

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF CUMBERLAND)	
VALLEY ELECTRIC, INC. FOR AN)	CASE NO.
ADJUSTMENT OF RATES)	2014-00159

ORDER

On November 21, 2014, the Commission received a petition filed by Cumberland Valley Electric, Inc. ("Cumberland Valley") pursuant to 807 KAR 5:001, Section 13, that seeks confidential treatment of portions of a salary survey supplied in response to a post-hearing data request from the Attorney General, by and through his Office of Rate Intervention ("AG"). The AG did not file a response to Cumberland Valley's petition.

DISCUSSION

The Commission is a public agency subject to Kentucky's Open Records Act, and all public records of the Commission "shall be open for inspection by any person, except as otherwise provided by KRS 61.870 to 61.884."¹ Therefore, "[a]ll material on file with the commission shall be available for examination by the public unless the material is confidential."²

During the November 5, 2014 evidentiary hearing, the AG made a request for Cumberland Valley to supply any statewide salary surveys that it had utilized. In its response to this request, Cumberland Valley stated:

¹ KRS 61.872(1).

² 807 KAR 5:001, Section 13(1).

Cumberland Valley has contacted KAEC [Kentucky Association of Electric Cooperatives] regarding your post hearing request. KAEC has informed CVE that it is not comfortable having its confidential and proprietary data disclosed in a proceeding before the PSC. KAEC has informed me that if the Attorney General is seeking compensation data of other cooperatives, then compensation data is available in each cooperative's publicly available IRS Form 990. KAEC's assimilation of compensation data in a centralized survey, however, is its proprietary property, and it has consequently requested that we not disclose it to nonmembers. I know we spoke generally about the possibility of providing certain compensation data actually used in the comparison on an anonymous basis, but given the KAEC's objection to the production of this information – as well as the indication that publicly available Form 990 data may satisfy the substance of the request – we would propose that the Attorney General's request can be satisfied through those publicly-available documents.³

On November 21, 2015, Cumberland Valley filed with the Commission and served upon the parties a petition for confidential treatment of the KAEC Survey. Cumberland Valley argues, among other things, that the information in the salary survey is confidential, that it is subject to a confidentiality agreement between Cumberland Valley and third parties that supplied the information, that it contains information of a personal nature, that is exempt from disclosure pursuant to KRS 61.878(1)(a) because public disclosure would constitute an unwanted invasion of personal privacy. Cumberland Valley also argues that the KAEC survey includes confidential and proprietary information that is exempt from disclosure pursuant to KRS 61.878(1)(c)(1) because it would permit unfair commercial advantage to competitors if openly disclosed. Cumberland Valley requests that it be afforded confidential treatment into perpetuity.

³ Cumberland Valley's Responses to Post-Hearing Data Requests, Item 1, filed Nov. 14, 2014.

The Commission has held that copyrighted documents which are not available for reproduction to the general public and which have been obtained through paid company subscriptions qualify for confidential protection.⁴ The Commission has granted confidential protection to benefit and compensation studies which are the product of the investment of extensive time and money.⁵ Having reviewed the salary study submitted by Cumberland Valley, the Commission finds that Cumberland Valley has met its burden pursuant to KRS 61.878(1)(c)(1) to demonstrate that the information is generally recognized as proprietary because the information would permit an unfair commercial advantage to competitors of Cumberland Valley if openly disclosed. The material should remain confidential for an indefinite period.

The Commission notes, however, that Cumberland Valley did not meet its burden pursuant to KRS 61.878(1)(a) to demonstrate that the public disclosure of the information would constitute a clearly unwarranted invasion of personal privacy. The Commission has held that “[r]edaction of the employee’s name, while disclosing the other information, will protect the employee without unduly infringing the public’s interest in the information.”⁶ The salary survey does not contain any employee names or classify the information by individual cooperatives; therefore, there are no grounds for

⁴ Case No. 2012-00180, *Application of Duke Energy Kentucky, Inc. to Implement a Hedging Program to Mitigate Price Volatility in the Procurement of Natural Gas* (Ky. PSC July 16, 2014).

