

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

In the Matter of:

ELECTRONIC INVESTIGATION OF THE)	
PROPOSED POLE ATTACHMENT TARIFFS OF)	CASE NO. 2022-00106
RURAL ELECTRIC COOPERATIVE)	
CORPORATIONS)	

MOTION FOR CONFIDENTIAL TREATMENT

1. Big Rivers Electric Corporation; Big Sandy R.E.C.C.; Blue Grass Energy Cooperative Corp.; Clark Energy Cooperative, Inc.; Cumberland Valley Electric, Inc.; Farmers R.E.C.C.; Fleming-Mason Energy Cooperative, Inc.; Grayson R.E.C.C.; Inter-County Energy Cooperative Corporation; Jackson Energy Cooperative Corporation; Jackson Purchase Energy Corporation; Kenergy Corp.; Licking Valley R.E.C.C.; Meade County R.E.C.C.; Nolin R.E.C.C.; Owen Electric Cooperative, Inc.; Salt River Electric Cooperative Corp.; Shelby Energy Cooperative, Inc.; South Kentucky R.E.C.C., Taylor County R.E.C.C. (each a “RECC” and collectively, the “RECCs”), by counsel, hereby jointly move the Kentucky Public Service Commission (the “Commission”), pursuant to KRS 61.878 and 807 KAR 5:001 Section 13, to grant confidential protection to certain documents provided in response to the Second Request for Information propounded by Commission Staff in the above-styled matter. The documents for which the RECCs seeks confidential protection consist of Joint Use Agreements between the various RECCs and third party attachers (each a “Joint Use Agreement” and collectively, the “Joint Use Agreements”), respectively, which documents were requested by Item No. 5 of Commission Staff’s Second Request.

2. The RECCs seek confidential protection for the entirety of each Joint Use Agreement, primarily in light of the pervasive nature of the confidential information contained in each document. The Joint Use Agreements are replete with detailed terms and conditions negotiated between private parties addressing matters such as maintenance, access, risk allocation, and insurance, as well as the applicable rates and fees to be paid by the parties. Moreover, certain of the Joint Use Agreements contain clauses specifically recognizing and requiring the confidentiality of that agreement's terms and conditions. In light of these facts, and fully consistent with the Commission's treatment of similar joint use agreements in years past (as described below), the RECCs request that each complete Joint Use Agreement remain unavailable to the general public, as contemplated by 807 KAR 5:001 Section 13(2)(a)(3)b.

3. Copies of the Joint Use Agreements, marked "CONFIDENTIAL" throughout, are submitted concurrently with this motion by email to PSCED@ky.gov with a read receipt. Because confidential treatment is sought for the entirety of these documents, a redacted copy of each has not been filed or uploaded to the public docket. To the extent required, the RECCs request permission to deviate as described from the filing requirements of 807 KAR 5:001 Section 13, pursuant to 807 KAR 5:001 Section 22.

4. A copy of this motion has been served on all parties to this proceeding through the use of electronic filing. *See* 807 KAR 5:001, Section 13(b).

5. If and to the extent a Joint Use Agreement becomes publicly available because it is no longer competitively sensitive, the RECC to which the agreement pertains will inform the Commission in writing and have its confidential status removed. 807 KAR 5:001 Section 13(10)(b).

I. Discussion

6. The Joint Use Agreements are entitled to confidential treatment pursuant to KRS 61.878(1)(c)(1), which protects “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.” 807 KAR 5:001 Section 13(2)(a)(1).

7. As noted above, the Joint Use Agreements include detailed terms and rates negotiated between private parties, retained by the RECCs as confidential business information. If potential users seeking pole attachments outside the tariff had access to the RECCs’ existing Joint Use Agreements, the potential users could use the information to unfairly negotiate terms to the detriment of the RECCs and other users. Likewise, disclosure of the Joint Use Agreements would afford the RECCs’ contractors and other parties access to information material to the RECCs in this specific line of business, thereby allowing them to manipulate contract negotiations and bidding processes. If the RECCs’ potential counterparties or competitors are privy to detailed information about the cooperative’s acceptable risk tolerances, financial arrangements, or like information about the inner-workings of the cooperative and its assets, the advantage they gain is a competitive disadvantage to the RECCs and their Member-Owners.

