

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF DUKE	)	
ENERGY KENTUCKY, INC. FOR: 1) AN	)	
ADJUSTMENT OF THE ELECTRIC RATES; 2)	)	
APPROVAL OF AN ENVIRONMENTAL	)	
COMPLIANCE PLAN AND SURCHARGE	)	CASE NO.
MECHANISM; 3) APPROVAL OF NEW	)	2017-00321
TARIFFS; 4) APPROVAL OF ACCOUNTING	)	
PRACTICES TO ESTABLISH REGULATORY	)	
ASSETS AND LIABILITIES AND 5) ALL OTHER	)	
REQUIRED APPROVALS AND RELIEF	)	
	)	

ORDER

On November 21, 2017 Duke Energy Kentucky, Inc. (“Duke Kentucky”) filed a motion, pursuant to 807 KAR 5:001, Section 13 and KRS 61.878, requesting that the Commission grant confidential protection to certain designated materials produced in a supplemental response to Commission Staff’s First Request for Information (“Staff’s First Request”) No. 59. Specifically, Duke Kentucky requested that invoices for costs incurred and services rendered in preparing for this rate case and other related documents be treated confidentially. Duke Kentucky argued that failing to treat the documents as confidential would place Duke at a competitive disadvantage in the future. Thus, Duke Kentucky argued that the designated materials must be maintained as confidential pursuant to KRS 61.878(1)(a) and (c).

On January 31, 2018, March 29, 2018, and April 3, 2018 Duke Kentucky filed supplemental responses to Staff’s First Request No. 59 providing documentation of its ongoing litigations fees and costs similar to those provided in its November 21, 2017

supplemental response. On all three of those dates, Duke Kentucky simultaneously made motions for confidential treatment requesting that the supplemental responses be treated as confidential by the Commission for the same reasons it asserted in its November 21, 2017 motion for confidential treatment. Duke Kentucky filed another supplement to Staff's First Request No. 59 on or about March 2, 2018, indicating that no fees and costs were incurred during the period referenced, but it did not request confidential treatment for that supplement.

The Commission is a public agency subject to Kentucky's Open Records Act, which requires that all public records "be open for inspection by any person, except as otherwise provided by KRS 61.870 to 61.884."<sup>1</sup> The exceptions to the free and open examination of public records contained in KRS 61.878 should be strictly construed.<sup>2</sup> The party requesting that materials be treated confidentially has the burden of establishing that one of the exceptions is applicable.<sup>3</sup> In determining whether materials should be exempt from disclosure, the Commission must balance the potential harm from disclosure with "the effect of protecting a given document from scrutiny by the public and potential intervenors."<sup>4</sup>

KRS 61.878(a) exempts from disclosure public records "containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." KRS 61.878(1)(c)1 exempts records that are

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<sup>1</sup> KRS 61.872(1).

<sup>2</sup> See KRS § 61.871.

<sup>3</sup> 807 KAR 5:001, Section 13 (2)(c).

<sup>4</sup> *Southern United Medigroup, Inc. v. Hughes*, 952 S.W.2d 195, 199 (Ky. 1997), *abrogated on other grounds by Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004).

“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.”

The invoices for costs and services incurred in preparation of this rate case and related documents are not of a personal nature and are not “generally recognized as confidential or proprietary.” Although this rate case is before an administrative agency, the proceedings are adversarial in nature, and Duke Kentucky is seeking to recover its costs and fees associated with the rate case. The cost and fees associated with pursuing or defending a civil action, including fees paid to experts and attorneys, are not generally recognized as confidential or proprietary.<sup>5</sup> In fact, when parties seek to recover costs and fees incurred in litigation in both federal and state courts, they are required to submit itemized explanations of those costs and fees sufficient to allow courts to assess their reasonableness and those submissions are not generally treated as confidential.<sup>6</sup> Moreover, to the extent documents pertain to the retention and payment of experts who have offered or prepared evidence in the record, the terms and conditions of their

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<sup>5</sup> See *e.g. Asbury University v. Powel*, 486 S.W.3d 246, 265 (Ky. 2016)(where the court referenced the total amount sought in attorney fees, total amount sought in costs, the hourly rates of the attorneys, the total hours billed down to the tenth of the hour, and the general work performed by the attorneys in the order and noted that the claimed fees were supported by affidavits from counsel with timesheets attached); see also *Flag Drilling Co., Inc. v. Erco, Inc.*, 156 S.W.3d 762, 766 (Ky. App. 2005) (where the court remanded an appeal to the trial court with instructions to obtain evidence regarding the reasonableness of the attorney fees claimed, in part, because an award of fees must be based on the facts and circumstances of each case and the reasonableness of the claimed fees).

<sup>6</sup> See *e.g. Johnson v. Zimmer Holdings, Inc.*, 73 F. Supp.3d 814, 825-6 (E.D. Ky. 2014) (where the court reviewed and discussed itemized bills from a party’s attorneys submitted in support of a claim for fees, large portions of which were included in the order itself, that provided information regarding the dates on which attorneys’ work was completed, the tasks that were performed on each day, the hours per day that each attorney worked on the tasks down to the tenth of the hour, and the names of each attorney who worked on the tasks); *Couch v. Transworld Systems, Inc.*, 3:16-CV-00618-CRS, 2017 WL 1520426 (W.D. Ky. Apr. 24, 2017) (where the court reviewed an attorney’s rates and specific billing entries to access whether the claimed attorney fees were reasonable).

retention and the compensation they received bears on the credibility of that evidence and, therefore, is not generally considered confidential, proprietary, or of a personal nature.<sup>7</sup> Finally, Duke Kentucky failed to demonstrate how the release of the designated materials would permit an unfair commercial advantage (and given the extent to which information about litigation costs and attorney fees are generally available and discussed in court proceedings and published orders it seems unlikely that there is evidence that such information would result in an unfair advantage). Thus, having carefully considered the motions and the materials at issue, the Commission finds that the materials designated by Duke Kentucky in its motions do not meet the criteria for confidential treatment and, therefore, are not exempted from public disclosure pursuant to KRS 61.878(1) and 807 KAR 5:001, Section 13.

IT IS THEREFORE ORDERED that:

1. Duke Kentucky's motions for confidential treatment made on November 21, 2017, January 31, 2018, March 29, 2018, and April 3, 2018 are hereby denied.
2. The documents and materials produced in response to Staff's First Request No. 59 for which confidential treatment was requested in those motions do not meet the criteria for confidential treatment and, therefore, shall be made available to the public.
3. The Commission will not place the materials into the public record for a period of 30 days pursuant to 807 KAR 5:001, Section 13(5).

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<sup>7</sup> See *Primm v. Isaac*, 127 S.W.3d 630, 635-9 (Ky. 2004) (indicating that evidence regarding what an expert witness was hired to do in a particular matter and the compensation they received is relevant and discoverable in civil matters); Fed. R. Civ. Pro. 26(a)(2) (requiring parties in federal court proceedings to automatically disclose significant information regarding retained experts whose testimony will be offered in support of claim or defense, including information regarding their qualifications and the compensation they received for their services).

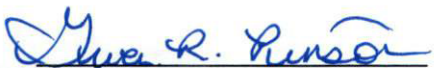
4. Nothing in this Order shall be construed as preventing the Commission from revisiting the confidential treatment of materials and information.

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By the Commission

ENTERED  
MAY 03 2018  
KENTUCKY PUBLIC  
SERVICE COMMISSION

ATTEST:



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