

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC ANNUAL COST RECOVERY )  
FILING FOR DEMAND SIDE MANAGEMENT ) CASE NO.  
BY DUKE ENERGY KENTUCKY, INC. ) 2017-00427

ORDER

On January 12, 2018, Duke Energy Kentucky, Inc. (“Duke Kentucky”) filed a petition, pursuant to 807 KAR 5:001, Section 13 and KRS 61.878(1)(c), requesting that the Commission grant confidential protection to an attachment to Duke Kentucky’s Responses to Commission Staff’s Initial Request for Information (“Staff’s First Request”), Item 8.

The information for which Duke Kentucky is seeking confidential protection contains calculations of avoided costs, by program, used by Duke Kentucky in evaluating its demand side management (“DSM”) programs. Duke Kentucky requests that the information remain confidential for a period of ten years.

In support of its petition for confidential treatment, Duke Kentucky argues that public disclosure of the detailed calculations of avoided costs would give Duke Kentucky’s vendors and competitors a commercial advantage regarding Duke Kentucky’s operations, is generally recognized as confidential and proprietary, and is exempt from public disclosure pursuant to KRS 61.878(1)(c).<sup>1</sup> Duke Kentucky further argues that the

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<sup>1</sup> Duke Kentucky’s Petition for Confidential Treatment at 2.

information, if made public, could be used by potential counter parties to undermine its efforts to reduce costs, ultimately harming customers.<sup>2</sup>

### 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.”<sup>3</sup> Therefore, “all material on file with the commission shall be available for examination by the public unless the material is confidential.”<sup>4</sup> 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.<sup>5</sup> Duke Kentucky bears the burden of demonstrating that unfair commercial advantage will result to their competitors from disclosure of the materials. To meet this burden, Duke Kentucky must demonstrate that disclosure will give their competitors “substantially more than a trivial unfair advantage.”<sup>6</sup>

807 KAR 5:001, Section 13(2), sets forth the procedure for making a request for confidential treatment, and it requires Duke Kentucky to establish “specific grounds pursuant to KRS 61.878, upon which the commission should classify the material as confidential.” Duke Kentucky has not demonstrated how the calculations of avoided costs

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<sup>2</sup> *Id.*

<sup>3</sup> KRS 61.872(1).

<sup>4</sup> 807 KAR 5:001, Section 13(1).

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

<sup>6</sup> 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).

used in evaluating its DSM programs would permit an unfair commercial advantage to competitors if disclosed. Duke Kentucky has not demonstrated how disclosure of the designated information could harm customers if used by potential counter parties to undermine Duke Kentucky's efforts to reduce costs. Furthermore, Duke Kentucky does not demonstrate the likelihood of competitive injury, and therefore does not meet the standard prescribed by KRS 61.878(1)(c) for nondisclosure. This is particularly so given the Commission's need to be able to fully and specifically address the cost impact in its final determination of this matter, and Duke Kentucky's retail customers' right to know the evidence upon which the Commission relied in determining whether the costs of the programs are fair, just, and reasonable. Duke Kentucky has not met its burden to show that this information qualifies for confidential treatment; accordingly, we find the information in the Attachment to Staff's First Request, Item 8, should be publicly available and that Duke Kentucky's petition should be denied.

We also note that the information for which Duke Kentucky requests confidential treatment is publicly available. The designated material for which Duke Kentucky requests confidential treatment is substantially similar to information contained in an attachment filed in response to Attorney General's Initial Request for Information ("Attorney General's First Request"), Item 4. Duke Kentucky filed the attachment to the Attorney General's First Request, Item 4, without identifying it as confidential and did not request confidential protection for the information that has been publicly available on the Commission's website since January 11, 2018. Publicly available information does not qualify for confidential treatment under KRS 61.878(1)(c).

In addition, Duke Kentucky has filed the designated material without properly identifying and distinguishing confidential material from other information as is required by Commission regulation. 807 KAR 5:001, Section 13(2)(a)(3) provides:

A request for confidential treatment of material shall be made by motion that: Includes ten (10) copies of the material in paper medium with those portions redacted for which confidentiality is sought, and, in a separate sealed envelope marked confidential, one (1) copy of the material in paper medium which identifies by underscoring, highlighting with transparent ink, or other reasonable means only those portions that unless redacted would disclose confidential material. Text pages or portions thereof that do not contain confidential material shall not be included in this identification. If confidential treatment is sought for an entire document, written notification that the entire document is confidential may be filed with the document in lieu of the required highlighting.

Based upon this procedural deficiency, and for failing to meet the other standards necessary to warrant confidential treatment, Duke Kentucky's petition should be denied.

IT IS THEREFORE ORDERED that:

1. Duke Kentucky's request for confidential protection for the designated information in the attachment to Staff's First Request, Item 8, is denied.
2. Within fourteen days of the date of entry of this Order, Duke Kentucky shall file a revised attachment to its response to Staff's First Request, Item 8, reflecting as unredacted the information which has been denied confidential treatment.
3. The materials for which Duke Kentucky's request for confidential treatment has been denied shall not be placed in the public record or made available for inspection for 20 days from the date of entry of this Order in order to allow Duke Kentucky to seek a remedy afforded by law.

By the Commission

ENTERED  
FEB 21 2018  
KENTUCKY PUBLIC  
SERVICE COMMISSION

ATTEST:

*for [Signature]*  
Executive Director

Case No. 2017-00427

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