

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF EAST KENTUCKY POWER)	
COOPERATIVE, INC. FOR APPROVAL TO)	
AMEND ITS ENVIRONMENTAL COMPLIANCE)	
PLAN AND RECOVER COSTS PURSUANT TO)	CASE NO.
ITS ENVIRONMENTAL SURCHARGE,)	2017-00376
SETTLEMENT OF CERTAIN ASSET)	
RETIREMENT OBLIGATIONS AND ISSUANCE OF)	
A CERTIFICATE OF PUBLIC CONVENIENCE AND)	
NECESSITY AND OTHER RELIEF)	

ORDER

On November 20, 2017, East Kentucky Power Cooperative, Inc. (“EKPC”) filed an application for the approval of an amendment to its Environmental Compliance Plan, the settlement of certain asset retirement obligations, a Certificate of Public Convenience and Necessity, and other relief (“Application”). The Application was accompanied by a Motion for Confidential Treatment in which EKPC sought confidential treatment for maps of Spurlock Station and an economic analysis of its proposed amendment, attached as Exhibit RH-1 to the testimony of Robin Hayes (“Hayes Testimony”). On January 19, 2018, EKPC responded to the Commission Staff’s First Request for Information (“Staff’s First Request”) and simultaneously filed a second Motion for Confidential Treatment seeking confidential treatment for actual and projected costs and benefits of EKPC’s membership in PJM Interconnection, LLC (“PJM”) provided in response to Staff’s First Request, Item 3, and additional maps of Spurlock Station pertaining to EKPC’s dust control plan. On February 16, 2018, EKPC

filed a supplemental version of Exhibit RH-1 and simultaneously filed a motion seeking to have it treated in a confidential manner. Having considered the motions and material at issue, the Commission grants EKPC's motions in part and denies them in part.

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."¹ Exceptions to the free and open examination of public records contained in KRS 61.878 should be strictly construed.² The party requesting that materials be treated confidentially has the burden of establishing that one of the exceptions is applicable.³ Moreover, in determining whether materials should be exempt from disclosure, the Commission must balance the harm from disclosure with "the effect of protecting a given document from scrutiny by the public and potential intervenors."⁴

The Commission finds that the maps of the Spurlock Station and surrounding utility assets are infrastructure records that disclose the location, configuration, or security of public utility critical systems. The Commission finds that the disclosure of the records would have a reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing, protecting against, mitigating, or responding to a terrorist

¹ KRS 61.872(1); *see also* KRS 278.020(1) (indicating that the Commission may, in its discretion, conduct a public hearing on any request for a certificate of need and convenience); KRS 278.020(9) (indicating that a public hearing is required in certain situations involving the construction of transmission lines); KRS 278.260(1) ("No order affecting the rates or service complained of shall be entered by the commission without a formal public hearing.").

² *See* KRS § 61.871.

³ 807 KAR 5:001, Section 13 (2)(c).

⁴ *See 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) (indicating that quasi-judicial agencies should engage in this balancing when determining whether documents should be exempt from disclosure pursuant to the Open Records Act).

act. Thus, the Commission concludes that the maps should be excluded from disclosure indefinitely pursuant to KRS 61.878(1)(m)1f as requested by EKPC.

The material regarding the actual and projected costs and benefits of EKPC's PJM membership for which EKPC next seeks confidential treatment identifies the benefits EKPC contends accrued to its members based on its PJM membership from June 1, 2016, through May 31, 2017, and the total benefits EKPC estimates contends will accrue to its members during its first ten years as a member of PJM. The estimated benefits for the first ten years include both historic estimates and future projections (the period at issue is 2013 through 2022).⁵ EKPC argues that disclosure of the information regarding the benefits of PJM membership would "potentially harm" its competitive position in the marketplace.⁶

The Commission finds that EKPC failed to establish that the material regarding the benefits of PJM membership meet the criteria for confidential treatment. The material is extremely general and includes only single figures providing the net of the costs and benefits during the relevant periods (a single figure for the period from June 1, 2016, through May 31, 2017, and a single figure for the estimated benefits from 2013 through 2022). With respect to the historical information, the Commission observes that another utility requested confidential treatment for related but more specific material – transmission capacity it expected to sell or bid in the PJM markets – but limited the request to projected information, which indicates that such historical information is not

⁵ See Case No. 2012-00169, *Application of East Kentucky Power Cooperative, Inc. to Transfer Functional Control of Certain Transmission Facilities to PJM Interconnection, LLC* (Ky. PSC December 20, 2012) (hereinafter "Case No. 2012-00169") (in which EKPC was authorized to become a full member of EKPC and in which a similar figure was discussed along with how it was calculated).

