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October 28, 2011

HAND DELIVERED

Mr. Jeff Derouen
Executive Director
Public Service Commission
211 Sower Boulevard
Frankfort, Kentucky 40602

Re: PSC Case No. 2008-00408

Dear Mr. Derouen:

Please find enclosed for filing with the Commission in the above-referenced case an original and ten copies of East Kentucky Power Cooperative, Inc.'s Application for Rehearing of Commission's Order of October 6, 2011.

Very truly yours,

Mark David Goss by D.

Mark David Goss
Counsel

Enclosures

Cc: Parties of Record

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

CONSIDERATION OF THE NEW FEDERAL STANDARDS OF THE ENERGY INDEPENDENCE AND SECURITY ACT OF 2007	)))	CASE NO. 2008-00408

EAST KENTUCKY POWER COOPERATIVE, INC.'S APPLICATION FOR REHEARING OF COMMISSION'S ORDER OF OCTOBER 6, 2011

Comes now East Kentucky Power Cooperative, Inc. ("EKPC") pursuant to KRS 278.400, and 807 KAR 5:001 Section 4, and makes application to the Kentucky Public Service Commission ("Commission") for rehearing and clarification of its Order of October 6, 2011 entered in this proceeding. Specifically, EKPC seeks clarification or modification of five items described below.

Applicability of PURPA and EISA 2007 to EKPC

In its October 6, 2011 Order the Commission notes that not all of Kentucky's jurisdictional electric utilities are subject to the Public Utility Regulatory Policies Act of 1978 ("PURPA") or to the new PURPA standards set forth in the Energy Independence and Security Act of 2007 ("EISA 2007"),[1] and that EKPC and several of its member distribution cooperatives are not subject to the standards as set forth in EISA 2007.[2] The Commission lists the electric utilities that are not subject to PURPA which includes EKPC and eight of its member distribution cooperatives.[3] On page 4 of the October 6, 2011 Order the Commission acknowledges that while some of the electric utilities are not subject to PURPA, the

[1] Order of Commission, October 6, 2011 at 2.
[2] *Id.*
[3] *Id.* at 3.

Commission's Order initiating this administrative case made all jurisdictional electric utilities parties to the proceeding.[4]

On page 10 of the October 6, 2011 Order the Commission states:

> In this administrative proceeding, the Commission addresses each new PURPA standard and the one non-PURPA standard. The four PURPA standards relating to Integrated Resource Planning, Rate Design Modifications to Promote Energy Efficiency Investments, Consideration of Smart Grid Investments, and Smart Grid Information, as well as the non-PURPA waste energy standard, apply to all the jurisdictional electric utilities that were made parties to this proceeding. (emphasis added)

EKPC believes that the portion of this statement which makes the four PURPA standards and the one non-PURPA standard applicable to all jurisdictional electric utilities contradicts the extensive discussion contained on pages 2 and 3 of the October 6, 2011 Order. On the one hand the Commission's Order clearly and correctly states that EKPC is not subject to PURPA and not subject to the standards set forth in EISA 2007, and on the other hand states that the four PURPA standards under consideration in this proceeding apply to EKPC.

EKPC requests rehearing and asks that the Commission review the referenced statement from page 10 of the October 6, 2011 Order and reconcile it with the Commission's statements contained on pages 2 and 3.

Incorporation of Additional Evidence into Record of New Administrative Case

As noted on page 114 of the October 6, 2011 Order the utilities that are parties to the proceeding agreed to discuss Smart Grid and Smart Meter technology issues collaboratively. As part of this collaborative effort, the utilities of record ("Joint Parties") submitted a report on March 25, 2011 titled "Consideration of the New Federal Standards of the Energy Independence and Security Act." Joint comments on the March 25, 2011 report were subsequently submitted by the Attorney General ("AG") and the Community Action Council for Lexington-Fayette,

[4] *Id.* at 4.

Bourbon, Harrison and Nicholas Counties, Inc. ("CAC"). The Commission stated on page 114 that it believed it was appropriate to use the March 25, 2011 report of the Joint Parties as well as the joint comments regarding the report submitted by the AG and CAC as the basis for establishing another administrative case focusing solely on Smart Grid and Smart Meter initiatives and to manage the collaborative effort.

