

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE JOINT APPLICATION OF NUON GLOBAL)
SOLUTIONS USA, BV, NUON GLOBAL)
SOLUTIONS USA, INC., AIG HIGHSTAR CAPITAL)
II, LP, HYDRO STAR, LLC, UTILITIES, INC. AND)
WATER SERVICE CORPORATION OF) CASE NO. 2005-00433
KENTUCKY FOR APPROVAL OF AN INDIRECT)
CHANGE IN CONTROL OF A CERTAIN)
KENTUCKY UTILITY PURSUANT TO THE)
PROVISIONS OF KRS 278.020(5) AND (6) AND)
807 KAR 5:001, SECTION 8)

ORDER

On March 8, 2006, the Commission entered an Order in this proceeding in which it approved the proposed transfer of control of Water Service Corporation of Kentucky ("Water Service") subject to certain conditions. Nuon Global Solutions USA BV ("Nuon BV"), Nuon Global Solutions USA, Inc. ("Nuon USA"), AIG Highstar Capital II, LP ("Highstar"), Hydro Star, LLC ("Hydro Star"), Utilities, Inc. ("Utilities"), and Water Service (collectively "Joint Applicants") have applied for rehearing on certain of these conditions and for confidentiality of certain information filed with the Commission and set forth in the Commission's Order of March 8, 2006. By this Order, we grant the application in part and deny in part.

In its Order of March 8, 2006, the Commission approved the proposed transfer of control subject to several conditions, including that: (1) Highstar notify the Commission subsequent to its board approval and as soon as practical following any public announcement of any acquisition of a regulated or non-regulated business representing

5 percent or more of Highstar's or Hydro Star's market capitalization, and (2) Highstar "adequately fund, construct, operate and maintain Water Service's treatment, transmission, and distribution systems; comply with all applicable Kentucky statutes and administrative regulations; and supply the needs of Water Service's customers."¹

Joint Applicants assert that these conditions should not be imposed upon Highstar. They argue that Highstar will not govern or control the operation of Water Service and that such control will reside instead in Hydro Star and Utilities. They further argue that, due to the private limited partnership structure of Highstar, the required notification would adversely affect Highstar and its investors and significantly impair their business activities and ability to attract investors.

The Attorney General ("AG") has opposed the Joint Applicants' request to remove the second condition in question. He argues that "Highstar, as the entity in control, should be made to commit to adequately fund, construct, operate and maintain its utility."²

Having considered the Joint Applicants' motion, the Commission finds that Highstar should be relieved of any requirement to notify the Commission of any acquisition of a regulated or non-regulated business representing 5 percent or more of Highstar's or Hydro Star's market capitalization. As Highstar has ultimate control over Water Utilities by virtue of its ownership of Hydro Star and represents the ultimate funding source for Water Utilities, the Commission is of the opinion that any revision of

¹ Order of March 8, 2006 at 7. The Commission also applied the first listed condition to Hydro Star and applied the second condition to Hydro Star, Utilities and Water Service.

² Attorney General's Response to Joint Applicants' Motion for Rehearing at 2. The AG takes no position on the first condition at issue.

the second condition in question would not be in the public interest and should not be made.

In separate motions, Joint Applicants have also requested confidential treatment for certain information contained in their filings with the Commission and withdrawal of the Commission's Order of March 8, 2006 and the issuance of a new order to protect the disclosure of this information.³ They request confidential treatment for the following information: (1) the amount of the purchase price;⁴ (2) the Stock Purchase Agreement between Nuon BV and Hydro Star;⁵ (3) Highstar Financial Statements and Supplemental Information for the period from May 18, 2004 to December 31, 2004;⁶ (4) the amount of capital commitments from Highstar's partners; the percentage of these commitments that have been called; and the amount of the committed capital which remains available to call for purposes of satisfying investments, management fees and

³ Because the Joint Applicants' Motion to Withdraw Order requires revisions to the Order of March 8, 2006, the Commission considers this motion to be an application for rehearing.

⁴ Case No. 2005-00323, Joint Application of Nuon Global Solutions USA, BV, Hydro Star, LLC, Utilities, Inc. and Water Service Corporation of Kentucky for Approval of an Indirect Change In Control of a Certain Kentucky Utility Pursuant to the Provisions of KRS 278.020(5) and (6) and 807 KAR 5:001, Section 8 (Ky.P.S.C. filed Aug. 3, 2005), Application at ¶ 11; Case No. 2005-00433, Application at ¶ 11. In Case No. 2005-00323, Nuon BV, Hydro Star, Utilities, and Water Service applied to the Commission for approval of the transfer of control of Water Service from Nuon BV to Hydro Star but subsequently withdrew their application. On October 20, 2005, the Joint Applicants submitted their application in the case at bar. In their application, the Joint Applicants incorporated by reference the record of Case No. 2005-00323.

