

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF)
KENTUCKY UTILITIES COMPANY FOR AN) CASE NO. 2018-00294
ADJUSTMENT OF ITS ELECTRIC RATES)

PETITION OF KENTUCKY UTILITIES COMPANY
FOR CONFIDENTIAL PROTECTION

Kentucky Utilities Company (“KU” or the “Company”) hereby petitions the Kentucky Public Service Commission (“Commission”) pursuant to 807 KAR 5:001, Section 13 and KRS 61.878(1) to grant confidential protection for the items described herein, which KU seeks to provide in response to the Commission’s First Request for Information. The specific Requests for Information for which KU seeks confidential protection are Request Nos. 36, 37, 48(a)(9), 50, and 66. In support of this Petition, KU states as follows:

1. On August 27, 2018, KU served notice of its intent to file a rate application for a general adjustment of its electric base rates with the Commission. On September 19, 2018, the Commission Staff issued its First Request for Information to KU. On September 28, 2018, KU filed with the Commission an application proposing changes in its base rate tariffs.

Confidential Personal Information (KRS 61.878(1)(a))

2. Commission Staff Request No. 37 asks KU to provide “the salaries and other compensation of each executive officer for the base period and three most recent calendar years.” Commission Staff Request No. 66 requests information about individual employee salaries and benefits. The Kentucky Open Records Act exempts from disclosure certain private and personal information.¹ The Kentucky Court of Appeals has stated, “information such as . . . wage rate . . .

¹ KRS 61.878(1)(a).

[is] generally accepted by society as [a] detail in which an individual has at least some expectation of privacy.”² And the Kentucky Supreme Court has characterized “one’s income” as “intimate” information of a private nature.³ The Commission should therefore give confidential treatment to the information included in KU’s response to Commission Staff Request Nos. 37 and 66 because disclosing the contents thereof would invade the privacy rights of the individuals named. Specifically, KU seeks confidential protection for the amount of the salary and other compensation not otherwise publicly disclosed. Since 2016, KU has not publicly reported in the annual Federal Energy Regulatory Commission (“FERC”) Form 1 Report the portion of the salary of the top five executives that is allocated to KU. Prior to 2016, KU publicly reported in the annual FERC Form 1 Report a portion of the salary of the top five executives that was allocated to KU, but did not otherwise publicly report these individuals’ compensation, making that information personal and private information that should not be in the public realm.⁴

Moreover, KU has not publicly disclosed any 2018 salary information of the current KU officers in filings with the Securities Exchange Commission (“SEC”). In fact, none of the current salary information or benefits for the existing officers has been publicly disclosed at any time in the past. As such, this information is personal and private information that should not be in the public realm. These KU employees, therefore, have a reasonable expectation that their compensation is personal and private information. Disclosure would constitute an unwarranted invasion of their personal privacy in contravention of KRS 61.878(1)(a). If KU publicly reports

² *Zink v. Department of Workers’ Claims, Labor Cabinet*, 902 S.W.2d 825, 828 (Ky. App. 1994).

³ *Cape Pub’ns, Inc. v. Univ. of Louisville Found., Inc.*, 260 S.W.3d 818, 822 (Ky. 2008).

⁴ Only the chief executive officer’s complete salary and other compensation was publicly disclosed each year in filings with the SEC; KU is not requesting protection from public disclosure of that information. Only a portion of the salary of the top five executives of KU was public disclosed prior to 2016 in the annual FERC Form 1 Reports. But that amount, plus the amount reported in the Louisville Gas and Electric Company FERC Form 1 Report, does not equal the total amount of salary for the top five executives. Thus, with the exception of the chief executive officer, the remaining top five executives’ salaries were not publicly disclosed, and their other compensation was not publicly disclosed.

in the annual FERC Form 1 Report a portion of the salary of the top five executives that is allocated to KU, or publicly reports the chief executive officer's compensation in filings with the SEC, KU will supplement its filing and disclose the information to the extent publicly disclosed in the FERC and SEC filings.

