

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))	CASE NO.
APPROVAL OF AN ENVIRONMENTAL)	2017-00321
COMPLIANCE PLAN AND SURCHARGE)	
MECHANISM; 3) APPROVAL OF NEW)	
TARIFFS; 4) APPROVAL OF ACCOUNTING)	
PRACTICES TO ESTABLISH REGULATORY)	
ASSETS AND LIABILITIES; AND 5) ALL)	
OTHER REQUIRED APPROVALS AND RELIEF)	

ORDER

This matter is before the Commission on a motion for rehearing filed by Duke Energy Kentucky, Inc. (“Duke Kentucky”) seeking partial reconsideration of Orders entered on May 3, 2018, and May 4, 2018, denying in part certain motions for confidential treatment filed by Duke Kentucky. Specifically, Duke Kentucky requested that the Commission reconsider those portions of its Orders that denied confidential treatment for Schedule G-3 filed with the Application and any supplements thereto; documents regarding employee benefits and compensation produced by Duke Kentucky in response to Commission Staff’s First Request for Information (“Staff’s First Request”), Items 37 and 66; attachment TS-6 to the direct testimony of Thomas Silinski; documents produced by Duke Kentucky in response to Commission Staff’s Second Request for Information (“Staff’s Second Request”), Item 90(b); and documents produced by Duke Kentucky in response to the Attorney General’s First Request for Information (“AG’s First Request”), Item 74 regarding the expected costs and savings arising from Duke Kentucky’s

implementation of advanced metering infrastructure. Having reviewed Duke Kentucky's motion and being otherwise sufficiently advised, the Commission denies Duke Kentucky's request for a rehearing in part and grants it in part for the reasons discussed herein.

Duke Kentucky requested a rehearing on the Commission's decision to deny confidential treatment to Schedule G-3 and supplements thereto and attachments to Duke Kentucky's responses to Staff's First Request, Items 37(c) and 66. Duke Kentucky asserted that those materials contain information regarding executive compensation that is broader than that publically disclosed in regulatory filings with the Federal Energy Regulatory Commission ("FERC") and the United States Securities and Exchange Commission ("SEC"). Duke Kentucky also asserted that the information contained in Schedule G-3 and supplements thereto, which contained budgeted salary information for the test year, had some projected information that should be afforded more protection than historical salary information. Thus, Duke Kentucky argued that Schedule G-3 and the attachments to the responses to Staff's First Request, Items 37(c) and 66, should be treated confidentially pursuant to KRS 61.878(1)(c)(1) because disclosure of those materials would place it at a competitive disadvantage in recruiting and retaining employees.¹

The Commission has generally held that executive officer compensation does not meet the criteria for confidential treatment, because such compensation is included as an expense in base rate calculations and because executive compensation information must

¹ It should be noted that Duke Kentucky actually did not cite to a specific exception to the Kentucky Open Records Act in making its request for rehearing regarding materials containing information regarding executive compensation, but based on its argument, it is apparent that it is basing the renewed request for confidential treatment on KRS 61.878(1)(c)(1).

be disclosed to the public in other regulatory filings.² For instance, each FERC Form 1 must contain the “name, title and salary for each executive officer.”³ FERC requires the public disclosure of the information on FERC Form 1 to allow it to fulfill its jurisdictional obligation to ensure that cost-based rates are reasonable and to provide information to the public to allow them to assess the reasonableness of rates.⁴ While FERC might require less information than what is at issue in the materials for which confidential treatment was sought herein, the fact that it requires disclosure of certain information regarding executive compensation and the bases for that requirement reflect an expectation that compensation for executive officers at public utilities should be subject to more public scrutiny than the compensation of other employees. Moreover, the SEC’s public scrutiny of executive compensation for companies that do not operate as monopolies indicates a more general expectation that executive compensation should be subject to public scrutiny. Duke Kentucky’s customers reflected those expectations by submitting a number of public comments regarding executive compensation. Thus, the Commission finds that Duke Kentucky failed to present sufficient evidence to persuade us that the information contained in Schedule G-3 and supplements thereto, and

² See, e.g., Case No. 2012-00221, *Application of Kentucky Utilities Company for an Adjustment of its Electric Rates* (Ky. PSC Sept. 11, 2013) at 1.

