

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF KENTUCKY UTILITIES)
COMPANY FOR CONFIDENTIAL PROTECTION)
OF CERTAIN INFORMATION CONTAINED IN) CASE NO. 97-197
BARGE TRANSPORTATION AND COAL)
PURCHASE CONTRACTS)

O R D E R

Kentucky Utilities Company ("KU") has petitioned for confidential treatment of the prices and rates contained in its barge transportation contract with Crouse Corporation and its purchase order for coal from Lanham Mining, Inc. Its petition presents two issues: (1) Does the Open Records Act apply to fuel adjustment clause ("FAC") filings? and (2) Does disclosure of the pricing information in KU's FAC filings create an "unfair commercial advantage" to KU's competitors? Finding that the Open Records Act applies to FAC filings and that KU has failed to show that disclosure of its FAC filings will permit an unfair commercial advantage to its competitors, the Commission upon rehearing denies the petition.

PROCEDURE

On April 8, 1997, KU petitioned for confidential protection of the pricing and rate information contained in its barge transportation contract with Crouse Corporation and its purchase order for coal from Lanham Mining, Inc.¹ By Order dated May 29, 1997, the

¹ KU also petitioned for confidential protection of a purchase order for the supply of coal from Consol Inc. On September 3, 1997, KU moved to withdraw that part of its petition which related to that purchase order. By this Order, we grant its motion to withdraw.

Commission found that confidential protection had been consistently denied to FAC filings and denied KU's request. KU then submitted a petition for rehearing which the Commission granted on July 7, 1997.

On August 13, 1997, the Commission held an evidentiary hearing on KU's petition at which Gerhard Haimberger, KU's Director of Fuels Management, and Ronald L. Willhite, KU's Vice President of Regulation and Economic Planning, testified. Following this hearing, KU submitted a written brief in support of its petition for confidential protection.

DISCUSSION

In its petition for confidentiality and subsequent filings, KU argues that the price and rate provisions of its fuel contracts and fuel transportation contracts are subject to the exemptions set forth in KRS 61.878. Under the provisions of the Kentucky Open Records Act, KRS 61.871-.884, all documents filed with a public agency are subject to public disclosure. KRS 61.878, however, specifically exempts

records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records;

KRS 61.878 (1)(c)(1).

KU argues that its barge transportation contract with Crouse Corporation and its purchase order for coal from Lanham Mining Company fall within the "unfair commercial advantage" exemption of the Open Records Act. KU's barge transportation contract contains the rate for shipment of coal, while the coal purchase order contains price,

quantity and quality specifications of coal purchased. KU argues that disclosure of this information would allow suppliers to manipulate their prices, ultimately resulting in increased prices to KU. Such increases, KU asserts, could damage its ability to compete in the wholesale electricity market.

All fuel and fuel transportation contracts have been subject to public disclosure since 1978 when Administrative Regulation 807 KAR 5:056 established the uniform FAC. While the FAC provides an optional mechanism for the automatic passthrough of changes in fuel prices, it imposes mandatory filing requirements upon those utilities that adopt an FAC. Specifically, they must:

submit copies of each fossil fuel purchase contract not otherwise on file with the Commission and all other agreements, options or similar such documents, and all amendments and modifications thereof related to the procurement of fuel supply and purchased power.

807 KAR 5:056, Section 1(7). In addition, any new contracts and agreements must be filed when executed. Id.

When the uniform FAC was proposed, several electric utilities objected to these filing requirements and argued that these documents should be considered confidential and not subject to public review. In rejecting these arguments, the Commission noted that all filings were subject to all provisions of the Open Records Act:

A major concern to many of the utilities was the Commission's proposal to treat information submitted to the PSC regarding the utilities' coal contracts as public information. Specific testimony on this point was submitted by Big Rivers Electric Corporation, **Kentucky Utilities**, and East Kentucky Power Cooperative. The thrust of the utilities' objections to public disclosure of information contained in coal contracts was that such information would be of little

practical benefit to the public at large, while disclosure of one coal company's prices to a utility could cause other suppliers to raise their prices to that level, thus causing a general increase in the cost of fuel to the utility.

The Commission's requirement that certain fuel purchasing records be filed by the utilities with the Commission clearly causes the application of KRS 61.870 to 61.884 to such records. The above described citations deal with "Public Records," their inspection, and exceptions, and the citation has therefore been incorporated in the regulation for the sake of convenience.

After careful consideration of the objections raised in support of confidential treatment of information submitted to the PSC regarding coal prices paid by utilities, the 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.**

Memorandum from Public Service Commission to Mable D. Robertson, Regulations Compiler, Legislative Research Commission, at 2-3 (May 31, 1978) (emphasis added).