Providing the requested confidential protection for the compensation information of KU's employees would fully accord with the purpose of the Act, which is to make government and its actions open to public scrutiny. Concerning the rationale for the Act, the Kentucky Court of Appeals has stated:

[T]he public's "right to know" under the Open Records Act is premised upon the public's right to expect its agencies properly to execute their statutory functions. In general, inspection of records may reveal whether the public servants are indeed serving the public, and the policy of disclosure provides impetus for an agency steadfastly to pursue the public good. At its most basic level, the purpose of disclosure focuses on the citizens' right to be informed as to what their government is doing.⁵

Citing the Court of Appeals, the Kentucky Office of the Attorney General ("AG") stated in an Open Records Decision ("ORD"), "If disclosure of the requested record would not advance the underlying purpose of the Open Records Act, namely exposing agency action to public scrutiny, then countervailing interests, such as privacy, must prevail."⁶

Moreover, in an order approving a petition for confidential treatment for Louisville Gas and Electric Company ("LG&E") in Case No. 89-374, the Commission stated that salary information "should be available for customers to determine whether those salaries are reasonable," but "the right of each individual employee within a job classification to protect such

⁵ 902 S.W.2d at 828-29 (Ky. App. 1994).

⁶ *In re: James L. Thomerson/Fayette County Schools*, KY OAG 96-ORD-232 (Nov. 1, 1996) (citing *Zink v. Department of Workers' Claims, Labor Cabinet*, 902 S.W.2d 825 (Ky. App. 1994)) (emphasis added).

information as private outweighs the public interest in the information.”⁷ In the same order, the Commission concluded, “Thus, the salary paid to each individual within a classification is entitled to protection from public disclosure.”⁸ The Commission had reached the same conclusion in two previous orders in the same case.⁹

The compensation information for which KU seeks confidential protection in this case is comparable to that provided to the Commission by KU in the past. The Commission granted confidential protection of the compensation paid to certain professional employees in a letter from the Executive Director of the Commission dated December 1, 2003, in *In the Matter of: An Investigation Pursuant to KRS 278.260 of the Earnings Sharing Mechanism Tariff of Louisville Gas and Electric Company*, Case No. 2003-00335. However, the Commission’s Executive Director has also denied such requests in the past.¹⁰

The Commission also has previously denied confidential protection to executive officer information and held that because executive officer “salaries are included as an expense in base rate calculations” and are “subject to public dissemination of regulatory filings,” the information

⁷ *In the Matter of: Application of Louisville Gas and Electric Company for an Order Approving an Agreement and Plan of Exchange and to Carry Out Certain Transactions in Connection Therewith*, Case No. 89-374, Order at 2 (Ky. PSC Apr. 30, 1997).

⁸ *Id.*

⁹ See *In the Matter of: Application of Louisville Gas and Electric Company for an Order Approving an Agreement and Plan of Exchange and to Carry Out Certain Transactions in Connection Therewith*, Case No. 89-374, Order at 2 (Ky. PSC Apr. 4, 1996); *In the Matter of: Application of Louisville Gas and Electric Company for an Order Approving an Agreement and Plan of Exchange and to Carry Out Certain Transactions in Connection Therewith*, Case No. 89-374, Order at 2 (Ky. PSC Apr. 8, 1994). See also *In the Matter of: Application of BellSouth Telecommunications, Inc. d/b/a South Central Bell Telephone Company to Modify its Method of Regulation*, Case No. 94-121, Order at 4-5 (Ky. PSC July 20, 1995) (“Salaries and wages are matters of private interest which individuals have a right to protect unless the public has an overriding interest in the information. The information furnished, however, only shows the salary range for three labor classifications and does not provide the identity of persons who receive those salaries. Therefore, disclosure of the information would not be an invasion of any employee’s personal privacy, and the information is not entitled to protection.”).

¹⁰ See, e.g., *In the Matter of Application of Kentucky Utilities Company for an Adjustment of Base Rates*, Case No. 2008-00251, Letter from Executive Director Stumbo (Sept. 2, 2008); *In the Matter of Application of Louisville Gas and Electric Company for an Adjustment of Its Electric and Gas Base Rates*, Case No. 2008-00252, Letter from Executive Director Stumbo (Sept. 2, 2008). See also *In the Matter of: An Adjustment of Gas and Electric Rates of Louisville Gas and Electric Company*, Case No. 90-158, Order (Ky. PSC Sept. 7, 1990).

should not be entitled to confidential protection.¹¹ KU respectfully disagrees because neither of these reasons justify denying confidential protection to executive officer information in this case. First, as the record demonstrates, only a portion of the officers' salary and other compensation is included in the cost of providing service to customers, and the average salary and other compensation is publicly disclosed on the filing schedule. Accordingly, KU customers may gauge the reasonableness of compensation through publicly disclosed information that is already available. Second, none of the current salary or benefit information for the existing officers for which KU is seeking confidential protection has been publicly disclosed at any time in the past.¹² Because KU requests confidential protection only for the executive salary benefits not otherwise publicly disclosed, granting confidential protection to this limited information accords with KRS 61.878(1)(a). KU's request is further supported by a recent Commission precedent.¹³ In Case No. 2017-00179, the Commission approved Kentucky Power Company's request to treat confidentially executive officer compensation information until the information is publicly disclosed in SEC filings.¹⁴

