



October 31, 2012

Via Messenger Service

Jeff Derouen
Cases No. 2011-00401
Kentucky Public Service Commission
211 Sower Blvd.
Frankfort, KY 40601

RECEIVED

OCT 31 2012

PUBLIC SERVICE
COMMISSION

Re: Revised Second Motion of Sonia McElroy and Sierra Club to Compel East Kentucky Power Cooperative to Respond to Intervenors Initial Requests for Information and for Continuance of Case Schedule

Dear Mr. Jeff Derouen,

On Tuesday, October 30, 2012, Intervenors Sonia McElroy and Sierra Club filed a Second Motion to Compel East Kentucky Power Cooperative to Respond to Intervenors Initial Requests for Information and for Continuance of Case Schedule. Today (October 31, 2012), Intervenors are filing a revised version of that motion that makes two changes. First, the footnote on page 9 was removed. This footnote stated that Mr. Fisk had lost power due to Hurricane Sandy. On Monday, October 29, 2012, Mr. Fisk called me and asked me to draft and file the Motion to Compel and for Continuance of the Case Schedule because he expected to lose power and he didn't know when the power would resume. When I didn't hear from Mr. Fisk on Tuesday, October 30, 2012, I assumed that his power was indeed out given all the news coverage of the hurricane. Mr. Fisk contacted me in the evening of October 30, 2012 and informed me that he did not lose power. Second, the conclusion inadvertently references discovery requests and the opportunity for supplemental requests for information that were already resolved through Intervenors' first motion. Therefore, the revised motion removes reference to Mr. Fisk losing power and removes reference to discovery questions that have already been resolved and supplemental requests that have already been allowed.

Sincerely,

Kristin A. Henry

Staff Attorney
Sierra Club
85 Second Street
San Francisco, CA 94105
Phone: (415) 977-5716
Fax: (415) 977-5793
kristin.henry@sierraclub.org

assumptions, projections, and analyses that went into EKPC's IRP. As such, Intervenors respectfully request that the Commission compel EKPC to fully respond to requests number 19(b) and (c), 21, 28(a) by a date certain, and to continue the deadline for Intervenors to file comments on EKPC's 2012 IRP until one month after such production.

I. Background

On April 20, 2012, EKPC filed with the Commission its 2012 IRP, which sets forth the company's proposed load forecast, power supply strategy, fuel cost projections, and demand side management evaluation for the next fifteen years. The filing raises a number of issues relevant to the future of EKPC and the costs that its ratepayers will face, including the level of cost-effective demand side management that EKPC could pursue, whether the company will bring various aging coal-fired generating units into compliance with environmental regulations through the installation of pollution controls or the retirement of those units, changing fuel prices, and the increasing feasibility and availability of renewable resources.

On May 25, 2012, the Commission issued a case management schedule in this docket. Intervenors moved to intervene on June 8, 2012, and, consistent with the deadline set in the case management schedule, submitted their initial information requests on the same day. While EKPC's responses to Intervenors' requests were due on June 25, the company on that day moved to delay the deadline for its responses to July 25. Intervenors did not object to such a delay, so long as the deadline for filing their supplemental information requests was also pushed back. The Commission then granted EKPC an extension for responding to Intervenors' initial requests until July 17 and established an August 3 deadline for Intervenors' supplemental requests.

The IRP process in Kentucky is governed by 807 KAR 5:058, which requires EKPC to submit every three years a plan that discusses historical and projected demand, resource options

for satisfying that demand, and the financial and operating performance of the EKPC system.

807 KAR 5:058 Section i(2). As the Commission Staff explained in evaluating EKPC's 2009

IRP filing, the IRP process was created to:

ensure that all reasonable options for meeting future supply needs were being considered and pursued in a fair and unbiased manner, and that ratepayers will be provided a reliable supply of electricity at the lowest possible cost¹

Intervenors' initial requests for information sought to probe the adequacy and reasonableness of EKPC's 2012 IRP filing. As such, Intervenors propounded requests regarding EKPC's plans for achieving compliance with various existing and expected environmental regulations, pursuit of demand side management, consideration of renewable and other generation resources, and assessment of future energy needs. Such requests are all relevant to issues addressed in the IRP and that are directly at stake in developing a lowest possible cost plan for meeting future supply needs.

