

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF DUKE)	
ENERGY KENTUCKY, INC. FOR: 1) AN)	
ADJUSTMENT OF THE ELECTRIC RATES; 2))	
APPROVAL OF AN ENVIRONMENTAL)	
COMPLIANCE PLAN AND SURCHARGE)	
MECHANISM; 3) APPROVAL OF NEW)	CASE NO.
TARIFFS; 4) APPROVAL OF ACCOUNTING)	2017-00321
PRACTICES TO ESTABLISH REGULATORY)	
ASSETS AND LIABILITIES AND 5) ALL OTHER)	
REQUIRED APPROVALS AND RELIEF)	

ORDER

On or about September 15, 2017, Duke Energy Kentucky, Inc. (“Duke Kentucky”) electronically filed two motions, pursuant to 807 KAR 5:001, Section 13 and KRS 61.878, requesting that the Commission grant confidential protection to certain designated materials. In the first motion, Duke Kentucky requested that certain materials filed in response to a September 7, 2017 deficiency letter be treated confidentially. In the second motion, Duke Kentucky requested that certain materials produced in response to Commission Staff's First Request for Information (“Staff’s First Request”) be treated confidentially. On or about January 12, 2018, Duke Kentucky filed a second supplement to Tab 36 and similarly requested that those materials remain confidential. Specifically, Duke Kentucky requested confidential treatment for the following documents:

1. Materials filed as supplements to Tab 36: Duke Kentucky asserted that it submitted monthly consolidated financial reporting summaries for Duke Kentucky and Duke

Energy Ohio, Inc. ("Duke Ohio") and monthly O&M and Capital Reports for Duke Kentucky as a supplement to Tab 36. Duke Kentucky stated that the materials provide information on its monthly O&M and capital expenses and financial projections. Duke Kentucky asserted that the materials would provide competitors with tremendous insight into its financial condition, capital and O&M philosophies, policies, practices and expenses, which could place it at a competitive disadvantage.

2. Internal accounting policies and procedures produced in response to Staff's First Request No. 8.

3. Executive compensation information produced in response to Staff's First Request No. 37: Duke Kentucky provided compensation information for executives during the base period and the three years prior to the base period, which indicates the raises received by each executive or the person holding the executive position during that period. Duke Kentucky asserted that disclosure of the information to the extent it has not been included in federal and other filings would place it at a disadvantage in its efforts to recruit and retain highly trained and competent employees and executives.

4. Federal and state income tax returns produced in response to Staff's First Request No. 48a(9).

5. Contracts with outside vendors and internal policies and procedures regarding the retention of outside vendors produced in response to Staff's First Request No. 50: Duke Kentucky stated that the documents contain, among other things, the standard terms and conditions for services, and actual negotiated terms and compensation for services from vendors for its electric business and that disclosure of the information would place it at a disadvantage in negotiating contracts with vendors in the future.

6. Vendor information produced in response to Staff's First Request No. 51: Duke stated that the materials contain information regarding the nature of work for which Duke Kentucky contracts for professional services in its ongoing operations and the compensation Duke Kentucky provides to those service providers. Duke Kentucky asserted that disclosure of the information would place it at a competitive disadvantage in negotiating contracts and may make it difficult to obtain professional services in the future.

7. Presentation to Compensation Committee produced in response to Staff's First Request No. 54: Duke Kentucky asserted that the presentation is highly confidential and

contains the independent consultant's evaluation of the Company's compensation programs, comparison to and advice on market trends and impacts of potential changes in laws.

8. Engagement letters, contracts, and invoices related to the expenses for preparation of the rate case produced in response to Staff's First Request No. 59: Duke Kentucky asserted that the documents contain information regarding negotiated rates and fees charged by vendors, consultants, and experts, which Duke Kentucky asserted would place it at a competitive disadvantage in negotiating services if disclosed.

9. Compensation and benefit information produced in response to Staff's First Request No. 66: The documents contain salary and benefit information for each corporate officer and the total salary and benefits by category for Directors, Managers, Supervisors, Exempt Employees, Non-Exempt Employees, Union Employees, and Non-Union Hourly Employees. Duke Kentucky submits that if its competitors had access to this information that they could use it to place Duke Kentucky at a disadvantage in recruiting and retaining officers and employees.