Ordering paragraph number 5 on page 127 of the October 6, 2011 Order states "A record of the efforts of the Smart Grid Collaborative, as detailed in the Commission Staff's informal conference ("IC") memo of November 2, 2009, Staff's IC memo of February 19, 2010, and EON's Joint Response on behalf of the parties filed on April 29, 2010, shall be incorporated into the record of the separate upcoming administrative proceeding on smart grid issues." This ordering paragraph fails to incorporate into the record of the new administrative proceeding the documents the Commission referenced on page 114 as the "basis" for establishing the proceeding.

EKPC requests rehearing and asks that the Commission review pages 114 and 127 of the October 6, 2011 Order and clarify that the March 25, 2011 report by the Joint Parties titled "Consideration of the New Federal Standards of the Energy Independence and Security Act," and the joint comments of the AG and CAC regarding this report are also incorporated into the record of the upcoming administrative proceeding on smart grid issues in order that the record in the case will be more fully developed to assist in its orderly consideration.

Adoption of Kentucky IRP Standard

In its October 6, 2011 Order the Commission found it impractical to adopt the proposed EISA 2007 Integrated Resource Plan ("IRP") Standard.[5] Instead, the Commission stated that in recognition of the increasing importance of energy efficiency and in further recognition of the authority granted by the applicable statutes and regulations, it had developed a Kentucky IRP Standard which shall be adopted by all jurisdictional utilities. The Kentucky IRP Standard is as follows:[6]

> Each electric utility shall integrate energy efficiency resources into its plans and shall adopt policies establishing cost-effective energy efficiency resources with equal priority as other resource options.
>
> In each integrated resource plan, the subject electric utility shall fully explain its consideration of cost-effective energy efficiency resources as a priority resource as required by regulation. In each certificate case, the subject electric utility shall fully explain its consideration of cost-effective energy efficiency resources as a priority resource.
>
> In each rate case, the subject electric utility shall fully explain its consideration of cost-effective energy efficiency resources and the impact of such resources on its test year.

Requirements for the three proceedings referenced in the Kentucky IRP Standard are detailed in the following administrative regulations: 807 KAR 5:058 for IRPs, 807 KAR 5:001 Section 9 for Certificates of Public Convenience and Necessity ("CPCN"), and 807 KAR 5:001 Section 10 for rate cases.

EKPC does not object to the provisions of the Kentucky IRP Standard per se. However, it is concerned with the manner in which the Kentucky IRP standard was created and questions whether it is lawful to establish requirements for all jurisdictional utilities through an Order.

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[5] *Id.* at 24.
[6] *Id.* at 24.

EKPC believes a previous court decision requires that the establishment of such requirements must be done through the administrative regulation process.

In its April 27, 1990 Order in Administrative Case No. 331[7] the Commission approved a set of guidelines on an interim basis for use by any utility that submitted a timely motion to utilize a forecasted test period. The Commission's April 27, 1990 Order was appealed by the Kentucky Attorney General to the Franklin Circuit Court on May 18, 1990.[8] On July 10, 1991 the Franklin Circuit Court entered an Order which determined that the April 27, 1990 Order of the Commission ". . . falls neatly within the statutory definition of a regulation, as it implements the new policy of the PSC of allowing the future test period method and describes the procedures that applicants will need to use to obtain the PSC's approval."[9] The Franklin Circuit Court further determined that the April 27, 1990 Order was ". . . clearly a 'regulation' as defined in KRS 13A.010(2), and as such, the PSC was required to observe proper procedures in creating the regulation."[10] The Franklin Circuit Court held that the Commission's action in promulgating the April 27, 1990 Order in Administrative Case No. 331 was contrary to KRS 13A.010, KRS 13A.120(6), and KRS 278.040(3) and was void.[11] There was no further appeal of the Franklin Circuit Court's decision.