EKPC's responses, however, were inadequate in numerous respects, despite the fact that the company had more than five weeks to respond. The inadequacies fell into three categories: (1) requests to which EKPC provided no response or failed to respond to the question that was posed, (2) requests that EKPC improperly objected to as "overly broad and unduly burdensome," and (3) requests that EKPC erroneously claimed are irrelevant the IRP proceeding. In order to ensure an open and transparent evaluation of the lowest cost resource plan for EKPC, Intervenors filed a motion to compel EKPC to provide full responses to each of Intervenors' initial requests.

On September 7, 2012, the Kentucky Public Service Commission ("Commission") issued an order granting in part and denying in part Intervenors Motion to Compel. The September 7

¹ *Staff Report on the 2009 Integrated Resource Plan of East Kentucky Power Cooperative, Inc.*, Case No. 2009-00106 (Nov. 2010), at 1.

Order required EKPC to respond to requests 19 and 21. Despite this Commission order, EKPC has still refused on respond to these questions.

In an effort to resolve these issues without involving the Commission, counsel for Intervenors sent EKPC's counsel a letter via electronic mail regarding the inadequacy of EKPC's responses on October 5, 2012. On October 10, 2012, EKPC's counsel responded via electronic mail that it was working with EKPC on a substantive response. On October 16, 2012, Intervenors inquired via electronic mail the status of EKPC's response. Electronic Mail Correspondence between Shannon Fisk and Mark David Goss attached as Exhibit 1. On October 18, 2012, EKPC sent a letter to Intervenors claiming that the October 7 Order only required EKPC to provide information that was "already available publicly with various governmental agencies." In addition, EKPC claimed that it would not produce an answer to request 28 as it was protected by the attorney-client privilege. Letter from M.D. Goss to Shannon Fisk (Oct. 18, 2012) attached as Exhibit 2. On October 26, 2012, Intervenors sent EKPC counsel a letter articulating the reasons why EKPC had an obligation to produce documents responsive to these requests and informed EKPC that it would file a motion to compel unless responses were received in our office by Monday, October 29, 2012. Letter from Shannon Fisk to Mark David Goss (October 26, 2012) attached as Exhibit 3. As of October 30, 2012, Intervenors have not heard from EKPC.

II. The Commission Should Compel EKPC To Respond to Intervenors' Initial Requests 19(b) and (c) and 21.

In Request 19, Intervenors sought information regarding the emissions testing that EKPC is conducting "to determine the best way to achieve compliance with the MATS rule," including (b) that EKPC "identify any additional emissions testing that [it] is undertaking or plans to undertake; and (c) that EKPC identify" the schedule by which EKPC expects to have all such

emissions testing completed.” EKPC did not respond to that request, instead claiming that this question was irrelevant to the IRP proceeding.

In Request 21, Intervenors sought information regarding emissions from its fleet. Specifically, it requested 21 “[f]or each of EKPC’s coal-fired electric generating units, identify the unit’s emissions rate in lbs/mmBtu and total emissions in pounds or tons per year for each of 2009, 2010, and 2011 for each of the following pollutants: a.) mercury; b.) sulfur dioxide; c.) HCl; and d.) particulate matter. EKPC did not respond to that request, instead claiming that this question was irrelevant to the IRP proceeding.

The August 2 Motion to Compel noted why this material is relevant to this proceeding. Specifically, that the testing at issue in Request 19 is being done “to determine the best way to achieve compliance with” the U.S. EPA’s Mercury and Air Toxics Standards (“MATS”). (IRP at p. 172). Compliance with that rule will require either installation of controls or retirements of some coal units and, therefore, is directly relevant to any evaluation of the lowest cost resource options for meeting EKPC’s future energy needs. Similarly, Request 21 requests information regarding emission rates and annual emissions from the coal units, information which, once again, is directly relevant to what steps would be needed to bring such units into compliance with MATS and other environmental standards.

