COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE APPLICATION OF KENTUCKY POWER COMPANY FOR A GENERAL ADJUSTMENT OF ELECTRIC RATES	)))	Case No. 2009-00459

KENTUCKY POWER COMPANY'S RESPONSE TO THE ATTORNEY GENERAL'S SUR-REPLY REGARDING HIS MOTION FOR AN EVIDENTIARY HEARING

The Attorney General's latest filing in this protracted dispute over the confidentiality of certain financial projections, shared by Kentucky Power Company ("Kentucky Power" or "Company") with credit rating agencies under a Security and Exchange Commission rule providing for confidentiality, reiterates the claim that an evidentiary hearing should be conducted by the Commission to explore the basis for Kentucky Power's confidentiality motion. Ultimately, to the extent it is relevant, the information, which was already provided to the Attorney General confidentially, is available for use at the hearing and consideration by the Commission. The Attorney General's filing, seeking public disclosure of this confidential information, reflects a fundamental misunderstanding of both procedural due process and the basis of Kentucky Power's confidentiality motion.

I. THE ATTORNEY GENERAL'S FILING MISCONSTRUES THE BASIS OF KENTUCKY POWER'S CONFIDENTIALITY MOTION AND THE EXTENT TO WHICH THE INFORMATION AT ISSUE HAS BEEN DISCLOSED.

The Attorney General's filing does not even address the federal regulations cited by Kentucky Power that promote confidential treatment of financial forecast information provided to credit rating agencies. Kentucky Power will not belabor the point made in previous filings,

but it bears repeating that 17 C.F.R. § 243.100(b)(2) exempts disclosures made to credit rating agencies from the full public disclosure requirements applicable when otherwise-nonpublic information is disclosed to certain identified persons. This provision implicitly acknowledges the confidential nature of the financial forecast information at issue in Kentucky Power's confidentiality motion and treats it the same as information provided to legal counsel. The regulation doesn't expressly "prohibit" public disclosure of the forecast information. However, it operates in such a manner as to protect the information from disclosure, which has the same effect as an express prohibition.[1] It was under this expectation of confidential treatment that Kentucky Power provided this information to the credit rating agencies.

Rather than addressing the specific federal regulations cited by Kentucky Power in previous filings, the Attorney General suggests that there is no role for federal law in the Commission's determination of confidentiality issues under KRS 61.878:

> KP likewise bears the burden of establishing that this Commission, which is governed by the law of the Commonwealth of Kentucky, is somehow subject to certain federal securities laws and/or regulations, which remain unidentified, and which according to counsel for KP require this Commission to keep the information at issue confidential. Such would truly constitute a case of first impression in this Commonwealth, and doubtlessly would of necessity raise significant Constitutional issues.[2]

The Attorney General's Constitutional concerns notwithstanding, Kentucky law exempts from the Open Records Act "[a]ll public records or information the disclosure of which is prohibited by federal law or regulation." There are no "significant Constitutional issues" to be addressed in this instance. If a federal regulation protects information from public disclosure then Kentucky follows that determination.

---

[1] Moreover, although KRS 61.878(1)(k) may not be directly applicable to the exemption provided by 17 C.F.R. § 243.100(b)(2), the policies underlying both the Kentucky statute and the federal regulation are consistent.

[2] Attorney General's Sur-Reply, p. 6.

Moreover, the Attorney General continues to take issue with Kentucky Power's claim that it will suffer a competitive injury if the confidential information at issue is publicly disclosed, arguing that "[i]t is well-established that KP, a monopoly utility, has a certified territory and in fact has *no competitors*."[3] The Attorney General's argument on this point reflects his fundamental misunderstanding of the basis for Kentucky Power's confidentiality motion. Kentucky Power has consistently maintained that public disclosure of the financial forecasts at issue will result in a competitive injury for Kentucky power in the credit market,[4] and the Attorney General has offered no basis to dispute the Company's position. The fact that Kentucky Power is an electric utility with a certified service territory has no bearing on its ability to compete for favorable rates in the credit market.[5]

Finally, the Attorney General incorrectly contends that all of the financial forecast information should be publicly disclosed because Kentucky Power agrees that some of the information should be disclosed:

> KP has already agreed to disclose information contained in some of the documents it produced in response to the Attorney General's discovery requests which indicate KP will be filing another base rate case in the next few months, and the amount of additional revenues it will apparently seek. Those documents were found in e-mails exchanged between KP and rating agencies. Yet the

---

[3] *Id.*, p. 1.

