

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

| | | |
|---|---|------------|
| ELECTRONIC JOINT APPLICATION OF AMERICAN |) | |
| ELECTRIC POWER COMPANY, INC., KENTUCKY |) | |
| POWER COMPANY AND LIBERTY UTILITIES CO. |) | CASE NO. |
| FOR APPROVAL OF THE TRANSFER OF OWNERSHIP |) | 2021-00481 |
| AND CONTROL OF KENTUCKY POWER COMPANY |) | |

**LIBERTY UTILITIES CO.'S
MOTION FOR CONFIDENTIAL TREATMENT**

Liberty Utilities Co. (“Liberty”), by counsel, moves the Public Service Commission of Kentucky (the “Commission”) for an order granting confidential treatment to certain information and documents filed in response to the initial requests for information. Specifically, Liberty requests confidential treatment for information or documents related to Items 9, 19, 57, and 68 of the Commission Staff’s First Request for Information and Items 25, 44, 53, 63, 80, and 100 of the Attorney General’s First Set of Data Requests. In support of this motion, Liberty states as follows:

Administrative Regulation 807 KAR 5:001, Section 13(2) sets forth the procedure by which certain information filed with the Commission shall be treated as confidential. Specifically, the party seeking confidential treatment must establish “specific grounds pursuant to KRS 61.878 [the Kentucky Open Records Act] for classification of that material as confidential.” 807 KAR 5:001, Section 13(2)(a)(1).

The Kentucky Open Records Act exempts certain records from the requirement of public inspection. *See* KRS 61.878. In particular, KRS 61.878(1)(c)(1) exempts from 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 present an unfair commercial advantage to competitors of the entity that disclosed the records.

This exception “is aimed at protecting records of private entities which, by virtue of involvement in public affairs, must disclose confidential or proprietary records to a public agency, if disclosure of those records would place the private entities at a competitive disadvantage.” Ky. OAG 97-ORD-66 at 10 (Apr. 17, 1997). One “obvious disadvantage” is created when proprietary information is disclosed “without the hurdles systematically associated with acquisition of such information about privately owned organizations.” *See Marina Management Service, Inc. v. Commonwealth of Ky., Cabinet for Tourism*, 906 S.W.2d 318, 319 (Ky. 1995). The information and documents referenced below are all highly-sensitive confidential and proprietary information that Liberty does not otherwise disclose, and the disclosure of which would cause substantial injury to Liberty’s competitive position.

Staff 1-9 requests Liberty’s audited financial statements. Liberty maintains its audited financial statements as confidential and does not publicly release them. In *Marina Management Services, Inc. v. Cabinet for Tourism*, 906 S.W.2d 318 (Ky. 1995), the Supreme Court held that a state agency properly withheld audited financial statements of a privately owned corporation submitted to the agency. The Court reasoned that disclosure would provide an unfair advantage to competitors by allowing them to ascertain the economic status of the marina operators. This Commission has made the same determination. *See Application Of Navitas Ky Ng, Johnson County Gas Company, And B & H Gas System For Approval Of Acquisition, Transfer Of Ownership, And Control Of Natural Gas Utility Systems*, Case No. 2020-00396 (Ky. PSC Feb. 3, 2021). Further, audited financial statements contain the analysis and opinions of the auditors,

which are not publicly available or disclosed for a non-publicly traded company, and the disclosure of such data, analysis, and opinions could provide an unfair competitive advantage over Liberty. Accordingly, Liberty respectfully requests confidential treatment for the financial statements it is producing in response to Staff 1-9.

Staff 1-19 requests an estimate of costs resulting from the planned transition of many of the centralized services that are now provided by AEPSC to Kentucky Power that will be provided directly by Kentucky Power after the transaction. The cost estimates were developed using knowledge that is not readily available outside of Liberty and required significant effort by Liberty to develop. It could be used by other entities to develop their own cost estimates without performing the same analysis and incurring the same costs that Liberty performed and incurred to obtain and develop the information, which is grounds for confidential treatment. *See Marina Management Services, Inc.*, 906 S.W.2d at 319.

In addition, disclosure of information provided in response to Staff 1-19 could put Liberty and ultimately Kentucky Power (should the acquisition be approved) at a significant disadvantage in negotiating with the potential employees Liberty may hire. Having vendors and job applicants know Liberty's cost structure and potential salaries would be highly damaging to Liberty's ability to negotiate effectively with potential employees and suppliers. In addition, Liberty could also be placed at an unfair and economic disadvantage in future mergers or acquisitions by disclosing Liberty's internal cost estimates related to transition agreements, which are often relied upon in determining a bid for a potential acquisition. The Commission has previously granted confidential treatment to estimated costs. *See Electronic Application Of Kentucky Power Company For (1) A General Adjustment Of Its Rates For Electric Service; (2) Approval Of Tariffs And Riders; (3) Approval Of Accounting Practices To Establish Regulatory Assets And Liabilities; (4) Approval*

Of A Certificate Of Public Convenience And Necessity; And (5) All Other Required Approvals And Relief, Case No. 2020-00174 (Ky. PSC Apr. 5, 2021). Accordingly, Liberty respectfully requests confidential treatment for the information it is producing in response to Staff 1-19.

