

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF KENTUCKY-AMERICAN WATER)
COMPANY FOR A CERTIFICATE OF PUBLIC)
CONVENIENCE AND NECESSITY AUTHORIZING) CASE NO. 2012-00096
THE CONSTRUCTION OF WATER TRANSMISSION)
MAINS, BOOSTER PUMP STATION AND TWO)
ELEVATED STORAGE TANKS FOR THE)
NORTHERN DIVISION CONNECTION)

KENTUCKY-AMERICAN WATER COMPANY’S PETITION FOR REHEARING

Pursuant to KRS 278.400, Kentucky-American Water Company (“KAW”) seeks rehearing of the Commission’s April 25, 2013 Order denying confidential protection for KAW’s responses to Items 3 and 65 of the Commission Staff’s First Request for Information. In support of this Petition, KAW states as follows:

I. Introduction

On July 23, 2012, KAW petitioned the Commission to grant confidential protection to KAW’s responses to, *inter alia*, Items 3 and 65 of the Commission Staff’s First Request for Information. The responses contain bids submitted by contractors as part of KAW’s competitive bidding process, as well as information regarding KAW’s tabulation of the bids. On April 25, 2013 the Commission held that the bid information does not warrant confidential protection because KAW “provided no evidence to demonstrate that the nature of competition within the construction industry in this region is so limited as that disclosure of bidding information will have a harmful effect, nor has it provided supporting evidence for or explained

its contention that disclosure of the information would likely result in manipulation of the bid process.”¹

II. The Commission’s Order Is Inconsistent with Prior Orders Granting Confidential Protection to Bid Information.

The Commission’s order denying confidential protection to the bid information is inconsistent with prior Commission orders, including prior KAW cases pertaining to certificates of public convenience and necessity. For example, in Case No. 2007-00134, which is the proceeding in which KAW requested a certificate to construct Kentucky River Station II, KAW was asked in a post-hearing data request to provide a copy “of all documents received by Kentucky-American in conjunction with its request for bids for construction of the facilities identified in Kentucky-American’s application.”² KAW requested confidential treatment for the entirety of its response, which was granted on January 17, 2008.³

The request and KAW’s response in Case No. 2007-00134 is indistinguishable from Item No. 65 and KAW’s response in this proceeding. Moreover, the confidential information provided in response to Item No. 3, which contains final bid amounts, is also similar to the information the Commission afforded confidential protection in Case No. 2007-00134. Because the Commission has historically permitted KAW to maintain the confidentiality of bid information in certificate of public convenience and necessity cases, KAW respectfully submits there is no reason to depart from its reasoned precedent in this proceeding.

While the Commission notes that it has granted confidential protection “for materials related to coal supply bids and coal bid analysis” after “taking extensive testimony on the nature of the coal industry,” the Commission’s prior orders (in KAW cases and otherwise) and letters

¹ April 25, 2013 Order at 3.

² See Item No. 7 of the Commission’s Post-Hearing Data Requests in Case No. 2007-00134.

³ See January 17, 2008 Letter from Beth O’Donnell to Lindsey W. Ingram, III in Case No. 2007-00134.

from the Executive Director demonstrate that the Commission has found that bid information outside of the coal bid context merits confidential protection without requiring extensive evidence “regarding the nature of the...industry.”⁴⁵ KAW’s request for confidential treatment of its bid information is therefore consistent with prior Commission rulings and orders.

III. Publicly Revealing Bid Information Is Likely to Result in Higher Construction Costs for KAW and Its Ratepayers.

If the bid information KAW provided in response to Items 3 and 65 of the Commission Staff’s First Request for Information is publically disseminated, KAW’s future construction costs will likely increase. The information KAW seeks to protect confidentially reveals, with respect to two projects, the precise amount that the lowest bidder underbid the other unsuccessful bidders. If the winning bidder is permitted to access this information for various projects, the bidder will be able to determine how much it could have increased its bid while remaining the low bidder.

