

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

In The Matter Of:

Electronic Application Of Kentucky Power	)	
Company For Approval Of A Contract For	)	Case No. 2020-00019
Electric Service With Air Products and	)	
Chemicals, Inc.	)	

**MOTION FOR CONFIDENTIAL TREATMENT**

Kentucky Power Company moves the Public Service Commission of Kentucky (“Commission”) pursuant to 807 KAR 5:011, Section 14, and 807 KAR 5:001, Section 13 for an order granting confidential treatment to the rate-related terms of the special contract between Air Products and Chemicals, Inc. (“Air Products”) and Kentucky Power (“Special Contract”) and related filings. Specifically, Kentucky Power moves for confidential treatment of the indicated portions of the following documents:

- (1) Table 1 of Article 5.1 of the Special Contract;
- (2) The Bill Illustration Addendum to the Special Contract; and
- (3) Confidential Exhibit 3 to the Application.

The information for which confidential treatment is sought is collectively referred to as the “Air Products Confidential Rate Information.”

The affidavit of Kirk T. Massa, Energy Manager, North Region, Air Products,<sup>1</sup> and the testimony of Brian K. West, Director of Regulatory Services, Kentucky Power,<sup>2</sup> are being filed in support of this motion. Kentucky Power further states in support of its motion:

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<sup>1</sup> (“Massa Affidavit”).

<sup>2</sup> (“West Testimony”).

## The Statutory And Regulatory Standard

1. KRS 61.878(1)(c)(1) exempts the following records from public disclosure:

records confidentially disclosed to an agency or required 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.

2. Pursuant to 807 KAR 5:011, Section 13, "Each utility shall file a copy of each special contract that establishes rates, charges, or conditions of service not contained in its tariff." Kentucky Power requests that the identified portions of the Contract be excluded from the public record. 807 KAR 5:011, Section 14 provides that a utility may request confidential treatment pursuant to 807 KAR 5:001, Section 13(3) for materials filed pursuant to 807 KAR 5:011. In addition, Kentucky Power requests that confidential treatment be afforded Confidential Exhibit 3 pursuant to 807 KAR 5:001, Section 13.

### Background

#### A. The Air Products Ashland, Kentucky Facility.

3. Air Products' maintains a facility located at 125 Russell Road, Ashland, Kentucky. The facility, which is located adjacent to the former AK Steel Ashland, Kentucky plant, produces industrial gases, including oxygen and nitrogen. The AK Steel Ashland plant closed during the fourth quarter of 2019. The Company is informed that the majority of the industrial gases produced at Air Products Ashland facility were delivered to the former AK Steel Ashland, Kentucky plant through a dedicated pipeline.

4. The sale of industrial gases is extremely competitive. Competitors of Air Products Ashland facilities include Air Liquide and Linde & Messer.<sup>3</sup>

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<sup>3</sup> Massa Affidavit at ¶ 5.

5. The existing peak contract load for Air Product’s Ashland facility is 26,900 kW. “Electrical energy is the major cost in the production of industrial gases.”<sup>4</sup>

6. Kentucky Power is informed by Air Products that the closure of the AK Steel Ashland plant, and the consequent loss of sales to the AK Steel facility will increase Air Products Ashland facility’s marginal cost of production as a result of contracting economies of scales. This in turn may result in the closure of the Air Products Ashland facility, and the consequent loss of its load, absent a change in its business model.

7. The loss of Air Products’ load would adversely affect Kentucky Power and its customers by requiring that the remaining customers assume the fixed costs currently borne by Air Products. It also would directly and adversely affect those Kentucky Power customers employed by Air Products at its Ashland facility.<sup>5</sup>

8. Kentucky Power entered into discussions with Air Products regarding steps Kentucky Power could take to assist Air Products’ efforts to transform the business model for its Ashland, Kentucky facility. Based on those discussions Air Products and Kentucky Power negotiated the Special Contract.

B. The Information For Which Confidential Treatment Is Requested Is Exempted From Public Disclosure By KRS 61.878(1)(c)(1).