The Kentucky IRP Standard as presented on page 24 of the October 6, 2011 Order appears to be a similar circumstance. The Commission has required adoption of the Kentucky IRP Standard by "all jurisdictional utilities." The Kentucky IRP Standard is a statement of policy and delineates how that policy is to be implemented. Further, the Kentucky IRP Standard

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[7] Administrative Case No. 331, An Investigation of Appropriate Guidelines for Filing Forecasted Test Periods. This proceeding preceded the amendment of KRS 278.190 and the creation of KRS 278.192 in 1992 which established the option of a forecasted test period for rate cases.

[8] *Commonwealth of Kentucky, ex rel. Frederic J. Cowan, Attorney General, et al. v. Public Service Commission*, Civil Action No. 90-CI-00798, Division No. 1, Franklin Circuit Court.

[9] July 10, 1991 Order of Franklin Circuit Court at 4. A copy of this Order is attached hereto as Exhibit 1.

[10] *Id.*

[11] *Id.* at 5.

prescribes additional requirements to be performed as part of three proceedings already covered by existing administrative regulations.

EKPC respectfully submits that in light of this Franklin Circuit Court decision the Commission cannot require the adoption of the Kentucky IRP Standard by the jurisdictional utilities through a Commission Order. The adoption of the Kentucky IRP Standard requirements should be accomplished by establishing new administrative regulations or amending the existing administrative regulations governing IRPs, CPCNs, and rate cases. EKPC therefore requests rehearing and asks that the Commission examine its decision to require the adoption of a Kentucky IRP Standard by Order in light of the holding in the July 10, 1991 Franklin Circuit Court decision and modify its October 6, 2011 Order in this proceeding accordingly.

In the event the Commission denies rehearing on this issue, EKPC believes a clarification of the October 6, 2011 Order is still required concerning the Kentucky IRP Standard. Ordering paragraph number 7 on page 127 of the October 6, 2011 Order states "The Kentucky IRP Standard set forth herein shall be adopted by each jurisdictional electric generating utility." (emphasis added) Likewise, ordering paragraph number 8 on page 128 of the October 6, 2011 Order states "Within 30 days of the date of this Order, each jurisdictional electric generating utility shall submit a statement to the Commission indicating its adoption of the Kentucky IRP Standard." (emphasis added)

Ordering paragraph numbers 7 and 8 appear to recognize that the Commission's IRP regulation, 807 KAR 5:058 Section 1 is not applicable to distribution cooperatives organized under KRS Chapter 279. However, at page 24 of the October 6, 2011 Order the Commission states that the Kentucky IRP Standard shall be adopted by all jurisdictional utilities.

EKPC requests rehearing and asks that the Commission review ordering paragraph numbers 7 and 8 and page 24 of the October 6, 2011 Order and clarify that the adoption of the Kentucky IRP Standard is required only of the jurisdictional electric generating utilities.

Adoption of Smart Grid Investment Standard

In its October 6, 2011 Order the Commission states:[12]

> Although adoption of the standard does not require investment in Smart Grid technology or infrastructure, the Commission believes that adoption of the EISA 2007 Smart Grid Investment Standard is appropriate in that it will require the electric utilities to investigate and consider Smart Grid technology and infrastructure as part of their investment decisions. The Commission, therefore, has determined that the jurisdictional electric utilities shall adopt the EISA 2007 Smart Grid Investment Standard.

EKPC has two concerns about the adoption of the Smart Grid Investment Standard. First, as previously discussed in this application for rehearing, the Commission noted on page 2 of the October 6, 2011 Order that EKPC and several of its member distribution cooperatives were not subject to the standards in the EISA 2007 such as the Smart Grid Investment Standard. Therefore, it is not clear to EKPC how the Commission can require adoption of the EISA 2007 Smart Grid Investment Standard. Second, and more importantly, EKPC respectfully submits that in light of the July 10, 1991 Franklin Circuit Court decision concerning Administrative Case No. 331, the Commission cannot require the adoption of the Smart Grid Investment Standard by the jurisdictional utilities through a Commission Order. The points detailed previously in the discussion of the Kentucky IRP Standard are equally applicable to the Smart Grid Investment Standard. EKPC therefore requests rehearing and asks that the Commission examine its decision to require the adoption of the Smart Grid Investment Standard by Order in light of the provisions of the July 10, 1991 Franklin Circuit Court decision and modify its October 6, 2011 Order in this proceeding accordingly.

