

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE COMMISSION

In the Matter of:)
)
 HEATHER RAE MCATEE,)
)
 COMPLAINANT)
)
 v.)
)
 COLUMBIA GAS OF KENTUCKY,)
 INC.)
)
 DEFENDANT)

Case No. 2009-00173

**PETITION OF COLUMBIA GAS OF KENTUCKY, INC.
 FOR CONFIDENTIAL TREATMENT OF DATA**

Now comes Defendant, Columbia Gas of Kentucky, Inc. (“Columbia”), and hereby requests, pursuant to 807 KAR 5:001, Section 7, that the Kentucky Public Service Commission (“Commission”) issue an order authorizing the confidential treatment of the Settlement Agreement between Columbia and Heather Rae McAtee, the Complainant (“Settlement Agreement”) and the letter memorandum sent by Judy M. Cooper to the Commission on September 3, 2009, regarding the Settlement Agreement and factual case background (“Memorandum”).

The Commission’s regulations require petitions for confidential treatment to set forth specific grounds pursuant to KRS § 61.870, *et seq.*, and be filed with an original clean copy of the proposed confidential material with proprietary information highlighted.¹ Pursuant to 807 KAR 5:001, Section 7, Columbia’s unredacted Settlement Agreement and Memorandum are attached to the original copy of this Petition as Attachment A. The Commission’s regulations

¹ 807 KAR 5:001 § 7(2)(a).

further require the requesting party to serve the petition and a redacted copy of the material on all parties of record.² Because this Settlement Agreement was between the parties of record, Ms. McAtee has already been served with an unredacted copy of the Settlement Agreement. In accordance with the regulations, Ms. McAtee will also receive a redacted copy of the Memorandum.

In view of the foregoing considerations, and as required by 807 KAR 5:001, Section 7, the Settlement Agreement should be classified as confidential, pursuant to KRS §§ 61.870 *et seq.*, on the following specific grounds:

- (1) An individual's settlement amount and repayment schedule is exempt from disclosure pursuant to KRS § 61.878(1)(a) because it contains "information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy."
- (2) Disclosing the contractual terms between Columbia and its meter-reading contractors, as contained in the Memorandum, constitutes a trade secret, as defined by KRS § 365.880 and protected by KRS § 365.888, and is shielded from disclosure in Commission proceedings under KRS § 61.878(1)(l).
- (3) Disclosure of the updating customer meter procedures Columbia is beginning to implement with its current meter readers contained in the Memorandum, "would permit an unfair commercial advantage to competitors" of Columbia if disclosed, and is generally recognized as confidential or proprietary under KRS § 61.878(1)(c)(1).
- (4) Preliminary recommendations and memoranda in which opinions are expressed, included in the Memorandum which details the background and policy behind the Settlement Agreement, are exempted from disclosure under KRS § 61.878(1)(j).

² 807 KAR 5:001 § 7(2)(c).

Initially, disclosure of the Settlement Agreement and Memorandum would provide information of a personal nature where the public disclosure thereof would constitute an unwarranted invasion of personal privacy. KRS § 61.878(1)(a) exempts from disclosure “public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.” The Kentucky Supreme Court has held that, “A plain reading of subsection (1)(a) reveals an unequivocal legislative intention that certain records, albeit they are ‘public,’ are not subject to inspection, because disclosure would constitute a clearly unwarranted invasion of personal privacy.”³ In *Courier-Journal*, the Court provided the following insight into the personal privacy exception:

The language of subsection (1)(a) implies a number of other conclusions as well. First, it reflects a public interest in privacy, acknowledging that personal privacy is of legitimate concern and worthy of protection from invasion by unwarranted public scrutiny...Second, the statute exhibits a general bias favoring disclosure...Third, given the privacy interest on the one hand and, on the other, the general rule of inspection and its underlying policy of openness for the public good, there is but one available mode of decision, and that is by comparative weighing of the antagonistic interests...Moreover, the question of whether an invasion of privacy is “clearly unwarranted” is intrinsically situational, and can only be determined within a specific context. *Id.*

The Kentucky Court of Appeals also recognized that the public has a vested interest in individual privacy and its protection from invasion by unwarranted public scrutiny.⁴

As applied to this case, both the Settlement Agreement and the Memorandum discuss specific settlement terms between Columbia and Ms. McAtee. This information includes the amount credited by Columbia to Ms. McAtee’s customer account, the amount Ms. McAtee promises to pay Columbia, and the arrearage repayment term. By disclosing this information, Ms. McAtee’s indebtedness would be open to public scrutiny, constituting an unwarranted invasion of privacy. On balance, the public does not have a significant interest in the Settlement

³ *Ky. Bd. of Exam’rs v. Courier-Journal*, 826 S.W.2d 324, 327 (Ky. 1992).

⁴ *Palmer v. Driggers*, 60 S.W.3d 591, 597-98 (Ky. Ct. App. 2001).