1. The Air Products Confidential Rate Information.

9. Table 1 of Article 5.1(B) of the Contract provides the per kWh rate to be used in calculating Air Product’s Monthly Energy Charge (“Air Products Contract Rate”). The rate, which increases annually after year two for the seven-year term of the Contract, is the product of negotiations between representatives of Air Products and Kentucky Power and reflects tradeoffs

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<sup>4</sup> *Id.* at ¶ 6.

<sup>5</sup> West Testimony at 4-5.

by both parties. The rate reflects on Kentucky Powers' part the Company's consideration of the size of Air Product's Contract load and the importance of the Air Products' facility to Kentucky Power's efforts to preserve its load.

10. The Bill Illustration Addendum attached to the Contract reflects the Year 1 and Year 2 Contract rate. Further, certain calculations shown in the Addendum would allow the "reverse-engineering" of the Year 1 and Year 2 Contract rate by Air Products' competitors and customers.

11. Exhibit 3 to the Application reflects the Air Products Contract Rate. The exhibit also could be used to discern the Company's confidential strategy in its negotiations with Air Products as well as the confidential basis upon which it designed the rates.

2. The Air Products Confidential Rate Information Is Confidential And Proprietary Information That Is Not Otherwise Publicly Available.

12. The Air Products Contract Rate information is confidential and proprietary. Dissemination of the Air Products Contract Rate is restricted by Kentucky Power, its parent, American Electric Power Company, Inc., and American Electric Power Service Corporation. The Company, AEP, and AEPSC take all reasonable measures to prevent its disclosure to the public as well as to persons within the Company and third-party vendors who do not have a need for the information. Within those organizations, the information is available only upon a confidential need-to-know basis that does not extend beyond those employees with a legitimate business need to know and act upon the identified information.



13. Kentucky Power provided the Air Products Contract Rate only to Air Products. It is Kentucky Power's understanding that Air Products similarly protects the Air Products Contract Rate information.<sup>6</sup>

14. Air Products was *not* provided Exhibit 3 to the Application. Exhibit 3 to the Application is subject to the same protections by the Company, AEP, and AEPSC against public disclosure as the Air Products Contract Rate.

15. The Air Products Confidential Rate Information is not publicly available, and cannot be reasonably discerned through lawful methods. No public purpose is served by the disclosure of the Air Products Confidential Rate Information.

3. Public Disclosure Of The Air Products Confidential Rate Information Will Provide An Unfair Commercial Advantage To Economic Development Competitors Of Kentucky Power, To Customers Of Kentucky Power Seeking To Negotiate Special Contracts, And To Competitors Of Air Products.

16. Public disclosure of the Air Products Confidential Rate Information would establish a ceiling for future negotiations with industrial and commercial enterprises looking to locate in the Company's service territory. Kentucky Power anticipates that the Air Products Contract Rate information would be the starting point for such negotiations and that other prospective enterprises could seek the same or lower rates. Existing customers also could use the Air Products Contract Rate to seek similar or lower rate treatment.<sup>7</sup>

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<sup>6</sup> Massa Affidavit at ¶¶ 7-8.

<sup>7</sup> West Testimony at 8.

17. Public disclosure of the Air Products Confidential Rate Information also would result in unfair commercial injury to Kentucky Power in connection with its economic development efforts. Kentucky Power competes with other retail electric utilities and economic development entities in the Commonwealth of Kentucky, as well as in other states to attract new commercial and industrial economic prospects, and to retain or expand service to existing commercial and industrial customers.

18. Public disclosure of the Air Products Confidential Rate Information would hinder Kentucky Power's economic development efforts by allowing competing retail electric utilities to underbid Kentucky Power, or force Kentucky Power to bid a lower rate than might otherwise be required in the absence of the public disclosure to secure the prospective customer. Kentucky Power would suffer unfair commercial injury in either case.<sup>8</sup>

19. Kentucky Power is informed that public disclosure of the Air Products Contract Rate information could be used by competitors and customers of Air Products to gain otherwise non-public information regarding Air Products Industries' production costs and place Air Products Industries at a commercial disadvantage vis-à-vis its competitors and customers.<sup>9</sup>

20. Disclosure of Exhibit 3 to the Application would reveal the confidential strategy Kentucky Power used to negotiate the Special Contract and design the Air Products Contract Rate. The disclosure of such information would jeopardize the Company's ability to negotiate future contracts.