Many of the contractors that submitted the bids that KAW seeks to keep confidential, including the selected contractors, repeatedly bid on KAW construction projects. For example, there is a construction company that bid on both of the projects referenced in the responses to Item Nos. 3 and 65. Without question, these contractors will be highly motivated to analyze its bid, in comparison with the other bids, and will use this information to the financial detriment of

⁴ April 25, 2013 Order at 3.

⁵ *See, e.g.*, October 7, 2011 Letter from Jeff Derouen to Allyson Sturgeon in Case No. 2011-00140 (granting confidential protection for generation construction bid and request for proposals-related information); Commission’s August 4, 2003 Order in Case No. 2003-00054 (granting confidential protection of contractor bid information contained in an Accelerated Main Replacement Program progress report); September 22, 2010 Letter from Jeff Derouen to James Miller in Case No. 2010-00269 (granting confidential protection to bid information regarding fuel contracts); May 9, 2012 Letter from Jeff Derouen to Allyson Sturgeon in Case No. 2012-00031 (granting confidential protection to bid information regarding ITO services); March 18, 2010 Letter from Jeff Derouen to Mark Overstreet in Case No. 2009-00545 (granting confidential protection to bid information regarding renewable generation); December 6, 2011 Letter from Jeff Derouen to Allyson Sturgeon in Case No. 2011-00375 (granting confidential protection to bid information contained in a Resource Assessment in a certificate of public convenience and necessity proceeding).

KAW and its ratepayers in bidding on future projects. Cumulatively, release of this information will have a chilling effect on the competitive nature of the bidding process.

The Commission accepted a similar argument from a utility with respect to contractors bidding on work associated with an accelerated main replacement program.⁶ The Commission accepted the utility's argument that:

...if contractors bidding on future AMRP work are able to access other contractors' past bids, the contractors could use the information as a benchmark for their bids and that this would likely lead to the submission of higher bids. It also asserts that contractors would not want their bid information publicly available for other contractors and that this disclosure would reduce the contractor pool available to ULH&P. It states that this would likely drive up the AMRP costs and; consequently, the rates that its gas customers must pay.⁷

The Commission agreed with the utility and granted confidential protection to the contractor bid information, finding that public disclosure of the bid information would cause "an unfair commercial advantage" pursuant to KRS 61.878(1)(c).⁸ If KAW's contractors are permitted to examine the bid information produced in response to Items 3 and 65 of the Commission Staff's First Request for Information, an unfair commercial advantage will inure to the contractors at KAW's, and its customers', financial detriment.

IV. Conclusion

The Commission's April 25, 2013 Order denying confidential protection to the bid information provided in response to Items 3 and 65 of the Commission Staff's First Request for Information conflicts with the Commission's prior treatment of bid information pertaining to certificates of public convenience and necessity in KAW cases, as well as cases involving other

⁶ Case No. 2003-00054, In the Matter of: Application of the Union Light, Heat and Power Company for Confidential Treatment (Ky. PSC August 4, 2003).

⁷ *Id.* at 3.

⁸ *Id.*

utilities. More importantly, departing from the precedent is likely to cause the submission of higher bids for future KAW construction projects, which the Commission has recognized is an unfair commercial advantage, and would drive up costs for ratepayers. For these reasons, KAW respectfully requests that the Commission grant rehearing on this issue and find that the information provided in response to Items 3 and 65 merit confidential protection.

Date: May 16, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Ordering Paragraph No. 10 of the Commission's March 20, 2012 Order, this certifies that Kentucky-American Water Company's May 16, 2013 electronic filing is a true and accurate copy of the documents being filed in paper medium; that the electronic filing has been transmitted to the Commission on May 16, 2013; that there are currently no parties that the Commission has excused from participating by electronic means in this proceeding; and that an original and one copy of the filing in paper medium will be hand delivered to the Commission on May 16, 2013.

By: Monica H. Braun