IN OPPOSITION TO
KENTUCKY POWER’S PETITION FOR CONFIDENTIAL TREATMENT
OF KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC.

Comes now Kentucky Industrial Utility Customers, Inc. (“KIUC”), and states as follows for its Response in Opposition to Kentucky Power Company’s Petition for Confidential Protection filed on April 10, 2013.

1. Kentucky Power Has Not Met Its Burden Of Providing “Tangible Evidence” Of A Competitive Disadvantage From Disclosure Of The Contract Terms.

Kentucky Power requests Commission approval pursuant to the recently enacted Kentucky Senate Bill 46 of the Renewable Energy Purchase Agreement For Biomass Energy Resources Between ecoPower Generation-Hazard LLC and Kentucky Power (“REPA”). Senate

Bill 46, among other things, requires applicants to include the purchase power agreement that is the subject of its request, “*as part of the application.*” Kentucky Power provided a redacted version of the REPA with its Application and seeks confidential treatment of certain provisions of the REPA.

Under the provisions of the Kentucky Open Records Act, KRS 61.871-.884, “[a]ll public records shall be open for inspection by any person, except as otherwise provided by KRS 61.870 to 61.884.”¹ However, KRS 61.878(1) establishes several classes of public records that are excluded from public inspection. Among those classes are documents “*generally recognized as confidential or proprietary*” whose disclosure would “*permit an unfair commercial advantage to competitors of the entity that disclosed the records.*”

Kentucky Power argues that KRS 61.878(1)(c)(1) exempts certain provisions of its REPA from public disclosure that could disadvantage Kentucky Power in future negotiations with other renewable energy suppliers, because if other suppliers knew of the existence of these provisions they “*would insist on the same or better terms as those negotiated in this purchase agreement.*” (Petition p. 3)

The Commission addressed a similar argument in Case No. 97-197.² In that case, Kentucky Utilities Company (“KU”) petitioned for confidential protection of the pricing and rate information contained in a barge transportation contract and a purchase order for coal. Like Kentucky Power in the present case, KU argued that its barge transportation contract and its purchase order for coal fall within the “*unfair commercial advantage*” exemption of the Open Records Act. KU's barge transportation contract contained the rate for shipment of coal, while

¹ KRS 61.872(1)

² In Re Kentucky Utilities Co. Case No. 97-197, Order of March 18, 1998.

the coal purchase order contained price, quantity and quality specifications of coal purchased. KU argued that disclosure of this information would allow suppliers to manipulate their prices, ultimately resulting in increased prices to KU. Such increases, KU asserted, could damage its ability to compete in the wholesale electricity market. The Commission denied KU's Petition for Confidential Protection, stating:

“[T]he Commission has concluded that the public is best served by allowing public disclosure of this information. No party produced evidence that public disclosure of coal contract information would have the effect of increasing the price of coal to the utilities. In this regard, the Commission emphasizes that public disclosure of such information is just as likely to have the effect of decreasing coal prices to utilities where one coal supplier may wish to undersell another in order to obtain a long-term contract with a utility. This lack of any firm evidence of anti-competitive effects resulting from public disclosure of coal price information must be weighed against the public's right to have access to information relating to a major component of their bills.

While the Commission agrees with KU's contention that the Open Records Act applies to FAC filings, we note that an electric utility must produce tangible evidence demonstrating unfair competitive advantage to justify an exemption from the public disclosure requirements. KU has failed in this regard.”

Parties seeking an exception to the Open Records Act under KRS 278.878(1)(c)(1), bear the burden of producing tangible evidence demonstrating unfair competitive advantage to justify an exemption from the public disclosure requirements. On pages 2 through 4 of its Petition, Kentucky Power speculates that it could be disadvantaged in future negotiations if the redacted provisions are made public, but does not provide a single bit of tangible evidence that disclosure of the redacted portions of the REPA will result in a competitive disadvantage. Kentucky Power's conjecture that public disclosure of parts of the REPA *could* disadvantage the Company in the future does not meet the standard of “*tangible evidence*” demonstrating an unfair advantage.

One could just as easily speculate that the public disclosure of the REPA could do the opposite and lead to more favorable terms in future negotiations with other suppliers. For example, suppliers may be motivated to enter into negotiations with Kentucky Power after reviewing the REPA and concluding that they can undercut ecoPower Generation-Hazard LLC. There is as much evidence that public disclosure will lead to a competitive advantage for Kentucky Power in the future as there is evidence that it will lead to a competitive disadvantage; which is to say that there is tangible evidence of neither.

2. The Circumstances Of Kentucky Power’s Proposed REPA Make It Particularly Important For The Entire Record To Be Available To The Public.

Kentucky Power’s request in this proceeding is unusual in several respects. First, Kentucky Power requests Commission approval of a contract that would increase customer rates by approximately \$50 million or 7%, but provides only about 58 MW of energy and capacity. On its face, this appears to be an unusually expensive power contract.

Second, if the Commission approves the contract pursuant to Senate Bill 46 the purchase power agreement will be “*valid for the entire term of the agreement.*” Presumably, consumers will be obligated to absorb the cost of the contract even if it is later determined that the contract was not fair, just and reasonable; or is no longer needed to serve ratepayers, etc. If the Commission approves the proposed contract ratepayers will be bound for the next 20 years with very limited, if any, ability to later reject the contract.

Finally, Kentucky Power seeks approval of a contract that was not obtained through a Request for Proposal (“RFP”), but instead was the product of negotiations between a single buyer and a single seller. Without an RFP the Commission has no way of ensuring that the

proposed contract is at or below market value. At the very least, a purchased power contract not obtained through an open RFP process should be subject to heightened scrutiny.

All of these factors weigh heavily in favor of strict application of the Commission policy that rate increase information should be open to the public. When two unregulated businesses agree to a contract there is a certain expectation that the contract will remain confidential in most circumstances. However, when a public utility asks the public to guarantee payment on an electric supply contract its terms are no longer private. The public's right to know the reasons for and details of a major rate increase far outweigh any speculative harm to Kentucky Power or its Supplier.

Accordingly, KIUC opposes Kentucky Power's Petition for Confidential Treatment and respectfully requests that the Commission deny the Petition.

DATED this 25th day of April, 2013.

Respectfully submitted,



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