

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

In the Matter of:

An Electronic Examination Of The Application Of)	
The Fuel Adjustment Clause Of Kentucky Power)	
Company From May 1, 2021 Through October 31,)	Case No. 2022-00036
2021)	

**Kentucky Power Company's
Response to Commission's June 8, 2023 Order**

Kentucky Power Company ("Kentucky Power" or the "Company") submits the following response to the June 8, 2023 Order entered by the Public Service Commission of Kentucky ("Commission"), and pursuant to 807 KAR 5:001E, Section 13(10)(d).

The Commission's June 8th Order states that Foresight Coal Sales, in conjunction with litigation pending before the United States District Court for the Eastern District of Kentucky, *Foresight Coal Sales, LLC v. Chandler*, Case No. 3:21-cv-00016-GFVT-EBA, has requested that the Commission "produce fuel bid sheets, filed with the Commission on April 14, 2022, that the Commission has afforded confidential treatment." To the extent that Foresight's requests seek any information or documents submitted by Kentucky Power to the Commission on April 14, 2022, for which the Commission has already granted Kentucky Power's motion for confidential treatment, Kentucky Power objects to the Commission's producing any such information or documents pursuant to 807 KAR 5:001E, KRS 61.878, and any other relevant privileges.

I. The Commission already granted Kentucky Power's Motion for Confidential Treatment of certain materials submitted to the Commission on April 14, 2022.

On April 14, 2022, Kentucky Power submitted to the Commission, under seal, certain documents containing confidential information exempt from disclosure under KRS 61.878.

These documents included confidential information, including key pricing and business terms,

provided to Kentucky Power by non-selected third parties in response to written solicitations. Because this information is confidential and provides insight into the manner by which Kentucky Power evaluates bids in response to coal-supply solicitations, Kentucky Power sought confidential treatment from the Commission for these materials pursuant to 807 KAR 5:001E, Section 13 and KRS 61.878(1)(c)(1).

On November 30, 2022, the Commission granted Kentucky Power’s Motion for Confidential Treatment of materials submitted under seal on April 14, 2022, finding that disclosure of the materials could “affect future bidding, allowing competitors and suppliers to gain an unfair advantage”, and because the type of information in question has been routinely held confidential by the Commission.¹ Accordingly, the Commission afforded confidential treatment to the materials and concluded that they were exempted from public disclosure for five years pursuant to KRS 61.878(1)(c)(1) and 807 KAR 5:001, Section 13.²

II. The confidential materials submitted under seal on April 14, 2022 to the Commission are exempt from public disclosure and should not be produced by the Commission to Foresight.

As the Commission correctly held in its November 30, 2022 Order, the materials in question are confidential and exempt from public disclosure pursuant to 807 KAR 5:001E, Section 13 and KRS 61.878(1)(c)(1).

807 KAR 5:001E, Section 13, excludes from disclosure by the Commission material which is “confidential”, including material which falls under the Kentucky Open Records Act’s

¹ See Commission’s November 30, 2022 Order at 2–3 (citing *In the Matter of: Electronic Examination of the Application of the Fuel Adjustment Clause of East Kentucky Power Cooperative, Inc., from May 1, 2017 through October 31, 2017*, Case No. 2018-00019, Order at 2 (Ky. P.S.C. May 29, 2018)).

² *Id.*

exemptions for public disclosure of information pursuant to KRS 61.878. KRS 61.878 excludes from the Open Records Act:

[R]ecords 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.

KRS 61.878(1)(c)(1).

The materials submitted to the Commission fall squarely within the above exemption. They include information, including key pricing and business terms, provided to the Kentucky Power by non-selected third parties in response to written solicitations. The information also provides insight into the manner by which Kentucky Power evaluates bids in response to coal-supply solicitations. Additionally, the information contained in the attachments was designated as confidential by the bidders responding to the solicitations, and Kentucky Power takes all reasonable measures to prevent its disclosure to the public and even persons within the company who do not have a need for the information. Accordingly, while confidential disclosure of this information to the Commission is not prohibited, the protections afforded by confidential treatment were, and continue to be, required.³

Foresight, a coal supplier, is precisely the type of entity from which the confidential coal-supply bidding sheets should be withheld. Disclosure of this information to Foresight, or to other similar entities, would give Foresight knowledge it otherwise would not be able to obtain, which

³ See KRS 61.878(1); see also *Hoy v. Kentucky Industrial Revitalization Authority*, 907 S.W.2d 766, 768 (Ky. 1995) (explaining that “information concerning the inner workings of a corporation is ‘generally accepted as confidential or proprietary’ and falls within the wording of” KRS 61.878(1)); see also KRS 365.880(4) (including within the definition of a “trade secret” any information that “[d]erives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use”).

it could subsequently use to its economic advantage when preparing its own coal-supply bids to Kentucky Power or other utilities. This could have the effect of raising fuel costs for Kentucky Power and other utility customers. Moreover, failure to maintain this information as confidential may have a chilling effect on the willingness of future bidders to submit responses to Kentucky Power coal-supply solicitations. The Commission has granted confidential treatment to similar information in past cases,⁴ and it correctly held that the information here was also confidential and should be afforded confidential treatment under Kentucky law.

For these reasons, Kentucky Power respectfully urges the Commission to maintain the confidentiality of its coal-supply bidding information by not producing them to Foresight in the Eastern District Court case, whether under seal or otherwise.

III. Conclusion

Accordingly, and for all of the reasons discussed herein, Kentucky Power respectfully requests that the Commission maintain the confidential treatment of the requested materials as already deemed necessary, and opposes Foresight's request for the Commission to produce the information and documents described in the Commission's June 8, 2023 Order.

⁴ Order, *In the Matter of: Electronic Examination Of The Application Of The Fuel Adjustment Clause Of Kentucky Power Company From November 1, 2016 Through October 31, 2018*, Case No. 2019-00002 (Ky. P.S.C. January 7, 2020); Order, *In the Matter of: Electronic Examination Of The Application Of The Fuel Adjustment Clause Of Kentucky Power Company From November 1, 2018 Through April 30, 2019*, Case No. 2019-00226 (Ky. P.S.C. March 30, 2020).

Respectfully submitted,



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