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PUBLIC SERVICE COMMISSION

In the Matter of:

AN EXAMINATION BY THE PUBLIC SERVICE)
COMMISSION OF THE ENVIRONMENTAL)
SURCHARGE MECHANISM OF KENTUCKY)
POWER COMPANY FOR THE SIX-MONTH)
BILLING PERIODS ENDING DECEMBER 31, 2002,)
DECEMBER 31, 2003, JUNE 30, 2004,)
DECEMBER 31, 2004, AND DECEMBER 31, 2005,)
AND FOR THE TWO-YEAR BILLING PERIODS)
ENDING JUNE 30, 2003 AND JUNE 30, 2005)

CASE NO. 2006-00128

KENTUCKY POWER COMPANY’S PETITION FOR REHEARING OF THE COMMISSION’S ORDER OF AUGUST 16, 2006 DENYING CONFIDENTIAL TREATMENT TO CERTAIN INFORMATION DISCLOSED IN RESPONSE TO CERTAIN OF THE COMMISSION STAFF’S DATA REQUESTS

Kentucky Power Company, by and through counsel, respectfully moves the Commission for a rehearing pursuant to KRS 278.400 on those portions of its Order of August 16, 2006 that denied confidential treatment of the information disclosed by Kentucky Power in response to the Commission Staff’s Data Request Number 17(b).¹ Kentucky Power initially sought confidential treatment of this information in its Petition for Confidential Treatment filed with the Commission on May 23, 2006. This request was denied by the Commission’s Executive Director in a Letter Ruling issued on June 9, 2006. On June 29, 2006, Kentucky Power petitioned the Commission to reconsider the decision reached by the Executive Director in the Letter Ruling. On August 16, 2006, the Commission entered its Order denying the request for confidential treatment with the exception of Kentucky Power’s response to Data Request

¹ The Commission’s Order granted confidential treatment to Kentucky Power’s response to Data Request 17(b)(1) regarding its NOx allowances for 2009-2011, but denied confidential treatment to Kentucky Power’s responses to the remainder of Data Request 17(b) and Data Request 18. Kentucky Power requests rehearing only on the portion of the Commission’s Order denying confidential treatment to the remainder of Data Request 17(b). Kentucky Power no longer seeks confidential treatment of its response to Data Request 18.

17(b)(1) regarding its NO_x allowances for 2009-2011. Rehearing of this Order is appropriate for two reasons: (1) the Commission's decision incorrectly discounts the financial impact that public disclosure of the information will have on Kentucky Power and its customers; and (2) the Commission's decision mistakenly relies upon the manner in which other utilities responded to similar data requests as evidence that the information sought from Kentucky Power did not require confidential treatment.² Kentucky Power therefore requests the Commission to issue an Order granting confidentiality; or, in the alternative, that the Commission schedule a hearing at which time evidence can be submitted in support of the Petition. Kentucky Power further requests the Commission to maintain the confidential treatment of Kentucky Power's responses to Data Request 17(b) pending its consideration of this Petition for Rehearing.

I. PUBLIC DISCLOSURE OF THE INFORMATION PRODUCED IN RESPONSE TO DATA REQUESTS 17(B) AND 18 WILL ADVERSELY IMPACT KENTUCKY POWER AND ITS CUSTOMERS.

KRS 61.878(1)(c)(1) excludes from the Open Records Act "records confidentially disclosed to an agency, generally recognized as confidential or proprietary, which if openly disclosed would present an unfair commercial advantage to competitors of the entity that disclosed the records." As recognized by the Commission in its August 16, 2006 Order, the Kentucky Supreme Court has interpreted this provision to hold that "if it is established that a document sought to be withheld is confidential or proprietary, and if disclosure to competitors would provide substantially more than a trivial unfair advantage, the document should be protected from disclosure." Commission Order at p. 3 (Citing *Southeastern United Medigroup*,

² The Commission possesses jurisdiction over this Petition for Rehearing under KRS 278.400. While Kentucky Power previously asked for reconsideration on this issue of confidentiality, the initial communication denying confidential treatment was made via letter by the Commission's Executive Director and not by an Order of the Commission. The Commission noted this fact in the opening sentence of its Order of August 16, 2006 ("On June 29, 2006, Kentucky Power Company ('Kentucky Power') filed a petition requesting reconsideration of the Commission's Executive Director's June 9, 2006 Letter Ruling denying confidential treatment for Kentucky Power's responses to certain of the Commission Staff's data requests."). Thus, only one "determination has been made by the commission" in this proceeding, and rehearing is appropriate under KRS 278.400.

Inc. v. Hughes, 952 S.W.2d 195, 199 (Ky. 1997)). In this case, the Commission recognizes that public disclosure of the information provided by Kentucky Power could impact its activities in the emission allowance market, but ignores Kentucky Power's claim that the risk is significant. *See* Commission Order at p. 5 ("While Kentucky Power's Surplus or deficit position could impact its negotiating position in a transaction, the risk does not appear as dire as it claims or as significant as is required under the Open Records Act.). The decision to discount the impact that disclosure will have on Kentucky Power is unwarranted, and the Commission's rationale for denying confidential treatment for each of the individual responses fails to adequately account for the resulting harm to Kentucky Power.

