

**COMMONWEALTH OF KENTUCKY**  
**BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

THE APPLICATION OF SOUTH KENTUCKY RURAL )  
ELECTRIC COOPERATIVE CORPORATION FOR ) Case No. 2018-00050  
APPROVAL OF MASTER POWER PURCHASE AND )  
SALE AGREEMENT AND TRANSACTIONS THEREUNDER )

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**THIRD MOTION FOR CONFIDENTIAL TREATMENT**

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Comes now South Kentucky Rural Electric Cooperative Corporation (“South Kentucky”), by and through counsel, pursuant to KRS 61.878, 807 KAR 5:001, Section 13 and other applicable law, and for its Motion requesting that the Commission afford confidential treatment to certain supplemental data request responses that South Kentucky is providing contemporaneously herewith,<sup>1</sup> South Kentucky submits as follows:

1. South Kentucky’s Application requests that the Commission consider and approve, consistent with KRS 278.300, a long-term power purchase agreement and related energy and capacity transactions entered into on or about December 19, 2017, by and between South Kentucky and Morgan Stanley Capital Group Inc. (“Morgan Stanley Capital Group”). South Kentucky’s proposal to diversify its power supply portfolio is the result of many months of discussions and analysis and is expected to yield significant wholesale power cost-savings for the benefit of South Kentucky’s approximately 50,000 members.

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<sup>1</sup> These responses being filed and served today include those to Item 2-7 of the Attorney General’s Supplemental Data Requests; Items 2-10, 2-39 and 2-42b of the Distribution Cooperatives’ Supplemental Requests for Information; and Items 2-1, 2-8, 2-9, and 2-42 of the Supplemental Information Request from East Kentucky Power Cooperative (“EKPC”).

2. On March 26, 2018, the Distribution Cooperatives submitted Supplemental Requests for Information to South Kentucky. On March 27, 2018, the Attorney General issued its Supplemental Data Requests to South Kentucky, and EKPC issued its Supplemental Information Request to South Kentucky.<sup>2</sup>

3. In response to the Attorney General's, Distribution Cooperatives' and EKPC's supplemental requests for information, South Kentucky is providing certain information for which it requests confidential treatment. Consistent with South Kentucky's request for confidentiality accompanying the Application and its recent Second Motion for Confidential Treatment, respecting certain responses to initial data requests posed in this proceeding, South Kentucky is willing to provide limited disclosure of the information in the following request items to those abiding by the terms and conditions of a non-disclosure agreement.

4. Request Item 2-7 of the Attorney General's Supplemental Data Requests states as follows:

If SKRECC's Application is approved as filed, provide all studies, estimates or projection of the effect on the financial credit metric and borrowing costs of SKRECC.

5. In its response to this request item, South Kentucky has produced Attachment AG 2-7, which includes a 10-year forecast of its statement of operations, information that is commercially sensitive and thus maintained on an internal basis to the cooperative and otherwise protected from public disclosure. Pursuant to 807 KAR 5:001, Section 13(2)(a)(3)(b), confidential treatment is sought for the entirety of Attachment AG 2-7. South Kentucky is filing a CD containing the requested confidential information, as well as all other responsive

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<sup>2</sup> Commission Staff also issued a Second Request for Information to South Kentucky on March 27. Those request items do not call for the production of confidential information.

information, as detailed below, for which confidential information pervades the document, consistent with 807 KAR 5:001 §13(2)(a)(3)(b).

6. Request Item 2-10 of the Distribution Cooperatives' Supplemental Requests for Information states as follows:

Please refer South Kentucky's Answer to DC 1-10 d. What evidence of collateral upon the start date for the delivery of power by Morgan Stanley does South Kentucky intend to post? Please provide the estimated annual cost of securing and maintaining said evidence of collateral.

7. In its response to this request item, South Kentucky has produced Attachment DC 2-10, which includes detailed calculations that include the pricing information for the energy and capacity transaction presented for approval in the Application. South Kentucky has previously requested confidential treatment for such sensitive information, as its revelation could harm South Kentucky's position in the market and afford competitors and vendors with a competitive advantage over it, all of which translates into higher costs for South Kentucky and, in turn, its members. Pursuant to 807 KAR 5:001, Section 13(2)(a)(3)(b), confidential treatment is being sought for the entirety of the materials contained in this Attachment, as confidential information pervades it. These materials are included on the CD referenced above in paragraph 6 of this motion, consistent with 807 KAR 5:001 §13(2)(a)(3)(b).

