

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY

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)

Case No. 2022-00396

PETITION FOR CONFIDENTIAL TREATMENT

Water Service Corporation of Kentucky, Corix Infrastructure (US) Inc., and SW Merger Acquisition Corp. (“SWMAC”) (collectively, “Joint Applicants”), by and through 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 Exhibit A to the Transaction Agreement (herein, “Exhibit A”), produced in Application Appendix B; and Appendix I of Exhibit D to the Transaction Agreement (herein, “Appendix I”), produced in Application Appendix B.

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. *See* 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. 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).

KRS 61.878(1)(c)(1) requires consideration of three elements: (1) whether the record is confidentially disclosed to an agency or required by an agency to be disclosed to it; (2) whether the record is generally recognized as confidential or proprietary; and (3) whether the record, if openly disclosed, would present an unfair commercial advantage to competitors of the entity that disclosed the records.

The Joint Applicants are confidentially disclosing Exhibit A and Appendix I to the Commission to provide it with a complete iteration of the Transaction Agreement. These components of the Transaction Agreement are not publicly available, nor will they become publicly available after the close of the merger, thus satisfying the first element of the statutory standard for confidentiality of a proprietary record.

In *Hoy v. Kentucky Indus. Revitalization Auth.*, 907 S.W.2d 766, 768 (Ky. 1995), the Kentucky Supreme Court held that documents detailing the “inner workings of a corporation (are) ‘generally recognized as confidential or proprietary.’” Exhibit A and Appendix I satisfy this

standard and, therefore, meet the second element of the statutory standard. Likewise, Exhibit A contains information about the duties, obligations and rights of shareholders (including rights to nominate directors and approve certain transactions). The allocation of responsibilities between management, the Board of Directors, and shareholders represent the quintessential inner-workings of a corporation.

Exhibit A and Appendix I also contain extraordinarily sensitive information including financial projections. The information could reveal how parties negotiate and value transactions. Moreover, the information contains commercially sensitive transaction terms and figures such as corporate structure and governance of the newly merged entity and capital calculations for the newly merged entity. The disclosure of this information would result in a clear commercial disadvantage against the Joint Applicants for competitors to gain invaluable insight into the structure, operation, and financial outlook of the newly merged entity. Kentucky Courts have deemed this private, corporate information to be confidential. As such, these confidential documents are subject to the proprietary exemption in KRS 61.878(1)(c)(1).

This Commission has treated similar, sensitive, proprietary information much like the Kentucky Supreme Court. In *Columbia Gas of Kentucky, Inc.*, Case No. 2021-00183, 2021 WL 4657674 (Oct. 4, 2021), the Commission found a corporate organizational chart fell within the statutory exemption for confidentiality. In a recent merger case, the Commission held that organizational structure documents were confidential. *See Joint Application of American Electric Company, Inc., Kentucky Power Company, and Liberty Utilities*, Case No. 20121-00481 at 3 (Ky. PSC May 13, 2022). Exhibit A contains the terms for a yet-to-be-drafted and entered-into shareholder agreement for the governance of the post-merger surviving entity. Exhibit A includes sensitive corporate information regarding business strategies, budgeting processes, future rights of

the parties, information rights, and other information that has been maintained confidential by the parties to the Transaction Agreement. The terms of Exhibit A are the result of a negotiated transaction and, as such, contains positions and reflects the “give and take” between the parties involved and the various forms of consideration each party is willing to provide and concede. And Appendix I utilizes certain actual financial information of SWMAC’s wholly owned subsidiary, SouthWest Water Company, and subsidiaries of Corix Infrastructure Inc. to demonstrate how to calculate the Closing Net Working Capital, Closing Net Indebtedness, Closing Capital Expenditure Amount, and Equity Balancing Payment at the closing of the Proposed Transaction (“Closing”). This information includes projections and expectations of the parties but does not reflect what those actual amounts will be at Closing. Both Exhibit A and Appendix I contain sensitive information regarding the organizational structure and intimate financial information that is not otherwise disclosed. Public disclosure of these documents would work a severe competitive disadvantage against the Joint Applicants and the newly merged entity.

For the foregoing reasons, the Joint Applicants respectfully request confidential treatment in perpetuity of Exhibit A and Appendix I of Exhibit D provided in their Application to this Commission. 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

M. TODD OSTERLOH
JAMES W. GARDNER
REBECCA C. PRICE
STURGILL, TURNER, BARKER & MOLONEY, PLLC
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

*Attorneys for Water Service Corporation of Kentucky and
Corix Infrastructure (US) Inc.*

and

/s/ Valerie T. Herring

VALERIE T. HERRING
TAFT STETTINIUS & HOLLISTER LLP
2200 IDS Center
80 South 8th Street
Minneapolis, MN 55402-2157
Telephone No.: 612.977.8400
Fax No.: 612.977.8650
VHerring@Taftlaw.com
Attorney for SW Merger Acquisition Corp.