

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF KENTUCKY-AMERICAN)
WATER COMPANY FOR A CERTIFICATE OF)
PUBLIC CONVENIENCE AND NECESSITY) CASE NO. 2012-00096
AUTHORIZING CONSTRUCTION OF THE)
NORTHERN DIVISION CONNECTION)

ORDER REGARDING REQUEST FOR CONFIDENTIAL TREATMENT

On April 25, 2013, the Commission entered an Order in which we denied in part the petition of Kentucky-American Water Company (“Kentucky-American”) that certain information contained in responses to requests for information be afforded confidential treatment and not be placed in the public record subject to public inspection. Kentucky-American has petitioned for rehearing of the portions of that Order in which we denied its Petition for Confidential Treatment. Finding no basis to modify our original decision, we deny the petition for rehearing.

This case involves Kentucky-American’s application for a Certificate of Public Convenience and Necessity to construct water transmission mains, a booster pump station, and two elevated water storage tanks to serve its Northern Division (“the Northern Connection Project”). Kentucky-American filed its application on May 31, 2012. During the discovery phase of this proceeding, Commission Staff requested Kentucky-American to provide “documents since January 1, 2000 in which Kentucky-American or its agents discuss the condition of the Owenton Water Treatment Plant and

possible repairs to that plant”¹ and “the bids submitted to Kentucky-American for the proposed facilities.”²

In response to these requests,³ Kentucky-American provided, *inter alia*, bid information on improvement projects at its Owenton Water Treatment Plant. The documents involve an electronic mail message that states the bid amounts submitted in 2005 on a proposed water intake for the Owenton Water Treatment Plant and the cost estimate for that proposed improvement based upon those bids and the bids submitted for the Northern Connection Project and tabulations of those bids.

Arguing that this information reveals the business model Kentucky-American uses – the procedure it follows and the factors and inputs it considers in evaluating bids for construction projects – and that disclosure of such information would damage Kentucky-American’s competitive position and business interests, Kentucky-American petitioned for confidential treatment of the information. Kentucky-American further argued that disclosure of the information would enable potential bidders to review the information and prospectively manipulate the bid solicitation process to the detriment of Kentucky-American and its customers by tailoring bids to correspond to and comport with Kentucky-American’s bidding criteria and process.

¹ Commission Staff’s First Request for Information to Kentucky-American Water Company, Item 3 (issued July 9, 2012).

² *Id.* Item 65.

³ In his First Request for Information, the Attorney General (“AG”) requested documents related to the calculation of the construction, permitting and right-of-way costs associated with the proposed facilities. AG’s First Request for Information to Kentucky-American Water Company, Item 2 (filed July 6, 2012). In responding to this request for information, Kentucky-American refers to its Response to Commission Staff’s First Request for Information, Item 65.

In our Order of April 25, 2013, we denied Kentucky-American's petition for confidential treatment as it pertained to this information.⁴ We found that Kentucky-American had provided no evidence to demonstrate that the nature of competition within the construction industry in this region was so limited as that disclosure of bidding information would have a harmful effect or to support its contention that disclosure of the information would likely result in manipulation of the bid process. We observed that the bid information regarding possible repairs to the Owenton Water Treatment Plant was over seven years old, contained only the final bid amount, and did not contain any breakdown or evaluation of the bid. As to the information involving the Northern Connection Project, we noted that Kentucky-American had provided only the submitted bids and had provided no evaluation of those bids other than a compilation or summary of all bids.

In its Petition for Rehearing, Kentucky-American contends that the Commission's action is inconsistent with prior Commission precedent.⁵ It notes that in Case No. 2007-00134,⁶ the Commission afforded confidential treatment to Kentucky-American's response to a request for "all documents received by Kentucky-American in conjunction with its request for bids for construction of the facilities identified in Kentucky-American's

⁴ Kentucky-American also sought confidential protection regarding certain personal information about its employees. In our Order of April 25, 2013, we granted Kentucky-American's petition for confidential treatment pertaining to that information.

⁵ On June 19, 2013, we granted Kentucky-American's Petition for Rehearing for the purpose of allowing adequate time to consider and address the Petition's merits.

⁶ Case No. 2007-0134, *Application of Kentucky-American Water Company for a Certificate of Convenience and Necessity Authorizing the Construction of Kentucky River Station II, Associated Facilities and Transmission Main* (filed Mar. 30, 2007).

application.”⁷ The information in question and that in Case No. 2007-00134, Kentucky-American argues, are similar and should be afforded the same treatment.