Since adopting the FAC Regulation in 1978, several utilities have requested and been denied confidential treatment of coal supply and coal transportation contracts. For example, in Case No. 9674, Kentucky Power Co. (Dec. 22, 1986), the Commission denied Kentucky Power Company's request for confidentiality under KRS 61.878, finding that:

The Open Records Act in KRS 61.872(1) clearly establishes the policy of open access by declaring: "All public records shall be open for inspection by any person, except as otherwise provided" Kentucky Power admits that the act does not specifically address the confidentiality of private contracts filed of record with a public agency. The company, however, urges the application of the exception for commercial records provided for in KRS 61.878(1)(b). This section protects records which "if openly disclosed would permit an unfair advantage to competitors of the subject enterprise." This is the only possible exception to the general policy of the Open Records Act that is cited by the company.

In this instance the Commission has an unusual opportunity to test the applicability of this section. Since 1978, Kentucky Power's coal contracts have been filed with the Commission and been open to public inspection. If this policy had been in error, one would expect clear evidence of the unfair advantage enjoyed by Kentucky Power's competitors. Yet we note again that the company's petition fails to cite a single instance of any harm it has suffered because of an unfair advantage gained by a competitor. All injuries mentioned in the petition are purely hypothetical. With this eight-year record, the wisdom of the Commission's judgment in 1978 has been powerfully affirmed. The Open Records Act clearly requires that all coal contracts filed with the Commission be made available for public inspection. **It would be improper for the Commission to now apply an exception knowing--based on the experience of the last eight years--that there is no reasonable expectation that any competitor will gain an unfair advantage by having these records available to the public.**

Id. at 3-4.

In Case No. 89-216, Kentucky Utilities Co. (Nov. 7, 1989), KU sought confidential treatment of agreements for the supply of coal to its Brown Generating Station. KU contended that disclosure of the contracts would place KU and its customers at a "serious competitive disadvantage in negotiating provisions governing the same subject matters with other potential suppliers" and would deprive KU of "the strategy and

opportunity of seeking to bargain for the most favorable mix of terms and conditions.” Id. at 2. KU requested that the Commission keep these contracts confidential indefinitely. Noting the decision in Kentucky Power Co., the Commission denied the application. Id. at 2-3.

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. Although its fuel and fuel transportation contracts have been subject to public view for nearly 20 years, its witnesses could not point to a specific instance where KU incurred higher fuel costs as a result of these disclosures.² KU provided no evidence to demonstrate that the fuel costs of Kentucky electric utilities have increased despite the existence of the public disclosure requirements or that the position of Kentucky electric utilities as compared to those of other states has declined. Federal governmental reports suggest the contrary.³

Moreover, KU has presented no evidence to show that its ability to compete in the wholesale electricity market has been adversely affected by public disclosure of its fuel

² In his testimony, Mr. Haimberger testified that KU suffers from public disclosure on a daily basis. Transcript (“Tr.”) at 12. He, however, failed to provide specific details. He referred only to an incident which occurred “quite a while ago” and which involved an unspecified coal contract for KU's Brown Station. Id. at 12-13.

³ See, e.g., Energy Information Administration, Coal Industry Annual 1996 at 171. In 1987 Kentucky ranked nineteenth out of 43 states with an average price of coal delivered to electric utilities of \$28.94. In 1996, it ranked fourteenth out of 43 states with an average price of coal delivered of \$24.43.

contracts. It offered no economic studies or analyses to support its claim of competitive disadvantage. Its witnesses failed to quantify the loss of any sales in the wholesale market or to identify the loss of any wholesale customer as a result of the public disclosure of its fuel and fuel transportation contracts.

KU has also failed to demonstrate that a wholesale competitor's knowledge of KU's fuel and fuel transportation contracts will translate into a competitive advantage that will deprive it of potential sales. Fuel is only one component of the final price of electricity. Many other components, including the operational characteristics of the electric utility's generating plants and utility management practices, play significant roles.

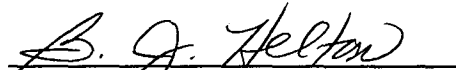
In the absence of clear evidence of unfair commercial disadvantage, the Commission finds that KU's application should be denied.

IT IS THEREFORE ORDERED that:

1. KU's Motion to withdraw from its Petition for Confidential Protection its purchase order for the supply of coal from Consol, Inc. is granted.
2. KU's Petition for Confidential Protection of its barge transportation contract with Crouse Corporation and its purchase order for coal from Lanham Mining, Inc. is denied. The barge transportation contract and purchase order shall be held and retained as confidential and shall not be opened for public inspection for a period of 30 days from the date of this Order. At the end of this period, the barge transportation contract and purchase order shall be placed in the public record without further Order from the Commission.

Done at Frankfort, Kentucky, this 18th day of March, 1998.

PUBLIC SERVICE COMMISSION




Chairman



Vice Chairman

Commissioner

ATTEST:


Executive Director