

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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| APPLICATION OF ADJUSTMENT OF RATES) | CASE NO. |
| OF KENTUCKY POWER COMPANY) | 91-066 |

O R D E R

This matter arising upon petition of Kentucky Power Company ("Kentucky Power") filed June 28, 1991 for confidential protection of its responses to Items 5, 59, 92, 139, 181a, 194, 279, 280, and 281 of the first set of data requests of the Attorney General of the Commonwealth of Kentucky ("Attorney General"), the Attorney General having filed his response to the motion on July 8, 1991, and it appearing to this Commission as follows:

On May 10, 1991, the Attorney General served upon Kentucky Power his first set of data requests containing 323 items, exclusive of subparts. In responding to the data requests, Kentucky Power objected to 65 items and refused to furnish the information requested. At a hearing before the Commission on June 19, 1991 held pursuant to the Attorney General's motion to compel, Kentucky Power was directed to furnish some of the information to which it had objected. The Commission's ruling was set forth in an Order entered June 26, 1991. The information, for which Kentucky Power now seeks protection, is part of the information furnished in response to the June 26, 1991 Order.

The Kentucky Open Records Act ("Act"), as codified in KRS 61.870 through 61.884, states that all public records are subject to inspection unless specifically exempted by statute. Exemptions from the Act are found in KRS 61.878. Subsection (1) of that section excludes nine different categories of information from the Open Access provisions of the Act. The Attorney General contends, however, that the exemption provisions do not permit the Commission "to treat information filed with it in a rate proceeding as confidential." The Attorney General further contends that Kentucky Power has failed to demonstrate any competitive harm that will result from disclosure of the information and "has otherwise failed to demonstrate any entitlement to confidentiality."

The positions taken by the Attorney General that the exemption provisions under the Act are not applicable to rate proceedings is unsupported by the statute. KRS 446.080(1) requires all statutes to be construed according to the intent of the legislature. In Bailey v. Reeves, Ky. 662 S.W.2d 832, 834 (1984), the Supreme Court held that "a legislature making no exceptions to the positive terms of a statute is presumed to have intended to make none." Applying that principle to this case, since KRS 61.878 makes no exception from its provisions for rate proceedings, it must likewise be presumed that the exemptions provided in that section of the Act are applicable to such proceedings. Thus, the only real issue is whether Kentucky Power has demonstrated its "entitlement to confidentiality" within the meaning of the Act.

Commission Regulation 807 KAR 5:001, Section 7, recognizes that information filed with the Commission may be protected as confidential and prescribes the procedure to be followed to obtain such protection. The petition filed by Kentucky Power conforms to that procedure. The regulation also provides, in Subsection (4), that confidential protection does not preclude discovery "but it may justify such limitations as are deemed necessary under the circumstances to protect the confidentiality of the material or information." Therefore, the Kentucky Power petition presents not only the issue of whether the information should be protected as confidential, but also assuming the information is entitled to protection, to what extent and under what circumstances should it be made available to the Attorney General.

The information sought to be protected was requested in Items 5, 59, 92, 139, 181a, 194, 279, 280, and 281 of the Attorney General's first data request. The information covers a range of subjects and Kentucky Power relies upon varying grounds to support its motion.

Item 5 requests copies of all studies conducted by Kentucky Power during the last three years concerning the effectiveness of its advertising and marketing programs. Kentucky Power contends that the information should be protected because it is obtained from customers who are promised confidentiality.

KRS 61.878(1)(a) exempts from disclosure "information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." This provision is intended to protect from public disclosure any

information contained in public records that relates to details of an individual's private life when the individual privacy interests in the information outweigh the public interests in the information. Board of Education of Fayette County vs. Lexington-Fayette Urban County Human Rights Commission, Ky.App. 625 S.W.2d 109, 111 (1981). It is not clear from the petition how or if customers who respond to the survey are identified and it cannot be determined whether disclosure of the information would "constitute a clearly unwarranted invasion" of the surveyed customers' personal privacy. Therefore, the information is not entitled to protection on that ground.

Kentucky Power also contends that the information is exempt from disclosure under KRS 61.878(1)(g). This provision exempts from disclosure only correspondence from a public agency with a private individual prior to final agency action. The provision is clearly not applicable to exchanges of information between private individuals. Therefore, Kentucky Power is not entitled to protection of the information under this provision.

Kentucky Power also maintains that the information could be used by its competitors to Kentucky Power's detriment. KRS 61.878(1)(b) exempts commercial information from public inspection which is likely to cause substantial competitive harm to the party from whom the information was obtained. Competitive injury occurs when disclosure of the information gives competitors an unfair business advantage. To the extent that the surveys identify customer needs and the effectiveness of different advertising messages, they would provide competitors useful information in

developing competing market strategies. Therefore, public disclosure of the information is likely to cause competitive injury and the information should be protected as confidential.

The petition identifies two surveys which provide the information requested in Item 5. Because both surveys are voluminous, Kentucky Power asks that it be allowed to make the information available for review upon request rather than providing a copy. This issue should have been raised by Kentucky Power at the hearing before the Commission on the Attorney General's motion to compel. The failure to do so prevents the Commission from evaluating the extent of any hardship that Kentucky Power would endure in reproducing the information. Therefore, the request should be denied and Kentucky Power should file a copy of each survey in accordance with the Order of June 26, 1991.

Item 59 requests a copy of Kentucky Power's consolidated income tax returns, including schedules, for the last two years. Although not expressly stated in neither the request for information nor the petition for confidential protection, it is assumed from the reference to the consolidated returns that the Attorney General is only seeking the federal returns. Kentucky Power contends that the income tax returns requested are exempt by KRS 61.878(1)(i). The Attorney General, in response, contends that income tax returns are subject to discovery and should be furnished.