[12] Order of Commission, October 6, 2011 at 114.

In the event the Commission denies rehearing on this issue, EKPC believes a clarification of the October 6, 2011 Order is still required concerning the Smart Grid Investment Standard. Ordering paragraph number 10 on page 128 of the October 6, 2011 Order states "Within 30 days of the date of this Order, each jurisdictional electric generating utility shall submit a statement to the Commission indicating its adoption of the Smart Grid Investment standard as set forth in EISA 2007." (emphasis added) There appears to be a conflict between the statement on page 24 and ordering paragraph number 10 in the October 6, 2011 Order. Since the Commission on page 100 of the October 6, 2011 Order acknowledges that the basic components of a Smart Grid include both transmission and distribution equipment and technologies, it is not clear from the Order whether the Commission intends that the Smart Grid Investment Standard should apply to all jurisdictional electric utilities or only the generating utilities.

EKPC requests rehearing and asks that the Commission review its discussion of the Smart Grid Investment Standard and ordering paragraph number 10 in the October 6, 2011 Order and clarify which jurisdictional electric utilities are required to adopt the Smart Grid Investment Standard.

EKPC and Member Cooperatives' Commitment to DSM and Energy Efficiency Programs

EKPC is concerned about statements included on pages 66 and 67 of the October 6, 2011 Order relating to the DSM and energy efficiency program offerings of EKPC and its member cooperatives, as well as the criticism that EKPC and its member cooperatives have not adopted a DSM surcharge. The Commission noted:[13]

> The Commission also believes that it is appropriate to express its concern that Big Rivers and EKPC and their member-cooperatives have not adopted a DSM surcharge. Although the testimony in this proceeding and other documents provided by the cooperatives indicate their support of energy efficiency, the menu of DSM and energy efficiency programs they offer does not meet the diversity of

[13] *Id.* at 66.

> programs or the level of commitment shown by the IOUs. The Commission recognizes the negative impact that reduced sales may have, especially for the distribution cooperatives. The testimony of Fleming-Mason's President and CEO clearly explains the negative financial impact of reduced sales. The Commission also recognizes that the predominantly rural service territories of the cooperatives may not lend themselves to the deployment of DSM and energy efficiency programs as well as the service territories of the IOUs.

EKPC has reviewed the statute authorizing the DSM surcharge and would respectfully suggest that the focus of KRS 278.285 on customer classes indicates this statute is oriented to retail rather than wholesale operations. The statute also appears to have been designed from the perspective of a vertically integrated, for-profit IOU rather than a member-owned, not-for-profit cooperative. One of the factors to be considered in evaluating the reasonableness of a proposed DSM program is whether the DSM program is consistent with the utility's most recent long-range IRP. The Commission's IRP regulation specifically does not apply to the member distribution cooperatives of EKPC. While sharing the same concerns as the IOUs over the recovery of the costs of DSM programs and net revenues from lost sales, the member-owned distribution cooperative does not require incentives designed to provide financial rewards to encourage the implementation of cost-effective DSM programs. The member-owned distribution cooperatives respond to the needs of its member-consumers when implementing DSM programs.

In response to the Commission Staff's first data request, EKPC indicated its current preference to recover DSM-related costs through base rates rather than through a DSM surcharge. EKPC also stated, "While recognizing that the surcharge via KRS 278.285 is an option available for cost recovery, EKPC understood it could choose the cost recovery option it

believed most appropriate."[14] However, this point was not addressed by the Commission in its discussion on pages 66 and 67 of the October 6, 2011 Order.

