

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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COMMISSION

In the Matter of:

THE APPLICATION OF KENTUCKY POWER)
COMPANY FOR A GENERAL ADJUSTMENT) Case No. 2009-00459
OF ELECTRIC RATES)

* * * * *

**KENTUCKY POWER COMPANY'S RESPONSE TO ATTORNEY GENERAL'S
MOTION FOR HEARING ON CONFIDENTIALITY ISSUES**

On February 26, 2010 Kentucky Power Company ("Kentucky Power") moved the Commission for confidential treatment of a limited portion¹ of the voluminous responses to the data requests filed by Commission Staff and the Attorney General. The Attorney General on March 5, 2010 filed his opposition to Kentucky Power's motion and also moved to have a portion of two data requests made public.² On March 12, 2010 Kentucky Power filed its reply in support of its motion and response to the Attorney General's motion. Kentucky Power's motion and response/reply were supported by the affidavits of Rene V. Hawkins, Assistant Treasurer and Managing Director of Corporate Finance for American Electric Power Service Corporation.

The Attorney General filed no affidavits in support of his motions. Instead, he now requests a full evidentiary hearing before the Commission for the stated purpose of "cross examination of Ms. Hawkins with regard to her statements in her affidavits."³ This request should be denied because the Attorney General has failed to show that such a hearing is required

¹ Kentucky Power sought confidential treatment for only portions of 2 of the 55 responses it filed to the Attorney General's data requests.

² The confidential information at issue was produced by Kentucky Power in response to AG 1-47 and AG 1-51.

³ Attorney General's Motion for Hearing at 2.

by statute or due process, or that it would be sufficiently beneficial to outweigh the substantial burdens it would impose on the Commission and the parties.

As an initial matter, neither Kentucky's Open Records Act, KRS 61.870 *et seq.*, nor the Commission's regulation implementing the Act, 807 KAR 5:001, Section 7, provide for evidentiary hearings in connection with the Commission's resolution of matters arising under the Act.⁴ To the contrary, the requirement for such a full-blown hearing, and the time required to prepare for such hearings, to brief the issues presented, and for the Commission to decide the question on the expanded record, would undermine the Act's requirement of "efficient and timely action in response to applications for inspection..."⁵

The Attorney General nevertheless insists that a full evidentiary hearing on the confidentiality issue is required by due process, stating that "as the Commission must make a determination with respect to the issue of confidentiality, such a hearing is required to satisfy due process concerns." In essence, the Attorney General argues that the Open Records Act, which makes no provision for such hearings in connection with disputes arising under it, is unconstitutional. Such an argument is not credible. Nor does it address how the hundreds of state and local agencies charged with administering the Open Records Act, many of which have no experience with, or facilities for, conducting such hearings, could reasonably be expected to administer the Act's provisions.

Nor does the sole authority cited by the Attorney General, *Utility Regulatory Commission v. Kentucky Water Service Company, Inc.*,⁶ support his claim. There, the Commission denied a utility's request for rehearing with respect to adjustments made by the Commission in a rate

⁴ Under the Open Records Act, there also is no statutory right to an evidentiary hearing before the Attorney General, who is charged with reviewing a public agency's denial of a request to inspect records. *See* KRS 61.880.

⁵ KRS 61.876(1).

order. Although the opinion is not completely clear, it appears that at least some of the adjustments reflected a shift in Commission treatment of certain items.⁷ In any event, the court of appeals concluded that the utility had not been afforded an opportunity to know “the issues on which the decision will turn...,”⁸ was not apprised of “what evidence is considered,” nor given “an opportunity to “test, explain or refute”⁹ Kentucky Power’s evidence and arguments. Nothing in the opinion suggests that a full-blown evidentiary hearing, such as is sought by the Attorney General, is required in connection with every disputed issue arising before the Commission. Moreover, the issues have clearly been framed by Kentucky Power’s papers, and the factual and legal bases for Kentucky Power’s motion have twice been made known to the Attorney General, who likewise has been afforded two opportunities to adduce whatever evidence and argument he believes supports his position. The Attorney General has been afforded full due process.

Moreover, there is an obvious distinction to be drawn between the rate case at issue in *Kentucky Water Service Company* and the Motion for Confidential Treatment at issue here. An evidentiary hearing is statutorily mandated in rate cases,¹⁰ but no such hearing is required for the Commission to decide confidentiality matters. Indeed, there appears to be no support in Kentucky law for the Attorney General’s claim that due process requires the Commission to hold an evidentiary hearing on Kentucky Power’s Motion for Confidential Treatment. It should be

⁶ *Utility Regulatory Commission v. Kentucky Water Service Company, Inc.*, 642 S.W.2d 591 (Ky. App. 1982) (“*Kentucky Water Service Company*”).

⁷ See, e.g., “JDITC money had been treated by retained earnings by the Commission in the past years, however, no objection had been raised by the Commission.” *Id.* at 592.

⁸ *Id.* at 593 quoting *Bowman Transportation v. Arkansas-Best Freight System*, 419 U.S. 281, 287 (1974).

⁹ *Id.* at 593.

¹⁰ At the time the Court of Appeals issued its opinion in *Kentucky Water Service Company*, KRS 278.190(1) provided: “Whenever any utility files with the commission any schedule stating new rates, the commission may, upon its own motion, or upon complaint as provided in KRS 278.260, and upon reasonable notice, enter upon a hearing concerning the reasonableness of the new rates.”

noted that a finding that due process requires an evidentiary hearing on a motion for confidential treatment would result in a substantial administrative burden for the Commission and its Staff, who would be charged with conducting such hearings on all confidentiality motions filed with it.

In addition to offering no legal justification for its hearing request, the Attorney General has also failed to identify what benefit such a hearing would hold for the Commission.¹¹ The Attorney General has offered no substantive evidence to counter the facts set forth in Ms. Hawkins affidavit, and has instead relied upon invective aimed at statements made by Kentucky Power, and its parent, American Electric Power (“AEP”), in confidential disclosures made to credit rating agencies. The Attorney General has identified no evidence it intends to produce at the requested hearing and no issues of fact for the Commission to resolve. Rather, it appears that the Attorney General intends to use the hearing solely as a fishing expedition. In the absence of a legitimate factual dispute, the Commission should not subject Kentucky Power to the expense and administrative burden of an evidentiary hearing.

Wherefore, Kentucky Power respectfully requests that the Commission deny the Attorney General’s Motion for Hearing and grant Kentucky Power’s Motion for Confidential Treatment on the basis of the filings made by the parties.

¹¹ See, *Kentucky Central Life Insurance Company v. Stephens*, 897 S.W.2d 583, 590 (Ky. 1995) (“While determining whether the process afforded is adequate, the court should consider the private interests affected, the governmental interests affected and the fairness and reliability of the existing procedures and the probable value, if any, of additional procedural safeguards.”)

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by first class mail, postage prepaid upon the following parties, this 22nd day of March, 2010:

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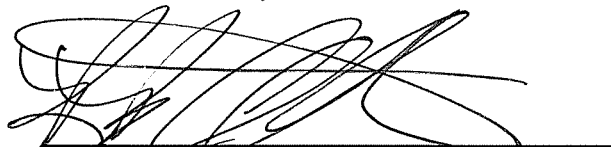
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