

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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)	CASE NO.
APPLICATION OF FARMERS RURAL)	2014-00292
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)	

ORDER

On April 9, 2015, East Kentucky Power Cooperative, Inc. ("EKPC") and Farmers Rural Electric Cooperative Corporation ("Farmers") (collectively "Joint Applicants"), filed a petition for rehearing of portions of three Commission Orders entered on March 30, 2015, in which the Commission addressed the following petitions by Joint Applicants: an August 21, 2014 petition seeking confidential treatment for certain materials filed with the application; an October 27, 2014 petition seeking confidential treatment for certain material filed in response to Commission Staff's First Request for Information ("Staff's First Request"); and a November 24, 2014 petition seeking confidential treatment for certain material filed in response to Commission Staff's Second Request for Information. Through their petition for rehearing, Joint Applicants request that the Commission enter an Order granting confidential treatment for the fuel cost information

related to the Glasgow Landfill Gas to Energy Project (“Glasgow LFGTE Project”) for a period of at least ten years.

Having reviewed the petition and being otherwise sufficiently advised, the Commission finds that Joint Applicants have failed to establish any grounds to justify granting a rehearing or reconsideration of the relevant portions of the March 30, 2015 Orders denying confidential treatment of the Glasgow LFGTE Project fuel costs.

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, “all material on file with the commission shall be available for examination by the public unless the material is confidential.”² Any party requesting a grant of confidential treatment for material has the burden to prove that the material falls within the exclusions from disclosure enumerated in the Open Records Act.³ In order to meet its burden of proof, Joint Applicants must show not only that the material in question is generally recognized as confidential or proprietary, but also that the information would permit an unfair commercial advantage to competitors if openly disclosed.⁴ The information must provide “substantially more than a trivial unfair advantage.”⁵

¹ KRS 61.872(1).

² 807 KAR 5:001, Section 13(1).

³ 807 KAR 5:001, Section 13(2)(c).

⁴ KRS 61.878(1)(c)(1); 807 KAR 5:001, Section 13(2)(c); *See Southeastern United Medigroup, Inc. v. Hughes*, 952 S.W.2d 195 (Ky. 1997).

⁵ *Southeastern United Medigroup, Inc.*, 952 S.W.2d 195, 199 (Ky. 1997).

In their Petition for Rehearing, Joint Applicants state:

At present, EKPC is a party to numerous LFGTE contracts and is actively negotiating with at least one other alternative fuel provider. EKPC also regularly evaluates and negotiates possible future arrangements with landfills and other fuel resources for various alternative energy projects. If the price EKPC pays for fuel from Glasgow is made public, there is no doubt that EKPC's competitive position would be irreparably harmed. Should parties with which EKPC intends to contract for landfill gas (or another alternative fuel source) be made aware of the price EKPC pays with respect to the Glasgow LFGTE Project, EKPC would have a distinct disadvantage in both existing and contemplated negotiations and may be unable to effectively secure appropriate, economic pricing for fuel.⁶

The Commission has previously definitively stated that "ratepayers have a right to know the actual costs of the power that they are purchasing, and they have a right to know the evidence upon which the Commission relied in determining that the costs" of a contract are fair, just, and reasonable.⁷ Further, 807 KAR 5:056, Section 1(10), provides that all documents required to be filed with the Commission pursuant to the Fuel Adjustment Clause ("FAC") regulation "shall be open and made available for public inspection," and the Commission has consistently denied confidential treatment to coal and other fuel supply contracts that are required to be filed pursuant to the FAC.

EKPC is a party to other LFGTE contracts, and, pursuant to 807 KAR 5:056, EKPC is required to file fuel-cost information for these projects as part of its monthly FAC filings. Consequently, EKPC's fuel-cost information for its other LFGTE projects is open and available for public inspection; therefore, this type of information, which is of

⁶ Joint Applicants' Petition for Rehearing at 5.