The Commission’s September 7 Order required EKPC to produce the requested information:

Given the ever-changing state of environmental compliance rules and regulations at present, the Commission finds, contrary to EKPC’s statements, that the emissions data is relevant to EKPC’s IRP. We also find that, rather than search for information via the various governmental environmental agencies, a party should be able to expect that information developed and/or maintained by a utility jurisdictional to this Commission will be provided when the party makes a legitimate request for such information. Accordingly, EKPC shall provide all of the information required of it in order to comply with Items 19 and 21 of Sierra Club’s June 8, 2012 Initial Request for Information.

Despite this Commission Order, EKPC has failed to produce responsive documents instead claiming that the Commission's September 7 Order granting Sierra Club's motion to compel limited the company to needing to provide only information that was "already available publicly with various governmental agencies." *See* Exhibit 2.

The September 7 Order does not so limit EKPC's discovery duties. The Commission's Order mentions information available from government agencies only in rejecting EKPC's assertion that it does not have to produce such information. Nothing in the Order suggests that information that EKPC has submitted to a government agency is the only type of emissions information that must be produced. Instead, the Commission made clear that "a party should be able to expect that information **developed and/or maintained by a utility** jurisdictional to this Commission will be provided when the party makes a legitimate request for such information." September 7 Order (*emphasis added*).

Sierra Club's requests are legitimate and seek information that presumably EKPC has "developed and/or maintained." For example, EKPC states at page 172 of its IRP that emissions testing to evaluate MATS compliance "is ongoing and is being conducted as part of an extensive engineering effort." As such, EKPC must have "developed and/or maintained" information regarding what testing is being or will be undertaken, and the schedule by which EKPC expects to complete such testing. Similarly, it would be surprising, to say the least, if EKPC has not "developed and/or maintained" information on how much sulfur dioxide, mercury, HCL, and particulate matter each of its coal units has emitted in 2009, 2010, and 2011. Pursuant to the September 7 Order, EKPC must produce such emissions and emissions testing information sought in Sierra Club 1-19b, 1-19c, and 1-21.

III. The Commission Should Compel EKPC To Respond to Request 28, which EKPC originally claimed could only be Produced under a Confidentiality Agreement and Now Claims is Protected by Attorney Client Privilege.

In Request 28, Intervenors sought information regarding the net present value revenue requirements for the Cooper, Dale, and Spurlock regarding the “annual environmental capital expenditures for each year from 2012 through 2026,” the “annual non-environmental capital expenditures for each year from 2012 through 2026,” the “annual fixed O&M costs for each year from 2012 through 2026,” the “annual variable O&M costs for each year from 2012 through 2026,” and the “annual fuel costs for each year from 2012 through 2026.”

In its original discovery responses, EKPC has refused to respond to Intervenors’ Request 28 on the grounds that the requested information is confidential or proprietary. At the time Intervenors filed its initial Motion to Compel, Intervenors were in the process of negotiating with EKPC a protective order to allow Intervenors to gain access to information that EKPC believes is entitled to confidential business information or trade secret protection. In its initial Motion to Compel, Intervenors reserved their right to pursue further relief from the Commission if EKPC was not forthcoming with responses to any of those requests after a protective order is signed.

With regards to Sierra Club request 1-28a, which seeks EKPC’s projected annual environmental capital expenditures for each of its coal units for each year of 2012 through 2026, EKPC originally claimed that the requested information was confidential business information. Now that Sierra Club has signed a confidentiality agreement, EKPC claims in the October 18, 2012 letter that the requested information is protected by attorney client privilege and attorney work product.

The October 18 letter provides no support for these newfound privilege claims. The attorney client and attorney work product doctrines protect from disclosure the internal thought

process of legal counsel and communications between counsel and a client. Request 1-28a does not seek any such information or communications. Instead, Request 1-28a seeks whatever environmental capital cost information EKPC used as inputs in calculating NPVRR for the resource plans identified in the IRP. Such cost information is directly relevant to the identification of the least cost plan for meeting future energy needs that is at the heart of the IRP process. As such, while disclosure of the information requested in 1-28a would not infringe on any valid privilege, withholding of such information would hinder the ability of the public, the Staff, and the Commission to review and evaluate EKPC's IRP.

