

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

A PETITION FOR CONFIDENTIALITY            )  
OF COAL SUPPLY AND COAL                    ) CASE NO. 9674  
TRANSPORTATION CONTRACTS OF            )  
KENTUCKY POWER COMPANY                 )

O R D E R

On July 28, 1986, Kentucky Power Company ("Kentucky Power") filed a petition with the Commission, requesting that its coal supply and coal transportation contracts be treated as proprietary, confidential and privileged information. These contracts and those of all electric utilities are currently available to the public under provisions of the Fuel Adjustment Clause ("FAC") regulation, 807 KAR 5:056.

The matter of fuel contract confidentiality was addressed in the Commission's 1978 investigation that resulted in the adoption of the present FAC. After holding hearings and evaluating the testimony of the electric utilities and other parties, the Commission determined that the public had a right to review these contracts and made recommendations to the Legislative Research Commission which were accepted and incorporated into the present regulation.

Kentucky Power presents six major arguments for treating coal supply and transportation contracts as confidential except in the context of a proper administrative proceeding. The Commission

does not find these arguments persuasive for the following reasons.

Kentucky Power first argues that disclosure of coal contracts will weaken its bargaining position and increase its costs. The Commission rejected this argument in 1978 upon finding that "public disclosure of such information is just as likely to have the effect of decreasing coal prices to utilities where one coal supplier may wish to undersell another in order to obtain a long-term contract with a utility."<sup>1</sup> This same rationale remains true today, even though the strong coal market that prevailed in 1978 has severely eroded to become a buyers' market. By relying on coal contract information available pursuant to the FAC regulation, suppliers are able to increase their market share by undercutting their competitors, all to the benefit of the utility and its ratepayers. Similarly, public disclosure of coal contracts substantially benefits utilities by providing a reliable and comprehensive source of information for their use in assessing the coal supply market and determining whether their existing contracts are competitive.

There is little reason to believe that Kentucky Power is harmed by making its coal contracts public. This is evident from the facts that Kentucky Power recites in its petition. According to the petition, coal purchasing for Kentucky Power is handled by its parent, American Electric Power Company. "Electric utilities constitute by far the largest segment of the coal market consuming

---

<sup>1</sup> Commission Memo to LRC, May 31, 1978.

hundreds of millions of tons annually," the petition states, "and AEP is the largest coal consumer in the country."<sup>2</sup> The petition makes plain that Kentucky Power through AEP has enormous market power in the purchase of coal. This substantial market power is present throughout the electric utility industry. It is no wonder that Kentucky Power in its petition is unable to cite a single instance where it or any other utility in Kentucky has paid higher prices for fuel or transportation because its contracts have been part of the public record.

Kentucky Power argues that granting confidentiality to its coal contracts would be consistent with the Kentucky Open Records Statute, the federal Freedom of Information Act, and the Staggers Act. Since the Open Records Act establishes the policy in Kentucky, we will confine ourselves to an analysis of the provisions of this act. It was this policy that guided the Commission in establishing its regulation, 807 KAR 5:001, Section 7.

The Open Records Act in KRS 61.872(1) clearly establishes the policy of open access by declaring: "All public records shall be open for inspection by any person, except as otherwise provided. . . ." Kentucky Power admits that the act does not specifically address the confidentiality of private contracts filed of record with a public agency. The company, however, urges the application of the exception for commercial records provided for in KRS 61.878(1)(b). This section protects records which "if openly disclosed would permit an unfair advantage to competitors

---

2 Petition, page 3.

of the subject enterprise." This is the only possible exception to the general policy of the Open Records Act that is cited by the company.

In this instance the Commission has an unusual opportunity to test the applicability of this section. Since 1978, Kentucky Power's coal contracts have been filed with the Commission and been open to public inspection. If this policy had been in error, one would expect clear evidence of the unfair advantage enjoyed by Kentucky Power's competitors. Yet we note again that the company's petition fails to cite a single instance of any harm it has suffered because of an unfair advantage gained by a competitor. All injuries mentioned in the petition are purely hypothetical. With this eight-year record, the wisdom of the Commission's judgment in 1978 has been powerfully affirmed. The Open Records Act clearly requires that all coal contracts filed with the Commission be made available for public inspection. It would be improper for the Commission to now apply an exception knowing--based on the experience of the last eight years--that there is no reasonable expectation that any competitor will gain an unfair advantage by having these records available to the public.

There are similar problems with attempting to treat coal contracts as proprietary and confidential pursuant to 807 KAR 5:001, Section 7. The Commission is of the opinion that this confidentiality regulation is not applicable to coal supply and transportation documents filed pursuant to the requirements of the FAC regulation. This is based on the mandatory language of paragraph (10) of the FAC regulation stating that such documents "shall be

open and made available for public inspection" and the administrative history of the FAC regulation indicating the explicit rejection in 1978 of utility requests to keep coal contracts confidential.

However, even if the confidentiality regulation were applicable, a review of the factors to be considered in granting such confidentiality demonstrates that Kentucky Power's request should be rejected. That regulation sets forth three factors to be considered when a petition seeks confidential treatment of commercial information. Those factors are:

1. Evidence revealing actual competition and the likelihood of substantial competitive injury.
2. The extent to which data of the sort in dispute is customarily disclosed to the public.
3. A balancing of the private competitive interests versus the public interest in disclosure.

807 KAR 5:001, Section 7(7)(b).

Regarding the first factor, the Commission has already found that no evidence of actual competitive injury was presented. Recognizing that these coal contracts have been public record for 8 years, the likelihood that substantial injury might occur in the future is minimal to non-existent. As to the second factor, all electric utilities in Kentucky have had their fuel and transportation contracts disclosed to the public since 1978 pursuant to the FAC regulation. Turning to the balancing test set forth in the last factor, the Commission is of the opinion that the tens of millions of dollars collected by Kentucky Power under its FAC

sufficiently justifies the public interest in disclosing its coal and transportation contracts.

An additional issue of significant import, but not addressed by Kentucky Power, is the propriety of designating contracts confidential when copies are already in the public's possession. For example, if the Commission were to designate Kentucky Power's contracts as confidential, what restriction, if any, applies to those individuals who obtained copies under the open records law during the past 8 years?

Given the policies underlying the Open Records Act and the Commission's regulation, the remaining arguments of Kentucky Power are unpersuasive. The company's contention that, even if confidentiality were granted, coal contracts could be reviewed by the public in a proper administrative proceeding falls before the broader requirements of the Open Records Act. The security measures taken by Kentucky Power and AEP to prevent disclosure of coal contracts cannot overcome the requirements of state law and Commission regulation. This is also true despite the fact that Kentucky Power and AEP have spent considerable time, effort, and money in developing its coal contracts. In balancing Kentucky Power's interest in confidentiality against the public's right to know, the record of the last eight years unquestionably favors the right to know.

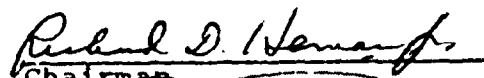
The Commission, having considered the evidence of record and being advised, is of the opinion and hereby finds that Kentucky Power has presented neither substantial evidence nor persuasive

argument in support of its petition for confidentiality of its coal contracts. Therefore, the petition should be denied.

IT IS THEREFORE ORDERED that Kentucky Power's petition for confidentiality be and it hereby is denied.

Done at Frankfort, Kentucky, this 22nd day of December, 1986.

PUBLIC SERVICE COMMISSION

  
Chairman

  
Vice Chairman

  
Commissioner

ATTEST:

---

Executive Director