10. Employee benefit information produced in response to Staff's First Request Nos. 68, 69, and 70: Duke Kentucky stated that the material contains employee contribution rates and detailed summaries of the Company's benefits, which it asserted would place it at a competitive disadvantage in recruiting and retaining employees if released.

Duke Kentucky argued that the materials designated and described above should be treated as confidential pursuant to KRS 61.878(1)(c) and (k).

The Commission is a public agency subject to Kentucky's Open Records Act, which requires that all public records "be open for inspection by any person, except as otherwise provided by KRS 61.870 to 61.884."¹ Exceptions to the free and open examination of public records contained in KRS 61.878 should be strictly construed.² The party requesting that materials be treated confidentially has the burden of establishing that one of the exceptions is applicable.³ In determining whether materials should be exempt from disclosure, the Commission must balance the harm from disclosure with "the effect of protecting a given document from scrutiny by the public and potential intervenors."⁴

Having carefully considered the petition and the materials at issue, the Commission finds that the designated portions of the documents identified herein—

¹ KRS 61.872(1).

² See KRS § 61.871.

³ 807 KAR 5:001, Section 13 (2)(c).

⁴ *Southern United Medigroup, Inc. v. Hughes*, 952 S.W.2d 195, 199 (Ky. 1997), *abrogated on other grounds by Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004).

except for the monthly financial reporting summaries and regulatory O&M and capital reports produced as supplements to Tab 36 and those documents produced in response to Staff's First Request Nos. 37, 59 and 66 — meet the criteria for confidential treatment and are exempted from public disclosure pursuant to KRS 61.878(1) and 807 KAR 5:001, Section 13 for the periods requested by Duke Kentucky.

Duke Kentucky argued that the consolidated monthly financial reporting summaries for Duke Kentucky and Duke Ohio, and Duke Kentucky's monthly O&M and capital reports produced as a supplement to Tab 36 are exempt from disclosure pursuant to KRS 61.878(1)(c)1, because the disclosure of those materials would place Duke Kentucky at a competitive disadvantage. KRS 61.878(1)(c)1 exempts records that are "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."⁵ However, regulated electric utilities in Kentucky are required to submit monthly reports regarding their actual O&M and capital expenses, and the materials at issue herein appear to provide little more detail than those reports to the extent they are providing actual financial information. Moreover, O&M and capital expenses are

⁵ KRS 61.878(1)(c)1.

contested issues in this matter, and the Commission has previously held that ratepayers have a right to know the evidence presented regarding the issues being decided.⁶ Thus, the Commission finds that Duke Kentucky has failed to establish that any of the information in Duke Kentucky's monthly O&M and capital reports or any of the actual information contained in the consolidated Duke Kentucky and Duke Ohio monthly financial reporting summaries meet the criteria for confidential treatment.

However, with respect to the consolidated financial reporting summaries for Duke Kentucky and Duke Ohio, the Commission finds that the "Key Messages" sections of those reports, which contain a narrative discussion of the potential causes of differences between actual costs and projected and prior costs, as well as the columns showing the differences between the plan and the actual costs do meet the criteria for confidential treatment. The basis for that finding, among other things, is that those portions of the financial reporting summaries, especially taken together, provide significant information regarding how Duke Ohio, which is not jurisdictional to Kentucky and is operating in a semi-competitive marketplace, projects costs and expenses. Thus, the Commission finds that the "Key Messages" sections and the columns showing the variance between the plan and actual costs and expenses are exempt from public disclosure pursuant to KRS 61.878(1) and 807 KAR 5:001, Section 13.

⁶ See Case No. 2016-00220, *Application of Clark Energy Cooperative, Inc. for a Certificate of Public Convenience and Necessity to Install an Advanced Metering Infrastructure (AMI) System* (Ky. PSC Dec. 22, 2016) at 1 (denying a request to treat costs of a project for which a CPCN was requested as confidential, in part, because the rate payers "have the right to know the costs of the assets that Clark Energy is proposing to purchase and they have a right to know the evidence upon which the Commission relied in determining that such costs are fair, just, and reasonable"); Case No. 2013-00219, *Application of Jackson Cooperative Corporation for an Adjustment of Rates*, (Ky. PSC Feb. 14, 2014) at 1–2 ("Jackson Energy's ratepayers have a right to know the actual costs of the power that they are purchasing, and they have a right to know the evidence upon which the Commission relied in determining that the costs of the Wellhead contract are fair, just, and reasonable.").