[4] *See* Reply in Support of Motion for Confidential Treatment and Response in Opposition to Attorney General's Motion to Disclose Confidential Information, p. 3 ("The ability to issue debt and attract investors to support the Company's ventures goes to the very core of its ability to succeed as a business. Indeed, Kentucky Power is competing with every other entity seeking investment for investor dollars and lower credit ratings typically lead to higher costs to the ratepayers. Should the Attorney General be successful in securing public disclosure of the confidential, nonpublic financial forecasts, such action would affect the Company's willingness to provide confidential information to the credit rating agencies to obtain credit ratings going forward. Without these credit ratings, the Company's ability to secure affordable debt to carry out its corporate functions, including the substantive operations of Kentucky Power, will be jeopardized. This puts the Company at a competitive disadvantage vis-à-vis other market participants who are able to furnish confidential information to credit rating agencies without having the information disclosed publicly.").

[5] Similarly off the mark is the Attorney General's reliance on the Kentucky Supreme Court's decision in *Southeastern United Medigroup, Inc. v. Hughes*, 952 S.W.2d 195, 200 (Ky. 1997), an Open Records Act case that does not address the procedural due process issues raised by the Attorney General in this proceeding.

> company seeks confidentiality for virtually the same information found in written presentations made to a rating agency.[6]

The Attorney General is mistaken in the argument that all of this information has already been disclosed. Kentucky Power has only agreed to disclose certain financial forecast information to the extent the information is no longer forecasted data as a result of the passage of time—*e.g.*, forecasts made in 2008 about options for the Company in 2009. Kentucky Power continues to maintain the confidentiality of all forward-looking financial projections.

I. DUE PROCESS DOES NOT REQUIRE AN EVIDENTIARY HEARING FOR THE COMMISSION TO GRANT KENTUCKY POWER'S CONFIDENTIALITY MOTION.

The law is well-established that "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'proper' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."[7] While the Attorney General maintains that "[t]he ability to test another party's evidence has always been recognized as a procedural due process right,"[8] Kentucky law is clear that "procedural due process does not always require a full-blown trial-type hearing."[9] In cases in which a procedural due process right is asserted, Kentucky courts look to the three factors identified by the United States Supreme Court in *Mathews v. Eldridge* to determine the actual process that is due.[10] One Kentucky court describes the process as follows:

> That test requires consideration of the private interest that will be affected by the official action; the risk of an erroneous deprivation

---

[6] *Id.*, p. 4.

[7] *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

[8] Attorney General's Sur-Reply Regarding his Motion for an Evidentiary Hearing ("Attorney General's Sur-Reply"), p. 2.

[9] *See Abul-Ela v. Kentucky Board of Medical Licensure*, 217 S.W.3d 246, 251 (Ky. App. 2006) ("Due Process includes, at a minimum, reasonable notice of the Board's intended action and a meaningful opportunity to be heard.").

[10] *Id.* (Quoting *Mathews v. Eldridge*, 424 U.S. 319, 333-335 (1976)).

> of such interest through procedures used, the probable value, if any, of additional or substitute procedural safeguards; and the government's interest that any additional procedural requirement would entail.[11]

The Attorney General addressed these factors in his most recent filing, claiming that "all three prongs of this test are readily ascertainable and dispositive in favor of the relief the Attorney General seeks."[12] However, it is unclear how the Attorney General could reach such a conclusion when he misapplied the *Mathews v. Eldridge* test by focusing on Kentucky Power's due process rights instead of his own. The Attorney General is the only party who has asserted a claim that due process requires the Commission to conduct an evidentiary hearing on Kentucky Power's confidentiality motion. Accordingly, it is the Attorney General's due process rights that are at issue.

Addressing the first prong of the *Mathews v. Eldridge* analysis, the Attorney General did not identify "liberty" or "property" interest in Kentucky Power's confidentiality motion that would be affected by the Commission's decision to hold or dispense with an evidentiary hearing. To that point, it is unclear what interest the Attorney General could possibly assert given the Kentucky Supreme Court's decision that "[u]tility ratepayers have no vested property interest in the rates they must pay for a utility service."[13] The Attorney General attempts to downplay the significance of this decision, arguing that it is "irrelevant because it deals with substantive due process rights, and has no bearing on the procedural due process issues at the core of the instant matter."[14] However, the decision goes to the heart of the Attorney General's failure to identify a "liberty" or "property" interest at issue; and it suggests that the Attorney General could not

---

[11] *Id.*

[12] Attorney General's Sur-Reply, p. 4.

