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17-ORD-002

January 5, 2017

In re: Andy McDonald/Frankfort Plant Board

*Summary:* Frankfort Plant Board established that contract price, relative risks assumed, and unique negotiated terms were confidentially disclosed information properly redacted from power purchase agreement under KRS 61.878(1)(c)1.

*Open Records Decision*

The question presented in this appeal is whether the Frankfort Plant Board ("FPB") violated the Open Records Act in partially denying Andy McDonald's August 19, 2016, request for the Power Purchase Agreement (PPA) between Big Rivers Electric Corporation ("Big Rivers") and the Kentucky Municipal Energy Agency ("KyMEA"). For the reasons stated below, we find no violation of the Act in the FPB's redactions pursuant to KRS 61.878(1)(c)1.

The Kentucky Municipal Energy Agency is a public agency formed by an interlocal agreement among eleven municipal electric systems, including the Frankfort Plant Board, in order to collaborate in efforts to serve their electric power and energy requirements. KyMEA enters into Power Purchase Agreements with private suppliers such as Big Rivers; the municipal electric systems then purchase this power from KyMEA and sell it to local consumers. The suppliers are chosen through competitive negotiation under the Model Procurement Code. Members of KyMEA are bound by its nondisclosure agreements made with its power suppliers, including Big Rivers. Under KyMEA's confidentiality policy, members receiving requests for confidential information must notify the provider to allow the provider to protect the

confidential information. In this case, Big Rivers was notified by KyMEA and made certain redactions to the PPA pursuant to KRS 61.878(1)(c)1.

According to James M. Miller, counsel for Big Rivers, the confidential information includes "the method for determining the contract price for power," the "obligations Big Rivers or KyMEA has undertaken; in other words, the relative risks assumed by each party," and "some very unique terms ... negotiated by the parties," disclosure of which "can harm Big Rivers' ability to compete." Mr. McDonald initiated an appeal on October 17, 2016, objecting to the redactions to the PPA. He argues that "ratepayers have a right and a need to know the terms of this contract" because the PPA "will be in effect until 2029" and "the public deserves to know the full implications of this contract and understand if there may be better options available."

KRS 61.878(1)(c)1., invoked by the FPB on behalf of Big Rivers pursuant to the nondisclosure agreements, excludes from the obligation of public disclosure:

records confidentially disclosed to an agency or required by an agency to be disclosed to it, 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.

Bearing in mind that the public agency bears the burden of proof in sustaining the denial under KRS 61.880(2)(c), we must consider the information in the record as to whether the material in question has been confidentially disclosed to FPB, is generally recognized as confidential or proprietary, and would permit competitors an unfair commercial advantage if disclosed.

Counsel for Big Rivers has submitted an extensive response to the appeal, including the following pertinent information, quoted here at some length:

Big Rivers can generate energy in excess of the requirements of its member cooperatives. Big Rivers attempts to sell this energy in the wholesale electric power market, where it competes with other generators of electricity. Big Rivers negotiated with KyMEA

to sell wholesale electric power from Big Rivers to serve the KyMEA municipalities....

....

... The intent of the parties to keep the Agreement confidential is evidenced by the fact that the unredacted version of the Agreement is stamped "Confidential" on each page. Also, Big Rivers has, pursuant to KRS 273.160(3) and 807 KAR 5:001 Section 13, filed a petition with the Public Service Commission ("PSC") seeking confidential treatment of the same portions of the Agreement that were redacted from the copy provided to Mr. McDonald.<sup>1</sup> The petition is pending with the PSC. In addition, before engaging in negotiations, Big Rivers and KyMEA entered into a Confidentiality and Non-Disclosure Agreement dated December 7, 2015, ... to protect confidential information disclosed during the negotiations. Finally, in Section 18.8 of the Agreement, the Parties agree to enter into a Mutual Confidentiality Agreement..., the purpose of which is to protect confidential information disclosed in performance of the Agreement. Thus, it is clear that Big Rivers has always intended to protect the confidential and proprietary information related to its transactions with KyMEA, including the *provisions* of the Agreement that Big Rivers wanted to keep confidential.

....

The Confidential Information consists of the confidential terms of the Agreement, and KRS 278.160(3) specifically recognizes that terms of contracts like the Agreement are not required to be publicly disclosed if such terms are entitled to protection under KRS 61.878(1)(c)1. The Confidential Information is not publicly available, is not disseminated within Big Rivers except to those employees and professionals with a legitimate business need to know and act upon the information, and is not disseminated to others without a legitimate need to know and act upon the

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<sup>1</sup> "KRS 273.160(3) provides that Big Rivers is not required to publicly disclose its rates and conditions of service not filed in its general schedule if those provisions 'would otherwise be entitled to be excluded from the application of KRS 61.878(1)(c)1.' Thus, the standard for keeping these provisions confidential in the PSC proceeding is the same [as] the standard applicable to this appeal; namely, KRS 61.878(1)(c)1." [Footnote in original text.]

information. As such, the Confidential Information is generally recognized as confidential and proprietary.

Big Rivers competes in the wholesale power market to sell energy excess to its members' needs. Big rivers' ability to successfully compete in the wholesale power market is dependent upon a combination of its ability to get the maximum price for the power sold, to keep its cost of producing that power as low as possible, and to negotiate the best terms available for wholesale power contracts. Fundamentally, if there is an increase in Big Rivers' cost of producing power or its business risk, its ability to sell that power in competition with other utilities is adversely affected.