Duke Kentucky argued that the materials produced in response to Staff's First Request No. 59 are exempt from disclosure pursuant to KRS 61.878(1)(c)1, because the release of the information will result in harm to it and to its vendors. However, the materials produced in response to Staff's First Request No. 59 pertain to fees and costs associated with Duke Kentucky's prosecution of this rate case only, which it is seeking to recover herein. Moreover, none of the documents are subject to the attorney-client privilege or work product doctrine, nor has Duke Kentucky claimed they are subject to those privileges, because it objected to the request based on those privileges and apparently withheld documents it contended were privileged.⁷ The costs and fees associated with pursuing or defending an action, including fees paid to experts and attorneys, are not generally recognized as confidential or proprietary where the party is seeking to recover those costs and fees as part of the action.⁸ Thus, the Commission

⁷ The issue here is whether to keep these documents from the public, not from the intervenors. The intervenors have had access to the documents throughout the case and continue to have access so any claim of privilege would have been waived if it existed. Moreover, even itemized attorney bills and timesheets are not generally subject to the attorney-client privilege or work product doctrine where a party seeks to recover those fees so long as the content of any communications or privileged information is removed from the bill. See *e.g. Johnson v. Zimmer Holdings, Inc.*, 73 F. Supp. 3d 814, 825-6 (E.D. Ky. 2014) (which includes copies of attorney bills submitted to the court).

⁸ See, *e.g., Asbury University v. Powel*, 486 S.W.3d 246, 265 (Ky. 2016) (where the court referenced the total amount sought in attorney fees, total amount sought in costs, the hourly rates of the attorneys, the total hours billed down to the tenth of the hour, and the general work performed by the attorneys in the order and noted that the claimed fees were supported by affidavits from counsel with timesheets attached); see also *Flag Drilling Co., Inc. v. Erco, Inc.*, 156 S.W.3d 762, 766 (Ky. App. 2005) (where the court remanded an appeal to the trial court with instructions to obtain evidence regarding the reasonableness of the attorney fees claimed, in part, because an award of fees must be based on the facts and circumstances of each case and the reasonableness of the claimed fees); *Couch v. Transworld Systems, Inc.*, 3:16-CV-00618-CRS, 2017 WL 1520426 (W.D. Ky. Apr. 24, 2017) (where the court reviewed an attorney's rates and specific billing entries to assess whether the claimed attorney fees were reasonable); *Primm v. Isaac*, 127 S.W.3d 630, 635-9 (Ky. 2004) (indicating that evidence regarding what an expert witness was hired to do in a particular matter and the compensation they received is relevant and discoverable in civil matters); see also Fed. R. Civ. Pro. 26(a)(2) (requiring parties in federal court proceedings to automatically disclose significant information regarding retained experts who will offer evidence at trial, including information regarding the basis for their evidence, their qualifications, their past work as an expert, and the compensation they received for their services).

finds that the materials produced in response to Staff's First Request No. 59 do not meet the criteria for confidential treatment and, therefore, are not exempted from public disclosure pursuant to KRS 61.878(1) and 807 KAR 5:001, Section 13.

Duke Kentucky similarly argued that documents regarding employee benefits and compensation produced in response to Staff's First Request Nos. 37 and 66 should be exempt from disclosure pursuant to KRS 61.878(1)(c)1. With respect to executive compensation information, the Commission has generally held that executive officer salary and compensation does not meet the criteria for confidential treatment, because the salaries are included as an expense in base rate calculations and because certain executive salary information must be disclosed to the public in any case in other regulatory filings.⁹ However, the materials produced by Duke Kentucky, which contain information regarding 14 executive officer positions, include compensation information for several officers and executives whose salaries are not apportioned jurisdictionally to Kentucky. The Commission finds that the information regarding officers and executives whose salaries and compensation or any portion thereof is or was jurisdictionally attributable to Kentucky does not meet the criteria for confidential treatment but that the information regarding executives and officers whose salaries and compensation is or was

⁹ See Case No. 2012-00221, *Application of Kentucky Utilities Company for an Adjustment of its Electric Rates* (Ky. PSC Sept. 11, 2013) at 1 (denying a request to treat executive salary and benefits as confidential for those reasons).

not jurisdictionally attributed to Kentucky does meet the criteria for confidential treatment, unless that information has been publically disclosed in other regulatory filings.¹⁰ The Commission finds that the compensation information produced in response to those requests referring generally to classes of employees does not meet the criteria for confidential treatment, because the aggregation of that information creates ambiguities as to the compensation for specific non-executive employees. Thus, Duke Kentucky's motion that the documents produced in response to Staff's First Request Nos. 37 and 66 be subject to confidential treatment is granted, in part, and denied, in part, as discussed herein above.