Agreement's terms, but has instead an interest in an economic and resolute conclusion to this proceeding. Because Ms. McAtee's personal interests are outweighed by the public interest in disclosure, the Settlement Agreement's terms should be protected from disclosure by KRS § 61.272(1)(a).

The Memorandum also addresses the contractual relationship between Columbia's past and current meter readers, including the current process to update customer meter information, constitutes a trade secret, as defined by Kentucky's Uniform Trade Secret Act, KRS § 365.880, *et seq.* Under the act, a trade secret means,

Information, including a formula, pattern, compilation, program, data, device, method, technique, or process, that:

(a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.⁵

The Kentucky Statutes provide that the trade secrets' secrecy should be preserved by reasonable means, which may include granting protective orders.⁶ Under the Open Records Act, "public records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly," are excluded from public disclosure.⁷ The Trade Secrecy Act falls within the last catch-all category of exemptions from public disclosure.⁸

As applied to the Memorandum, Ms. Cooper provided background detail regarding the meter reading contracts. Columbia derives independent economic value from the secrecy of its

⁵ KRS § 365.880(4).

⁶ KRS § 365.888.

⁷ KRS § 61.878(1)(I).

⁸ *See* 94-ORD-97, 1994 Ky. AG LEXIS 83 (August 5, 1994).

previous and current contractual relationships, allowing Columbia to enter into agreements for more favorable terms to customers, including the better provisions under the new meter reading contract. Moreover, Columbia has taken every reasonable effort to ensure the meter reading contract terms remain confidential. The information contained within the former and current meter reading contracts were not disseminated within Columbia, and are known only by those of Columbia's employees who have a legitimate business need to know and act upon that information. Therefore, the information contained in the Memorandum regarding the contractual relationships with Columbia's former and current meter readers is a trade secret and should not be disclosed to the public, as protected under KRS § 61.878(1)(I).

Disclosure of the Memorandum's discussion concerning Columbia's current meter readers and its plans to update Columbia's customer meter system will also provide Columbia's competitors with unfair commercial advantage. The Open Records Act provides an exception for "records confidentially disclosed to an agency or required by an agency to be disclosed to it, general recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entities that disclosed the records."⁹ The Commission has interpreted this section to require utilities to show that the: (1) commercial documents are generally recognized as confidential or proprietary and that (2) disclosure would permit an unfair commercial advantage to competitors.¹⁰ The Kentucky Supreme Court held that to trigger the KRS § 61.878(1)(c)(1) exemption, disclosure to competitors should provide substantially more than a trivial unfair advantage.¹¹

⁹ KRS § 61.878(1)(c)(1).

¹⁰ *In the Matter of Joint Petition for Arbitration of NewSouth Communications Corp., Nuvox Communications, Inc., KMC Telecom III LLC, and Xspedius Communications, LLC on behalf of its Operating Subsidiaries*, PSC Case No. 2004-00044, Order (June 2, 2006) at 7 (citing 93-ORD-43, 1993 Ky. AG LEXIS 73 (April 13, 1993)).

¹¹ See *United Medigroup, Inc. v. Hon. John J. Hughes*, 952 S.W.2d 195 (Ky. 1997).

The Memorandum describes the current process by which Columbia and its current meter-reading contractor are updating the customer meter information in Columbia's territory. This information, which includes the general outline of the formal procedure being developed by Columbus to aid in its ability to read meters, is generally recognized as proprietary and confidential, especially in the initial stages of development. If the Memorandum was publicly disclosed it would provide Columbia's competitors advance notice of Columbia's plans to improve its system and would provide them a competitive advantage over Columbia. They could also develop plans similar to Columbia's plan outlined in the Memorandum. Therefore, the Commission should protect the correspondence as per KRS § 61.878(1)(c)(1), because permitting its disclosure would provide a significant unfair competitive advantage to Columbia's competitors.

The Memorandum also contains preliminary recommendations and expresses opinions as to Columbia's settlement agreement with Ms. McAtee, and is protected from public disclosure under KRS § 61.878(1)(j). The Attorney General has interpreted preliminary, as used in KRS § 61.878(1)(j), as "obviously refer[ing] to recommendations made [and memoranda prepared] by a person prior to a final decision."¹² The Attorney General also opined that preliminary recommendations and preliminary memoranda are protected from disclosure "notwithstanding the fact that they are prepared for the agency by outside agencies or private consultants."¹³

The preliminary recommendations and opinions contained within the Memorandum between Columbia and the Commission concerns evidence regarding an outstanding Motion to Dismiss. Because the Commission has not made a final decision as to dismissing this proceeding, disclosure of this preliminary information would hinder Columbia's ability to enter into

¹² OAG No. 00-ORD-139 at 14 (citing OAG No. 90-ORD-97 at 4) (alteration in original).

