

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION BY WATER SERVICE)
CORPORATION OF KENTUCKY,)
ALONG WITH CORIX)
INFRASTRUCTURE (US) INC. AND)
SW MERGER ACQUISITION CORP.,)
FOR APPROVAL OF TRANSFER OF)
CONTROL AND ESTABLISHMENT)
OF A REGULATORY ASSET)

Case No. 2022-00396

PETITION FOR CONFIDENTIAL TREATMENT

Water Service Corporation of Kentucky (“WCK”), Corix Infrastructure (US), Inc., and SW Merger Acquisition Corp. (collectively, “Joint Applicants”), by counsel jointly move the Public Service Commission of Kentucky (the “Commission”) pursuant to 807 KAR 5:001, Section 13(2) and KRS 61.878(1)(c) for an Order granting confidential treatment to certain information being provided in response to the Commission’s Initial Request for Information.

Standard of Review

Administrative Regulation 807 KAR 5:110, Section 5 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 “each basis upon which the petitioner believes the material should be classified as confidential” in accordance with the Kentucky Open Records Act, KRS 61.878. 807 KAR 5:110 Section 5(2)(a)(1).

The Kentucky Open Records Act exempts certain records from the requirement of public inspection. *See* KRS 61.878. KRS 61.878(1)(a) exempts from disclosure “public records containing information of a personal nature where the public disclosure thereof would constitute a

clearly unwarranted invasion of personal privacy.” This exception is intended to protect privacy, which Kentucky courts have held as a “basic right of the sovereign people.” *See Bd. of Ed. of Fayette Cty. v. Lexington-Fayette Urb. Cty. Hum. Rts. Comm’n*, 625 S.W.2d 109, 110 (Ky. Ct. App. 1981). The test the Kentucky Supreme Court has adopted to determine if information is exempt from disclosure, pursuant to KRS 61.878(1)(a), requires that the information be “of a personal nature” and that, upon “weighing the interest of the person involved against the public’s interest in disclosure,” the disclosure would constitute an invasion of privacy. *Cape Publications, Inc. v. Univ. of Louisville Found., Inc.*, 260 S.W.3d 818, 821 (Ky. 2008) (citing *Kentucky Bd. Of Exam’rs of Psychologists v. Courier-Journal*, 826 S.W.2d 324, 327-28 (Ky. 1992)).

In addition, 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 the Joint Applicants do not otherwise disclose, and the disclosure of which would cause substantial injury to the Joint Applicants’ competitive position.

Information for which Confidential Treatment is Requested

Item 9 of the Initial Request for Information seeks information related to transaction costs attributable to the Proposed Transaction. The Joint Applicants treat transaction costs as confidential and do not publicly disclose such costs in the ordinary course of business. Disclosure of this information would provide an advantage to the Joint Applicants' competitors, who would benefit from knowledge of estimated and actual transaction costs without the hurdles systematically associated with acquisition of such information about privately owned organizations. Accordingly, the Joint Applicants request confidential treatment for the transaction costs identified in response to Item 9 of the Initial Request for Information.

Item 10 of the Initial Request for Information requests names and job duties of Kentucky-based employees. The same information was requested and provided in WSCK's pending rate case, Docket No. 2022-00147. In that case, WSCK requested confidential treatment of the employees' names and titles because they were being provided in conjunction with the individual employees' salary information. If the employees' names and job duties were publicly disclosed in this transfer-of-control case, anyone could easily cross-reference the filings in the rate case and determine employees' salary information.

As more fully described in the Petition for Confidential Treatment filed on June 28, 2022 in Case No. 2022-00147, this information should be maintained as confidential. The Commission has held that "personally identifiable [salary] information for . . . non-executive employees" would constitute a disclosure of personal nature and would invade employees' personal privacy. *Electronic Application of Grayson County Water District for a Rate Adjustment Pursuant to 807 KAR 5:076*, No. 2021-00191, at 2 (Ky. PSC June 3, 2022). In addition, public disclosure of employees' salary information is likely to result in increased costs and a loss of negotiating ability

for WSCK and increased risk of a higher cost of service resulting from greater employee compensation demands and higher costs to recruit and retain skilled employees and managers. Accordingly, the Joint Applicants request confidential treatment of the employee names and titles being provided in response to Item 10 to ensure against the disclosure of employee's salary information.