Finally, we note EKPC has a history of delaying data responses. For instance, EKPC submitted redacted versions of its responses to Sierra Club requests 1-26(b), 1-28b-e, 35a, and 45a to the Commission on October 19, 2012, more than four months after initially requested and two months after Sierra Club signed a confidentiality agreement with EKPC. Unredacted versions of those responses were posted on October 23, 2012 and were sent via First Class Mail so they were not received until October 29, 2012. This long delay before Intervenors receive responses from EKPC has been typical throughout this proceeding. Moving forward, Intervenors request that EKPC use delivery methods (such as electronic mail, overnight delivery services, or mailing in advance) that ensure that Sierra Club receives documents in a timely fashion and consistent with deadlines established by the Commission.

IV. The Commission Should Continue the Deadline for the Filing Comments on EKPC's 2012 IRP.

The current case management schedule requires that Intervenors and the Staff serve comments on EKPC's 2012 IRP by the end of business on this Friday, November 2, 2012. EKPC's repeated failure to respond to discovery, has hindered Intervenors' ability to fully participate in the identification of a least cost resource plan for the company by failing to

substantively respond to a number of Intervenor's information requests regarding critical portions of EKPC's 2012 Integrated Resource Plan ("IRP"). Without the requested information, Intervenor's are unable to fully evaluate and comment on the reasonableness of the assumptions, projections, and analyses that went into EKPC's IRP. As such, Intervenor's request that the Commission establish a date certain by which EKPC will be required to provide complete responses to the requests for information discussed above, and extend the deadline for Intervenor's and the Staff to submit comments on EKPC's 2012 IRP until one month after such date of production.

V. Conclusion

For the foregoing reasons, Intervenor's request that the Commission compel EKPC to fully respond to Intervenor's initial requests for information numbers 19(b) and (c), 21, and 28(a) by a date certain, and to continue the deadline for Intervenor's and Staff to submit comments on EKPC's 2012 IRP until one month after such date of production.

Respectfully submitted,



Joe Childers, Esq.
Joe F. Childers & Associates
300 Lexington Building
201 West Short Street
Lexington, Kentucky 40507
859-253-9824
859-258-9288 (facsimile)

Of counsel:

Kristin Henry
Sierra Club

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Shannon Fisk
Earthjustice
156 William Street, Suite 800
New York, NY 10038
Phone: (215) 327-9922
sfisk@earthjustice.org

Dated: October 31, 2012

CERTIFICATE OF SERVICE

I certify that I had filed with the Kentucky Public Service Commission and served a copy of this **REVISED SECOND MOTION OF SONIA MCELROY AND SIERRA CLUB TO COMPEL EAST KENTUCKY POWER COOPERATIVE TO RESPOND TO INTERVENORS INITIAL REQUESTS FOR INFORMATION AND FOR CONTINUANCE OF CASE SCHEDULE** via electronic mail and U.S. Mail on October 31, 2012 to the following:

Mark David Goss
Goss Samford, PLLC
2365 Harrodsburg Road, Suite B130
Lexington, KY 40504
mdgoss@gosssamfordlaw.com

Michael L. Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
mkurtz@bklawfirm.com



Kristin Henry <kristin.henry@sierraclub.org>

EKPC IRP document production

5 messages

Shannon Fisk <sfisk@earthjustice.org>

Fri, Oct 5, 2012 at 12:44 PM

To: "Mark David Goss (mdgoss@gosssamfordlaw.com)" <mdgoss@gosssamfordlaw.com>

Cc: "Kristin Henry (kristin.henry@sierraclub.org)" <kristin.henry@sierraclub.org>, "Nguyen, Quang D (PSC) (QuangD.Nguyen@ky.gov)" <QuangD.Nguyen@ky.gov>

MD,

In reviewing EKPC's responses to Sierra Club's information requests in this proceeding, we have come across additional inadequacies that EKPC needs to address.

First, EKPC declined to provide substantive responses to Sierra Club requests 1-26b, 1-28, 1-35a, and 1-45a because, at the time of the responses, Sierra Club had not yet signed a confidentiality agreement with EKPC.

Sierra Club signed such agreement on August 16 but has not yet received responses to those requests. Please let us know by when you will produce all information and documents responsive to Sierra Club requests 1-26b, 1-28, 1-35a, and 1-45a.