¹³ OAG No. 00-ORD-139 at 16.

subsequent settlement agreements with future complainants. Therefore, because the Memorandum contains preliminary recommendations and preliminary memoranda expressing the opinions and mental impressions of Columbia, the Memorandum should receive confidential treatment, as per KRS § 61.878(1)(j).

On a final note, the Commission has permitted confidential settlement agreements in past complaint proceedings. In Case No. 2005-00482, the Commission granted Alec, Inc., and Touchtone Communications, Inc.'s motion to dismiss because the parties had reached a settlement agreement. In the Motion to Dismiss, the parties moved to dismiss "with prejudice as the parties have reached a confidential settlement agreement."¹⁴ The motion to dismiss was not accompanied by the confidential settlement agreement. The Commission granted the motion to dismiss in its August 1, 2007 Order without requiring further disclosure of the settlement agreement reached by the parties.¹⁵ More recently, in Case No. 2009-00026, Duke Energy Kentucky and Chris Wiseman filed a joint motion to dismiss.¹⁶ The Commission granted the motion to dismiss in its May 7, 2009 Order without requiring further evidence of the settlement agreement.¹⁷ Instead, the Commission held, "The parties advise that they have reached a settlement of all the issues in this matter...the Commission will grant the parties' request to dismiss the matter with prejudice."¹⁸ In Case No. 2006-00385, Louisville Gas and Electric Company filed a response with the Commission stating that John McKeehan, the Complainant, agreed to notify the Commission when a settlement had been reached and to request his

¹⁴ *In the Matter of: Touchtone d/b/a ALEC, Inc. v. Ky. Alltel, Inc.*, PSC Case No. 2005-00482, Motion to Dismiss as Settled (July 11, 2007).

¹⁵ *In the Matter of: Touchtone d/b/a ALEC, Inc. v. Ky. Alltel, Inc.*, PSC Case No. 2005-00482, Order (August 1, 2007).

¹⁶ *In the Matter of: Chris Wiseman v. Duke Energy Kentucky, Inc.*, PSC Case No. 2009-00026, Joint Motion to Dismiss Complaint (March 26, 2009).

¹⁷ *In the Matter of: Chris Wiseman v. Duke Energy Kentucky, Inc.*, PSC Case No. 2009-00026, Order (May 7, 2009).

¹⁸ *Id.*

Complaint to be dismissed.¹⁹ When Mr. McKeehan failed to respond to the Commission's Order requiring him to provide notice if his complaint had been settled, the Commission closed his Complaint and removed it from the docket.²⁰ Finally, in Case No. 2007-00310, counsel for the Allen County Water District filed a letter with the Commission stating the case had been settled between the parties.²¹ The letter further stated, "As you are aware by my erroneous submission to you of the Settlement Agreement, this case has been settled ... Since I erroneously forwarded the Settlement Agreement, I would appreciate your returning it to me at your earliest convenience and not file it of record."²² The Commission granted Allen County's request, and the Settlement Agreement was not filed as part of the record. Moreover, the Commission "having reviewed the record and being otherwise sufficiently advised," found the case should be dismissed.²³

By granting this Petition and providing for confidential treatment of the Settlement Agreement and Memorandum, the Commission and the parties can fully resolve this proceeding, thereby balancing the public interest with the personal privacy concerns identified in KRS § 61.878(1)(a), (c)(1), and (l).

WHEREFORE, Columbia respectfully requests that the Commission issue an order authorizing the confidential treatment of the Settlement Agreement and Memorandum in Attachment A hereto, pursuant to 807 KAR 5:001, Section 7, for the reasons stated herein.

¹⁹ *In the Matter of: John McKeehan v. Louisville Gas and Electric Company*, PSC Case No. 2006-00385, Letter to Ms. O'Donnell (February 9, 2007).

²⁰ *In the Matter of: John McKeehan v. Louisville Gas and Electric Company*, PSC Case No. 2006-00385, Order (April 2, 2007).

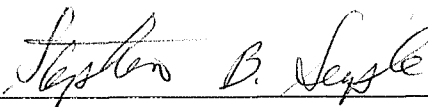
²¹ *In the Matter of: Jimmy Harston and Randy Harston v. Allen County Water District*, PSC Case No. 2007-00310, Letter to Stephanie Stumbo (August 14, 2008).

²² *Id.*

²³ *In the Matter of: Jimmy Harston and Randy Harston v. Allen County Water District*, PSC Case No. 2007-00310, Order (January 5, 2009).

Respectfully Submitted,

COLUMBIA GAS OF KENTUCKY, INC.



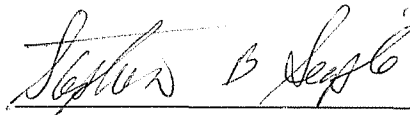
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Confidential Treatment was served upon all parties of record by regular U. S. mail and electronic mail this 16th day of October, 2009.



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ATTACHMENT A