

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

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In the Matter of:

THE APPLICATIONS OF BIG RIVERS )  
 ELECTRIC CORPORATION FOR: )  
 (I) APPROVAL OF WHOLESALE TARIFF )  
 ADDITIONS FOR BIG RIVERS ELECTRIC ) CASE NO. 2007-00455  
 CORPORATION, (II) APPROVAL OF )  
 TRANSACTIONS, (III) APPROVAL TO ISSUE )  
 EVIDENCES OF INDEBTEDNESS, AND )  
 (IV) APPROVAL OF AMENDMENTS TO )  
 CONTRACTS; AND )  
 OF E.ON U.S. LLC, WESTERN KENTUCKY )  
 ENERGY CORP. AND LG&E ENERGY MARKETING, )  
 INC. FOR APPROVAL OF TRANSACTIONS )

**RESPONSE OF E.ON U.S. LLC, WESTERN KENTUCKY  
 ENERGY CORP. AND LG&E ENERGY MARKETING, INC.  
 TO THE MOTION TO COMPEL OF THE CITY OF HENDERSON  
 UTILITY COMMISSION, d/b/a HENDERSON MUNICIPAL POWER & LIGHT**

E.ON U.S. LLC (“E.ON U.S.”), Western Kentucky Energy Corp. (“WKEC”) and LG&E Energy Marketing, Inc. (“LEM”) (the “E.ON Entities”), by counsel, for their Response to the Motion to Compel the E.ON Entities to Provide Discovery to the City of Henderson Utility Commission, d/b/a Henderson Municipal Power & Light (“HMP&L”), state as follows:

**INTRODUCTION AND BACKGROUND**

On March 4, 2008, HMP&L filed a motion asking this Commission to compel the E.ON Entities to provide to it the confidential and proprietary response to Data Request No. 83 (“DR 83”) of the Attorney General’s Initial Request for Information to Joint Applicants (“AG Initial Request”) (“Motion to Compel”). As HMP&L accurately noted, the E.ON Entities have offered

to provide, pursuant to a protective agreement, all other confidential information filed by the E.ON Entities and requested by HMP&L.<sup>1</sup> However, the E.ON Entities object to providing to HMP&L the confidential and proprietary response to DR 83, which consists of the text of the letter agreement providing for certain payments to be made by the E.ON Entities to Alcan Primary Products Corporation and Century Aluminum of Kentucky (collectively, the “Smelters”). The information sought by HMP&L does not affect HMP&L’s interests or rights in any way. Nor does possession of the information affect HMP&L’s ability to participate in this proceeding. Accordingly, 807 KAR 5:001, Section 7(5)(b) does not entitle HMP&L to the information.

### ARGUMENT

807 KAR 5:001, Section 7(5)(b) – a subsection of the regulation that is neither cited nor quoted by HMP&L in its Motion – provides the analysis applicable to a party’s demand for information that has been filed in a Commission case, that has been found by the Commission to be entitled to confidential protection, and that has not been provided to the demanding party. HMP&L contends that, simply because it is a party to this case, it is entitled to all documents filed in the case, confidential or not. HMPL is wrong. With regard to information filed in response to data requests, Section 7(5)(b) of 807 KAR 5:001 provides, instead, as follows:

If the commission grants confidential protection to the responsive material and if parties have not entered into protective agreements, ***then any party may petition the commission requesting access to the material on the grounds that it is essential to a meaningful participation in the proceeding.*** The petition shall include a description of efforts to enter into a protective agreement and any unwillingness to enter into a protective agreement shall be fully explained. Any party may respond to the petition within ten (10) days after it is filed with the commission. ***The commission shall determine if the petitioner is entitled to the***

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<sup>1</sup> Such an agreement has been sent to HMP&L for signature. As of this date, HMPL has not returned an executed copy.

*material, and the manner and extent of the disclosure* necessary to protect confidentiality.

807 KAR 5:001, §7(5)(b) (emphasis added).

The plain language of the regulation alone refutes a number of HMP&L's contentions.

First, HMP&L clearly errs in assuming that, simply because it is a party to this case, it is automatically entitled to any more than what it has already received.<sup>2</sup> While 807 KAR 5:001, §7(5)(a) does say that all parties are entitled to be served with responses to discovery requests, it also says that those service copies may be served "with only those portions for which confidential treatment is sought obscured." Section 7(5)(b) of that same regulation clearly anticipates, however, that legitimate disputes with regard to a party's desire to obtain confidential information will arise. When they do, the Commission "shall determine *if* the petitioner is entitled to the material, and the manner and *extent* of the disclosure" that is appropriate. 807 KAR 5:001, § 7(5)(b) (emphasis added). HMP&L's insistence that the E.ON parties are somehow in violation of "the disclosure provisions of the Commission's regulation" [HMP&L Motion at 2] is obvious error. Party status notwithstanding, Section 7(5)(b) clearly permits the Commission to find that disclosure is not warranted, or to find that only partial disclosure, or disclosure in some particular manner, is appropriate.