⁵ Case No. 2005-00323, Application at Exhibit 3.

⁶ Case No. 2005-00323, Joint Applicants' Response to Commission Staff's First Data Request, Exhibit 9.

expenses;⁷ and (5) the amount of the transaction costs related to the proposed stock purchase.⁸

The Commission notes that the Joint Applicants have failed to comply with the procedure for requesting confidential treatment as set forth in Administrative Regulation 807 KAR 5:001, Section 7. Such requests should be made at the time of filing the material and must specifically identify the material for which confidential treatment is sought. Joint Applicants filed the material in question with the Commission without any request for confidential treatment and in at least two instances revealed this material in their application.

The Commission has great difficulty accepting the Joint Applicants' assertions that "they just discovered that numerous documents containing confidential information are available for public access"⁹ and that they "never intended for the Confidential Material to become public and placed on the Commission's website."¹⁰ KRS 61.872(1) requires information filed with the Commission to be available for public inspection unless specifically exempted by statute. Additionally, Administrative Regulation 807 KAR 5:001, Section 7(1), provides that "[a]ll material on file with the commission shall be available for examination by the public unless the material is confidential as provided herein." The Joint Applicants knew, or should have known, that all documents filed with

⁷ Case No. 2005-00433, Order of March 8, 2006 at 3 – 4.

⁸ Case No. 2005-00323, Joint Applicants' Response to Commission Staff's First Data Request, Item 19.

⁹ Joint Applicants' Motion to Withdraw Order and Issue New Order at 3.

¹⁰ Joint Applicants' Supplemental Petition for Confidentiality at 5.

the Commission are available for public inspection and that regulatory procedures must be followed in order to obtain confidential treatment of any of that material.

Given the large number of entities involved in this transaction, the unique private investment structure of Highstar, and the Joint Applicants' efforts to identify some of the materials as confidential at the time of filing, the Commission finds good cause exists to deviate from the procedural requirements of 807 KAR 5:001, Section 7, and to consider whether confidential protection should be afforded to material already filed with the Commission.

KRS 61.872(1) provides that “[a]ll public records shall be open for inspection by any person, except as otherwise provided by KRS 61.884.” 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.” KRS 61.878(1)(c)(1).

Joint Applicants argue that KRS 61.878(1)(c)(1) exempts all material in dispute. They bear the burden of demonstrating that unfair commercial advantage will result to their competitors from disclosure of the materials. To meet this burden, they must demonstrate that disclosure will give their competitors “substantially more than a trivial unfair advantage.” Southeastern United Medigroup, Inc. v. Hughes, 952 S.W.2d 195 (Ky.1997).

Highstar's Financial Statements. Joint Applicants argue that Highstar's financial statements and references from these statements that are set forth in the Order of

March 8, 2006¹¹ are highly confidential and not generally subject to public disclosure. They further argue that disclosure of this material would give Highstar's business competitors an unfair business advantage by revealing sensitive financial information about its capital funds. Because Highstar is a private limited liability partnership and its Financial Statements are not publicly disclosed, disclosure could result in a chilling effect on Highstar's business activities and its ability to attract investors that would shrink the pool of potential investors and the amount of available capital.

The Commission notes that Joint Applicants, when submitting Highstar's Financial Statements, identified that these statements were considered confidential and should not be disclosed to the public. Based upon a careful review of these documents, the Commission finds that the financial statements contain sensitive information that is not available to the public and that their disclosure to the public would result in competitive harm to Highstar. The Commission further finds that information derived from these statements and to which reference is made in the Order of March 8 should be afforded confidential treatment and not disclosed to the public.

Stock Purchase Agreement.¹² Joint Applicants contend that the Stock Purchase Agreement contains confidential and proprietary provisions including the purchase price, the payment terms, conditions precedent to the closing, employee benefit arrangements, termination fee and other sensitive provisions. They further contend that public disclosure of these provisions would permit business competitors to discern

¹¹ Since this particular monetary information contained in the final order is all contained in the Financial Statements and supplemental information for which confidential treatment is sought, they will be considered together.

¹² Case No. 2005-00323, Application, Exhibit 3.

Hydro Star's negotiating strategies, areas of concern, and risk management approaches. With such information, the Joint Applicants contend, business competitors who are competing with Hydro Star for other potential acquisitions will have an unfair competitive advantage.

