

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN EXAMINATION BY THE PUBLIC SERVICE )  
COMMISSION OF THE ENVIRONMENTAL )  
SURCHARGE MECHANISM OF KENTUCKY )  
POWER COMPANY FOR THE SIX-MONTH )  
BILLING PERIODS ENDING DECEMBER 31, 2002, ) CASE NO. 2006-00128  
DECEMBER 31, 2003, JUNE 30, 2004, )  
DECEMBER 31, 2004, AND DECEMBER 31, 2005, )  
AND FOR THE TWO-YEAR BILLING PERIODS )  
ENDING JUNE 30, 2003 AND JUNE 30, 2005 )

O R D E R

On June 29, 2006, Kentucky Power Company (“Kentucky Power”) filed a petition requesting reconsideration of the Commission’s Executive Director’s June 9, 2006 Letter Ruling denying confidential treatment for Kentucky Power’s responses to certain of the Commission Staff’s data requests. In particular, Kentucky Power requests reconsideration of the denial of confidential treatment of responses to Commission Staff’s Data Request Items 17(b) and 18 which involve Kentucky Power’s forecasts for its participation in the emission allowance market.

ARGUMENT

Kentucky Power contends that the subject information is exempt from public disclosure pursuant to Kentucky’s Open Records Act. In its motion, Kentucky Power maintains that the information is excluded under KRS 61.878(1)(c)<sup>1</sup> because it asserts

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<sup>1</sup> Kentucky Power refers to KRS 61.878(c)(1) probably intending to refer to KRS 61.878(1)(c).

that disclosure of the information contained in its responses would be harmful to Kentucky Power and its customers. They further contend, inter alia, that no party to this proceeding has offered any objection to its request for confidential treatment.

### BACKGROUND

The Commission is a public agency and the documents at issue are public records subject to the Kentucky's Open Records Act, KRS 61.870 to 61.884 (the "Open Records Act"). "[T]he basic policy of [the Open Records Act] is that free and open examination of public records is in the public interest and the exceptions provided by KRS 61.878 or otherwise provided by law shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others."<sup>2</sup> The primary purpose of the Open Records Act is to inform the public as to whether governmental agencies are properly executing their statutory functions.

All material on file with the Commission is to be "open for inspection by any person, except as otherwise provided in KRS 61.870 to 61.884."<sup>3</sup> A person requesting that the Commission grant confidential treatment has the burden to show that the material falls within an exclusion-from-disclosure requirement enumerated in the Open Records Act.<sup>4</sup>

KRS 61.878(1)(c) of the Open Records Act provides an exemption for "records confidentially disclosed to an agency or required by an agency to be disclosed to it,

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<sup>2</sup> KRS 61.871.

<sup>3</sup> See KRS 61.872(1); see also, Lexington-Fayette Urban County Government v. Lexington Herald-Leader Co., 941 S.W.2d 469, 471 (Ky. 1997).

<sup>4</sup> 807 KAR 5:001, Section 7(2)(d).

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; . . . .”

To the extent that the petitioner relies on KRS 61.878(1)(c), it must show that the commercial documents are generally recognized as confidential or proprietary and that disclosure would permit an unfair commercial advantage to competitors.<sup>5</sup> The court in Southeastern United Medigroup, Inc. v. Hughes,<sup>6</sup> in considering KRS 61.878(1)(c), held that if it is established that a document sought to be withheld is confidential or proprietary, and if disclosure to competitors would provide substantially more than a trivial unfair advantage, the document should be protected from disclosure.

Kentucky Power has requested that the responses to the following two discovery requests be kept confidential:

Request number 17:

Provide the following information concerning Kentucky Power’s inventories of SO<sub>2</sub> and NO<sub>x</sub> emission allowances:

- b. For each year in the period 2006 through 2016,
  - (1) Indicate the number of emission allowances allocated or expected to be allocated by the Environmental Protection Agency for the Big Sandy generating units.
  - (2) Indicate the number of emission allowances estimated to be allocated to Kentucky Power under the Interim Allowance Agreement or other allocation mechanism.
  - (3) Indicate the number of emission allowances Kentucky Power estimates it will utilize in conjunction with the operation of the Big Sandy generating units. Reflect the changes resulting from the adoption of the Clean Air Interstate Rule.

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<sup>5</sup> See, e.g., 93-ORD-43.

<sup>6</sup> Southeastern United Medigroup, Inc. v. Hughes, 952 S.W.2d 195, 199 (Ky. 1997).

(4) If available, indicate any other estimated additions or withdrawals of emission allowances from the Kentucky Power inventories of emission allowances. Include a description of the type of addition or withdrawal.