¹¹ *In the Matter of: Application of Kentucky Utilities Company for an Adjustment of its Electric Rates*, Case No. 2012-00222, Order Regarding Request for Confidential Treatment at 2 (Ky. PSC Sept. 11, 2013). *See also In the Matter of: Application of Kentucky-American Water Company for an Adjustment of Rates*, Case No. 2015-00418, Order at 2 (Ky. PSC Aug. 31, 2016) (finding "that KAWC's executive salaries are an expense in the rate base calculations" and holding that "such salary compensation is not entitled to confidential protection"); *In the Matter of: Application of Kentucky Utilities Company for an Adjustment of its Electric Rates*, Case No. 2014-00371, Order Regarding Request for Confidential Treatment at 1-2 (Ky. PSC Jan. 20, 2016) (denying confidential protection for executive salary information for the same reasons as Case No. 2012-00222 and noting that "[m]ovant has not offered any argument to depart from this precedent"); *In the Matter of: An Adjustment of Gas and Electric Rates of Louisville Gas and Electric Company*, Case No. 90-158, Order (Ky. PSC Sept. 7, 1990) ("Since LG&E seeks to recover through its rate structure the compensation in salaries paid to its executive employees, LG&E customers have a right to know whether the salaries and compensation paid to such employees are reasonable.").

¹² If KU publicly reports executive salary or benefits in FERC or SEC filings, KU will supplement its petition and disclose the information to the same extent publicly disclosed in the FERC and SEC filings through a filing in this case.

¹³ *In the Matter of: Electronic Application of Kentucky Power Company for (1) A General Adjustment of Its Rates for Electric Service; (2) An Order Approving Its 2017 Environmental Compliance Plan; (3) An Order Approving Its Tariffs and Riders; (4) An Order Approving Accounting Practices to Establish Regulatory Assets and Liabilities; and (5) An Order Granting All Other Required Approvals and Relief*, Case No. 2017-00179, Order (Ky. PSC Aug. 23, 2017).

¹⁴ *Id.*

**Confidential Information Protected from Disclosure
by Federal or State Law(KRS 61.878(1)(k) and (l))**

3. Commission Staff Request No. 48(a)(9) asks KU to provide “federal and state income tax returns for the most recent tax year, including supporting schedules.” Tax related documents and information merit confidential protection. KRS 61.878(1)(k) exempts from disclosure “[a]ll public records or information the disclosure of which is prohibited by federal law or regulation.”¹⁵ Under 26 U.S.C. § 6103(a), state officials are prohibited from publicly disclosing any federal income tax return or its contents. Therefore, federal income tax returns and their content fall within the KRS 61.878(1)(k) exemption from public disclosure. The Kentucky Open Records Act also exempts from disclosure “[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly.”¹⁶ KRS 131.190(1) requires all income tax information filed with the Kentucky Department of Revenue be treated in a confidential manner. Thus, state income tax returns are also confidential in nature and protected from disclosure by the Kentucky Open Records Act. The Commission has previously kept KU’s and LG&E’s federal and state income tax returns confidential in base rate cases.¹⁷ Because KU’s response to Commission Staff Request No. 48(a)(9) contains KU’s federal and state tax returns, the Commission should grant confidential protection of this information.

¹⁵ KRS 61.878(1)(k).

¹⁶ KRS 61.878(1)(l).

¹⁷ *In the Matter of: Application of Kentucky Utilities Company for an Adjustment of Its Electric Rates*, Case No. 2012-00221, Order Regarding Request for Confidential Treatment (Ky. PSC Sep. 18, 2013); *In the Matter of: Application of Louisville Gas and Electric Company for an Adjustment of its Electric and Gas Base Rates*, Case No. 2008-00252, Letter from Executive Director Derouen (Ky. PSC Feb. 6, 2009). The Commission has also recently granted confidential protection for income tax return information filed by other utilities. *See, e.g., In the Matter of: Investigation of the Impact of the Tax Cuts and Jobs Act on the Rates of Columbia Gas of Kentucky, Inc.*, Case No. 2018-00041, Order (Ky. PSC June 6, 2018); *In the Matter of: Electronic Application of Duke Energy Kentucky, Inc. for 1) An Adjustment of the Electric Rates; 2) Approval of an Environmental Compliance Plan and Surcharge Mechanism; 3) Approval of New Tariffs; 4) Approval of Accounting Practices to Establish Regulatory Assets and Liabilities and 5) All Other Required Approvals and Relief*, Case No. 2017-00321, Order (Ky. PSC May 3, 2018); *In the Matter of: Application of Kentucky American Water Company for an Adjustment of Rates*, Case No. 2015-00418, Order (Ky. PSC Aug. 31, 2016).

