

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF KENERGY)
CORP. FOR A CERTIFICATE OF PUBLIC)
CONVENIENCE AND NECESSITY FOR THE)
CONSTRUCTION OF A HIGH-SPEED FIBER)
NETWORK AND FOR APPROVAL OF THE)
LEASING OF THE NETWORK'S EXCESS)
CAPACITY TO AN AFFILIATE TO BE ENGAGED)
IN THE PROVISION OF BROADBAND SERVICE)
TO UNSERVED AND UNDERSERVED)
HOUSEHOLDS AND BUSINESSES OF THE)
COMMONWEALTH)

CASE NO.
2021-00365

ORDER

On March 4, 2022, Kentucky Broadband Cable Association (KBCA) filed a petition, pursuant to 807 KAR 5:001, Section 13, and KRS 61.878, requesting that the Commission grant confidential protection for Exhibits 1, 2, and 3 to its responses to Commission Staff's First Request for Information (Staff's First Request). On March 20, 2022, KBCA filed an additional petition requesting confidential protection for a supplement to Exhibit 3 of its response to Staff's First Request.

LEGAL STANDARD

The Commission is a public agency subject to Kentucky Open Records Act,¹ which requires that all public records "be open for inspection by any person, except as otherwise provided by KRS 61.870 to KRS 61.884."² The exceptions to the free and open

¹ KRS 61.870 through 61.884.

² KRS 61.872(1).

examination of public records should be strictly construed.³ The party requesting that the materials be granted confidential protection has the burden of establishing that one of the exemptions is applicable.⁴ KRS 61.878(1)(a) exempts information from disclosure that is personal and if disclosed would be an unwarranted invasion of privacy.⁵ KRS 61.878(1)(c)(1) provides an exception to the requirement for public disclosure of records that are “generally recognized as confidential and proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records.

KBCA'S ARUGMENT

KBCA stated Exhibit 1 filed in response to Staff's First Request contains information from its member Charter Communication's (Charter) September 2021 Federal Communications Commission (FCC) Form 477 that shows maximum broadband speeds and the technology used. Charter does not disclose this information publicly until the FCC publishes the data. KBCA argued that if disclosed, competitors could use the information for a competitive advantage over Charter. The request was for this information to be held confidential until published by the FCC.

KBCA stated Exhibit 2 filed in response to Staff's First Request contains screenshots of Charter's availability at various residences within its service territory that overlaps with Kenergy Corp.'s (Kenergy) service territory. KBCA argued this information

³ KRS 61.878.

⁴ 807 KAR 5:001, Section 13(2)(c).

⁵ KRS 61.878(1)(a).

would be an unwarranted invasion of personal privacy if disclosed. The request was for this information to be held confidential indefinitely.

KBCA stated Exhibit 3 and the supplement to Exhibit 3 filed in response to Staff's First Request contains information from Ookla regarding speed testing in Charter's service territory. KBCA argued the information should be confidential because it is only available with a paid subscription to Ookla. KBCA requested this information be held confidential indefinitely.

DISCUSSION AND FINDINGS

Having considered the petitions and the material at issue, the Commission finds that KBCA's petitions are granted in part and denied in part. The Commission finds that the designated material contained in KBCA's Exhibit 1 and 3 are records that meet the criteria for confidential treatment and are exempted from public disclosure pursuant to KRS 61.878(1)(c)(1) and 807 KAR 5:001, Section 13.

The Commission further finds that the request for confidential treatment is denied for Exhibit 2. The Commission has previously held that residential addresses are confidential, however, the documents that KBCA provided as Exhibit 2 do not contain addresses. The document contains a list of service counties and the price for internet in the counties without any addresses. Therefore, Exhibit 2 does not meet the criteria for confidential treatment and is not exempted from public disclosure pursuant to KRS 61.878(1)(a) and 807 KAR 5:001, Section 13.

IT IS THEREFORE ORDERED that:

1. KBCA's petitions for confidential treatment for exhibits provided in response to Staff's First Request are granted in part and denied in part.

2. KBCA's petition for confidential treatment for Exhibit 1 is granted and shall not be placed in the public record or made available for public inspection until published by the FCC or until further Order of this Commission.

3. KBCA's petitions for confidential treatment for Exhibit 3 are granted and shall not be placed in the public record or made available for public inspection for an indefinite period or until further Order of this Commission.

4. KBCA's petition for confidential treatment for Exhibit 2 is denied.

5. Use of the designated material granted confidential treatment by this Order in any Commission proceeding shall comply with 807 KAR 5:001, Section 13(9).

6. KBCA shall inform the Commission if the designated material granted confidential treatment becomes publicly available or no longer qualifies for confidential treatment.

7. If a nonparty to this proceeding requests to inspect the material granted confidential treatment by this Order and the period during which the material has been granted confidential treatment has not expired, KBCA shall have 30 days from receipt of written notice of the request to demonstrate that the material still falls within the exclusions from disclosure requirements established in KRS 61.878. If KBCA is unable to make such demonstration, the requested material shall be made available for inspection. Otherwise, the Commission shall deny the request for inspection.

8. The Commission shall not make the requested material for which confidential treatment was granted available for inspection for 30 days from the date of service of an Order finding that the material no longer qualifies for confidential treatment in order to allow KBCA to seek a remedy afforded by law.

9. The designated material denied confidential treatment by this Order is not exempt from public disclosure and shall be placed in the public record and made available for public inspection.

10. If KBCA objects to the Commission's determination that the requested material not be granted confidential treatment, it must seek either rehearing pursuant to KRS 278.400 or judicial review of this Order pursuant to KRS 278.410. Failure to exercise either of these statutory rights will be deemed as agreement with the Commission's determination of which materials shall be granted confidential treatment.

11. Within 30 days of the date of service of this Order, KBCA shall file a revised version of the designated material for which confidential treatment was denied, reflecting as unredacted the information that has been denied confidential treatment.

12. The designated material for which KBCA's request for confidential treatment has been denied shall neither be placed in the public record nor made available for inspection for 30 days from the date of service of this Order to allow KBCA to seek a remedy afforded by law.

PUBLIC SERVICE COMMISSION



Chairman

Vice Chairman

Commissioner



ATTEST:


Executive Director

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