

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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|-------------------------------------|---|------------|
| APPLICATION OF KENTUCKY POWER |) | |
| COMPANY FOR APPROVAL OF ITS 2011 |) | |
| ENVIRONMENTAL COMPLIANCE PLAN, FOR |) | |
| APPROVAL OF ITS AMENDED |) | |
| ENVIRONMENTAL COST RECOVERY |) | CASE NO. |
| SURCHARGE TARIFF, AND FOR THE GRANT |) | 2011-00401 |
| OF A CERTIFICATE OF PUBLIC |) | |
| CONVENIENCE AND NECESSITY FOR THE |) | |
| CONSTRUCTION AND ACQUISITION OF |) | |
| RELATED FACILITIES |) | |

O R D E R

On February 7, 2012, Riverside Generating Company, L.L.C. (“Riverside”) filed a motion for rehearing of the Commission’s January 26, 2012¹ Order denying Riverside’s request for full intervenor status in this case.

In support of its motion, Riverside states that, since the issuance of the January 26, 2012 Order, Kentucky Power Company (“Kentucky Power”) has filed in the record of this case information related to Riverside and its business relationship pursuant to a petition for confidentiality. Riverside asserts that it is a customer of, and has a business relationship with, Kentucky Power and, if not granted intervention, it will not be able to know the nature, extent, or type of information about its business operations that is being disclosed. Without the ability to know the nature and scope of potentially

¹ In the first paragraph of its Motion, Riverside requests that the Commission’s Order of January 26, 2010 be reconsidered. The Commission will treat this as a clerical error, as a subsequent reference to the Commission’s Order denying Riverside’s motion to intervene refers to the correct date of the Order, January 26, 2012.

sensitive financial or business information being disclosed, Riverside claims it cannot protect its business interests and will be forced to accept Kentucky Power's judgment about the confidential nature of the information.

Riverside cites two prior Commission decisions which argue support of its renewed request for intervention. In one case involving Western Kentucky Gas Company ("WKG"),² the Commission denied a petition for confidential protection of certain information that was filed by WKG but prepared by a third party, Ernst & Young. WKG had a prior agreement to not publicly disclose the information prepared by Ernst & Young. In denying the WKG request for confidentiality, the Commission found that:

While the information sought to be protected in this case may consist of a unique method of study, disclosure of this method of study would not be detrimental to Western Kentucky. Only Ernst & Young could suffer injury if its competitors were able to acquire the information. As Ernst & Young is the real party in interest, as contemplated by CR 17.01, et. seq., the Commission finds the petition of Western Kentucky should be denied.³

In the other case, Green River Electric Corporation ("Green River") filed a petition for confidential protection of the Shareholders' Agreement of a third party, Kentucky Telecommunications, Inc. ("KTI"), on the grounds that public disclosure of the information was likely to cause KTI competitive injury.⁴ In denying Green River's request for confidentiality, the Commission held that:

² Case No. 90-013, In the Matter of: Rate Adjustment of Western Kentucky Gas Company, September 17, 1990 Order.

³ Id., p. 1.

⁴ Administrative Case No. 326, In the Matter of: An Investigation into the Diversification of Rural Electric Cooperative Corporations into the Satellite-Delivered Television Programming Services, Order entered September 17, 1990.

Because the information may be of a sensitive nature, KTI should be permitted to intervene in this proceeding for the purpose of protecting the information from disclosure.⁵

On February 9, 2012, Kentucky Power filed a response in opposition to Riverside's motion for rehearing. Kentucky Power argues that the Commission properly denied Riverside's motion to intervene and that, in now seeking rehearing, Riverside does not contest the basis for the Commission's denial of intervention or otherwise challenge the findings supporting the denial. Rather, Kentucky Power asserts that Riverside is using the rehearing motion to introduce additional arguments not initially raised in its motion for intervention. Kentucky Power argues that KRS 278.400 authorizes rehearing "with respect to any of the matters determined" by the Commission, and that, under the plain language of this statute, Riverside cannot now raise for the first time on rehearing a new claim relating to an interest in the confidentiality of its business information. Kentucky Power also argues that Riverside has failed to establish a genuine risk of confidential information being disclosed and is unable to do so because the information at issue was filed under seal pursuant to a confidentiality petition and has been shared only with the Commission and those parties that have executed a non-disclosure agreement. In addition, Kentucky Power states that it did notify Riverside of its intent to file the confidential information under seal prior to doing so.

Kentucky Power next argues that the prior Commission decisions cited by Riverside are not controlling since they did not involve petitions for confidentiality of information that was asserted to be confidential to the petitioning party. Finally,

⁵ *Id.*, p. 2.

Kentucky Power suggests that, if Riverside is granted intervention, the intervention should be limited solely to protecting its interest in the confidentiality of its business information.

Based on the motion for rehearing and the response, and being otherwise sufficiently advised, the Commission finds that any interest that Riverside may have in protecting the confidentiality of its business information does not rise to a level that will support its intervention in this case. To the extent that Riverside claims that it “is without any control over the disclosure of confidential business information and without remedy to protect itself from inappropriate disclosure,”⁶ the protection from such disclosure and the remedy for breach thereof lies in the enforcement of a pre-existing non-disclosure agreement. If Riverside has disclosed confidential business information to Kentucky Power subject to the terms of such a non-disclosure agreement, the Commission has no jurisdiction to enforce the terms of that agreement.

The Commission’s regulation on confidentiality provides, in pertinent part, that “[a]ny person requesting confidential treatment of any material shall file a petition”⁷ While Riverside, as a non-party to this case, could file a petition here for confidential protection of its business information, such a petition has already been filed by Kentucky Power on its own behalf. Even if Riverside was a party to this case, it would not know what information Kentucky Power intended to disclose until after the disclosure was made. Kentucky Power has stated that it did provide advance notice to

⁶ Riverside Motion at paragraph 6.

⁷ 807 KAR 5:001, Section 7(2)(a).

Riverside prior to filing its confidential information here, and we expect Kentucky Power to continue providing that courtesy to Riverside.

The two cases cited by Riverside are factually distinguishable from the present controversy. Here, Kentucky Power has not merely requested confidentiality for information asserted to be confidential to a third party, but has actually asserted that the information is confidential to itself and that public disclosure will cause competitive injury to Kentucky Power. The Commission granted Kentucky Power's request for confidentiality by letter dated February 24, 2012.

In conclusion, Riverside has not persuaded the Commission that it has a special interest in the proceeding that is not otherwise adequately represented or that it is likely to present issues or develop facts that would assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings.

Riverside will have ample opportunity to participate in this proceeding even though it is not granted intervenor status. Riverside can review all documents filed in this case and monitor the proceedings via the Commission's website at the following web address:

<http://psc.ky.gov/Home/Library?type=Cases&folder=2011cases/2011-00401>

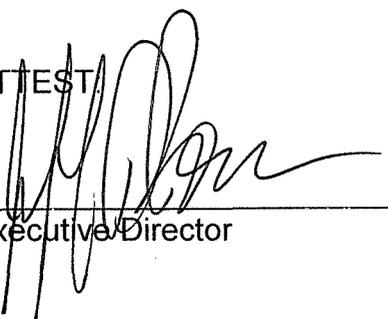
Riverside may also file comments as frequently as it chooses, and those comments will be entered into the record of this case. Finally, it may also attend and present public comment at the public hearing to be held at our offices in Frankfort, Kentucky. The date for that hearing will be scheduled in the near future.

IT IS THEREFORE ORDERED that Riverside's motion for rehearing is denied.

By the Commission

ENTERED *ft*
FEB 27 2012
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST



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