Request number 18:

Through the end of 2016, does Kentucky Power plan on achieving SO<sub>2</sub> and NO<sub>x</sub> emission limit compliance for the Big Sandy generating units only through the operation of currently in service emission control equipment and the consumption of emission allowances? If no, describe Kentucky Power's current plans for SO<sub>2</sub> and NO<sub>x</sub> emission limit compliance at Big Sandy through the end of 2016.

### DISCUSSION

Kentucky Power contends that “in markets such as the emission allowance market where there is a limited quantity of the item being purchased and sold, any information about the quantity of the item available to or required by one market participant is of tremendous commercial value to the other participants.”<sup>7</sup> However, these same two questions were asked of Kentucky Utilities Company (“KU”), Louisville Gas and Electric Company (“LG&E”), and East Kentucky Power Cooperative, Inc. (“East Kentucky”) (although only East Kentucky was asked about NO<sub>x</sub> allowances – KU and LG&E do not recover NO<sub>x</sub> emission expenses in their surcharges currently). These three utilities provided this information in the public record. It does not appear that the extent of the confidential nature of this information is a perspective shared by the other utilities.

Kentucky Power appears to base its argument on the premise that if others are aware of its surplus or deficit position concerning emission allowances, the price that

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<sup>7</sup> Kentucky Power Company's Petition for Reconsideration of the Commission's Denial of Confidential Treatment for Responses to Certain of the Commission Staff's Data Requests at 4.

Kentucky Power may have to pay in future transactions could be affected. Emission allowances are publicly traded and the price is controlled more by the overall supply and demand forces at work in the entire market rather than the needs of one company or group of companies viewed in isolation. While Kentucky Power's surplus or deficit position could impact its negotiating position in a transaction, the risk does not appear as dire as it claims or as significant as is required under the Open Records Act. We now examine the discreet elements of Kentucky Power's request for consideration.

Data Request 17(b)(1)

The SO<sub>2</sub> emission allowances allocated by the Environmental Protection Agency ("EPA") to Kentucky Power have been publicly disclosed by the EPA. The NO<sub>x</sub> emission allowances have been assigned for 2006-2008 under the SIP Call, and this information has also been publicly disclosed. Kentucky Power did provide its internal estimates of available NO<sub>x</sub> allowances for 2009-2011, and this information should be kept confidential because it was based on internal estimates.

Data Request 17(b)(2)

The Interim Allowance Agreement is a public document that is used by the American Electric Power ("AEP") East companies to allocate SO<sub>2</sub> allowances among the operating companies. While the response to this question is a forecasted estimate, this information also does not appear to be as sensitive as Kentucky Power contends. The SO<sub>2</sub> allowances awarded by the EPA are publicly known, the degree to which an AEP operating company is deficit or not within the AEP group can be generally determined from published information, and the historic consumption of SO<sub>2</sub> allowances is publicly reported.

#### Data Request 17(b)(3)

Historic consumption rates of SO<sub>2</sub> allowances is publicly available information. The public could generally estimate the impact that any new pollution control equipment might have on the historic emission data. The impact of the Clean Air Interstate Rule is public record. Consequently, there is insufficient reason for this response to be kept confidential.

#### Data Request 17(b)(4)

NO<sub>x</sub> allowances that have been allocated to Kentucky Power under the SIP Call and historic emissions are also public knowledge. Kentucky Power's response states how many allowances may be sold, not how many allowances will be sold. Again, this response is not sufficiently confidential.

#### Data Request 18

Kentucky Power's response to this request is general in nature. Kentucky Power states that it could retrofit the Big Sandy units with additional emission control technologies, but notes that no final decision has been made. Kentucky Power publicly announced several months ago that it had plans to add a scrubber at Big Sandy. This response is not confidential.

### CONCLUSION

The Commission is mindful of the fact that the exceptions provided in KRS 61.878 are to be strictly construed. The burden falls upon the person seeking to withhold a public document from public inspection to show that it falls within an exception to the Open Records Act. Having considered this standard and the particular facts of this case, the Commission finds that the petitioner fails to meet its statutory

burden with the exception of its response to question 17(b)(1) regarding its NOx allowances for 2009-2011.

IT IS THEREFORE ORDERED that:

1. The requests for confidential treatment are denied with the exception of Kentucky Power's response to Data Request 17(b)(1) regarding its NOx allowances for 2009-2011.

2. Kentucky Power shall advise the Commission in writing if at any time the information granted confidential treatment becomes publicly available or otherwise no longer qualifies for confidential treatment.

3. The documents addressed in this Order shall not be placed in the public record for 20 days to allow the petitioner to seek any remedy afforded by law.<sup>8</sup>

Done at Frankfort, Kentucky, this 16<sup>th</sup> day of August, 2006.

By the Commission

ATTEST:



Executive Director

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<sup>8</sup> 807 KAR 5:001, Section 7(4).