⁷ Case No. 2013-00219, *Application of Jackson Energy Cooperative Corporation for an Adjustment of Rates* (Ky. PSC Feb. 14, 2014) at 2 and 3 (motion for reconsideration denied by an Order entered Feb. 27, 2014).

the same nature as coal-supply contract information and which is already publicly disclosed, is not generally recognized as confidential or proprietary. The fact that the fuel costs for the Glasgow LFGTE Project will not be included in EKPC's FAC calculation does not change their underlying character or the right of the ratepayers to know the actual cost of power that they are purchasing, and the Commission declines to treat the Glasgow LFGTE Project fuel costs differently than fuel costs for EKPC's other LFGTE projects.

Further, Joint Applicants must show not only that the material in question is generally recognized as confidential or proprietary, but also that the information would permit an unfair commercial advantage to competitors if openly disclosed.⁸ "Competitive injury results when competitors gain an unfair advantage from public disclosure of information not otherwise available to the public."⁹ In light of the fact that fuel costs for EKPC's other five LFGTE projects are publicly available, EKPC has failed to establish any difference between those five other LFGTE projects and the Glasgow LFGTE project at issue here. Consequently, EKPC has failed to prove that public disclosure of the Glasgow LFGTE Project will cause it a competitive injury.

In their Petition for Rehearing, Joint Applicants further state:

Farmers has a vested interest in keeping confidential the fuel costs associated with the Glasgow LFGTE Project. Although not currently anticipated, Farmers may wish to pursue other alternative energy projects in the future with a different fuel supplier; if other energy providers are privy to the fuel costs Farmers

⁸ KRS 61.878(1)(c)(1); 807 KAR 5:001, Section 13(2)(c); See *Southeastern United Medigroup, Inc. v. Hughes*, 952 S.W.2d 195 (Ky. 1997).

⁹ Case No. 89-216, *In the Matter of: Petition for Confidentiality of Kentucky Utilities Company*, (Ky. PSC Nov. 7, 1989) at 3.

pays with respect to the Glasgow LFGTE Project, Farmers' ability to negotiate and its competitive position are weakened.¹⁰

The Commission encourages Farmers to pursue other economically viable alternative energy projects; nonetheless, Farmers' ratepayers have the right to know the actual costs of the power that they are purchasing. Fuel costs have been subject to public disclosure since the promulgation of 807 KAR 5:056 (the FAC regulation) in 1978 and are, therefore, not generally recognized as confidential or proprietary.

As the Commission noted in response to Joint Applicants' October 27, 2014 petition seeking confidential treatment for certain material filed in response to Staff's First Request, "the fuel associated with this project is from a unique and exclusive source."¹¹ In light of the distinct facts and circumstances that led the parties to enter into the purchase power agreement and special contract for the Glasgow LFGTE Project, the Commission finds that disclosure of the fuel costs will not grant to Farmers' competitors any unfair competitive advantage in future negotiations involving alternative energy projects.¹² The injuries suggested by Joint Applicants are purely hypothetical and fail to demonstrate that disclosure results in an unfair advantage to Farmers' competitors.¹³

¹⁰ Joint Applicants' Petition for Rehearing at 5.

¹¹ Order addressing Joint Applicants' Oct. 27, 2014 petition for confidential treatment (Ky. PSC Mar. 30, 2015) at 5.

¹² See Case No. 2013-00144, *Application of Kentucky Power Company for Approval of the Terms and Conditions of the Renewable Energy Purchase Agreement for Biomass Energy Resources Between the Company and Ecopower Generation-Hazard LLC; Authorization to Enter into the Agreement; Grant of Certain Declaratory Relief; and Grant of All Other Required Approvals and Relief* (Ky. PSC Aug. 27, 2013) at 4.

¹³ See Case No. 97-197, *In the Matter of: Petition of Kentucky Utilities Company for Confidential Protection of Certain Information Contained in Barge Transportation and Coal Purchase Contracts* (Ky. PSC Mar. 18, 1998) at 5-7.

After having reviewed the Petition for Rehearing, the Commission finds that the Petition for Rehearing should be denied.

IT IS THEREFORE ORDERED that Joint Applicants' Petition for Rehearing is denied.

By the Commission

ENTERED
APR 27 2015
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:



Executive Director

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