

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN EXAMINATION BY THE PUBLIC SERVICE )  
COMMISSION OF THE APPLICATION OF THE )  
FUEL ADJUSTMENT CLAUSE OF KENTUCKY ) CASE NO. 92-492-B  
POWER COMPANY FROM MAY 1, 1993 TO )  
OCTOBER 31, 1993 )

AN EXAMINATION BY THE PUBLIC SERVICE )  
COMMISSION OF THE APPLICATION OF THE )  
FUEL ADJUSTMENT CLAUSE OF KENTUCKY ) CASE NO. 92-493-B  
UTILITIES COMPANY FROM MAY 1, 1993 TO )  
OCTOBER 31, 1993 )

AN EXAMINATION BY THE PUBLIC SERVICE )  
COMMISSION OF THE APPLICATION OF THE )  
FUEL ADJUSTMENT CLAUSE OF LOUISVILLE ) CASE NO. 92-494-B  
GAS AND ELECTRIC COMPANY FROM MAY 1, )  
1993 TO OCTOBER 31, 1993 )

O R D E R

Kentucky Power Company ("Kentucky Power"), Kentucky Utilities Company ("KU"), and Louisville Gas and Electric Company ("LG&E") have petitioned for confidential protection of certain information pertaining to their fuel procurement practices. At issue is whether the coal bids which an electric utility receives and its written evaluations of those bids are exempt from public disclosure under the Open Records Act. Finding that KRS 61.878(1)(c) exempts the information in question from public disclosure, the Commission grants the petitions.

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On December 27, 1993, the Commission initiated formal reviews of the operation of the fuel adjustment clauses of Kentucky Power, KU, and LG&E. To determine the reasonableness of each utility's coal purchases, the Commission ordered each utility to furnish, inter alia, the bid tabulation sheets which ranked coal vendor proposals for each coal solicitation and a brief explanation for each vendor selection.

Kentucky Power, KU, and LG&E provided this information, but requested confidential treatment for it. Finding that each utility had failed to prove that the Open Records Act exempted this information from public disclosure, the Commission denied these requests.

Each utility subsequently petitioned for rehearing.<sup>1</sup> The Commission granted the petitions, ordered a hearing on each request, and consolidated the cases for purposes of hearing. An evidentiary hearing was held. Following the submission of briefs, the Commission heard oral arguments.

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Commission Regulation 807 KAR 5:001, Section 7(1), provides that "[a]ll material on file with the commission shall be available for examination by the public unless the matter is considered confidential." It further provides that material will be considered confidential only if it meets one of the exclusions set forth in the Kentucky Open Records Act. 807 KAR 5:001, Section

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<sup>1</sup> Kentucky Industrial Utility Customers intervened in this proceeding but did not take a position on the utilities' petitions.

7(a)1. The party requesting confidential treatment has the burden of showing that the material falls within an exclusion. 807 KAR 5:001, Section 7(d).

KRS 61.878(1)(c)1 exempts records "confidentially disclosed to an agency or required by an agency to be disclosed to it, 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."

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The material in question falls into two categories - coal supplier bids and the utilities' written evaluations of those bids. The bids contain not only suppliers' actual offered prices, but also precise information regarding transportation costs by point of origin and type of transportation. The written evaluations, or bid tabulation sheets, include the criteria used to evaluate each bid. Such criteria include a supplier's tonnage flexibility, the consistency of its offering with the utility's long range plans, coal quality, cost of removing sulfur and ash, and transportation costs.

In the case of each utility, the material in question is generally regarded as confidential and privileged. Access to the bids and the utility's evaluations is limited to select employees within the utility's fuel procurement and regulatory affairs departments.<sup>2</sup> This information is not routinely disclosed to

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<sup>2</sup> Transcript of Evidence ("T.E.") at 35-36.

regulatory agencies and, when disclosed, those agencies have treated it as confidential.