The Commission notes that Joint Applicants, when submitting the Stock Purchase Agreement, advised the Commission that they considered the agreement to be confidential and stated that it should not be disclosed to the public. Based upon a careful review of this document, the Commission finds that portions of the document, if disclosed, may result in substantial competitive harm to the Joint Applicants. We further find that, as disclosure of significant portions of the agreement would not result in any competitive harm, a blanket application of confidential protection to the agreement is inappropriate and unlawful. Given the size of the document in question, the Commission finds that the Joint Applicants' motion for confidential treatment should be denied, but that the Joint Applicants should be permitted to renew their motion provided that they identify the specific provisions that required confidential treatment.

Purchase Price¹³ and Transaction Costs.¹⁴ Joint Applicants make numerous arguments for the confidential treatment of the purchase price and the transaction costs. Joint Applicants, however, stated the purchase price in the main body of their original

¹³ Case No. 2005-00323, Application at ¶ 11; Case No. 2005-00433, Application at ¶ 11.

¹⁴ Case No. 2005-00323, Joint Applicants' Response to Commission Staff's First Data Request, Item 19.

and second applications¹⁵ and did not identify this information as proprietary or confidential. Similarly, the Joint Applicants provided the transaction costs without a request for confidential treatment or any identification that the information was proprietary or confidential. Accordingly, the Commission finds that this information should not be afforded confidential treatment.

IT IS THEREFORE ORDERED that:

1. Joint Applicants' Application for Rehearing is granted in part and denied in part.

2. Joint Applicants' request to amend Ordering Paragraph 9 and Appendix A, Condition 6, of the Commission's Order of March 8, 2006 to delete all references to Highstar is granted.

3. Ordering Paragraph 9 of the Commission's Order of March 8, 2006 is amended to read:

Hydro Star shall notify the Commission subsequent to its board approval and as soon as practicable following any public announcement of any acquisition of a regulated or non-regulated business representing 5 percent or more of Hydro Star's market capitalization.

4. Condition 6 of Appendix A of the Commission's Order of March 8, 2006 is amended to read:

Hydro Star will notify the Commission subsequent to its board approval and as soon as practicable following any public announcement of any acquisition of a regulated or non-regulated business representing 5 percent or more of Hydro Star's market capitalization.

¹⁵ Case No. 2005-00323, Application at ¶ 11 and Case No. 2005-00433, Application at ¶ 11.

5. Joint Applicants' request to amend Ordering Paragraph 10 and Appendix A, Condition 10, of the Commission's Order of March 8, 2006 to delete all references to Highstar is denied.

6. Joint Applicants' Petition for Confidentiality and Supplemental Petition for Confidentiality is granted in part and denied in part.

7. Confidential treatment is afforded to the material identified in Footnote 6 to this Order.

8. References in Finding Paragraph 11 to the amount of Highstar's capital commitments from its partners and to its remaining capital commitment shall be redacted from the public copy of the Commission's Order of March 8, 2006 and any copy of this Order that is provided to any person who has not entered into a confidentiality agreement with Highstar.

9. References in Finding Paragraph 16 to the amount of Highstar's available capital shall be redacted from the public copy of the Commission's Order of March 8, 2006 and any copy of this Order that is provided to any person who has not entered into a confidentiality agreement with Highstar.

10. Joint Applicants' Petition for Confidentiality and Supplemental Petition for Confidentiality as it relates to the documents identified in Footnotes 12 and 13 of this Order are denied. Joint Applicants may renew their Petition for confidentiality for the documents identified in Footnote 12 provided that they identify in their renewed Petition the specific provisions of the documents that required confidential treatment.

11. Joint Applicants' Motion to Withdraw Order and Issue New Order is denied.

12. The Executive Director shall not place the material for which confidential treatment was denied in the public record for 20 days following this Order to allow the Joint Applicants to seek any remedy afforded by law.

13. Within 7 days of the date of this Order, the chief executive officer of Highstar, Hydro Star, Utilities and Water Service shall each file with the Commission, a written acknowledgement on behalf of his/her entity that the entity accepts and agrees to be bound by the commitments, as modified by this Order, set forth in Appendix A of the Commission's Order of March 8, 2006.

14. Joint Applicants shall advise the Commission in writing if at any time the material granted confidential treatment becomes publicly available or otherwise no longer qualifies for confidential treatment.

Done at Frankfort, Kentucky, this 3rd day of April, 2006.

By the Commission

ATTEST:



Executive Director