EKPC has reviewed the data responses provided by the four IOUs in this proceeding concerning the offered electric DSM programs and the associated savings from the programs.[15] EKPC has compared those responses with its own[16] and believes such a comparison shows that EKPC and its member cooperatives offered as many programs as the IOUs and reported savings from those programs on par with the IOUs. The Commission provided no analyses or comparisons of the evidence submitted in this proceeding by the IOUs and EKPC and its member distribution cooperatives to support the Commission's conclusions concerning program diversity and level of commitment. There is also no explanation as to whether the program diversity and level of commitment "benchmarks" were based on one IOU or a blending of the four IOUs. Finally, EKPC is puzzled by the Commission's criticism of a perceived lack of program diversity when compared to the IOUs, while in the same paragraph it acknowledges that "the predominantly rural service territories of the cooperatives may not lend themselves to the deployment of DSM and energy efficiency programs as well as the service territories of the IOUs."[17]

EKPC requests rehearing and asks the Commission to review the statements and conclusions expressed on pages 66 and 67 of the October 6, 2011 Order and provide clarification as to how conclusions concerning the diversity of programs and the level of commitment of EKPC and its member cooperatives when compared to the IOUs were determined.

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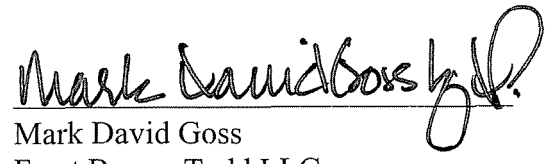
[14] Response to the Commission Staff's First Data Request, filed March 30, 2009, Item 42, page 1 of 2.
[15] Response to the Commission Staff's First Data Request, filed March 30, 2009, Item 24 for Duke Energy Kentucky; Item 66, page 2 of 2 for Kentucky Power Company; and Item 86 for Kentucky Utilities Company and Louisville Gas and Electric Company (combined response for the two utilities).
[16] Response to the Commission Staff's First Data Request, filed March 30, 2009, Item 43(a).
[17] Order of Commission, October 6, 2011 at 66-67.

WHEREFORE, EKPC respectfully applies to the Commission to grant its request for rehearing, consider the matters raised herein, and clarify the Commission's Orders where appropriate.

This 28th day of October 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served by U.S. Mail, postage prepaid, on October 28, 2011 to the following:

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Exhibit 1

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION NO. I
CIVIL ACTION NO. 90-CI-00798

COMMONWEALTH OF KENTUCKY, EX REL.
FREDERIC J. COWAN, ATTORNEY GENERAL, ET AL. PLAINTIFFS

VS. ORDER

FILED
JUL 10 1991
FRANKLIN CIRCUIT COURT
JANICE MARSHALL, CLERK

PUBLIC SERVICE COMMISSION
OF KENTUCKY, ET AL. DEFENDANTS

*** *** ***

This case arose when the Kentucky Public Service Commission (PSC) issued preliminary draft guidelines in Administrative Case No. 331 which would, if implemented, allow utilities to submit information in a rate case using a forecasted test period. The PSC invited comments on the draft guidelines. Utilities and consumer groups filed comments and participated in a public forum concerning the issues in Case No. 331. Plaintiffs in this action participated in the comment procedure and objected to the future test period method. On August 27, 1990, the PSC issued an Interim Order adopting guidelines set out in the draft guidelines for filing a rate case based on a future test period. These guidelines encompass some fifty-seven pages of material. Prior to such Order, on March 19, 1990, Columbia Gas of Kentucky filed a Notice of Intent to file for a rate increase pursuant to KRS 278.180, utilizing the draft guidelines in Case No. 331. On May 16, 1990, the Plaintiffs filed this action for Review and Complaint for

Writ of Prohibition, pursuant to KRS 278.410, asserting that the Defendant could not establish this new policy by issuing an administrative order. Plaintiffs assert that Defendants had to follow the regulatory process as established in Chapter 13A of the Kentucky Revised Statutes. Plaintiff's motion for restraining order and/or writ of prohibition was overruled by this Court on August 21, 1990. Under KRS 278.410(1), this Court may set aside the order only on the grounds that it is "unlawful or unreasonable." Com. ex rel. Stephens v. South Central Bell Telephone Co., Ky., 545 S.W.2d 927, 931 (1976). Upon submission of actions brought under KRS 278.410, this Court shall enter a judgment "either sustaining the order of the Commission or setting it aside or vacating it in whole or in part, or modifying it, or remanding it to the Commission with instructions." KRS 278.450.

