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VIA ELECTRONIC FILING

June 20, 2023

Ms. Linda Bridwell
Executive Director
Kentucky Public Service Commission
211 Sower Blvd
Frankfort, KY 40601

Re: Case No. 2020-00249

An Electronic Examination of the Application of the Fuel Adjustment Clause of Duke Energy Kentucky, Inc. from November 1, 2019 through April 30, 2020

Dear Ms. Bridwell:

Thank you for your correspondence of May 31, 2023 regarding the records request received by the Commission from Foresight Coal Sales, LLC (Foresight), related to its ongoing suit in the Eastern District of Kentucky, United States District Court, docketed as 3:21-cv-00016-GFVT-EBA. On behalf of Duke Energy Kentucky, Inc. (Duke Energy Kentucky or the Company), we understand that Foresight has requested confidential records supplied to the Commission by the Company in the above-referenced case.

Specifically, Foresight has requested, through discovery, that the Commission produce fuel bid sheets, filed with the Commission on September 2, 2020, that the Commission has afforded confidential treatment. Upon receipt of your May 31, 2023 correspondence, Duke Energy Kentucky has reviewed the confidential records which it submitted in this case. Based upon our review, we believe that the provisions of KRS 61.878(1)(c)(1) and 807 KAR 5:001, Section 13 continue to apply and, therefore, the requested documents are exempt from disclosure under the Kentucky Open Records Act. In further support of this position, Duke Energy Kentucky respectfully offers the following:

On August 19, 2020, the Commission initiated the six-month review to examine Duke Energy Kentucky's application of its Fuel Adjustment Clause from November 1, 2019, through April 30, 2020.¹ Concurrently, Duke Energy Kentucky was required to file responses to the

¹ *In the Matter of an Electronic Application of the Fuel Adjustment Clause of Duke Energy Kentucky, Inc. from November 1, 2019 through April 30, 2020*, Order, Case No. 2020-00249 (Ky. P.S.C. Aug. 19, 2020).

information requested in the Appendix to this Order within 14 days.² Specifically, Item 21 requested the following:

Refer to 807 KAR 5:056 3(5), which states, “For any contracts entered into on or after December 1, 2019, the commission shall, in determining the reasonableness of fuel costs in procurement contracts and fuel procurement practices, evaluate the reasonableness of fuel costs in contracts and competing bids based on the cost of the fuel less any coal severance tax imposed by any jurisdiction.”

a. Provide a listing of any new coal contracts entered into on or since December 1, 2019.

b. For each bid solicitation or potential spot purchase that resulted in a new purchase contract on or after December 1, 2019, provide the bid evaluation sheets that include the coal severance tax rate per ton or MMBTU, as appropriate, be levied.

In response to this request, Duke Energy Kentucky provided a fuel bid sheet which included fuel solicitation proposal evaluations and rankings. But for this request, the Company would not have tendered this confidential record to the Commission.

In order to preserve the confidential nature of these records, Duke Energy Kentucky filed a petition for confidential treatment along with its responses.³ The petition specifically sought confidential treatment for STAFF-DR-01-021 Confidential Attachment, a fuel bid sheet. In support of its petition, the Company described the extent to which the attachment included confidential and proprietary information that includes fuel solicitation proposal evaluations and rankings. Duke Energy Kentucky further stated that the disclosure of such information would divulge inside information to potential competitors and fuel vendors harming the Company and its customers, as competitors and counterparties would know how the Company evaluates its fuel supply and procures fuel for its generating station. The Company also explained that, even internally, the information is retained on a need-to-know basis and is not freely available.

In an Order entered on February 3, 2021, the Commission granted Duke Energy Kentucky’s petition for confidential treatment and held that the confidential records shall “not be placed in the public record or made available for public inspection for ten years or until further Order of this Commission.” The holding of the Commission’s February 3, 2021 Order is still correct. Information regarding the details of fuel bid sheets are specifically and expressly recognized as exempt from public disclosure in KRS 61.878(1)(c)(1). This provision in the Open Records Act exempt from public disclosure:

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;

² *Id.*

³ *Id.*, Petition for Confidential Treatment (Sep. 2, 2020).

Openly disclosing fuel bid sheets would clearly permit an unfair commercial advantage to competitors of Duke Energy Kentucky and the confidential information is equally plainly the type of information for which confidential treatment is assured. Additionally, providing this information to Foresight would give them access to the confidential pricing of other coal suppliers in the competitive market in which they compete for Duke Energy Kentucky's business. Allowing them access to this information would undermine future solicitations Duke Energy Kentucky may hold as Foresight could then use this sensitive information to adjust their bids in an effort to win contracts they may not otherwise have or worse, result in the Duke Energy Kentucky paying a higher cost for coal than it otherwise would have to pay. Further, releasing this information of confidential bidding information to one supplier would likely discourage others from participating in future solicitations or else risk their respective pricing be disclosed to competitors. Moreover, as ten years has yet to pass, the significance of the confidential information continues to be relevant and useful to those who might intend to harm Duke Energy Kentucky and its customers. Accordingly, we respectfully request the Commission deny Foresight's request to disclose records deemed confidential.

In the event that the Commission determines to release the requested confidential records to Foresight, we respectfully request that the Company be notified and given an opportunity to seek an appropriate remedy in the Franklin Circuit Court prior to such disclosure. On behalf of Duke Energy Kentucky, thank you for the opportunity to provide this response. Pursuant to the Commission's July 22, 2021 Order in Case No. 2020-00085, no paper copy of this filing will be made.

Respectfully submitted,

/s/Rocco D'Ascenzo

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