8. The Joint Use Agreements are also subject to renewal and thus ongoing negotiation between existing counterparties. Consequently, disclosing the detailed terms and rates of the agreements could potentially harm the relationships that the RECCs have with existing users and could place the RECCs at a competitive disadvantage in negotiating future pole attachment agreements with other counterparties. Finally, some of the Joint Use Agreements contain express

confidentiality provisions, which both reflect the proprietary nature of the terms and require the continued maintenance of confidentiality with respect to the agreement.

9. The public disclosure of the Joint Use Agreements will inevitably inure to the benefit of each RECC's potential counterparties and competitors, which would gain valuable, non-public information about the cooperative's business. Information such as this is generally recognized as confidential or proprietary.¹

10. The Commission has previously granted confidential protection to similar agreements between joint users on the grounds described herein. *See 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 to KIUC's Initial Request for Information (Ky. PSC Dec. 2, 2015); *In the Matter of Application of Louisville Gas & Electric Company for an Adjustment of its Electric Rates*, Case No. 2016-00371, Order Regarding Request for Confidential Treatment to AT&T Kentucky's First Request for Information (Ky. PSC Dec. 10, 2018). In those cases, as here, at issue were third-party joint use and pole attachment agreements, and the Commission determined that those agreements should remain under seal in order to avoid an unfair commercial advantage to the utility's counterparties/competitors.

¹ *See, e.g., Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 768 (Ky. 1995) ("It does not take a degree in finance to recognize that such information concerning the inner workings of a corporation is 'generally recognized as confidential or proprietary'"); *Marina Management Servs. v. Cabinet for Tourism, Dep't of Parks*, 906 S.W.2d 318, 319 (Ky. 1995) (unfair commercial advantage arises simply from "the ability to ascertain the economic status of the entities without the hurdles systemically associated with the acquisition of such information about privately owned organizations"); Case No. 2019-00115, *In the Matter of: Electronic Application of Grayson County Water District for a Deviation from Meter Testing Requirements of 807 KAR 5:066, Section 16(1)*, Order (Ky. P.S.C. September 19, 2019) (granting confidential protection for proprietary product produced by a third party that was not available to the general public/required membership to obtain and was generally recognized as confidential).

11. The Joint Use Agreements are not publicly available, are not disseminated within each relevant RECC except to those employees and professionals with a legitimate business need to know and act upon the information, and are not disseminated to others without a legitimate need to know and act upon the information.

II. Time Period

12. The RECCs request that each Joint Use Agreement remain confidential until five (5) years after its expiration or termination, as the public disclosure of the proprietary and confidential information contained in the Joint Use Agreements could be used to the RECCs' competitive disadvantage through that time. After the expiration of this period, it appears likely the information in the pertinent Joint Use Agreement will be sufficiently dated as to no longer present risk to the RECCs.

III. Conclusion

13. Based on the foregoing, the Joint Use Agreements are entitled to confidential protection. If the Commission disagrees, then the Commission should hold an evidentiary hearing to protect the RECCs' due process rights and to supply the Commission with a complete record to enable it to reach a decision with regard to this matter. *See Utility Regulatory Com'n v. Kentucky Water Service Co., Inc.*, 642 S.W.2d 591 (Ky. App. 1982).

WHEREFORE, the RECCs respectfully request that the Commission classify and protect as confidential the Joint Use Agreements.

This 2nd day of June, 2022.

Respectfully submitted,

DINSMORE & SHOHL LLP

/s/ Edward T. Depp

Edward T. Depp

R. Brooks Herrick

101 South Fifth Street, Suite 2500

Louisville, Kentucky 40202

E-mail: tip.depp@dinsmore.com

E-mail: brooks.herrick@dinsmore.com

Phone: (502) 540-2300 Fax: (502) 585-2207

M. Evan Buckley

100 West Main Street, Suite 900

Lexington, Kentucky 40507

E-mail: evan.buckley@dinsmore.com

Phone: (859) 425-1000 Fax: (859) 425-1099

Counsel to the RECCs

Certification

I hereby certify that a copy of the foregoing has been served electronically on all parties of record through the use of the Commission's electronic filing system, and there are currently no parties that the Commission has excused from participation by electronic means. Pursuant to the Commission's July 22, 2021 Order in Case No. 2020-00085, a paper copy of this filing has not been transmitted to the Commission.

/s/ Edward T. Depp

Counsel to the RECCs