IT IS THEREFORE ORDERED that:

1. Duke Kentucky's motions for confidential treatment made on September 15, 2017, and January 12, 2018, be and are hereby granted, in part, and denied, in part.
2. The materials produced in response to Staff's First Request No. 59 for which confidential treatment was requested do not meet the criteria for confidential treatment and, therefore, shall be made available to the public.
3. Portions of the material produced in response to Staff's First Request Nos. 37 and 66 providing compensation information for officers whose compensation was not attributed to Kentucky and not previously released publically, as discussed in more detail herein above, meet the criteria for confidential treatment pursuant to KRS 61.878(1) and

¹⁰ For instance, with respect to attachment Staff-DR-01-066, this would mean in the section showing the total amount of compensation for each executive individually that the fields for regular, overtime, excess vacation payroll, standby, bonus, other, and subtotal to the right of any officer whose compensation was not attributed to Kentucky should be redacted but those same fields in section showing amounts allocated to Kentucky should not be reacted to show that no amount of the compensation for those executives was allocated to Kentucky. The total amounts shown in the second to last line of each page of that spreadsheet may also be reacted since it could be used to determine the compensation information for those non-jurisdictional executives.

807 KAR 5:001, Section 13 and, therefore, shall be exempt from public disclosure. The remaining portions of those materials do not meet the criteria for public disclosure and, therefore, shall be made available to the public. Within 30 days from the date of this order, Duke Kentucky shall file into the public record the materials produced in response to Staff's First Request Nos. 37 and 66 with only the information for which confidential treatment was granted redacted. That redacted content for which confidential treatment shall not be placed in the public record or subject to public disclosure for a period of 20 years.

4. The "Key Messages" sections and the columns showing the differences between the plan and the actual costs in the consolidated financial reporting summaries for Duke Kentucky and Duke Ohio filed as a supplement to Tab 36 meet the criteria for confidential treatment and, therefore, shall not be placed in the public record or made available to the public for a period of ten years. The remaining information and materials filed as a supplement to Tab 36 for which confidential treatment was requested do not meet the criteria for confidential treatment and, therefore, shall be made available to the public. Within 30 days from the date of entry of this order, Duke Kentucky shall file into the public record the consolidated financial reporting summaries for Duke Kentucky and Duke Ohio with only the information for which confidential treatment was granted redacted.

5. The designated internal accounting policies and procedures produced in response to Staff's First Request No. 8; federal and state income tax returns produced in response to Staff's First Request No. 48a(9); contracts with outside vendors and internal policies and procedures regarding the retention of outside vendors produced in response

to Staff's First Request No. 50; vendor information produced in response to Staff's First Request No. 51; the presentation to the Compensation Committee produced in response to Staff's First Request No. 54; and employee benefit information produced in response to Staff's Request Nos. 68, 69, and 70 for which confidential treatment was requested shall not be placed in the public record or subject to public disclosure for a period of 20 years.

6. The use of materials granted confidential treatment in any Commission proceeding shall comply with 807 KAR 5:001, Section 13(9).

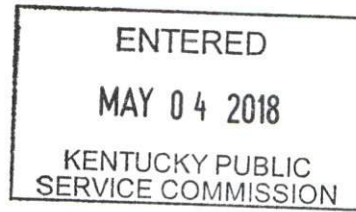
7. Duke Kentucky shall inform the Commission if the materials granted confidential protection become publicly available or no longer qualify for confidential treatment.

8. If a non-party to this proceeding requests to inspect materials granted confidential treatment by this order, Duke Kentucky shall have 20 days from receipt of written notice of the request to demonstrate that the materials are exempt from disclosure, pursuant to KRS 61.878. If Duke Kentucky is unable to make such demonstration or the non-party establishes that an exemption does not apply, the requested materials shall be made available for inspection.

9. The Commission shall not place the documents and materials for which confidential treatment was denied into the public record for a period of 30 days pursuant to 807 KAR 5:001, Section 13(5).

10. Nothing in this Order shall be construed as preventing the Commission from revisiting the confidential treatment of documents and materials.

By the Commission



ATTEST:


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