³ See, e.g., FERC Form 1 at cover page, i, 104.

⁴ See *Central Hudson Gas and Electric Corporation*, 148 FERC 61,130 at 9-10, 2014 WL 4085799 (FERC Aug. 18, 2014) (where FERC denied confidential treatment to executive salaries, in part, because the information was necessary to carry out its jurisdictional responsibility to evaluate the reasonableness of cost-based rates); see also *Revisions to Forms, Statements and Reporting Requirements for Electric Utilities and Licensees*, Docket No. RM08-5-000, Final Rule, Order No. 715, at 1-2 (2008, eff. January 1, 2009) (in which FERC undertook a rulemaking to amend its reporting requirements, including FERC Form 1, to “improve the forms, reports and statements to provide, in fuller detail, the information the Commission needs to carry out its responsibilities . . . and to provide . . . the public information to assess the justness and reasonableness of electric rates.”).

attachments to Duke Kentucky's responses to Staff's First Request, Items 37(c) and 66 are entitled to confidential treatment in a base rate case.⁵

Moreover, in arguing that it would be placed at a competitive disadvantage by the disclosure, Duke Kentucky makes generalized claims about how the disclosure might affect its ability to recruit and retain executive officers. However, given the amount of information publically available regarding executive compensation and the structure of regulated utilities in Kentucky and other jurisdictions, Duke Kentucky failed to establish that it will suffer the negative effects alleged. Conversely, exempting the information at issue from public disclosure would negatively affect the public's ability to understand and respond to a concern raised in public comments and would likely serve to undermine the public's confidence in the Commission's decision. Thus, the Commission finds that Schedule G-3 and the attachments to Duke Kentucky's response to Staff's First Request, Items 37(c) and 66 should not be exempt from disclosure and, therefore, Duke Kentucky's request for a rehearing with respect to those materials is denied.⁶

⁵ The Commission also observes that although Schedule G-3 contains budgeted executive compensation for the future test year, which is therefore forecasted, that Duke Kentucky provided public testimony as to how those numbers were forecasted. Specifically, Duke Kentucky filed testimony of Mr. Thomas Silinski into the public record indicating that its executive compensation for the test year was calculated based on an anticipated 3 percent raise. Direct Testimony of Thomas Silinski at page 13, line 16 through page 15, line 21 (filed September 1, 2017) ("Silinski Testimony"). Further, Duke Energy only redacted the compensation information from Schedule G-3, and its supplement to the schedule states how Duke Kentucky calculated the forecasted salary increase for each executive based on historical data by assuming an annual percentage salary increase.

⁶ See 807 KAR 5:001, Section 13(2)(c) (indicating that the party that seeks confidential treatment has the burden of proving that the documents are confidential); see also *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) (indicating that a hearing officer must balance the harm from disclosure with "the effect of protecting a given document from scrutiny by the public and potential intervenors" when determining whether materials should be exempt from disclosure pursuant to KRS 61.878(1)(c)1).

Duke Kentucky next requested a rehearing on the portion of the May 3, 2017 Order denying confidential treatment for the attachment to Duke Kentucky's response to Staff's Second Request, Item 90(b), which it claimed contained information regarding the total compensation for lobbyists that performed work for Duke Kentucky. Duke Kentucky argued that the information regarding the compensation of the employees at issue should be exempt from public disclosure because they performed work other than lobbying activity, though they are registered lobbyist, and that the information is of a personal nature.

However, even though the May 3, 2018 Order mentions that there is an argument that lobbyist salaries should not be confidential, the Commission did not base its decision to deny confidential treatment to the attachment to Duke Kentucky's response to Staff's Second Request, Item 90(b) on that argument. Rather, the Commission found that the attachment, as filed, revealed no information regarding the relevant employees' compensation.⁷ However, based on assertions in Duke Kentucky's motion requesting a rehearing, it appears that the document Duke Kentucky is referring to contains additional information and therefore differs from the document in the Commission's record. Thus, the Commission will grant rehearing for the attachment to Duke Kentucky's response to