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<sup>8</sup> *Id.* at 9.

<sup>9</sup> Massa Affidavit at ¶ 6.

21. Industrial customers such as Air Products protect their customer-specific cost information, and expect Kentucky Power to do likewise, because of the adverse effect that public disclosure of such information would have on the customers' competitiveness. Required public disclosure of such information may make commercial and industrial prospects less likely to locate in Kentucky Power's service territory. This in turn would place Kentucky Power at a commercial disadvantage in its economic development efforts to attract commercial and industrial customers to its service territory.

4. Kentucky Power Is Required To Disclose The Air Products Confidential Rate Information To The Commission.

22. Kentucky Power is required by 807 KAR 5:011, Section 13 to file the Contract, including the Air Products Confidential Rate information, with the Commission.

5. The Commission Previously Has Accorded Confidential Treatment To Information Similar To The Air Products Confidential Rate Information.

23. The Commission previously has recognized the unfair commercial injury to retail utilities, including retail electric suppliers, and their special contract counterparties, that results from the public disclosure of the rate and other terms of special contracts.

24. In *In the Matter of: Application Of Atmos Energy Corporation For An Adjustment Of Rates And Tariff Modifications*,<sup>10</sup> Atmos Energy sought confidential treatment of the contract terms because public disclosure of the terms would give competitors of Atmos, and competitors of the counterparties, "information that could be used to negotiate favorable terms for them as well as develop marketing strategies harmful to ... [Atmos] or those specific customers."<sup>11</sup>

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<sup>10</sup> Case No. 2013-00148.

<sup>11</sup> Order, *In the Matter of: Application Of Atmos Energy Corporation For An Adjustment Of Rates And Tariff Modifications*, Case No. 2013-00148 at 3 (Ky. P.S.C. November 25, 2013).

Based on the identified injury the Commission concluded that the information Atmos sought to protect met “the criteria for confidential treatment and are exempted from public disclosure....”<sup>12</sup>

25. Confidential treatment also has been accorded special contract rate information to prevent other customers of the utility from gaining an unfair commercial advantage in negotiations with the utility. In *In the Matter of: Valley Gas, Inc. Request For Approval Of A Special Contract With Mago Construction Company And A Deviation From The Gas Cost Adjustment Clause*, Valley Gas sought confidential treatment of the pricing information because public disclosure of the information would provide competitors of Valley Gas (other energy suppliers) as well as other customers of Valley Gas to gain an unfair commercial advantage:

Public disclosure of the price would allow other large volume customers to use that information as the “ceiling” in any future contract negotiations that they might have with Valley. Knowledge of this information would give those customers to drive a “harder bargain” for terms more advantageous to them than terms in this agreement. This in turn, would be less advantageous to Valley and its tariffed customers.<sup>13</sup>

The Commission granted Valley Gas’ motion for confidential treatment, and on its own motion found that the contract rate filed in response to a staff data request also was “entitled to confidential protection pursuant to KRS 61.878(1)(c)(1).”<sup>14</sup>

26. The Commission similarly recognized that the public disclosure of special contract terms could result in an unfair commercial advantage to new customers of a retail electric utility in *In the Matter of: Application Of East Kentucky Power Cooperative For Approval Of Special Contract Between EKPC, Owen Electric Cooperative, And Gallatin Steel*

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<sup>12</sup> *Id.* at 5.

<sup>13</sup> Letter Motion, *In the Matter of: Valley Gas, Inc. Request For Approval Of A Special Contract With Mago Construction Company And A Deviation From The Gas Cost Adjustment Clause*, Case No. 2014-00328 at 1 (Ky. P.S.C. Filed October 3, 2014).

<sup>14</sup> Order, *In the Matter of: Valley Gas, Inc. Request For Approval Of A Special Contract With Mago Construction Company And A Deviation From The Gas Cost Adjustment Clause*, Case No. 2014-00328 at 1 (Ky. P.S.C. October 28, 2014).