Second, despite the Commission's granting of Sierra Club's motion to compel, EKPC has yet to fully respond to Sierra Club requests 1-19b, 1-19c, and 1-21. In 1-19b and 1-19c, Sierra Club requested identification of any additional emissions testing that EKPC is undertaking or plans to undertake to determine the best way to achieve compliance with the MATS rule, and the schedule by which EKPC expects to complete such testing. In response, EKPC simply produced, as Sierra Club requested in 1-19a, the results of some testing that has already occurred, while not providing the information that Sierra Club requested, and that the Commission ordered EKPC to provide, in 1-19b and 1-19c.

Sierra Club request 1-21 sought, in part, the total annual emissions in pounds or tons of mercury, HCl, particulate matter, and sulfur dioxide. The Commission made clear in its ruling on Sierra Club's motion to compel that the requested information should be provided. Yet in response, EKPC provided a 1-page spreadsheet in which the total annual emissions of mercury, HCl, and particulate matter in 2009, 2010, and 2011 is identified only as "N/A". We presume that EKPC knows how much mercury, HCl, and particulate matter each of its coal-fired electric generating units emits. Consistent with the Commission's order, please produce the requested information sought in Sierra Club 1-21 as soon as possible.

Please let me know if you have any questions. Thanks,

Shannon

Shannon Fisk
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Philadelphia, PA 19103
T: 215-717-4522
C: 215-327-9922

www.earthjustice.org

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Mark David Goss <mdgoss@gosssamfordlaw.com>

Wed, Oct 10, 2012 at 6:45 AM

To: Shannon Fisk <sfisk@earthjustice.org>

Cc: "Kristin Henry (kristin.henry@sierraclub.org)" <kristin.henry@sierraclub.org>, "Nguyen, Quang D (PSC) (QuangD.Nguyen@ky.gov)" <QuangD.Nguyen@ky.gov>, "Ann Wood (ann.wood@ekpc.coop)" <ann.wood@ekpc.coop>, "David Smart (david.smart@ekpc.coop)" <david.smart@ekpc.coop>

Shannon--I am working with EKPC staff on a substantive response to the issues raised in your email. I should be able to specifically address these issues in the next day or two.

Thanks,

MD

Mark David Goss

Goss ■ Samford
Attorneys at Law

2365 Harrodsburg Road, Suite B130

Lexington, KY 40504

(859) 368-7740 (o)

(859) 351-2776 (c)

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From: Shannon Fisk [mailto:sfisk@earthjustice.org]
Sent: Friday, October 05, 2012 3:45 PM
To: Mark David Goss
Cc: Kristin Henry (kristin.henry@sierraclub.org); Nguyen, Quang D (PSC) (QuangD.Nguyen@ky.gov)
Subject: EKPC IRP document production

[Quoted text hidden]

Shannon Fisk <sfisk@earthjustice.org> Tue, Oct 16, 2012 at 4:26 PM
To: Mark David Goss <mdgoss@gosssamfordlaw.com>
Cc: "Kristin Henry (kristin.henry@sierraclub.org)" <kristin.henry@sierraclub.org>, "Nguyen, Quang D (PSC) (QuangD.Nguyen@ky.gov)" <QuangD.Nguyen@ky.gov>, "Ann Wood (ann.wood@ekpc.coop)" <ann.wood@ekpc.coop>, "David Smart (david.smart@ekpc.coop)" <david.smart@ekpc.coop>

MD,

Please let me know the status of EKPC's response to the issues raised in my e-mail below.

Shannon

From: Mark David Goss [mailto:mdgoss@gosssamfordlaw.com]
Sent: Wednesday, October 10, 2012 9:46 AM
To: Shannon Fisk
Cc: Kristin Henry (kristin.henry@sierraclub.org); Nguyen, Quang D (PSC) (QuangD.Nguyen@ky.gov); Ann Wood (ann.wood@ekpc.coop); David Smart (david.smart@ekpc.coop)
Subject: RE: EKPC IRP document production

[Quoted text hidden]