Given the nature of the coal market,<sup>1</sup> disclosure of coal supplier bids and a utility's written evaluations of those bids will likely increase utility fuel costs. A coal supplier's principal objective is the maximization of its profits. Only a coal supplier's uncertainty about its competitors' prices and its fear of losing a contract because of an excessive bid limits its bid price. Coal suppliers routinely play the coal solicitation process to their advantage in an effort to obtain the highest price for their coal.<sup>4</sup>

Disclosure of unsuccessful bids would provide coal suppliers with detailed information about market conditions in general and their competitors in particular.<sup>5</sup> Armed with information about its

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<sup>1</sup> In its Orders denying the original petitions for confidential protection, the Commission assumed that the coal market is competitive and that greater access to pricing information would spur additional competition and improve the operation of the coal market. This assumption was based on the premise that production and transportation costs of most coal producers were comparable. The evidence of record suggests the contrary. T.E. at 110-112. To the contrary, it suggests that disclosure of coal supplier bids will not produce significant reductions in coal supplier prices or improve the operation of the market. In fact, several courts and commentators have suggested that disclosure produces a contrary result. See, e.g., Continental Oil Co. v. Federal Power Comm'n, 519 F.2d 31 (5th Cir. 1975); Stevenson, Information and Rivalrous Competition, 48 Geo. Washington Law Rev. 671 (1980).

<sup>4</sup> T.E. at 110-116.

<sup>5</sup> Sections 1(7) and 1(10) of Commission Regulation 807 KAR 5:056 require public disclosure of the successful bid.

competitors' costs, a coal supplier can increase its offered price to maximize its profit without fear of losing a contract.

In some instances, disclosure of the bidding information and a utility's bid evaluation methodology may strengthen a coal supplier's bargaining position. This information will reveal the number of available coal suppliers for certain types of coal and particular locations. If a coal supplier learns that it has few, if any, competitors to supply a particular type of coal or a particular utility plant, its bargaining position when negotiating a contract is significantly increased and its selling price will likely be higher.

As the disclosure of the bidding information and bid evaluation methodology will lead to higher fuel prices and thus higher electric rates, it will injure the utilities' ability to compete in the retail and wholesale electric markets. Higher energy rates will weaken their ability to compete with other electric utilities in the increasingly competitive wholesale power market. While each utility has a monopoly on retail electric service in its certified territory,<sup>6</sup> it must compete with suppliers of other forms of energy such as natural gas. Higher retail electric prices will lessen its ability to compete with these suppliers.

Disclosure of the bid evaluation methodology will weaken each utility's ability to compete in the wholesale electric market in another manner. The methodology contains detailed information about

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<sup>6</sup> KRS 278.018(1).

each utility's internal operations. Competitors could use this information to obtain an advantage in securing coal suppliers and in marketing their bulk power.

After considering the evidence of record and being otherwise sufficiently advised, the Commission finds that the materials in question are generally recognized as confidential and proprietary and that their disclosure to the public will create an unfair commercial advantage to the utilities' competitors. This material is, therefore, exempted from public disclosure under KRS 61.878(1)(c) and should be afforded confidential treatment.

While the materials in question should be afforded confidential treatment at the time of their filing, their value and the adverse impact of their disclosure decreases with time. Market conditions change and the coal supplier bids gradually cease to be useful indicators of current market conditions. Similarly, as utility market conditions change, evaluation methodologies become stale.

Accordingly, the Commission finds that coal bids submitted in the Commission's periodic reviews of an electric utility's fuel adjustment clause should be given confidential treatment only for a period of two years from the date of their filing and that an electric utility's written evaluation of those bids should be afforded confidential treatment only for a period of three years from the date of filing. Where, at the end of this three year period, an electric utility believes these written evaluations

continue to contain confidential information, it may petition for an extension of this period.

IT IS THEREFORE ORDERED that:

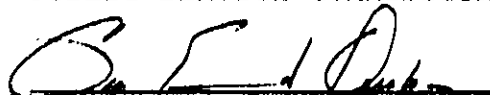
1. The motions of Kentucky Power, KU, and LG&E for confidential protection are granted.

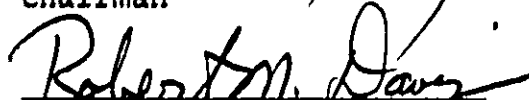
2. All coal bids submitted in response to the Commission's Orders of December 27, 1993 shall be afforded confidential protection for a period of two years from the date of their filing.

3. All coal bid tabulation sheets submitted in response to the Commission's Order of December 27, 1993 shall be afforded confidential protection for a period of three years from the date of their filing. Each utility may, at the end of this period, petition for an extension of this period. Such petitions will be granted only upon a showing of good cause.

Done at Frankfort, Kentucky, this 30th day of November, 1995.

PUBLIC SERVICE COMMISSION

  
Chairman

  
Vice Chairman

  
Commissioner

ATTEST:

  
Executive Director