⁶ EKPC's Motion for Confidential Treatment (filed Jan. 19, 2018) at 3.

generally considered to be confidential.⁷ Moreover, EKPC's previous estimate of the net benefit of its first ten years as a PJM member (along with more detailed information regarding costs and benefits) was included in EKPC's supplemental response to the Attorney General's First Request for Information, Item 31, and in the Final Order in Case No. 2012-00169, both of which are currently available to the public and posted on the Commission's website in that case.⁸ EKPC is also required to pass the benefits it receives from its PJM membership to its members such that it would be necessary for that information to be made public, at least in general terms, to account for the benefits passed on.⁹ Thus, the Commission finds that EKPC failed to establish that the information regarding the benefits of PJM membership for which confidential treatment was sought meets the criteria for confidential treatment, and therefore, that material should not be exempt from public disclosure.

Exhibit RH-1, which was prepared and sponsored by Robin Hayes, is a summary of an economic analysis she performed to compare the environmental compliance plan proposed in the Application ("Proposed Compliance Plan") and an alternative proposal to convert Spurlock Units 1 and 2 from coal-fired generators to natural gas-fired generators ("Alternative Compliance Plan").¹⁰ EKPC argued that Exhibit RH-1 is

⁷ Case No. 2017-00179, *Electronic Application of Kentucky Power Company for (1) A General Adjustment of its Rates for Electrical Service; (2) An Order Approving Its 2017 Environmental Compliance Plan; (3) an Order Approving its Tariffs and Riders; (4) An Order Approving Accounting Practices to Establish Regulatory Assets and Liabilities; and (5) An Order Granting All Other Required Approvals and Relief* (Ky. PSC, Oct. 5, 2017) at 3–4.

⁸ Case No. 2012-00169, *EKPC*, Final Order at 12–17.

⁹ See Case No. 2012-00169, Final Order at 20 ("[T]he Commission finds that EKPC's membership in PJM should be conditioned upon EKPC agreeing to file, no later than November 30, 2015, an application for approval of a rate mechanism to flow back to customers the capacity market benefits expected to accrue from membership in PJM").

¹⁰ Hayes Testimony at 2:3-2:8.

confidential and proprietary and that its disclosure “would give bidders and contractors a tremendous competitive advantage in seeking to secure the work” necessary to implement the Proposed Compliance Plan, thereby qualifying it for exemption from disclosure pursuant to KRS 61.878(c)(1). However, the Commission must rely on the information contained in Exhibit RH-1 to make its decision on the merits in this matter, because Exhibit RH-1 is EKPC’s primary evidence regarding the relative costs of the Proposed Compliance Plan and the Alternative Compliance Plan.¹¹ Thus, considering the interests involved, the Commission finds that portions of Exhibit RH-1 should be exempt from public disclosure but that other portions should not be exempt from disclosure.

Specifically, Exhibit RH-1 contains the capital expenditures and expenses that EKPC contends it would incur in implementing the Proposed Compliance Plan and the Alternative Compliance Plan from 2017 through 2035. For each plan, capital expenditures are broken down by year and into various phases or projects – all of which will be completed by 2024, according to the estimate. Similarly, expenses are broken down by year and into various components through 2035. Exhibit RH-1 also sets forth the net cash flow for each of the plans from 2017 through 2035 by year and indicates how EKPC calculated the total present value of the net cash flow for each.¹² The

¹¹ See KRS 278.183 (2) (indicating the Commission must determine whether the environmental compliance plan is “reasonable and cost-effective for compliance with the applicable environmental requirements” and, if so, “establish a reasonable return on compliance-related capital expenditures.”); see also Case No. 2014-00292, *Application of East Kentucky Power Cooperative, Inc. for an Order Declaring the Glasgow Landfill Gas to Energy Project to be an Ordinary Extension of Existing Systems in the Usual Course of Business and a Joint Application of Farmers Rural Electric Cooperative Corporation and East Kentucky Power Cooperative, Inc. for Approval to Enter into a Ten Year Purchased Power Agreement and Approval of a Special Contract* (Ky. PSC Mar. 30, 2015), Order at 2 (“[C]apital costs are not generally recognized as confidential or proprietary when submitted in support of a request for a CPCN.”).