Staff 1-57 requests internally prepared reports, analyses or reviews of the credit profile for Kentucky Power and Liberty. In response, Liberty is producing information regarding its corporate family's credit profile, which is highly sensitive information about Algonquin Power & Utilities Corp.'s ("Algonquin")—Liberty's ultimate parent—financial condition relative to the transaction. Disclosure of this type of information would be highly prejudicial to Liberty and Algonquin. It is not information that is made public, and in fact, as a publicly traded company, Algonquin is subject to stringent securities law requirements governing how and when information is publicly disclosed. To require production of such information here could cause significant harm. The Commission has previously granted confidential treatment for this type of analysis. *See Application Of Big Rivers Electric Corporation For Approval To Issue Evidences Of Indebtedness*, Case No. 2012-00492 (Ky. PSC July 10, 2019)(granting confidential treatment for documents revealing business strategies regarding credit agreements and portions of financial reports provided to a board of directors and to credit rating agencies); *Application Of Atmos Energy Corporation For An Adjustment Of Rates And Tariff Modifications*, Case No. 2013-00148 (Ky. PSC Nov. 25, 2013)(granting confidential treatment to reports and analyses related to credit ratings in response to Items 176 and 180). Accordingly, Liberty respectfully requests confidential treatment for the information it is producing in response to Staff 1-57.

Staff 1-68 and AG 1-44 request documents and presentations to Liberty's Board of Directors regarding the possible acquisition of Kentucky Power. This information contains sensitive discussions by Algonquin relating to the transaction, which would reveal Algonquin's

financial information, the Board of Directors' deliberations and decision-making process, as well as highly confidential information relating to the due diligence process. All of the information is confidential business information not available to the public and would cause damage to Algonquin and Liberty if disclosed. As such, the documents responsive to these requests contain sensitive confidential and proprietary information, the disclosure of which could be used by Liberty competitors to gain a competitive advantage over it. Further, the disclosure of this type of information could place Liberty at an economic disadvantage related to future transactions if its internal deliberations in a competitive bidding process are revealed. The Commission has previously granted confidential treatment to materials presented to boards of directors in transfer-of-control cases. *See The Joint Petition Of Kentucky-American Water Company, Thames Water Aqua Holdings Gmbh, Rwe Aktiengesellschaft, Thames Water Aqua Us Holdings, Inc., And American Water Works Company, Inc. For Approval Of A Change In Control Of Kentucky-American Water Company*, Case No. 2006-00197 (Ky. PSC Aug. 29, 2006).¹

AG 1-25 requests documentation related to plans to expand the use of renewable fuels in Kentucky Power's generation portfolio. In response, Liberty is providing data from preliminary analysis of opportunities associated with renewable generation in Kentucky. This is proprietary information that Liberty does not publicly disclose and has acquired through its diligence and resources. Consistent with the Court's decision in *Marina Management Services, Inc.*, 906 S.W.2d at 319, disclosure would provide an unfair advantage to competitors by allowing them to access

¹ *See also Application Of PPL Corporation, E.ON AG, E.ON US Investments Corp., E.ON U.S. LLC, Louisville Gas And Electric Company, And Kentucky Utilities Company For Approval Of An Acquisition Of Ownership And Control Of Utilities*, Case No. 2010-00204 (Ky PSC Staff Letter Sept. 30, 2010)(granting confidential treatment for minutes of the board of directors and other due diligence materials); *Joint Application Of Duke Energy Corporation, Duke Energy Holding Corp., Deer Acquisition Corp., Cougar Acquisition Corp., Cinergy Corp., The Cincinnati Gas & Electric Company And The Union Light, Heat And Power Company For Approval Of A Transfer And Acquisition Of Control*, Case No. 2005-00228 (Ky PSC Staff Letter Oct. 10, 2005)(confirming approval of Joint Applicants' Petition for Confidential Treatment of Information filed on August 30, 2005, including confidential treatment for minutes of the board of directors).

the information “without the hurdles systematically associated with acquisition of such information about privately owned organizations.” *Id.* at 319. Accordingly, Liberty requests confidential treatment of the information being produced in response to AG 1-25.