⁷ Confidential attachment to Duke Kentucky's response to Staff's Second Request, Item 90(b), as filed with the Commission on November 14, 2017, is a spreadsheet indicating that the amount of compensation for two registered lobbyist recorded in FERC Account 426400. The spreadsheet contains the names of two registered lobbyist, a percentage allocation that is not explained, three columns labeled "Base Salary," "Fringe Benefit Allocation," and "Incentive Pay Allocation" corresponding to rows for the two employees and a row labeled "Total." Duke Kentucky only requested confidentiality for the columns labeled "Base Salary," "Fringe Benefit Allocation," and "Incentive Pay Allocation" to the extent they correspond to the rows labeled for the two employees and the row labeled "Total." However, the two lines corresponding to the two employees are blank in all three of the relevant columns. Thus, the Commission previously found that the attachment, as filed on November 14, 2017, did not disclose confidential information regarding those employees.

Staff's Second Request, Item 90(b) to obtain and review a copy of the confidential attachment as referred to by Duke Kentucky in its rehearing motion.

Duke Kentucky next requested rehearing of the May 3, 2018 Order denying confidential treatment for attachment TS-6. Duke Kentucky asserted in its motion for rehearing that the attachment was "a salary increase survey provided by The Conference Board, Inc. ("The Conference Board") and was developed under its proprietary processes," and argued that its disclosure would "reveal copyrighted information."

Although it generally mentioned that copyrighted material should be kept as confidential, Duke Kentucky did not argue that attachment TS-6 was subject to copyright protection in its original motion and described the document in its original motion as:

Duke's Total Cash Compensation vs. Market for Exempt Positions document, which is a comparison of the average base and total compensation for several Duke Energy exempt positions to those of similar companies, based on applicable external survey data.⁸

Further, the Commission finds that some of the same information contained in attachment TS-6 is contained in Mr. Silinski's public testimony, and Mr. Silinski's testimony states that the information came from the EAP Data Information Solutions, LLC, 2016 Energy Technical Craft and Clerical Survey.⁹ Thus, based on the information provided by Duke

⁸ Duke Kentucky's Motion for Confidential Treatment (filed Sept. 1, 2017); *see also* Silinski Testimony at 15:12-15:14 ("Confidential Attachment TS-6 (TCC vs. Market for Exempt Positions) compares the average base and total compensation for several Duke Energy exempt positions to those of similar companies, based on applicable external survey data.").

⁹ Silinski Testimony at page 17, line 7 through page 18, line 4.

Kentucky, the Commission is not able to find that attachment TS-6 or any portion thereof is subject to copyright protection.¹⁰

Since Duke Kentucky has not provided adequate information for the Commission to determine whether or not the information contained in attachment TS-6 would be subject to copyright protection,¹¹ the Commission will grant a rehearing with respect to attachment TS-6 to take additional evidence on any applicable copyright protection to prevent any potential federal copyright violation, which may preempt state law on these issues. To facilitate the Commission's review of whether attachment TS-6 is protected by any federal copyright laws, within ten days of the entry of this Order, Duke Kentucky shall identify those portions of attachment TS-6 that it contends are subject to copyright protection, state every basis for its assertion of copyright protection, and provide evidence supported by an affidavit demonstrating its claim of copyright protection, including evidence indicating circumstances under which attachment TS-6 was prepared and obtained and the purpose for which it was prepared and obtained; and any contract, license, or other agreement indicating how Duke Kentucky may permissibly use attachment TS-6 or the information therein.

Duke Kentucky lastly requested a rehearing on the Order requesting confidential treatment for confidential attachments to Duke Kentucky's responses to the AG's First Request, Items 74(a) and 74(b). Duke Kentucky argues that those attachments are duplicates of, or derived from, attachments filed in Case No. 2016-00152 that are subject

¹⁰ See, e.g., *Hollander v. Steinberg*, 419 Fed. Appx. 44, 47 (2d Cir. 2011) ("[T]he district court ... correctly determined that [the defendant's] use of [the plaintiff's] essays [in judicial proceedings] was a fair use."); *Assessment Technologies WI, LLC v. Wiredata, Inc.*, 350 F.3d 640, 643 (7th Cir. 2003) (noting that data and data stored in an obvious or intuitive manner is not copyrightable).

