

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

| | | |
|-------------------------------|---|----------------|
| GREEN RIVER STEEL CORPORATION |) | |
| |) | |
| Complainant |) | |
| |) | |
| v. |) | CASE NO. 10300 |
| |) | |
| KENTUCKY UTILITIES COMPANY |) | |
| |) | |
| Defendant |) | |

O R D E R

Before this Commission is a motion to compel responses to an informational request.

Green River Steel Corporation ("Green River Steel") has filed a complaint against Kentucky Utilities Company ("KU"). KU supplies electric power to Green River Steel under the terms of its Large Commercial/Industrial Time-of-Day ("LCI-TOD") Rate Schedule. In its Complaint, Green River Steel alleges that the LCI-TOD Rate Schedule unjustly and unreasonably discriminates against it in two respects. First, it is alleged that the LCI-TOD Rate Schedule does not provide enough consecutive hours of off-peak demand charges to allow for the efficient production of steel products. Second, it includes a special termination provision of 5 years perpetual notice - a provision which Green River Steel describes as unnecessary in its case as "little or no new investment is required" by KU to provide service.

On November 11, 1988, Green River Steel served an informational request on KU. KU filed responses to the information request, but refused to answer five questions which it insisted involved confidential and proprietary information. On November 23, 1988, Green River Steel moved that KU be compelled to answer these questions and to provide more satisfactory answers to 3 other questions. KU responded to this motion on December 7, 1988.

As our Rules of Procedure are silent on discovery matters, we look to the Federal and Kentucky Rules of Civil Procedure for guidance. These rules, quite broad in scope, permit a party to obtain discovery of any matter, not privileged, which is relevant to the subject matter of the pending action. Fed.R.Civ.P. 26(b)(1); CR 26.02(1). Under these rules, confidential commercial information enjoys no privilege from disclosure. Kleinerman v. U.S. Postal Service, 100 F.R.D. 66 (D. Mass. 1983). Courts, however, have protected confidential commercial information where one party's need for protection outweighs the other party's need for disclosure. 8 C. Wright & A. Miller, Federal Practice and Procedure §2043 at 301-303 (1970). To prevent discovery of such information, a party must first demonstrate that "disclosure will work a clearly defined and very serious injury." U.S. v. IBM, 67 F.R.D. 40, 46 (S.D.N.Y. 1975). If this requirement is met, the burden shifts to the party seeking discovery to establish that disclosure of the information is relevant and necessary. Upon such a showing, a balancing of the parties' interests occurs. If the party seeking discovery proves unable to meet its burden,

discovery is denied. Centurion Industries, Inc. v. Warren Steurer, 665 F.2d 323 (10th Cir. 1981).

With this guidance, we turn to Green River Steel's motion to compel.

Green River Steel requests that KU provide the name of each new and existing customer who has qualified for the LCI-TOD rate since it was approved (Q.1),¹ the name of each existing customer who, apart from normal growth, has increased its demand (Q.2), and a copy of each LCI-TOD contract executed by KU since the LCI-TOD rate was approved (Q.3).

Noting that it has a written policy against disclosing customer information, KU refuses to comply with Green River Steel's request. It asserts that the information sought "may well be confidential and proprietary" to its customers and that disclosure by public filing . . . may be adverse to their interests and pose a risk of competitive disadvantage." KU Response, p. 3. It further asserts that the contracts sought by Green River Steel "may disclose operating characteristics or other information which the customer regards as confidential." Id., p. 4.

KU fails to demonstrate how disclosure of this information to Green River Steel will work a clearly defined and very serious injury. It asserts that disclosure of the information may place its other customers at a competitive disadvantage. We believe that KU has confused disclosure of information to the complainant

¹ The number in parenthesis corresponds to the question in Green River Steel's informational request of November 11, 1988.

with disclosure to the public. Nowhere in its response has KU suggested that Green River Steel competes with other KU industrial and commercial customers. Without such competition, disclosure of the information to Green River Steel will not pose any "risk of competitive disadvantage" to other KU customers. We, therefore, find no reason to deny Green River Steel access to the requested information.

Green River Steel also requests the most recent proposals made by KU and Westvaco Corporation in their negotiations for a new service contract (Q.4). It asserts this information is needed to verify KU witness Robert Hewett's testimony that Westvaco, KU's remaining special contract customer, has agreed to accept a new service contract containing a 5 year termination notice provision. In addition, Green River Steel seeks management memorandum and Board of Directors' minutes which discuss the reasons, from KU and Westvaco's standpoints, why KU has continued to serve Westvaco as a special contract customer but refuses to serve it as such a customer (Q.5).

KU objects to both requests contending the documents sought relate to confidential and privileged negotiations between KU and Westvaco and as such are entitled to protection under civil discovery rules. It also states that the request requires an exhaustive search of its management files and Directors' minutes and could not be conducted in a reasonable time.