A. The Commission Erred in Downplaying the Impact of Disclosure.

As set forth in detail in its Motion for Confidential Treatment and its earlier Petition for Reconsideration, the emission allowance market is highly-competitive. Any information about whether a participant in the market is in a "long" or "short" position—i.e., in a position where it will be required to purchase additional allowances or where it will have excess allowances to sell—undoubtedly will impact the price of allowances because it will provide evidence as to the number of emission allowances available in the market. If the market understands that Kentucky Power and the other operating companies in the American Electric Power ("AEP") system are in a long position, then Kentucky Power and AEP will receive a lower price for allowances they sell than they would otherwise receive. Likewise, if the market understands that Kentucky Power and AEP are in a short position, then Kentucky Power and AEP will be forced to pay a higher price for allowances. This situation is amplified in this case because the data requests at issue require Kentucky Power to disclose information about how emission allowances are allocated among the AEP East operating companies. Other participants in the emission allowance market will be able to review the information disclosed by Kentucky Power and

determine not only whether Kentucky Power is in a long or a short position, but also whether AEP is in a long or short position. As a result, Kentucky Power and AEP will suffer—either by receiving lower revenues from the sale of allowances, or by paying more for the purchase of allowances. AEP is a major participant in the emission allowance market and its position obviously impacts pricing. Knowledge of this position provides a tremendous competitive advantage to the other participants in the market. *See Flathead Joint Bd. of Control v. United States DOL*, 309 F.Supp.2d 1217, 1221 (D. Mont. 2004) (Recognizing that, in markets where there is a limited quantity of the item being purchased and sold, any information about the quantity of the item available to or required by one market participant is of tremendous commercial value to the other participants). Certainly, the public disclosure of the information produced by Kentucky Power in this case will provide more than a “trivial unfair advantage” to the other participants in the emission allowance market.

B. The Commission’s Decisions Concerning Each Discreet Data Request Reflect Mistaken Assumptions about the Harmful Impact of Disclosure.

The Commission’s confidentiality analysis with respect to the specific data requests at issue downplays the adverse impact that disclosure will have upon Kentucky Power and AEP. With respect to Data Request 17(b)(2), the Commission recognizes that Kentucky Power’s response is a forecasted estimate that provides information about how allowances will be allocated from 2006 through 2016 under the AEP Interim Allowance Agreement. However, the Commission finds that confidentiality is not required because the “information does not appear to be as sensitive as Kentucky Power contends.” The basis for this assertion seems to be the following: “The SO₂ allowances awarded by EPA are publicly known, the degree to which an AEP operating company is deficit or not within the AEP group can be generally determined from published information, and the historic consumption of SO₂ allowances is publicly reported.”

The Commission offers no explanation for why these factors make the information provided by Kentucky Power any less sensitive than Kentucky Power claims. The fatal flaw in the Commission's analysis is that none of the information it describes provides information about the role Kentucky Power and AEP intend to play in the emission allowance market going forward. It is the disclosure of this information that is harmful to Kentucky Power and AEP because it creates a significant competitive disadvantage for the next ten years.

Data Request 17(b)(3) requested forecasted information about the number of emission allowances Kentucky Power intends to use in conjunction with its operation of the Big Sandy generating units for 2006 through 2016. The Commission denied Kentucky Power's confidentiality request on the ground that "[h]istoric consumption rates of SO₂ allowances is publicly available information" and the "public could generally estimate the impact that any new pollution control equipment might have on the historic emission data." The Commission's response again misses the point by focusing on historic levels of consumption rather than forecasted future consumption. The forecasted information provides other emission allowance market participants with far more information than is available through the historical data because it accounts for any additional emission control equipment Kentucky Power intends to place into service in the next ten years.

Data Request 17(b)(4) requests information about other "estimated additions or withdrawals of emission allowances from the Kentucky Power inventories of emission allowances." The Commission articulated the following rationale for denying confidential treatment to Kentucky Power's response: "NO_x allowances that have been allocated to Kentucky Power under the SIP Call and historic emissions are also public knowledge. Kentucky Power's response states how many allowances may be sold, not how many will be sold." Again, the fact

that certain historic information might be publicly available has no bearing on whether the disclosure of forecasted information will place Kentucky Power and AEP at a competitive disadvantage. The forecasted information is important to other participants in the emission allowance market because it reflects information beyond historic data, and provides insight into how Kentucky Power and AEP will be acting in the market for the next ten years.