¹¹ 807 KAR 5:001, Section 13 (2)(c) (indicating that the party that seeks confidential treatment has the burden of proving that the documents are confidential).

to a motion for confidential treatment on which no order was entered. Duke Kentucky argued that because no order was issued on the motion that the information is deemed confidential as a matter of law per 807 KAR 5:001, Section 13(4). Duke Kentucky also argued that although the project is in progress it is not complete and suppliers “could potentially manipulate the market and undermine Duke Kentucky’s ability to manage its costs.”

The Commission finds that 807 KAR 5:001, Section 13(4), is intended to allow confidential treatment for materials filed in a case while the motion for confidential treatment in that case is pending. The fact that a motion is pending as to the same or similar materials in one case would not prohibit the Commission from ruling on those materials in another case and determining that those materials as filed in the other case should not be exempt from public disclosure. In fact, as noted in nearly every Order granting confidential treatment, the Commission may revisit an Order granting confidentiality where the circumstances justifying confidential treatment have changed. Thus, the Commission’s treatment of the attachments to Duke Kentucky’s response to the AG’s First Request, Items 74(a) and 74(b) in a previous matter does not prevent it from denying Duke Kentucky’s motion for confidential treatment as to those materials in this matter.

Moreover, Duke Kentucky failed to present evidence justifying confidential treatment for the attachments to its response to the AG’s First Request, Items 74(a) and 74(b), in its motion for confidential treatment. Duke Kentucky also failed to identify evidence in its motion for rehearing justifying confidential treatment for the attachments. Even its main substantive argument in the motion for rehearing is hypothetical in noting

the “potential” that suppliers would use the information to manipulate the market. Moreover, the information contained in the confidential attachments is broad and large portions of it do not contain information regarding expected costs. Thus, Duke Kentucky’s motion for rehearing, with respect to attachments to its response to the AG’s First Request, Items 74(a) and 74(b), is denied.

IT IS THEREFORE ORDERED that:

1. Duke Kentucky’s motion for rehearing is denied as to Schedule G-3 and supplements thereto; the attachments in Duke Kentucky’s response to Staff’s First Request, Items 37(c) and 66; and the attachments to Duke Kentucky’s response to the AG’s First Request, Item 74(a) and 74(b).

2. Duke Kentucky’s motion for rehearing is granted as to attachment TS-6 and the attachment to Duke Kentucky’s response to Staff’s Second Request, Item 90(b) as discussed herein.

3. Within ten days from the date this Order is entered, Duke Kentucky shall:

- a. File an accurate copy of the attachment to Duke Kentucky’s response to Staff’s Second Request, Item 90(b), which shall be treated as confidential until further Order of the Commission;
- b. Identify those portions of attachment TS-6 that Duke Kentucky contends are subject to copyright protection;
- c. State every basis for the assertion of copyright protection as to attachment TS-6;
- d. Provide evidence supported by an affidavit demonstrating the claim of copyright protection, including but not limited to:

(1) Evidence indicating circumstances under which attachment TS-6 was prepared and obtained and the purpose for which it was prepared and obtained; and

(2) Any contract, license, or other agreement indicating how Duke Kentucky may permissibly use attachment TS-6 or the information therein.

4. Duke Kentucky may file a brief further explaining any argument previously made that the attachment to Duke Kentucky's response to Staff's Second Request, Item 90(b) and attachment TS-6 should be exempt from public disclosure when it files the materials identified in ordering paragraph 3.

5. Any other party may file a response to any filing made by Duke Kentucky pursuant to ordering paragraphs 3 and 4 within seven days of Duke Kentucky's filing.


6. The May 3, 2018, and May 4, 2018 Orders on Duke Kentucky's motions for confidential treatment at issue herein shall be amended to the extent that they pertain to attachment TS-6 and the attachment of Duke Kentucky's response to Staff's Second Request, Item 90(b), both of which shall continue to be treated as confidential until further Order by this Commission.

7. All other provisions of the May 3, 2018, and May 4, 2018 Orders on Duke Kentucky's motions for confidential treatment shall remain in full force and effect, except that any period established in those Orders for the filing into the public record of materials for which rehearing was denied herein shall run from the date of this Order.

By the Commission

ENTERED
JUN 12 2018
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:


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Case No. 2017-00321

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