Big Rivers also competes for reasonably-priced credit in the credit markets, and its ability to compete in that respect is directly impacted by its financial results and business risks assumed. Any event that adversely affects Big Rivers' credit margins will adversely affect its financial results and potentially impact the price it pays for credit....

The Confidential Information includes the method for determining the contract price for power [and] the relative risks assumed by each party. These provisions are independently negotiated with each customer. If future customers are aware of the risks assumed by Big Rivers, or by KyMEA, this could impact Big Rivers' negotiations with future customers, who could demand similar provisions, and it could unfairly benefit Big Rivers' competitors, who may use this information to make more competitive proposals than Big Rivers.

Additionally, the Agreement was the result of extensive negotiations by sophisticated businesses that are parties to a complex transaction. Therefore, some very unique terms were negotiated by the parties. The Agreement also contains a unique combination of these terms. For both of these reasons, public

disclosure of these terms and how they are used in the Agreement can harm Big Rivers' ability to compete.

.... [P]ublic disclosure of the confidential terms of the Agreement would allow potential purchases of power from Big Rivers in the future to use the terms as a benchmark for negotiations, leading to less favorable prices and increased risks for power sales for Big Rivers. [T]his places Big Rivers at an unfair competitive disadvantage in the wholesale power and credit markets.

.... [O]ther suppliers would be able to use this information to potentially underbid Big Rivers in wholesale transactions.

Finally, ... potential suppliers of power to Big Rivers ... will be able to manipulate the price of power bid to Big Rivers in order to maximize their revenues, thereby driving up Big Rivers' costs and impairing Big Rivers' ability to compete in the wholesale power and credit markets.

.... Big Rivers is involved in the very competitive *wholesale power* and credit markets. The Confidential Information can be used by competitors of Big Rivers and future purchasers to undermine Big Rivers' negotiation strategy, thereby harming Big Rivers' ability to secure future sales, or secure such sales on competitive and favorable terms.

Big Rivers also notes, by way of analogy, that the PSC in 2003 granted confidential protection for bids submitted to Union Light Heat & Power based on arguments that "contractors on future work could use the bids as a benchmark, which would likely lead to the submission of higher bids," and "that the higher bids would lessen ULH&P's ability to compete with other gas suppliers."

KyMEA has also filed a response to this appeal, through its attorney Charles S. Musson. In addition to much of the information provided by Big Rivers, KyMEA observes:

The wholesale electric power market, composed of a myriad group of public and private entities, is sophisticated and subject to numerous variables when pricing and selling energy and firm capacity. Power purchase agreements are not solely based on term length and pricing, but combine a number of factors to determine not only availability but the overall cost of power to be supplied under the agreement. Besides the term and power prices, typical power purchase agreements, similar to the PPAs negotiated by KyMEA, contain additional provisions relating to:

1. Adjustment to amount of capacity and energy provided under the agreement;
2. Identification of the sources from which energy and capacity shall be provided;
3. Dispatching and scheduling procedures and flexibility for the power purchaser;
4. Effect of statutory and regulatory changes upon the agreement (*e.g.* changes such as the Clean Power Plan);
5. Fuel adjustment clauses;
6. Remedies upon the parties for failure to perform;
7. Payment procedures and timing of payments;
8. Credit support of the power provider;
9. Indemnification provisions; and
10. Delivery points and financial considerations resulting from transmission congestion charges.

In negotiating power purchase agreements, the concessions given or the terms agreed upon for one or more items in the agreement have a direct effect on the pricing or terms of the power supply arrangement. The complexity and uniqueness of a power purchase agreement requires that all of its terms be examined as a "whole" and if disclosure is required, such disclosure to competitors could adversely affect the ability of the power provider to negotiate competitive agreements in the future. In addition, the purchaser under a power purchase agreement, such as KyMEA, may not wish certain provisions disclosed as such disclosure may adversely affect the ability of KyMEA as a purchaser of energy to

negotiate a more favorable agreement with a different provider simultaneously or in the future.

A response by the Illinois Power Marketing Company (IPMC) has also been received, which was submitted because it was arguably unclear from the record whether IPMC's PPA with KyMEA was at issue in this appeal. We do not interpret Mr. McDonald's appeal as including issues relating to the PPA with IPMC, and accordingly do not decide any matters relating to that agreement.

The respondents in this appeal have extensively described the competitive nature of the power and credit markets, along with their prevalence of confidential terms and proprietary information. This office has previously recognized that the wholesale electric power market is highly competitive. 10-ORD-191. The efforts made by the parties to the agreements to ensure the confidentiality of shared information have likewise been thoroughly documented in the record.

"[I]f it is established that a document is confidential or proprietary, and that disclosure to competitors would give them substantially more than a trivial unfair advantage, the document should be protected from disclosure." *Southeastern United Medigroup, Inc. v. Hughes*, 952 S.W.2d 195, 199 (Ky. 1997) (abrogated in part on other grounds by *Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004)). We find that FPB and the other respondents have met their burden of showing that the withheld portions of the PPA were confidentially disclosed to FPB, that their contents are generally recognized as confidential or proprietary, and that their disclosure would permit an unfair advantage to competitors in the highly competitive credit and wholesale electric power markets. Accordingly, FPB properly relied on KRS 61.878(1)(c)1.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882. Pursuant to KRS 61.880(3), the Attorney General must be notified of any action in circuit court, but should not be named as a party in that action or in any subsequent proceeding.

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A handwritten signature in black ink, appearing to read "James M. Herrick", written in a cursive style.

James M. Herrick  
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