Confidential or Proprietary Commercial Information (KRS 61.878(1)(c)(1))

4. Commission Staff Request No. 36 asks KU to provide expected employee merit expense increases, by employee group, for the past two calendar years, the base period, and the forecasted test period. With respect to the forecasted test period, KU requests to keep its expectations regarding increases for its employees confidential. If KU's expectations are publicly disclosed, it could impair the Company's competitive negotiating position with employee groups in direct contravention of KRS 61.878(1)(c)(1).

5. Commission Staff Request No. 50 asks KU to provide policies, schedules, agreements, and additional information pertaining to the compensation paid for professional outside services. The Kentucky Open Records Act 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."¹⁸ Some of the documents provided in response to Commission Staff Request No. 50 contain pricing details, descriptions of the scope of work, and the unique way in which work is priced and packaged for the Company by service providers. The public disclosure of that information will prejudice both the service provider by allowing its competitors to know how it offers and prices its services and the Company's ability to obtain the most reasonable prices for such professional services in the competitive marketplace and negotiate the rates for professional services in the future. Further, disclosing descriptions of the scope of work could prejudice the Company's negotiating position in bargaining-unit negotiations in the future. KU requests with this petition that the Commission protect from public disclosure this confidential information. The public disclosure of this information will create precisely the kind of competitive harm KRS 61.878(1)(c)(1) intends to prevent. Thus, the Commission should grant confidential protection to this information.

¹⁸ KRS 61.878(1)(c)(1).

The Confidential Information Subject to this Petition

6. The information for which KU is seeking confidential treatment is not known outside of KU, and it is not disseminated within KU except to those employees with a legitimate business need to know the information.

7. KU will disclose the confidential information, pursuant to a confidentiality agreement, to intervenors with a legitimate interest in this information and as required by the Commission.

8. If the Commission disagrees with this request for confidential protection, it must hold an evidentiary hearing (a) to protect KU's due process rights and (b) to supply the Commission with a complete record to enable it to reach a decision with regard to this matter.¹⁹

9. Unless otherwise noted, in compliance with 807 KAR 5:001, Sections 8(3) and 13(2)(e), KU is filing with the Commission one paper copy that identifies by highlighting the information for which confidential protection is sought and one electronic copy with the same information obscured. Pursuant to 807 KAR 5:001, Section 13(2)(a)(3)(b), confidential treatment is sought for the entire document produced in response to Commission Staff Request No. 48(a)(9). For this document, written notification that the entire document is confidential is filed in lieu of highlighting.

10. KU requests that the information be kept confidential for at least five years from the date of this filing as that is the amount of time necessary before the confidential information becomes dated to the point that the need for protection no longer exists.

¹⁹ *Utility Regulatory Commission v. Kentucky Water Service Company, Inc.*, 642 S.W.2d 591, 592-94 (Ky. App. 1982).

WHEREFORE, Kentucky Utilities Company respectfully requests that the Commission grant confidential protection for the information described herein.

Dated: October 12, 2018

Respectfully submitted,




Kendrick R. Riggs
Stoll Keenon Ogden PLLC
2000 PNC Plaza
500 West Jefferson Street
Louisville, Kentucky 40202-2828
Telephone: (502) 333-6000
Fax: (502) 627-8722
kendrick.riggs@skofirm.com

Allyson K. Sturgeon
Managing Senior Counsel
Regulatory and Transactions
LG&E and KU Services Company
220 West Main Street
Louisville, Kentucky 40202
Telephone: (502) 627-2088
Fax: (502) 627-3367
allyson.sturgeon@lge-ku.com

Counsel for Kentucky Utilities Company

CERTIFICATE OF COMPLIANCE

In accordance with 807 KAR 5:001 Section 8(7), this is to certify that Kentucky Utilities Company's October 12, 2018 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 October 12, 2018; that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding; and that an original of the filing will be filed by hand-delivery with the Commission within two business days from the date of the electronic filing.



Gerald R. Rieps
Counsel for Kentucky Utilities Company