Second, as a party demanding confidential information without having executed an agreement to obtain that information, HMP&L is directed by Section 7(5)(b) of the regulation to *petition the Commission for it*, not to ask that the E.ON Entities be "compelled" to provide it.

There is a distinction with a very meaningful difference between petitioning the Commission for

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<sup>2</sup> HMP&L makes the puzzling assertion, at page 2 of its Motion, that it "was not provided even a redacted copy of the information." HMP&L is in error. Redacted copies of the responses were, in fact, properly provided to HMP&L in accordance with 807 KAR § 7(5)(a).

access to confidential information and asking the Commission to compel an action by another party. Pursuant to 807 KAR 5:001, § 7(5)(b), HMP&L is the petitioner. It therefore bears the burden of demonstrating to the Commission that, even though the Kentucky Open Records Act protects the information from disclosure, depriving HMP&L of that information will render HMP&L unable to participate “meaningfully” in this proceeding. Indeed, the regulation requires HMP&L to demonstrate that possession of the confidential information is “*essential*” to HMP&L’s meaningful participation in the proceeding.

HMP&L has not even begun to make such a showing. Nor can it.

The amount to be paid by the E.ON Entities to the Smelters is the substance of an agreement by and among private parties, none of which is a regulated utility. The amount to be paid by the E.ON Entities to the Smelters will have no affect whatsoever upon the ability of Big Rivers to carry out its responsibilities as a generation and transmission cooperative once again in control of its destiny. The amount to be paid by the E.ON Entities to the Smelters will have no affect whatsoever upon HMP&L or the interests it cited when it moved to intervene in this case: “the continued operation of the [HMP&L] power plant and the ability of HMPL to provide service to its customers.”<sup>3</sup>

HMP&L does not even attempt to describe how the knowledge of the exact amount to be paid to the Smelters by the E.ON Entities could possibly affect HMP&L’s power plant or its customers. Nor does it explain why lack of this knowledge renders HMP&L unable to participate in this proceeding. Instead, HMP&L sets up one strawman after another and purports to demolish it. It argues that it is entitled to the information simply because it is a party, and “there is no provision giving discretion to any party to selectively provide documents to

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<sup>3</sup> Motion to Intervene of Henderson Municipal Power & Light, at 1.

HMP&L” [ Motion to Compel, at 2]. But as we have seen, HMP&L’s status as a party does not relieve it of its burden of proving to the Commission that learning how much the Smelters will be paid by the E.ON parties is “essential” to HMP&L’s participation in the proceeding.

Next, HMP&L claims that “the regulation prohibits withholding confidential documents from parties” [Motion to Compel, at 2]. HMP&L seriously misreads the regulation. The very section of the regulation it quotes, Section 7(5)(a), specifically provides that “[a]ny party’s response to discovery requests shall be served upon all parties, *with only those portions for which confidential treatment is sought obscured.*” In short, the regulation specifically permits the very action that HMP&L claims it prohibits.

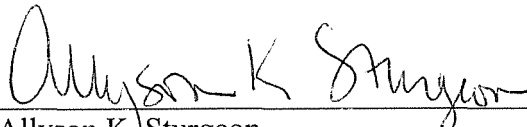
Next, HMP&L asserts that “[n]othing in the regulation allows a party to determine what documents are provided” [Motion to Compel, at 3]. As we have seen, this misses the mark entirely. A party is entirely within its rights to withhold confidential information from another *party*, even if it files that information with the *Commission*. If such a thing could not lawfully occur, then 807 KAR 5:001, § 7(5)(b), which provides that a party denied access to confidential information may petition the Commission to obtain it, would not exist.

HMP&L misreads the law and makes no showing of fact that demonstrates entitlement to the information at issue. HMP&L’s motion should be denied.

## CONCLUSION

To the extent HMP&L's motion to compel may be treated as a petition to obtain access to confidential information, it must be denied. HMP&L fails to offer any argument, much less a persuasive one, that the information it seeks is "essential" to its "meaningful participation in the proceeding" pursuant to the applicable subsection of the regulation. No such argument is available. HMP&L's motion must be denied.

Respectfully submitted,

A handwritten signature in black ink that reads "Allyson K. Sturgeon". The signature is written in a cursive style and is positioned above a horizontal line.

Allyson K. Sturgeon  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Response was served via U.S. mail, first-class, postage prepaid, this 12<sup>th</sup> day of March 2008, upon the following persons:

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