The Commission derives its power to issue orders from KRS 278.040(3), which states:

> The Commission may adopt, in keeping with KRS Chapter 13A, reasonable regulations to implement the provisions of KRS Chapter 278.

The pertinent section of Chapter 13A, KRS 13A.020(6), reads:

> No administrative body shall issue standards or by any other means issue a document of any type where an administrative regulation is required or authorized by law.

KRS 13A.010(2) defines an Administrative Regulation as:

> A statement of general applicability promulgated by an administrative body that implements, interprets, or prescribes law

> or policy, or describes the organization, procedure, or practice requirements of any administrative body.

KRS 13A.010(2)(b) also contains an exception to the definition of administrative remedies for "declaratory rulings," but provides no definition of the term within the statute.

KRS 13A.100 provides that:

> Any administrative body which is empowered to promulgate administrative regulations shall, by administrative regulation prescribe . . . (1) Each statement of general applicability, policy, procedure, memorandum, or other form of action that implements; interprets; prescribes law or policy; describes the organization, procedure, or practice requirements of any administrative body. (Emphasis added)

The Defendants argue that the Order No. 331 did not have to be promulgated through the administrative regulations process established in KRS Chapter 13A because 1) it is not a statement of general applicability; and 2) it falls within the "declaratory rulings" exclusion. They characterize the order as merely setting out a "rate-making methodology." They further contend that the PSC needs "flexibility" in addressing each particular case, and the Order is a "press release" or "checklist" which will give the PSC that flexibility. Defendants cite federal cases and cases from other states for the proposition that "general statements of policy" do not need to run the gauntlet of administrative regulatory procedure.

Order No. 331, by its own terms, is applicable to "all utilities under the Commission's jurisdiction."

Appendix A to Order No. 331 of the PSC, p. 1. Additionally, as the Defendant PSC emphasized in oral argument, any utility may apply under the new filing requirements if they so choose, even though the PSC advised through Order No. 331 that such a method may not be "cost efficient or advisable for the majority of small or medium-sized utilities." App. A, p. 2. It is apparent that Order No. 331 is a "statement of general applicability." Additionally, the Order falls neatly within the statutory definition of a regulation, as it implements the new policy of the PSC of allowing the future test period method and describes the procedures that applicants will need to use to obtain the PSC's approval.

This order is clearly a "regulation" as defined in KRS 13A.010(2), and as such, the PSC was required to observe proper procedures in creating the regulation. To label order No. 331 a 'declaratory ruling' does not alter its regulatory character. Even though KRS 278.190(1) "afford[s] the PSC broad discretion in factors to be considered in rate-making," when the agency creates statements of general applicability which establish new policy and set out procedures to be followed, it must observe proper procedure. National-Southwire Aluminum Corporation v. Big Rivers Electric, Ky. App., 785 S.W.2d 503, 512 (1990). Regulatory procedure, especially in the case of the PSC, must be utilized in order that the public remains fully apprised of the policies and activities of the agency.

While the Court recognizes the PSC's interest in establishing "case-by-case" rate-making, the interest of the public in rates which are "fair, just, and reasonable" is equally compelling, and will not be overlooked for convenience. KRS 278.030(1). As the case is resolved by examination of this issue, it is unnecessary to look to the modification argument of the Plaintiffs under KRS 13A.130.

Therefore, the action of the PSC in promulgating the Order No. 331 was contrary to KRS 13A.010, KRS 13A.120(6), and KRS 278.040(3), and is void.

Based upon the foregoing and being otherwise fairly and fully advised this Court does hereby ORDER and DECLARE:

That the Order of the Public Service Commission in Case No. 331 is void and held for naught.

This is a final and appealable Order and there is no just reason for delay.

Entered this 10th day of July, 1991.

JOYCE M. ALBRO, JUDGE
FRANKLIN CIRCUIT COURT
DIVISION I

90-00798.007/08