

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE APPLICATION OF KENTUCKY UTILITIES)
COMPANY TO ASSESS A SURCHARGE UNDER)
KRS 278.183 TO RECOVER COSTS OF) CASE NO. 93-465
COMPLIANCE WITH ENVIRONMENTAL)
REQUIREMENTS FOR COAL COMBUSTION)
WASTES AND BY-PRODUCTS)

O R D E R

This matter arising upon petition of Kentucky Utilities Company ("KU"), filed February 8, 1995, pursuant to 807 KAR 5:001, Section 7, for confidential protection of information concerning its SO₂ allowance accounts on the grounds that disclosure of the information is likely to cause KU competitive injury, and upon the response of Kentucky Industrial Utility Customers, Inc. ("KIUC"), an intervenor in this proceeding, filed February 15, 1995, objecting to Commission approval of a confidentiality agreement tendered by KU as an exhibit to its petition on the grounds that it is unduly burdensome and unworkable, and it appearing to this Commission as follows:

In this proceeding, KU has requested a surcharge pursuant to KRS 278.183 to recover its costs in complying with the environmental requirement relating to coal combustion wastes and byproducts. In accordance with the Commission's Order of July 19, 1994, KU has submitted its "Emission Allowance Management Strategy Plan." This document includes the details of KU's plans for SO₂ allowance accounts management, future compliance strategies,

internal risk assessments of various options, and future marketing plans for system and off-system sales. KU seeks to protect this information as confidential on the grounds that disclosure is likely to cause it competitive injury. KU, however, does not object to furnishing the information it seeks to protect to intervenors under a confidentiality agreement and has attached to its petition a proposed form of confidentiality agreement that it considers suitable.

In responding to the petition, KIUC does not object to protection of the information, but does object to the form of confidentiality agreement tendered by KU. KIUC maintains that the tendered confidentiality agreement is unduly burdensome and unworkable and should not be approved by this Commission as the only means by which the information will be shared with intervenors.

The first issue to be addressed is the matter of confidential protection. KRS 61.872(1) requires information filed with the Commission to be available for public inspection unless specifically exempted by statute. Exemptions from this requirement are provided in subsection (1) of KRS 61.878. That subsection exempts several categories of information. One category exempted by paragraph (c)1. is information confidentially disclosed to the Commission which if made public would permit an unfair commercial advantage to competitors of the party from whom the information was obtained. To qualify for the exemption, the party claiming confidentiality must demonstrate actual competition and a

likelihood of substantial competitive injury if the information is publically disclosed. Competitive injury occurs when disclosure of the information gives competitors an unfair business advantage.

Disclosure of the information sought to be protected would enable potential buyers and sellers of SO₂ allowances to judge KU's level of need either to buy or sell allowances from its accounts. Potential sellers or buyers could use this information in their negotiations with KU to KU's detriment. Similarly, knowledge of KU's future marketing plans for system and off-system sales would assist potential buyers of off-system power in negotiating purchases from KU and would also assist KU's competitors in the market by furnishing them information relative to the price KU would be required to charge for the sale. Therefore, disclosure of the information would be detrimental to KU's operations and the information should be protected as confidential.

The second issue to be addressed is raised by KIUC's response to KU's petition and involves the confidentiality agreement tendered by KU as an attachment to the petition. Although KIUC does not object to protecting the information that is the subject of the petition, it is concerned that an Order granting protection will also approve the confidentiality agreement as the only means available to the intervenors who wish to review the information. This, however, is not the case.

The procedure by which a party may seek access to confidential information filed by another party is set forth in 807 KAR 5:001, Section 5(b). Under the regulation a party seeking

access to confidential information must first attempt to negotiate a disclosure agreement with the provider of the information. If those efforts are unsuccessful, the party seeking the information may petition for access to the information. The Commission must then determine whether the party seeking the information is entitled to it, and if so, the protection necessary to ensure the confidentiality of the information. The procedure for gaining access to confidential information is entirely separate and distinct from the procedure for declaring information confidential, and granting confidential protection to the information filed by KU will not establish or affect the right of any intervenors to the information.

If KIUC believes it is entitled to the information sought to be protected, it should first attempt to negotiate a disclosure agreement with KU that is mutually acceptable to both parties. If no agreement can be reached, KIUC should then petition the Commission in the manner prescribed by the regulation.

This Commission being otherwise sufficiently advised,
IT IS ORDERED that:

1. The information concerning the details of KU's plans for SO, allowance management, future compliance strategies, internal risk assessments of various options, and future marketing plans for system and off-system sales, which KU has petitioned be withheld from public disclosure, shall be held and retained by this Commission as confidential and shall not be open for public inspection.

2. KIUC's objection to the proposed settlement agreement be and it is overruled.

Done at Frankfort, Kentucky, this 26th day of April, 1995.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director