Mark David Goss <mdgoss@gosssamfordlaw.com>

Thu, Oct 18, 2012 at 5:19 AM

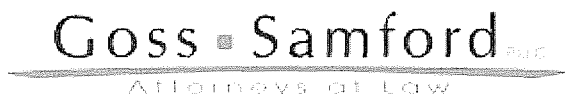
To: Shannon Fisk <sfisk@earthjustice.org>

Cc: "Kristin Henry (kristin.henry@sierraclub.org)" <kristin.henry@sierraclub.org>, "Nguyen, Quang D (PSC) (QuangD.Nguyen@ky.gov)" <QuangD.Nguyen@ky.gov>, "Ann Wood (ann.wood@ekpc.coop)" <ann.wood@ekpc.coop>, "David Smart (david.smart@ekpc.coop)" <david.smart@ekpc.coop>

Shannon---A formal response will be coming your way this morning.

MD

Mark David Goss



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From: Shannon Fisk [mailto:sfisk@earthjustice.org]

Sent: Tuesday, October 16, 2012 7:27 PM

To: Mark David Goss

[Quoted text hidden]

[Quoted text hidden]

Shannon Fisk <sfisk@earthjustice.org>

Fri, Oct 26, 2012 at 7:11 AM

To: Mark David Goss <mdgoss@gosssamfordlaw.com>

Cc: "Kristin Henry (kristin.henry@sierraclub.org)" <kristin.henry@sierraclub.org>, "Nguyen, Quang D (PSC) (QuangD.Nguyen@ky.gov)" <QuangD.Nguyen@ky.gov>, "Ann Wood (ann.wood@ekpc.coop)" <ann.wood@ekpc.coop>, "David Smart (david.smart@ekpc.coop)" <david.smart@ekpc.coop>

MD,

Please see attached a letter from Sierra Club regarding discovery issues in this matter.

Shannon

From: Mark David Goss [mailto:mdgoss@gosssamfordlaw.com]

Sent: Thursday, October 18, 2012 8:20 AM

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[Quoted text hidden]



EKPC - IRP - Discovery - 10-26 Ltr to EKPC.pdf

28K

October 18, 2012

Mr. Shannon Fisk
Earthjustice
1617 John F. Kennedy Blvd., Suite 1675
Philadelphia, PA 19103

Re: Case No. 2012-00149

Dear Mr. Fisk:

This letter is in response to your email dated Friday, October 5, 2012, which addressed perceived “inadequacies” by the Sierra Club in certain EKPC responses in the Integrated Resource Plan proceeding.

First, the Sierra Club requested that additional information be provided to requests 1-26b, 1-28, 1-35a, and 1-45a. EKPC did not provide responses to these data requests because, at the time the responses were required to be filed, EKPC did not have an executed confidentiality agreement with the Sierra Club. As the Sierra Club notes, it signed a confidentiality agreement on August 16, 2012. As a result, EKPC agrees to provide responses, which will be filed with the Commission under a Petition for Confidential Treatment of Information, to requests 1-26b, 1-28 b-e, 1-35a, and 1-45a on October 19, 2012. Please note that the response to request 1-28a is subject to attorney-client privilege and is attorney work product; therefore, EKPC will not be responding to this request.

Second, the Sierra Club states that EKPC has yet to fully respond to requests 1-19b, 1-19c, and 1-21. EKPC disagrees. Page 3 of the Commission’s September 7, 2012 Order states: “We also find that, rather than search for information via the various governmental agencies, a party should be able to expect that information developed and/or maintained by a utility jurisdictional to this Commission will be provided when the party makes a legitimate request for such information.” The Sierra Club made a legitimate request for this information, and EKPC has provided the information to the Sierra Club that was already available publicly with various governmental agencies.

Sincerely,



Mark David Goss



EARTHJUSTICE

Because the earth needs a good lawyer

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

October 26, 2012

VIA ELECTRONIC MAIL

Mark David Goss
Goss Samford PLLC
2365 Harrodsburg Road, Suite B-130
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mdgoss@gosssamfordlaw.com

**RE: East Kentucky Power Cooperative Integrated Resource Plan Filing,
Kentucky PSC Case No. 2012-00149**

Dear Mr. Goss.