Item 11 of the Initial Request for Information seeks “reports submitted by financial advisors to Joint Applicants related to the proposed transfer of indirect control of Water Service Kentucky.” The Commission has previously granted confidential treatment for this type of due diligence analysis in prior acquisition cases. *See Electronic Joint Application of American Electric Power Company, Inc., Kentucky Power Company And Liberty Utilities Co. for Approval of the Transfer of Ownership and Control of Kentucky Power Company*, Case No. 2021-00481 (Ky. PSC March 24, 2022).¹ The reports submitted by financial advisors contain sensitive documentation relating to the Proposed Transaction, which would reveal analysis on the Joint Applicants’ and related entities’ finances, as well as highly confidential information relating to the Joint Applicants’ due diligence process. All of the information is confidential business information not available to the public and would cause damage to the Joint Applicants, if disclosed. As such, the documents responsive to these requests contain sensitive confidential and proprietary information, the disclosure of which could be used by the Joint Applicants’ competitors to gain a competitive advantage over them. Further, the disclosure of this type of information could place the Joint

¹ *See also 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 due diligence materials).

Applicants at an economic disadvantage related to future transactions if their analyses of the corporations are revealed. *See Marina Management Service, Inc.*, 906 S.W.2d at 319. Accordingly, the Joint Applicants request confidential treatment for the documents being produced in response to Item 11 of the Initial Request for Information.

In addition, the confidential information being provided in response to Item 11, if disclosed to the other transacting party, could result in competitive commercial injury to the other transacting parties, i.e., the Corix Parties vis-à-vis SouthWest Parties and vice versa. Accordingly, Joint Applicants have agreed not to exchange certain documents and/or information between each other. Specifically, the “Project Victor SWWC Board Discussion” document dated April 29, 2022 prepared by CIBC will be confidentially produced to the Commission on a pink background and will not be produced to the Corix Parties. The Board Update, Project Stingray dated June 16, 2022 (Strictly Private and Confidential) prepared by RBC Capital Markets, LLC (“RBC”) and Board Update, Project Stingray dated August 10, 2022 (Strictly Private and Confidential), also prepared by RBC will be confidentially produced to the Commission on a light blue background and will not be produced to the SouthWest Parties.

For the foregoing reasons, the Joint Applicants respectfully request confidential treatment in perpetuity of the information described above. If the Commission disagrees with this request for confidential protection, it must hold an evidentiary hearing (a) to protect the Joint Applicants’ due process rights and (b) to supply the Commission with a complete record to enable it to reach a decision about this matter.

Respectfully submitted,

/s/ M. Todd Osterloh
STURGILL, TURNER, BARKER & MOLONEY, PLLC
M. TODD OSTERLOH
JAMES W. GARDNER
REBECCA C. PRICE
333 West Vine Street, Suite 1500
Lexington, KY 40507
Telephone No. (859) 255-8581
Fax No. (859) 231-0851
tosterloh@sturgillturner.com
jgardner@sturgillturner.com
rprice@sturgillturner.com
*Counsel for Water Service Corporation of Kentucky and
Corix Infrastructure (US) Inc.*

and

/s/ Valerie T. Herring
TAFT STETTINIUS & HOLLISTER LLP
Valerie T. Herring
2200 IDS Center
80 South 8th Street
Minneapolis, Minnesota 55402
2157 Telephone No.:
612.977.8400
Fax No.: 612.977.8650
VHerring@Taftlaw.com
*Attorney for SW Merger
Acquisition Corp*

1802620