*Company*.<sup>15</sup> There, East Kentucky Power sought confidential treatment of “the maximum amount which Gallatin Steel Company [the special contract counterparty] would pay for any load forecast error adjustments” under the special contract because public disclosure “could provide an unfair commercial advantage to potential new industrial customers of ... [the utility] and to competitors of Gallatin Steel.”<sup>16</sup> Based upon the allegations of commercial injury to both the utility and its customer that would result from the public disclosure of the information for which confidential treatment was sought the Commission granted confidential treatment to the requested information pursuant to KRS 61.878(1)(c)(1).<sup>17</sup>

27. The Commission also granted confidential treatment to, *inter alia*, the financial terms (including the rates) of a gas supply agreement between Natural Energy Utility Corporation and an unnamed customer.<sup>18</sup> Natural Energy argued that public disclosure of the special contract terms would result in unfair commercial advantage to the competitors of the utility:

NEUC has active competitors who could use this information to their advantage and to the direct disadvantage of Atmos [*sic*]. NEUC would be at a competitive threat of loss of business due to the ability of its competitors to leverage the information to their advantage. The public disclosure of the customer name, customer identifiable information, monetary terms negotiated with the customer and critical monetary terms would permit an unfair advantage those competitors.<sup>19</sup>

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<sup>15</sup> Case No. 2013-00174.

<sup>16</sup> Order, *In the Matter of: Application Of East Kentucky Power Cooperative For Approval Of Special Contract Between EKPC, Owen Electric Cooperative, And Gallatin Steel Company*, Case No. 2013-00174 at 1 (Ky. P.S.C. April 8, 2014).

<sup>17</sup> *Id.* at 2.

<sup>18</sup> See Order, *In the Matter of: The Filing Of A Special Contract By Natural Energy Utility Corporation*, Case No. 2018-00164 at 2 & n3. (Ky. P.S.C. September 6, 2018).

<sup>19</sup> Petition for Confidentiality, *In the Matter of: The Filing Of A Special Contract By Natural Energy Utility Corporation*, Case No. 2018-00164 at 2 (Ky. P.S.C. Filed May 1, 2018).

The Commission concluded that the public disclosure of the contract terms could result in an “unfair commercial advantage” to the utilities competitors and granted the petition for confidential treatment.<sup>20</sup>

28. The Commission most recently granted confidential treatment to certain rate-related information in the special contract between Kentucky Power and Braidy Industries Inc.<sup>21</sup>

29. Kentucky Power faces direct competition from other retail electric utilities in Kentucky and other states in recruiting commercial and industrial customers to its service territory, and in connection with efforts by such competitors to recruit its existing customers or its existing customers’ expansion facilities. Thus, although Kentucky Power does not face direct competition in providing retail electric service to customers located within its service territory, it is subject to the same sort of unfair commercial disadvantage faced by the utilities in *Atmos*, *Valley Gas*, and *Natural Energy*.

D. The Air Products Confidential Rate Information Should Remain Confidential For The Term Of The Special Contract.

30. Kentucky Power requests that the Air Products Confidential Rate Information remain confidential and withheld from public disclosure for the term of the Air Products Contract (seven years from its effective date) after which the Air Products Contract rates will no longer have commercial value.

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<sup>20</sup> Letter Ruling, *In the Matter of: The Filing Of A Special Contract By Natural Energy Utility Corporation*, Case No. 2018-00164 at 2 (Ky. P.S.C. June 8, 2018).

<sup>21</sup> Order, *In The Matter Of: The Electronic Application Of Kentucky Power Company For Approval Of A Contract For Electric Service With Braidy Industries Inc.*, Case No. 2018-00418 (Ky. P.S.C. August 20, 2019) (according confidential treatment to special contract rate information and other filings that would reveal Kentucky Power’s negotiation strategy).

WHEREFORE, Kentucky Power Company respectfully requests the Commission to enter an Order:

1. According confidential status to and withholding from public inspection the Air Products Confidential Rate Information, including the Air Products Contract Rate information; and
2. Granting Kentucky Power all further relief to which it may be entitled.