I write on behalf of Sierra Club with regards to your October 18, 2012 letter and EKPC's continued failure to comply with its duty to respond to discovery in the above-referenced proceeding. In particular, EKPC has provided no substantive response to Sierra Club requests 1-19b, 1-19c, and 1-28a, and only a partial response to request 1-21, even though those requests were submitted more than four months ago, and in spite of the fact that the Commission granted Sierra Club's motion to compel a response to 1-19b, 1-19c, and 1-21 more than six weeks ago.

Your October 18 letter claims that the Commission's September 7 Order granting Sierra Club's motion to compel somehow limited the company to needing to provide only information that was "already available publicly with various governmental agencies." While a creative argument, the September 7 Order plainly does not so limit EKPC's discovery duties. The Commission's Order mentions information available from government agencies only in rejecting EKPC's assertion that it does not have to produce such information. Nothing in the Order suggests that information that EKPC has submitted to a government agency is the only type of emissions information that must be produced. Instead, the Commission made clear that "a party should be able to expect that **information developed and/or maintained by a utility** jurisdictional to this Commission will be provided when the party makes a legitimate request for such information." (Sept. 7 Order at p. 3) (emphasis added).

Sierra Club's requests are legitimate and seek information that presumably has been "developed and/or maintained" by EKPC. For example, EKPC states at page 172 of its IRP that emissions testing to evaluate MATS compliance "is ongoing and is being conducted as part of an extensive engineering effort." As such, EKPC must have "developed and/or maintained" information regarding what testing is being or will be undertaken, and the schedule by which EKPC expects to complete such testing. Similarly, it would be surprising, to say the least, if EKPC has not "developed and/or maintained" information on how much mercury, HCL, and particulate matter each of its coal units has emitted in 2009, 2010, and 2011. Pursuant to the

September 7 Order, EKPC must produce such emissions and emissions testing information sought in Sierra Club 1-19b, 1-19c, and 1-21.

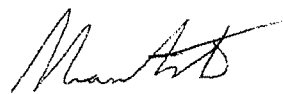
With regards to Sierra Club request 1-28a, which seeks EKPC's projected annual environmental capital expenditures for each of its coal units for each year of 2012 through 2026, the company, EKPC claimed that the requested information was confidential business information. Now that Sierra Club has signed a confidentiality agreement, EKPC claims in the October 18 letter that the requested information is somehow protected by attorney client privilege and as attorney work product.

The October 18 letter provides no support for these newfound privilege claims, which is not surprising given that such claims are meritless. The attorney client and attorney work product doctrines protect from disclosure the internal thought process of legal counsel and communications between counsel and a client. Request 1-28a does not seek any such information or communications. Instead, Request 1-28a seeks whatever environmental capital cost information EKPC used as inputs in calculating NPVRR for the resource plans identified in the IRP. Such cost information is directly relevant to the identification of the least cost plan for meeting future energy needs that is at the heart of the IRP process. As such, while disclosure of the information requested in 1-28a would not infringe on any valid privilege, withholding of such information would hinder the ability of the public, the Staff, and the Commission to review and evaluate EKPC's IRP.

Finally, we note that while EKPC submitted redacted versions of its responses to Sierra Club requests 1-26(b), 1-28b-e, 35a, and 45a to the Commission on October 19 (more than four months after initially requested and two months after Sierra Club signed a confidentiality agreement with EKPC), unredacted versions of those responses have not been received by Sierra Club as of the time of this letter. This week long delay before Sierra Club receives responses from EKPC has been typical throughout this proceeding. Moving forward, we request that EKPC use delivery methods (such as electronic mail, overnight delivery services, or mailing in advance) that ensure that Sierra Club receives documents in a timely fashion and consistent with deadlines established by the Commission.

Sierra Club welcomes the opportunity to resolve these issues without needing to involve the Commission. We would note, however, that EKPC has dragged its heels in responding to legitimate discovery requests for more than four months now and that the current deadline for Sierra Club to submit comments regarding EKPC's IRP is drawing near. Given the importance of the issues involved and the short amount of time remaining in this proceeding, further delay by EKPC cannot be countenanced. If we do not receive the requested documents in our office by Monday, October 29, 2012, Sierra Club will file a motion to compel and also seek an extension of time to file comments.

Sincerely,



Shannon Fisk