8. Request Item No. 2-39 of the Distribution Cooperatives' Supplemental Information Request states as follows:

Please refer to South Kentucky's response to DC 1-4. Are there any documents responsive to this request for information that were not produced by South Kentucky in its response dated March 13, 2018? If so, please provide a copy of those documents.

9. In its response to this request item, South Kentucky has reviewed all its internal communications, and is producing email correspondence that could be construed to fall within

the broad scope of Distribution Cooperatives' Supplemental Request Items 2-39 and 2-40. This correspondence includes attachments that contain information for which confidential protection is appropriate. In some instances, the information reflects sensitive internal financial information (comparable to the information produced in Attachment AG 2-7), or competitively sensitive pricing data (comparable to the information produced in Attachment DC 2-10). In other cases, the information includes proprietary analyses performed by South Kentucky's consultant EnerVision of pricing details relating to both the proposed transaction in question. To this end, some of the information includes internal financial and operational information used by EnerVision, data that if disclosed would give competitors insight into South Kentucky they otherwise are not privy to, as well as information regarding power market conditions that, again, is not available to them publicly and could be to the detriment of South Kentucky were it required to return to the market. For Attachment DC 2-39, confidential information pervades much of the information being produced. Accordingly, and pursuant to 807 KAR 5:001, Section 13(2)(a)(3)(b), confidential treatment is being sought for the entirety of confidential materials. These materials are included on the CD referenced in paragraph 6 of this motion, consistent with 807 KAR 5:001 §13(2)(a)(3)(b).

10. Request Item 2-42b of the Distribution Cooperatives' Supplemental Requests for Information states as follows:

Is South Kentucky seeking a letter of credit or line of credit facility that will be available to meet its collateral obligations under the PPA?

- i. If the answer is "yes," has South Kentucky calculated the amount of the credit facility it will require in order to be in a position to satisfy the collateral requirements of the PPA?
  1. If the answer to this question is "yes," please state that amount, and provide all calculations and workpapers supporting that amount.
  2. If the answer to this question is "no," please state how South Kentucky will meet its collateral obligations under the PPA.

11. In its response to this request item, South Kentucky is producing Attachment DC 2-42, which provides information on the potential collateral requirements. This information includes details relating to the collateral levels negotiated between South Kentucky and Morgan Stanley Capital Group. Confidential protection was sought in connection with the Application for this same information, as it is market sensitive and its disclosure could be harmful to South Kentucky (as it would compromise South Kentucky's negotiating position and impair competitiveness). South Kentucky notes that confidential information does not pervade Attachment DC 2-42. Accordingly, a confidential version and a public (i.e., redacted) version are being filed in connection with the production.

12. Request Item 2-1 of the EKPC Supplemental Information Request states as follows:

Please refer to South Kentucky's response to the Attorney General's First Request for Information ("AG's First"), Item 2 and South Kentucky's response to EKPC's First Request for Information ("EKPC's First"), Item 40.

- a. Please identify the specific EKPC 20-year financial forecast referenced in these responses.
- b. Please provide a copy of the referenced financial forecast.

13. In its response to this request item, particularly 2-1b, South Kentucky is providing the referenced forecast. Like Attachment AG 2-7 discussed above, this attachment includes a forecast of financial and operational information of EKPC, data that is commercially sensitive and protected through reasonable measures. To this end, the attachment itself states throughout that it is "Privileged and Confidential". Pursuant to 807 KAR 5:001, Section 13(2)(a)(3)(b), confidential treatment is being sought for the entirety of the materials contained in this

Attachment, as confidential information pervades it. These materials are included on the CD referenced above in paragraph 6 of this motion, consistent with 807 KAR 5:001 §13(2)(a)(3)(b).

14. Request Item 2-8 of the EKPC Supplemental Information Request states as follows:

Please refer to South Kentucky's response to the Cooperatives' First, Item 3, DC Attachment 3 (Public version), e-mail response from Michelle Herrman to George Bishara dated January 18, 2018 (PDF pages 3 and 4 of 21) and Item 4, DC Attachment 4 (Public version), Amendment 3/MOU RFP Process Update dated December 19, 2017, slide 8 (PDF page 36 of 118). In the e-mails contained in Attachment 3, the Rural Utilities Service ("RUS") was raising questions as to whether the proposed Morgan Stanley transaction included any embedded derivatives. South Kentucky responded that its auditor had confirmed there were no embedded derivatives. However, in the December 19, 2017 presentation, slide 8 states that the proposed financial capacity agreement "is truly a financial hedge".