Respectfully submitted,



Mark R. Overstreet  
Katie M. Glass  
STITES & HARBISON PLLC  
421 West Main Street  
P.O. Box 634  
Frankfort, Kentucky 40602-0634  
Telephone: (502) 223-3477  
Facsimile: (502) 779-8349  
[moverstreet@stites.com](mailto:moverstreet@stites.com)  
[kglass@stites.com](mailto:kglass@stites.com)

John W. Pollom  
STITES & HARBISON PLLC  
250 West Main Street, Suite 2300  
Lexington, Kentucky 40507  
Telephone: (859) 226-2300  
Facsimile: (859) 253-9144  
[jwpollom@stites.com](mailto:jwpollom@stites.com)

COUNSEL FOR KENTUCKY POWER  
COMPANY

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

In the Matter of:

Application Of Kentucky Power Company	)	
For Approval Of Contract For Electric Service	)	Case No. 2020-00____
With Air Products And Chemicals, Inc.	)	

**AFFIDAVIT OF KIRK T. MASSA**

Kirk T. Massa, first being duly sworn, states:

1. I am of the age of majority and competent to make this affidavit. I have personal knowledge of the matters set forth in this affidavit.
  
2. I am employed by Air Products and Chemicals, Inc. (“Air Products”). I am employed as Energy Manager, North Region at Air Products Ashland, Kentucky facility located at 125 Russell Road, Ashland, Kentucky (“Ashland Facility”). In that capacity, I procure and manage the energy needs for Air Products. I have personal knowledge of the Contract for Electric Service Between Kentucky Power Company and Air Products (“Special Contract”) that is the subject of this case.
  
3. I also have specific personal knowledge of the confidential, proprietary, and competitively sensitive of the Air Products confidential information that is the subject of Kentucky Power’s motion for confidential as a result of my job responsibilities (“Confidential Information”). I likewise have personal knowledge of the efforts taken by Air Products to maintain the secrecy of the Confidential Information. Finally, I have personal knowledge of the unfair competitive disadvantage Air Products would suffer if the Confidential Information became public.



4. It is my understanding that Kentucky Power seeks confidential protection for the information regarding the special pricing contained in paragraph 5.1(B) of the Special Contract.

**Public Disclosure of the Confidential Information Will Provide An Unfair Commercial Advantage To Competitors Of Air Products**

5. Air Products' Ashland Facility produces industrial gases including oxygen & nitrogen. Its competitors include Air Liquide, Linde & Messer. The sale of industrial gases is extremely competitive.

6. Air Products would be placed in an unfair commercial disadvantage to its competitors and customers if the Confidential Information were disclosed to the public. Electrical energy is the major cost in the production of industrial gases. The public disclosure of the Confidential Information would permit competitors of Air Products to calculate the cost incurred by Air Products in the production of its industrial gas products. That information in turn may allow competitors of Air Products to undercut Air Products in the sale of industrial gas products. Customers of Air Products likewise could use the pricing information to negotiate more favorable prices to the customers for the purchase of Air Products industrial gas products.

**The Confidential Information Is Not Available To Or Ascertainable By Other Parties**

7. All information regarding the actual costs incurred by Air Products in the production of industrial gas is restricted by Air Products to prevent unfair competition. The Confidential Information is not available or ascertainable by other parties through normal or proper means. No reasonable amount of independent research would allow third parties to ascertain the Confidential Information.

8. Air Products consistently enters into confidential supplier contracts and Non-Disclosure Agreements with energy suppliers and vendors regarding sensitive facility energy information.

Additionally, Air Products has policies in place to prevent dissemination of any production facility contract information, these include secure servers and firewalls.

Further the Affiant sayeth naught.

*Kirk T. Massa*  
 Kirk T. Massa

COMMONWEALTH OF PENNSYLVANIA )  
 )  
 COUNTY OF LEHIGH )

Subscribed and sworn to or affirmed before me this day of 16<sup>th</sup> January, 2020 by Kirk T. Massa.

*Robin S. Grohotolski*  
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 Notary Public