¹² Hayes Testimony at 1:16-1:20, Exhibit RH-1 at 1-2.

information contained in Exhibit RH-1 is not contained in the Hayes Testimony.¹³ Thus, the Commission finds that the total values, including the total yearly values, do not meet the criteria for confidential treatment, and therefore, that information should not be exempt from public disclosure. However, the Commission finds that, under the circumstances, the line items that include estimates of specific expenditures or projects meet the criteria for confidential treatment for a period of seven years, at which point EKPC expects the capital projects to be completed, and therefore, that the line item information should be exempt from disclosure for that period.

IT IS THEREFORE ORDERED that:

1. EKPC's motions for confidential treatment are granted in part and denied in part.
2. The maps of Spurlock Station and other facilities for which confidential treatment was sought meet the criteria for confidential treatment and, therefore, those materials shall be exempt from public disclosure, unless and until this Commission orders otherwise.
3. The material regarding the benefits of PJM membership for which confidential treatment was sought do not meet the criteria for confidential treatment and, therefore, those materials shall be made available to the public.
4. Lines 11 through 36 of page 1 of Exhibit RH-1; Lines 48 through 53 of page 1 of Exhibit RH-1; Lines 56 through 59 of page 1 of Exhibit RH-1; Lines 19 through 52 of page 2 of Exhibit RH-1; Lines 59 through 62 of page 2 of Exhibit RH-1; Lines 70 through 72 of page 2 of Exhibit RH-1; and Lines 76 through 79 of page 2 of

¹³ Hayes Testimony at 4:20-5:11.

Exhibit RH-1, with the exception of the first column on the left of each page of the spreadsheet, meet the criteria for confidential treatment and, therefore, that information shall be exempt from public disclosure for a period of seven years from that date of this Order, unless and until this Commission orders otherwise.

5. The remaining lines of Exhibit RH-1 and the whole of the first column on the left side of each page do not meet the criteria for confidential treatment and, therefore, that information shall be made available to the public.

6. Within 35 days from the date of this order, EKPC shall file into the public record a copy of Exhibit RH-1 as filed with the Application and a copy of the supplemental version of Exhibit RH-1 as filed on or about February 16, 2018, with the information the Commission held should be treated as confidential redacted, but containing all other information in Exhibit RH-1 as filed previously filed.

7. Within 35 days from the date of this order, EKPC shall file into the public record a copy of its response to Staff's First Request, Item 3, in which the information regarding the benefits of PJM membership contained therein is not redacted.

8. The Commission shall not place the materials in the public record for a period of 30 days pursuant to 807 KAR 5:001, Section 13(5), unless filed into the public record by EKPC prior to that time.

9. The use of materials granted confidential treatment in any Commission proceeding shall comply with 807 KAR 5:001, Section 13(9).

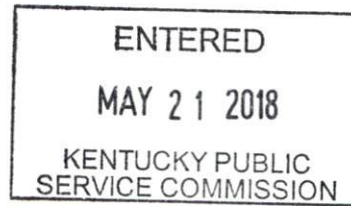
10. EKPC shall inform the Commission if the materials granted confidential protection become publicly available or no longer qualify for confidential treatment.

11. If a non-party to this proceeding requests to inspect materials granted confidential treatment by this Order and the period during which the materials have been granted confidential treatment has not run, EKPC shall have 20 days from receipt of written notice of the request to demonstrate that the materials still fall within the exclusions from disclosure requirements established in KRS 61.878. If EKPC is unable to make such demonstration, the requested materials shall be made available for inspection.

12. 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



ATTEST:

A handwritten signature in blue ink, appearing to read "Greg R. Purse". The signature is written in a cursive style and is positioned above a horizontal line.

Executive Director

Case No. 2017-00376

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