- a. Please provide copies of any correspondence between South Kentucky and its auditor discussing the subject of derivatives.
- b. Please explain how South Kentucky and/or its auditor determined there were no embedded derivatives in the proposed Morgan Stanley transaction, when it was acknowledged by EnerVision, Inc. ("EnerVision") in its December 19, 2017 presentation that the financial capacity agreement was a financial hedge.
- c. If South Kentucky is aware, what additional accounting requirements would RUS insist on if it were determined that the financial capacity agreement is an embedded derivative?

15. In its response to this request item, and particularly subparts a and b, South Kentucky is producing Attachment EKPC 2-8. This attachment includes the pricing for the energy and capacity transaction, information which, as explained above, is appropriately subject to confidential protection. South Kentucky would note that confidential information does not pervade Attachment EKPC 2-8. Accordingly, a confidential version and a public (i.e., redacted) version are being filed in connection with the production.

16. Request Item 2-9 of the EKPC Supplemental Information Request states as follows:

Please refer to South Kentucky's response to the Cooperatives' First, Item 6a. In this response, South Kentucky contends that EKPC's CEO provided it with assurances at two informal meetings that EKPC could mitigate the impacts of the Alternate Source designation.

- a. Please provide citations to South Kentucky's Application or responses to the first requests for information where it has disclosed the capacity and energy contemplated to be provided by the independent power producer which contacted South Kentucky in the spring of 2017.
- b. Provide copies of the proposal submitted by the independent power producer when it contacted South Kentucky in the spring of 2017. Please also provide any additional proposals or amendments provided by the independent power producer up to the response date for the Request for Proposals ("RFP").
- c. Please indicate whether South Kentucky knew it would be considering an Alternate Source that would provide 58 MW at a 100 percent load factor prior to the August 7 and 21, 2017 meetings.
- d. Please explain why the response to Item 6 makes no mention of either the capacity or load factor discussed during the August 7 and 21, 2017 meetings.

17. In response to this request item, and particularly subpart b, South Kentucky is providing Attachment EKPC 2-9 (the referenced proposal). This proposal was originally provided to South Kentucky in accordance with a confidentiality agreement between them, by which South Kentucky committed to employ reasonable measures to protect the confidentiality of such information. Moreover, and as with other information in this proceeding for which South Kentucky has sought confidentiality protection, the information reflected in this proposal is sensitive market information, as it reflects initial terms by the proponent relative to the supply offer then under consideration. In addition, disclosure of these terms publicly could give others a competitive advantage in the marketplace that they would not otherwise have but for this information.<sup>3</sup> Pursuant to 807 KAR 5:001, Section 13(2)(a)(3)(b), confidential treatment is being sought for the entirety of the materials contained in this Attachment, as confidential information pervades it. These materials are included on the CD referenced above in paragraph 6 of this motion, consistent with 807 KAR 5:001 §13(2)(a)(3)(b).

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<sup>3</sup> As noted in South Kentucky's Second Motion for Confidential Treatment, upon information and belief, certain of the Distribution Cooperatives are participating in solicitations for which the data reflected in this item would provide pricing information, giving these entities access to competitive market intelligence that, absent this proceeding, would be otherwise unknowable to them or any other market participant, and which the proponent took measures to protect.

18. Request Item 2-22 of the EKPC Supplemental Information Request states as follows:

Please refer to South Kentucky's response to EKPC's First, Item 15. Concerning a master letter of credit or subordinate letters of credit:

- a. Please provide the expected dollar amount of any master letter of credit or subordinate letters of credit South Kentucky anticipates needing in conjunction with the proposed Morgan Stanley transaction.
- b. Please provide the total expected annual cost in dollars of any master letter of credit or subordinate letters of credit South Kentucky anticipates needing in conjunction with the proposed Morgan Stanley transaction.
- c. If South Kentucky has not determined the expected dollar amount of any master letter of credit or subordinate letters of credit it would need in conjunction with this transaction, please explain why this determination has not been made.