⁵ See Case No. 2013-00167, *Application of Columbia Gas of Kentucky, Inc. for an Adjustment of Rates for Gas Service* (Ky. PSC Oct. 29, 2013).

⁶ *Id.* See also Case No. 2013-00237, *Application of Water Service Corporation of Kentucky for an Adjustment of Rates* (Ky. PSC June 24, 2014). (“The request to redacted in its entirety the schedule containing non-descript numbers and all salary information pertaining to corporate employees of Utilities, Inc., based on KRS 61.878(1)(c)(1), as an unfair commercial advantage to competitors is overbroad and should be denied because the salary information without employee names is not an unfair commercial advantage to competitors.”)

Cumberland Valley to assert an unwarranted invasion of privacy with respect to the disclosure of the compensation information in the salary survey.

In its Responses to Post-Hearing Requests, Cumberland Valley stated that compensation data is publicly available through each electric cooperative's U.S. Internal Revenue Service Form 990.⁷ "Form 990, Part VII requires the listing of the organization's current or former officers, directors, trustees, key employees, and highest compensation employees, and current independent contractors, and reporting of certain compensation information relating to such persons."⁸ Each individual who is required to be listed on the Form 990 is required, under federal law, to disclose compensation information. Therefore, there were no grounds to assert an unwarranted invasion of privacy with respect to the disclosure of compensation information for or relating to individuals who are listed on Part VII of the IRS Form 990.

The Commission also notes that, in its petition, Cumberland Valley stated that the information is subject to a confidentiality agreement between Cumberland Valley and third parties that supplied the information. Cumberland Valley did not supply a copy of a confidentiality agreement with its petition. Cumberland Valley, as Movant, has the burden of proof to show that the material falls within an exclusion from disclosure.⁹ The Commission cannot identify and determine Cumberland Valley's obligations to third parties because Cumberland Valley did not submit an agreement for review.

⁷ *Id.*

⁸ *2014 Instructions for Form 990 Return of Organization Exempt from Income Tax*, p. 24, retrieved from <http://www.irs.gov/pub/irs-pdf/i990.pdf> on Jan. 30, 2015.

⁹ 807 KAR 5:001, Section 13(2)(c).

Having carefully considered the petition and the materials at use, the Commission finds that:

1. Disclosure of the materials for which Movant seeks confidential treatment would permit an unfair commercial advantage to competitors of Cumberland Valley. The materials are generally recognized as proprietary and meet the criteria for confidential treatment pursuant to KRS 61.878(1)(c)(1), and 807 KAR 5:001, Section 13, and are exempted from public disclosure.

2. The materials for which Movant seeks confidential treatment would not, if disclosed, constitute a clearly unwarranted invasion of personal privacy and do not meet the criteria for confidential treatment pursuant to KRS 61.878(1)(a), and 807 KAR 5:001, Section 13.

3. The materials for which Movant seeks confidential treatment should not be placed in the public record or made available for public inspection for an indefinite period of time due to the proprietary nature of the information.

IT IS THEREFORE ORDERED that:

1. Movant's petition for confidential protection pursuant to KRS 61.878(1)(c)(1) is hereby granted.

2. The materials for which Movant seeks confidential treatment shall not be placed in the public record or made available for public inspection for an indefinite period of time.

3. Movant shall inform the Commission if the materials in question become publicly available or no longer qualify for confidential treatment.

4. If a non-party to this proceeding request to inspect materials granted confidential treatment by this Order, the Commission shall notify Movant in writing and direct Movant to demonstrate within 20 days of its receipt of the notice that the materials still fall within the exclusions from disclosure requirements established in KRS 61.878. If Movant is unable to make such demonstration, the requested materials shall be made available for inspection. Otherwise, the Commission shall deny the request for inspection.

5. The Commission shall not make the requested materials available for inspection for 20 days following an Order finding that the materials no longer qualify for confidential treatment in order to allow Movant to seek a remedy afforded by law.

By the Commission

ENTERED
MAY 07 2015
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:


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