Kentucky-American further argues that its future construction costs are likely to increase if public dissemination of the information in question is permitted. The information in question contains the precise amount that the lowest bidder underbid the other bidders. “If the winning bidder is permitted to access this information for various projects,” Kentucky-American argues, “the bidder will be able to determine how much it could have increased its bid while remaining the low bidder.”⁸ It further argues that successful bidders will be “highly motivated to analyze its bid, in comparison with other bids, and will use this information to the financial detriment of . . . [Kentucky-American] and its ratepayers in bidding on future projects.”⁹

KRS 278.400 establishes the standard for review of applications for rehearing. It provides that “[u]pon rehearing any party may offer additional evidence that could not with reasonable diligence have been offered on the former hearing.” The statute is intended to provide closure to Commission proceedings by limiting rehearing to new evidence not readily discoverable at the time of the original hearings.¹⁰ It requires parties to Commission proceedings to use reasonable diligence in the preparation and presentation of their case and serves to prevent piecemeal litigation of issues. We have

⁷ Case No. 2007-00134, Kentucky-American’s Response to Public Service Commission’s Post-Hearing Data Requests, Item 7 (filed Jan. 9, 2008). *See also* Letter from Beth O’Donnell, Executive Director, Public Service Commission, to Lindsey W. Ingram III, counsel for Kentucky-American Water Company (Jan. 17, 2008).

⁸ Petition for Rehearing at 3.

⁹ *Id.* at 3 – 4.

¹⁰ Case No. 96-524, *An Examination by the Public Service Commission of the Application of the Fuel Adjustment Clause of Louisville Gas and Electric Company from November 1, 1994 to October 31, 1996* (Ky. PSC Mar. 11, 1999) at 2.

further interpreted the statute as providing an opportunity for the Commission to address any errors or omissions in our Orders.¹¹

After careful consideration of Kentucky-American's petition, we find no compelling basis to modify our Order of April 25, 2013. Our actions in Case No. 2007-00134 and the present case are distinguishable. At the time that we granted confidential treatment of the bidding documents, no final action had been taken on Kentucky-American's application and no final contract had been awarded. The possibility existed that a new round of bidding might be necessary. In the current proceeding, the contract for the Northern Connection Project has been awarded, and construction commenced some time ago. Moreover, the bids surrounding the proposed improvements to the Owenton Water Treatment Plant are more than eight years old and were the product of a very different economic and business environment.

The Commission acknowledges that vendors are likely to analyze the submitted bids to the preparation of future bids. In Kentucky, at least 200 water utilities – water districts and municipal utilities – are subject to the Open Records Law and must make submitted bids available for public inspection. Potential vendors have this information

¹¹ Case No. 2009-00127, *DPI Teleconnect, LLC v. Bellsouth Telecommunications, Inc. d/b/a AT&T Kentucky* (Ky. PSC Mar. 2, 2012) at 3.

available to develop their bids.¹² Kentucky-American has presented no evidence to demonstrate that the availability of this information has resulted in higher winning bids and reduced savings to utilities and their customers. Moreover, Kentucky-American has presented no evidence to suggest that the construction industry in this region is so lacking in competitive firms that a very few firms have such market power as to dominate and manipulate the bidding process.

In summary, the Commission finds that Kentucky-American has not met the burden set forth in KRS 278.400 to require a rehearing in this matter. It has failed to present any new evidence or argument to disturb our earlier findings. In the absence of any discernible error in the Order of April 25, 2013, Kentucky-American's Petition for Rehearing should be denied.

IT IS THEREFORE ORDERED that:

1. Kentucky-American's Petition for Rehearing is denied.
2. Twenty-three days after the day of this Order, the materials in Items 3 and 65 of Kentucky-American's Response to Commission Staff's First Request for Information shall be placed in the public record.

¹² A cursory search of the Internet quickly uncovered bid tabulation sheets for projects upon which the firms seeking to construct the Northern Connection Project had previously bid. *See, e.g.*, http://www.cityofomaha.org/pw/images/stories/bids/OPW_5187352222_Bid_Tab.pdf (last visited Jan. 4, 2014) (Garney Companies, Inc.); <http://laserfiche.cocoafll.org/WebLink8/0/doc/1331/Page101.aspx> (last visited Jan. 4, 2014) (Garney Companies, Inc.); <http://www.bryantx.gov/fetch.html?name=04-108-Tab.pdf> (last visited Jan. 4, 2014) (Garney Companies, Inc.); <http://www.indy.gov/eGov/City/OFM/Purch/Documents/PDF/ITB0006787.pdf> (last visited Jan. 4, 2014) (Reynolds, Inc.); http://www.epwu.org/public_info/agenda/archive/2011/attachments/Item5072810.pdf (last visited Jan. 4, 2014) (Reynolds, Inc.); <http://www.louisvilleky.gov/NR/rdonlyres/1BF83D4A-76D7-4606-969E-AFF5B72658F7/0/11103.pdf> (last visited Jan. 4, 2014) (MAC Construction & Excavating, Inc.).

By the Commission

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