19. In response to this request item, and particularly subpart b, South Kentucky is producing Attachment EKPC 2-22. As explained in the response, the information in this attachment is intended to support South Kentucky's estimate of its collateral requirement. This information utilizes confidential pricing and threshold data from the transactions as a basis for the calculations set forth therein. Accordingly, for the reasons previously discussed for Attachment EKPC 2-8 and Attachment DC 2-42, confidential treatment is appropriately extended to this information as well. Pursuant to 807 KAR 5:001, Section 13(2)(a)(3)(b), confidential treatment is being sought for the entirety of the materials contained in this Attachment, as confidential information pervades it. These materials are included on the CD referenced above in paragraph 6 of this motion, consistent with 807 KAR 5:001 §13(2)(a)(3)(b).

20. The Kentucky Open Records Act and applicable precedent exempts from disclosure information "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.”<sup>4</sup> As described above, the responses for which South Kentucky seek confidential treatment contain information that is, or is based on or acquired from, proprietary information provided by EnerVision, is not on file with publicly with any public agency, and is not publicly available from any commercial or other source. The aforementioned information is also distributed within South Kentucky only to those employees who must have access for business reasons, and is generally recognized as confidential and proprietary in the energy industry. The public disclosure of this information will create precisely the kind of competitive harm KRS 61.878(1)(c)(1) intends to prevent.

21. KRS 61.878(1)(c)(1) protects “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.” The Kentucky Supreme Court has stated, “information concerning the inner workings of a corporation is ‘generally accepted as confidential or proprietary’” *Hoy v. Kentucky Industrial Revitalization Authority*, 907 S.W.2d 766, 768 (Ky. 1995). All of the Confidential Information is critical to South Kentucky’s effective execution of business decisions and strategy. If disclosed, the confidential information would give South Kentucky’s competitors insights into its business operations and strategies that are otherwise publicly unavailable. Accordingly, the confidential information satisfies both the statutory and common law standards for affording confidential treatment.

22. As South Kentucky recognized in its initial motion for confidentiality, in the unlikely event the Commission determined to deny in whole or in part the Application, South

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<sup>4</sup> See KRS 61.878(1)(c)(1); see also, e.g., Case No. 2016-00269, *In the Matter of: Application of East Kentucky Power Cooperative, Inc. for Issuance of a Certificate of Public Convenience and Necessity, Approval of Certain Assumption of Evidences of Indebtedness and Establishment of a Community Solar Tariff*, Order at pp. 2-3 (Ky. P.S.C. Nov. 30, 2016).

Kentucky would face the prospect of revising the proposed transaction or returning to the market. If this were to occur and South Kentucky's potential counterparties had access to essential commercial terms such as price, value, and the identities of their competitor-bidders responding to the initial RFP, South Kentucky would be placed at a significant competitive disadvantage ultimately resulting in financial harm to the cooperative and its Owner-Members.

23. Finally, as noted above and in its original motion, South Kentucky does not necessarily object to limited disclosure of certain of the confidential information described herein (consistent with Commission regulations and its long-standing practice and procedures), pursuant to an acceptable confidentiality and nondisclosure agreement, to intervenors with a legitimate interest in reviewing the same for the sole purpose of participating in this case.

24. In accordance with the provisions of 807 KAR 5:001, Section 13(2), South Kentucky is filing, separately and under seal, one (1) unredacted copy of the data request responses addressed herein with the confidential information highlighted. Also, confidential information pervades the entirety of some spreadsheets addressed above with written notification given pursuant to 807 KAR 5:001, Section 13(2)(a)(3)(b). A redacted original and one confidential copy have also been tendered to the Commission.

25. In accordance with the provisions of 807 KAR 5:001, Section 13(2), South Kentucky respectfully requests that the confidential information be withheld from public disclosure for a period of ten (10) years. The public disclosure of the confidential information prior to the expiration of this time period will result in a competitive disadvantage to South Kentucky and could be detrimental to future negotiations with vendors and competitors.

26. If, and to the extent, the Confidential Information becomes publicly available or otherwise no longer warrants confidential treatment., South Kentucky will notify the Commission and have its confidential status removed, pursuant to 807 KAR 5:001 Section 13(10).

**WHEREFORE**, on the basis of the foregoing, South Kentucky respectfully requests that the Commission classify and protect as confidential the specific confidential information described herein for a period of ten (10) years.

Dated this 5<sup>th</sup> day of April, 2018.

Respectfully submitted,

/s/Matt Malone

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**CERTIFICATE OF SERVICE**

Pursuant to 807 KAR 5:001 Section 6, the undersigned certifies that consistent with 807 KAR 5:001 Section 4(8)(d)(3), a copy of this document has been electronically served upon the following:

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This 5<sup>th</sup> day of April, 2018.

/s/Matt Malone

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