II. THE MANNER IN WHICH OTHER UTILITIES RESPONDED TO SIMILAR DATA REQUESTS IS IRRELEVANT.

In issuing its Order denying confidential treatment to Kentucky Power's responses to the Data Requests, the Commission Order relied on the fact that other utilities provided responses to similar requests without seeking confidential treatment. Specifically, the Commission found as follows:

Kentucky Power contends that "in markets such as the emission allowance market where there is a limited quantity of the item being purchased and sold, any information about the quantity of the item available to or required by one market participant is of tremendous commercial value to the other participants." However, these same two questions were asked of Kentucky Utilities Company ("KU"), Louisville Gas and Electric Company ("LG&E"), and East Kentucky Power Cooperative, Inc. ("East Kentucky") (although East Kentucky was asked about NO_x allowances – KU and LG&E do not recover NO_x emission expenses in their surcharges currently). These three utilities provided this information in the public record. It does not appear that the extent of the confidential nature of this information is a perspective shared by the other utilities.

Commission Order at p. 4. The Commission's Order does not explain why the approach taken by these utilities is relevant to that taken by Kentucky Power. Indeed, there are numerous logical explanations for why Kentucky Power would seek confidential treatment whereas the other utilities might not.

First, from the responses provided by the other utilities in response to the comparable data requests, it does not appear that any of the other utilities are as active in the emission allowance market as Kentucky Power and AEP. This is important for at least two reasons:

(1) the disclosure of forecasted emission allowance market participation for these other utilities will not have the same impact on market prices as the disclosure of the forecasted participation of Kentucky Power and AEP; and (2) Price fluctuations for emission allowances are not as important to the other utilities as they are to Kentucky Power and AEP because of their relative lack of reliance on the market for emission limit compliance purposes. Second, Kentucky Power is more inclined than the other utilities to seek confidential treatment of its responses to the data requests because Kentucky Power disclosed far more information regarding its forecasted market participation. For example, Kentucky Power's response to Data Request 17(b)(2) required it to divulge information that revealed the extent to which the entire AEP East system would be participating as a buyer or seller in the emission allowance market from 2006 through 2016. None of the comparable data requests directed to the other utilities elicited such expansive, and sensitive, information.³

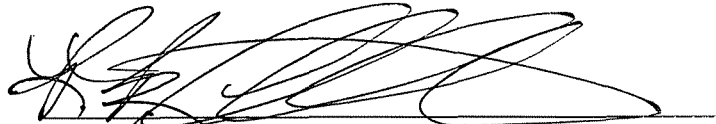
III. CONCLUSION

For the reasons set forth above, Kentucky Power respectfully seeks a rehearing on the issues presented herein. Specifically, Kentucky Power requests that the Commission either enter an Order granting confidential treatment to Kentucky Power's responses to Data Request 17(b), or set a confidential hearing on this matter, at which time Kentucky Power can present evidence to the commission—both live testimony and documentary exhibits—supporting its claim that disclosure of the information at issue in this matter will adversely impact Kentucky Power vis-à-

³ Request 8(b)(2) to East Kentucky in Case No. 2006-00131 asked East Kentucky to "Indicate the number of emission allowances that have been "swapped" or otherwise transferred to other entities." It sought only historic data and required East Kentucky to produce no sensitive forecast information. Similarly, Data Request 17(b)(2) to LG&E in Case No. 2006-00130 asked LG&E to "Indicate the number of emission allowances estimated to be returned in kind by IMPA" and Data Request 18(b)(2) to KU in Case No. 2006-00129 asked KU to "Indicate the number of emission allowances estimated to be received from OMU." Neither of these requests required LG&E or KU to disclose sensitive information about future participation in the emission allowance market. Simply stated, it is understandable that the other utilities were not as concerned as Kentucky Power about confidentiality because the "comparable" data requests didn't require them to disclose the same sort of sensitive market participation information.

vis its competitors in the emission allowance market and will provide “more than a trivial unfair advantage” to those competitors. Kentucky Power further requests the Commission to maintain the confidentiality of Kentucky Power’s responses to Data Request 17(b) pending its consideration of this Petition.

Respectfully submitted,



Bruce F. Clark
R. Benjamin Crittenden
STITES & HARBISON, PLLC
421 West Main Street
P.O. Box 634
Frankfort, Kentucky 40602-0634
Telephone: (502) 223-3477
COUNSEL FOR KENTUCKY POWER
COMPANY

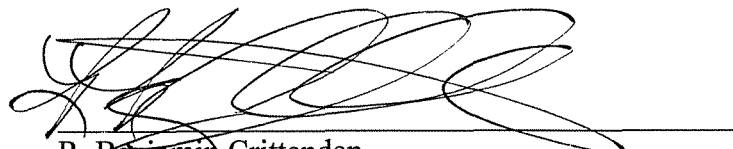
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served first class mail, postage prepaid, upon the following:

Michael L. Kurtz
Boehm, Kurtz & Lowry
Suite 1510
36 East Seventh Street
Cincinnati, Ohio 45202

Elizabeth E. Blackford
Assistant Attorney General
Suite 200
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204

on this the 5th day of September, 2006.



R. Benjamin Crittenden