AG 1-53 requests documents that have been filed with other regulatory bodies regarding the proposed transaction. In response, the Joint Applicants are providing the application that was submitted to the Federal Energy Regulatory Commission (“FERC”) under Section 203 of the Federal Power Act for transfer of control of Kentucky Power and AEP Kentucky Transmission Company, Inc. The public version of that application is being publicly filed with the Public Service Commission. As described on page 30 of the FERC application, there are workpapers underlying the horizontal market analysis performed by Dr. Arenchild. According to his testimony, which is attached as Exhibit J to that FERC application, Dr. Arenchild evaluated the potential competitive impact on electricity markets as a result of the proposed transaction. Disclosure of these workpapers, which were provided to FERC on a confidential basis, would enable competitors and others in the electricity markets to ascertain confidential information “without the hurdles systematically associated with acquisition of such information about privately owned organizations.” Accordingly, it should be declared confidential under KRS 61.878(1)(c).

Moreover, the workpapers being provided in response to AG 1-53 constitute “[t]rade secrets and commercial or financial information obtained from a person [that are] privileged or confidential” under 18 C.F.R. § 388.107(d), and FERC deems them to be confidential. *See* 18 C.F.R. § 388.107 (“The following records are exempt from disclosure”) Accordingly, these documents are also protected from disclosure under KRS 61.878(1)(k), which exempts “public records or information the disclosure of which is prohibited by federal law or regulation.” Liberty

respectfully requests confidential treatment for the information it is producing in response to AG 1-53.

AG 1-63 requests due diligence reports. These reports contain information regarding Liberty's analysis of the potential opportunity to acquire Kentucky Power and as such, contains highly confidential business information and analyses. This information would provide competitors with Liberty's operational strategies as well as give other entities selling or seeking to acquire utilities information as to Liberty's acquisition approach. The Commission has previously granted confidential treatment for this type of due diligence analysis in prior acquisition cases. *See Electronic Proposed Acquisition by Bluegrass Water Utility Operating Company, LLC and the Transfer of Ownership and Control of Assets by P.R. Wastewater Management, Inc., Marshall County Environmental Services, LLC, LH Treatment Company, LLC, Kingswood Development Inc., Airview Utilities, LLC, Brocklyn Utilities, LLC, Fox Run Utilities, LLC, and Lake Columbia Utilities, Inc.*, Case No. 2019-00104 (Ky. PSC Feb. 25, 2021); *Application Of Atmos Energy Corporation For An Adjustment Of Rates And Tariff Modifications*, Case No. 2013-00148 (Ky. PSC Dec. 3, 2013); *Application Of PPL Corporation, E.ON AG, E.ON US Investments Corp., E.ON U.S. LLC, Louisville Gas And Electric Company, And Kentucky Utilities Company For Approval Of An Acquisition Of Ownership And Control Of Utilities*, Case No. 2010-00204 (Ky PSC Staff Letter Sept. 30, 2010)(granting confidential treatment for minutes of the board of directors and other due diligence materials). Accordingly, Liberty requests confidential treatment of the due diligence report being provided in response to AG 1-63.

AG 1-80 requests copies of each debt instrument between Kentucky Power and Liberty or any subsidiary of Liberty. In response, Liberty is submitting an intercompany debt agreement between Liberty and a current subsidiary (as opposed to Kentucky Power, with which it has no

debt instruments), which is confidential and not publicly disclosed by the parties to that agreement. This agreement reveals detailed information about intercompany financing, including interest rates and processes. If disclosed, Liberty and its subsidiaries would suffer commercial disadvantage. In *Marina Management Services, Inc. v. Cabinet for Tourism*, 906 S.W.2d 318 (Ky. 1995), the Supreme Court held that a state agency properly withheld information on notes payable and related-party transactions. The Court reasoned that disclosure would provide an unfair advantage to competitors by allowing them to ascertain the economic status of private companies “without the hurdles systematically associated with acquisition of such information about privately owned organizations.” *Id.* at 319. Accordingly, the Commission should grant confidential treatment to the debt agreement that is a related-party transaction between Liberty and a subsidiary.

AG 1-100 requests records related to how the boards of directors operate. In response, Liberty is providing information relating to how its subsidiaries operate their board of directors. This information is highly sensitive and reflects Liberty’s approach to corporate governance which is not publicly disclosed by Liberty. As the Kentucky Supreme Court has found, "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). In addition, disclosure of this information would enable other entities to peer into Liberty’s private business “without the hurdles systematically associated with acquisition of such information. *Marina Management Services*, 906 S.W.2d at 319. Accordingly, Liberty respectfully requests confidential treatment for the information provided in response to AG 1-100.

For the foregoing reasons, Liberty respectfully requests confidential treatment of the above-referenced information and documents in perpetuity.

RESPECTFULLY SUBMITTED,

STURGILL, TURNER, BARKER & MOLONEY, PLLC



James W. Gardner

M. Todd Osterloh

333 West Vine Street, Suite 1500

Lexington, KY 40507

Phone: (859) 255-8581

E-mail: jgardner@sturgillturner.com

E-mail: tosterloh@sturgillturner.com

Counsel for Liberty Utilities Co.

1606808