We cannot accept KU's assertions that its contract negotiations are privileged. KU cites no specific authority to support its claim of privilege nor have we found any. While the material

involving commercial negotiations may be considered confidential commercial information, it is protected from discovery only if serious injury would result from its disclosure. KU has not shown that either it or Westvaco would be injured if their most recent negotiation proposals were disclosed to Green River Steel. As each is already aware of the other's proposal, disclosure will place neither KU nor Westvaco at a disadvantage. KU also fails to advance any reason why disclosure to Green River Steel of documents relating to its disparate treatment of Westvaco and Green River Steel would cause KU serious injury.

Green River Steel has petitioned this Commission to compel KU to identify its customers which initially resisted the 5 year cancellation notice but eventually signed service contracts containing such provisions (Q.25). This request is in response to KU witness J. W. Tipton's testimony that "some have initially resisted, but all eventually signed contracts with the five year cancellation notice like that included in the current Green River contract." KU objects to this request contending it requires the disclosure of confidential and privileged information relating to the negotiations between KU and its customers. KU also states the information sought is immaterial to the issues in this case and offered to strike Mr. Tipton's remark from his testimony.

The identity of these customers has no relevance to this case. The reactions of KU customers to the 5 year termination notice has no bearing on whether the application of such a notice requirement to Green River Steel is unjustly or unreasonably discriminatory. Green River Steel's suggestion that disclosure of

this information is necessary to confirm that all KU customers have been required to submit to the notice requirement is without merit. Green River Steel has been granted access to the contracts of all LCI-TOD customers, examination of these contracts should enable it to verify the "accuracy and completeness" of Tipton's testimony. Accordingly, we find that Green River Steel's request that KU identify customers objecting to the termination notice provision should be denied.

Green River Steel's final requests for information (Q.26-Q.28) concern certain hypothetical revenue calculations. It asks KU to make certain assumptions, then perform certain calculations as to revenues based on these assumptions, and then provide the results and working papers. Objecting to these requests, KU asserts that discovery rights extend only to existing records and materials. As it has not performed the requested calculations, KU contends that it cannot be forced to perform such calculation under the guise of discovery.

The purpose of discovery is to ensure mutual knowledge of all relevant facts gathered by the parties and essential to proper litigation. Through discovery either party may compel the other to disgorge information and documents within its possession. In this instance Green River Steel's request exceeds the boundaries of discovery. KU has not performed the requested calculations. While we can compel KU to provide calculations which it has already performed or disclose data necessary to perform such calculations, we cannot compel it to develop new evidence for an

adversary party. Accordingly, Green River Steel's request for KU to perform these calculations must be denied.

This Commission is aware that only a few days remain before the scheduled hearing. Recognizing that locating, assembling, and then assimilating its requested material would require a major effort, we offered to continue these proceedings. Green River Steel, the complainant and the movant for this motion, however objected to any continuance. The scheduled hearing, therefore, will not be delayed. We find that KU should exercise its best efforts to provide the material in question by January 10, 1989. That material which is not readily available should be provided as soon as it becomes available, but no later than January 27, 1989. We note that by refusing to accept a continuance, Green River Steel has waived any claim of prejudice resulting from the late receipt of the requested material. We also note that, by subsequent order, the briefing schedule of this case will be amended to ensure that the requested material is not unfairly used.

Finally, this Commission is aware of the potential dangers posed by public access to the materials which we have ordered disclosed. The material contains sensitive information about the business operations of some KU customers. This information is not generally known and could cause these KU customers serious economic injury if discovered by their competitors. We, therefore, find that this material should be afforded confidential treatment as set out in Commission Regulation 807 KAR 5:001, Section 7.

IT IS THEREFORE ORDERED that:

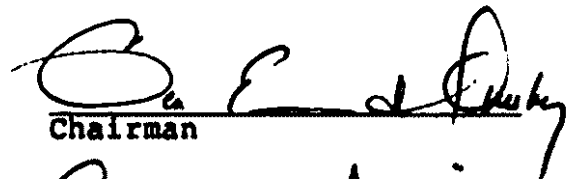
1. Green River Steel's motion to compel responses by KU to its informational request of November 11, 1988 be granted in part and denied in part. KU shall respond to Questions 1 through 5 of Green River Steel's November 11, 1988 informational request, but is not required to respond to Questions 25 through 28 of that informational request.

2. KU shall deliver to Green River Steel and to this Commission no later than January 10, 1989 all readily available material sought in Questions 1 through 5 of Green River Steel's November 11, 1988 informational request. That material which is not provided on or before January 10, 1989 shall be provided as soon as it becomes available, but no later than January 27, 1989.

3. KU's responses to Questions 1 through 5 of Green River Steel's November 11, 1988 informational request shall be afforded confidential treatment as set out in Commission Regulation 807 KAR 5:001, Section 7.

Done at Frankfort, Kentucky, this 6th day of January, 1989.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman

ATTEST:

Executive Director


Commissioner