[13] *Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Co.*, 983 S.W.2d 493, 497 (Ky. 1998).

[14] Attorney General's Sur-Reply, pp. 5-6, n. 6.

possibly have such an interest when even ratepayers have no "property" interest in the rates they pay.

Rather than addressing any due process interest he might have that would compel the Commission to conduct an evidentiary hearing in this proceeding, the Attorney General instead focuses on the nature of Kentucky Power's interest, arguing that "KP simply has no private interest that would preclude the additional process the Attorney General seeks, that of a limited hearing to cross-examine Ms. Hawkins."[15] However, the first prong of the *Mathews v. Eldridge* test does not require Kentucky Power to establish that it has a due process interest that would be infringed upon if the Commission conducted an evidentiary hearing. Rather, it requires the Attorney General to establish that he has a due process interest that requires the Commission to conduct an evidentiary hearing. The Attorney General has made no such showing and the Commission should deny his hearing request.

The Attorney General's analysis of the second prong of the *Mathews v. Eldridge* test suffers from the same deficiency as his analysis of the first, as the Attorney General provides no showing that an evidentiary hearing would reduce the risk of an erroneous deprivation of some "liberty" or "property" interest, and instead offers an unsupported conclusion that Kentucky Power will not be harmed if the Commission conducts an evidentiary hearing. Moreover, it is difficult to conceive of any arguments the Attorney General could advance to support a claim that an evidentiary hearing will reduce the risk of some erroneous deprivation of a due process interest. Kentucky Power has provided the Attorney General with all of the confidential information at issue in this case, and the Attorney General will have the same opportunity to access and use the information whether or not the Commission decides to conduct an evidentiary

[15] *Id.*, p. 4.

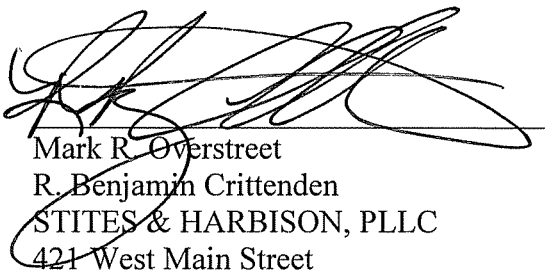
hearing. The Attorney General gains nothing from an evidentiary hearing and loses nothing if no evidentiary hearing is conducted.

With respect to the final prong of the *Mathews v. Eldridge* test, the Attorney General contends that a "evidentiary hearing for the sole purpose of cross-examining the only affiant KP offered in support of its position would clearly be quite useful to this Commission, and would impose only a very slight burden, if any at all."[16] While the Attorney General might believe that an evidentiary hearing will be useful to the Commission, the Attorney General has not identified any facts in dispute for the Commission to decide. The Attorney General has offered no substantive evidence to counter the facts set forth in the affidavits of Renee Hawkins and has identified no statements within the affidavits with which he disagrees. It is unclear why such a proceeding would be beneficial to the Commission in the absence of a legitimate factual dispute. A full evidentiary hearing should not be required on confidentiality motions whenever an intervening party offers an unsupported claim that it might discover the existence of some factual dispute through cross-examination.

[16] *Id.*, p. 5.

WHEREFORE, Kentucky Power respectfully requests that the Commission deny the Attorney General's request for an evidentiary hearing and grant the Company's confidentiality motion.

Respectfully submitted,



Mark R. Overstreet
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 copy of the foregoing was served by first class mail, postage prepaid, upon the following parties, on this 14th day of April, 2010.

Dennis G. Howard, II
Lawrence W. Cook
Paul D. Adams
Office of the Attorney General
1024 Capital Center Drive, Suite 200
Frankfort, KY 40601-8204

Joe F. Childers
Getty & Childers
1900 Lexington Financial Center
250 West Main Street
Lexington, KY 40507

Sam R. Collins
470 Main Street, 2nd Floor, Suite 1
Post Office Drawer 1179
Hazard, KY 41702

Matthew R. Malone
Hurt, Crosbie & May PLLC
The Equus Building
127 West Main Street
Lexington, KY 40507

Richard Hopgood
Wyatt, Tarrant & Combs, LLP
250 West Main Street
Suite 1600
Lexington, KY 40507-1746

Holly Rachel Smith
Hitt Business Center
3803 Rectortown Road
Marshall, VA 20115

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

R. Benjamin Crittenden