

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

A REVIEW PURSUANT TO 807 KAR 5:058 OF)
THE 1993 INTEGRATED RESOURCE PLAN OF) CASE NO. 93-381
THE UNION LIGHT, HEAT & POWER COMPANY)

O R D E R

This matter arising upon petition of The Union Light, Heat & Power Company ("ULH&P"), filed February 1, 1994, pursuant to 807 KAR 5:001, Section 7, for confidential protection of the emission allowance forecasts filed in response to Item 57 of the Commission's data requests and the fuel cost forecasts filed in response to Item 16 of the Attorney General's data requests on the grounds that the information constitutes trade secrets and confidential commercial information exempt from public disclosure, and it appearing to this Commission as follows:

In response to separate data requests from the Commission and the Attorney General, ULH&P has filed certain forecast information which it has petitioned be protected from public disclosure as confidential. The information sought to be protected was derived from separate studies conducted by ICF Resources Incorporated ("ICF"), Resources Data International, Inc. ("RDI"), and AER*X, Inc. ("AER*X"), independent consultants who conduct research on matters pertaining to the utility industry. The research is compiled in reports which utilities purchase under subscription contracts. Because the market value of these reports would be diminished if the information they contain were made public, the

subscription contracts each contain provisions that require subscribing utilities to protect the reports as confidential.¹ To

¹ The subscription contract with ICF provides in part as follows:

Proprietary Nature - ICF Resources' allowance market multi-client study reports and presentations are prepared solely for the use of all subscribers. Use of these reports or presentations (or parts thereof) by other parties, or by the subscriber for purposes other than the subscribers own internal use is prohibited unless authorized in writing by ICF Resources Incorporated.

The subscription contract with RDI provides in part as follows:

IV. Security - Confidentiality.

Client agrees not to sell, provide, furnish, lease, copy, disclose, assign, donate, transfer, or make available in any form to any other person outside of itself and its affiliated companies the information provided under their contract.

The information from AER*X was developed under a contract with Energy Management Associates, Inc. ("EMA") who in turn sold the information to its subscribers. The EMA subscription contract provides in part as follows:

1 . . . Recipient further acknowledges that this agreement creates a confidential relationship between the parties upon which the company [EMA] is willing to grant certain rights to the recipient as provided herein. Recipient also acknowledges and agrees that use of the Trade Secrets is furnished during the term of this agreement to recipient on a confidential and secret basis for the sole and exclusive use of recipient in connection with the study and agrees it will not publish, disclose, or otherwise divulge to any person, except necessary offices and employees of recipient, at any time, either during or after the termination of this agreement, nor permit its offices or employees to divulge any such information regarding the Trade Secrets without the prior written consent of an officer of the company. Recipient agrees that the Forecast will be used only in the conduct of its normal business and that no secondary distribution will be permitted or made . . .

comply with these contractual obligations, ULH&P limits access to the reports to those in the company who are involved in long-term forecasting, generation planning, integrated resource planning, and fuel supply processes.

Information filed with the Commission is required by KRS 61.872(1) of the Kentucky Open Records Act to be maintained for public inspection unless specifically exempted by statute. Exemptions from disclosure are provided by KRS 61.878(1). To enable persons who file information with the Commission to protect that information from public scrutiny, the Commission promulgated 807 KAR 5:001, Section 7. That regulation establishes the procedure that petitioners must follow in order to remove information filed with the Commission from the public record. The regulation is procedural only and does not establish any criteria by which information sought to be protected should be evaluated. Instead, the regulation refers back to the Open Records Act and requires those requesting protection to set forth in their petition the specific grounds of the Act upon which they rely.²

Footnote continued:

3. If required by order of government or judicial body, Recipient may release to such body the information required by such Order, provided that Recipient shall use its best efforts to prevent such information from becoming part of the public domain.

² The regulation in its present form is the result of an amendment approved on September 24, 1991. Prior to its amendment, the regulation did provide criteria for determining whether information qualified for exemption as either a trade secret or as confidential commercial information.

As grounds for its petition here, ULH&P contends that the information sought to be protected is confidential trade secret or commercial information. Such information is exempt from disclosure by KRS 61.878(1)(c). To qualify for the exemption, it must be established that disclosure of the information is likely to cause competitive injury to the party who files the information.

ULH&P makes four arguments in support of its petition. However, only one argument addresses the issue of competitive injury suffered by ULH&P. Therefore, that is the only argument that need be considered at this time.³

As one of its grounds for protection, ULH&P contends that disclosure of the information could adversely affect its ability to purchase fuel and allowances at competitive prices.⁴ Because the

³ KRS 61.878(1)(c) provides in relevant part as follows:

The following public records are excluded from the application of [the Open Records Act] and shall be subject to inspection only upon Order of a court of competent jurisdiction ...:

1. Records confidentially disclosed to an agency, generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records, ...

⁴ In addition to alleging that it will suffer competitive injury by the release of the information, ULH&P also contends the information should be protected because:

1. The information was provided by the independent consultants to ULH&P on condition that it be treated as confidential and not publicly disclosed.
2. Disclosure of the information could affect the competitive position of the consultants from whom ULH&P obtained the information.
3. Disclosure of the information could expose ULH&P to liability for damages for breach of contract.

Any petition seeking to raise these issues must be brought by ICF, RDI, or AER*X.

information reveals the "benchmarks" by which ULH&P evaluates bids for these purchases, ULH&P maintains that suppliers will set their bids at levels close to the forecast rather than submit true market value bids. This argument ignores the dynamics of the marketplace. Since these purchases will be made in a competitive market, it is more reasonable to assume that prospective sellers, knowing they face competition from other sellers, will endeavor to offer their properties at the lowest possible price in order to make the sale. Therefore, disclosure of the studies is unlikely to adversely affect the bidding process and the information should not be protected on that ground.

This Commission being otherwise sufficiently advised,

IT IS ORDERED that:

1. The petition to protect as confidential the emission allowance price forecasts and fuel price forecasts filed in response to the Commission's and the Attorney General's data requests be and is hereby denied.

2. The information sought to be protected shall be held and retained by the Commission as confidential and shall not be open for public inspection for a period of 20 days from the date of this Order, at the expiration of which it shall be placed in the public record.

Done at Frankfort, Kentucky, this 8th day of December, 1994.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman

ATTEST:


Executive Director


Commissioner