KRS 61.878(1)(i) exempts from public disclosure "all public records or information, the disclosure of which is prohibited by

federal law or regulation." Under 26 USCA, §6103(a), state officials are prohibited from publicly disclosing any federal income tax return or its contents. Therefore, federal income tax returns fall within the exemption provided by KRS 61.878(1)(i) and are exempt from disclosure.

Item 92 requests copies of Kentucky Power's bonus programs or incentive award programs in effect for the most recent three years. In response to the request, Kentucky Power has filed copies of two incentive programs, the Management Incentive Compensation Plan which covers 15 management positions and the Power Plant Incentive Compensation Plan which covers five management positions at the generating plants. The Management Incentive Compensation Plan is designated as confidential on its cover, but no such designation appears on the Power Plant Incentive Compensation Plan. As grounds for its petition, Kentucky Power contends that disclosure of the information would constitute an unwarranted invasion of the personal privacy of the individuals affected by the plan. If true, the information would be exempt under KRS 61.878(1)(i).

As noted in the petition, the plan documents show how performance awards are calculated as a percent of base salary. They do not, however, provide any information in and of themselves by which the amount any individual covered by the plan would be entitled to receive. Therefore, disclosure of the information would not, in any way, constitute an invasion of the covered employees' privacy interests.

Even if the information would permit disclosure of an individual's income, the public's interest in the information would outweigh the privacy interests. Customers of Kentucky Power have an interest in seeing that the rates approved by this Commission are "fair, just, and reasonable" as required by KRS 278.030(1). Since Kentucky Power seeks to recover through its rates structure, the compensation paid to its employees, including management employees, customers of Kentucky Power have a right to know whether the salaries and compensation paid to such employees are reasonable. In that regard, while it is appropriate to protect the amount of compensation paid to individual employees to the extent possible, where there are only a limited number of employees in a particular position, such protection may not always be afforded. The information, therefore, furnished in response to Item 92 is not entitled to protection and should be furnished to the Attorney General.

Item 139 requests the total annualized salaries or wages for each employee of Kentucky Power as of December 31, 1990. Item 181a requests a listing of all employees of Kentucky Power as of December 31, 1990 and their current annual salary level. Kentucky Power contends that this information is of a personal nature exempt from disclosure under KRS 61.878(1)(a).

The Order of June 26, 1991 directs the manner in which the information requested in Item 139 should be furnished. The method to be used endeavors to protect, as far as possible, the compensation paid each individual employee by allowing employees to be identified only by the job classification. While this

method will reveal the compensation paid to some employees, it protects as confidential the compensation paid to most employees. However, as noted in relation to the information furnished in response to Item 92, the ratepayers' interests in the information outweigh the privacy interests of those few individual employees whose compensation will be discernible from the information.

In responding to the request, Kentucky Power has furnished a list of its employees identified by an employee number and their compensation. While this conforms to literal terms of the June 26, 1991 Order, it is contrary to its intent. Kentucky Power should, therefore, resubmit its response and in addition to the information previously furnished, include each individual's job description and furnish a copy to the Attorney General.

Item 194 requests Kentucky Power to identify all current negotiations intended to increase systems sales. This question refers to sales by Kentucky Power and its parent, American Electric Power System ("AEP"), to other utilities. Kentucky Power contends that this information is exempt under KRS 61.878(1)(b) as confidential commercial information, the disclosure of which is likely to cause competitive injury.

Kentucky Power and AEP compete with other utilities in the wholesale power market. The information concerning wholesale prices and terms offered by Kentucky Power could be used by competing suppliers in marketing their own power. Therefore, disclosure of the information is likely to cause competitive injury and the information should be protected as confidential.

Items 279, 280, and 281 request information concerning residential customer usage of power broken down according to income levels. Item 279 requests the annual average amount of power used per customer, Item 280 requests the average air conditioning saturation level, and Item 281 requests the average electric heat saturation level. Kentucky Power contends that disclosure of the information would constitute an invasion of the customers' privacy interests and, therefore, should be maintained as confidential.

The requests ask that the information be furnished in the form of averages for each different group comprising the different income levels. Therefore, the identity of any individual customer could not be ascertained from the information and disclosure of the information would, therefore, not constitute an invasion of any customers' privacy interests.

Kentucky Power also contends that disclosure of the information is likely to cause it competitive injury. As an example, Kentucky Power states that if a competitor learned of the electric heat saturation level of Kentucky Power's customers segregated by household income level, it could use the information to devise competing market strategies aimed at Kentucky Power customers. While this argument may have validity with respect to Item 281, the petition presents no evidence to support the proposition that its responses to Items 279 and 280 would be of any competitive value. Kentucky Power provides a monopolistic service and, except for the heat requirements, residential customers have no competitive alternative source. Therefore, only

the information requested in Item 281 should be protected as confidential and the information requested in response to Items 279 and 280 should be furnished to the Attorney General.

This Commission being otherwise sufficiently advised,

IT IS ORDERED that:

1. The information furnished in response to Items 5, 59, 194, and 281 shall be held and retained by this Commission as confidential.

2. Kentucky Power shall, within five working days from the date of this Order, serve upon the Attorney General copies of the information filed in response to Items 92, 279, and 280.

3. Within five working days from the date of this Order, Kentucky Power shall file the information requested in Items 139 and 181a in the form and manner prescribed by this Order and shall serve a copy upon the Attorney General.

4. Kentucky Power and the Attorney General shall negotiate for an agreement setting forth terms and conditions upon which the Attorney General shall be permitted to review the material protected from disclosure by this Order as confidential.

Done at Frankfort, Kentucky, this 23rd day of July, 1991.

PUBLIC SERVICE COMMISSION


For the Commission

ATTEST:


Executive Director