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**PUBLIC SERVICE  
COMMISSION**

**COMMONWEALTH OF KENTUCKY**

**BEFORE THE PUBLIC SERVICE COMMISSION**

In The Matter Of:

The Application Of Kentucky Power Company For: )  
 (1) The Approval Of The Terms And Conditions Of The )  
 Renewable Energy Purchase Agreement For Biomass )  
 Energy Resources Between The Company And ) Case No. 2013-00144  
 ecoPower Generation-Hazard LLC; (2) Authorization )  
 To Enter Into The Agreement; (3) The Grant Of Certain )  
 Declaratory Relief; And (4) The Grant Of All )  
 Other Required Approvals and Relief )

**Motion For Rehearing Of The Commission's  
 August 27, 2013 Order Denying Confidential Treatment**

Kentucky Power Company respectfully moves the Public Service Commission of Kentucky pursuant to KRS 278.400 for rehearing of the Commission's August 27, 2013 Order denying the Company's April 10, 2013 petition for confidential treatment of "certain terms and provisions of a Renewable Energy Purchase Agreement for Biomass Energy Resources ('REPA') between Kentucky Power and ecoPower Generation-Hazard LLC ('ecoPower')." <sup>1</sup> The Commission's determination that the disclosure of the confidential REPA terms and conditions will not result in a competitive disadvantage to the Company is premised upon irrelevant considerations and hence unsupported by substantial evidence. In addition, the Order is contrary to KRS 61.878(1)(c)(1).

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<sup>1</sup> Order, *In The Matter Of: The Application Of Kentucky Power Company For: (1) The Approval Of The Terms And Conditions Of The Renewable Energy Purchase Agreement For Biomass Energy Resources Between The Company And ecoPower Generation-Hazard LLC; (2) Authorization To Enter Into The Agreement; (3) The Grant Of Certain Declaratory Relief; And (4) The Grant Of All Other Required Approvals and Relief* at 1, Case No. 2013-00144 (Ky. P.S.C. August 27, 2013) ("Order"). The Company's subsequent petitions for confidential treatment of certain of its data request responses, which involve confidential information in addition to the terms and conditions of the REPA, remain outstanding.

## STATEMENT OF THE CASE

### 1. The Company's Motion

The Company's April 10, 2013 motion sought confidential treatment of selected terms of the 110-page REPA. The information to be protected included specific pricing information, certain material contract terms, including risk allocation, and the existence of certain contract terms (and hence the Company's willingness to accept such terms.)<sup>2</sup> The terms and conditions for which confidential treatment was sought typically are vigorously negotiated by suppliers and purchasers.<sup>3</sup>

The majority of the contract's terms were filed in the public record in unredacted form. In accordance with 807 KAR 5:001, Section 13, the Company filed under seal with the Commission the pages containing confidential information, with the confidential terms highlighted. In addition, the confidential portions of the REPA also were made available to the intervenors pursuant to a non-disclosure agreement. Thus, the Commission, the Staff, Kentucky Industrial Utility Customers, Inc., and the Attorney General each had full access to the complete REPA.

In its motion and the affidavit of Jay F. Godfrey, the Company detailed the nature of competitive injury that Kentucky Power (and its sister companies) would sustain if it were required to disclose the confidential information. Mr. Godfrey, who is the Managing Director – Renewable Energy for American Electric Power Corporation, was responsible for the negotiation

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<sup>2</sup> Affidavit of Jay F. Godfrey at ¶ 8.

<sup>3</sup> Petition for Confidential Treatment, *In The Matter Of: The Application Of Kentucky Power Company For: (1) The Approval Of The Terms And Conditions Of The Renewable Energy Purchase Agreement For Biomass Energy Resources Between The Company And ecoPower Generation-Hazard LLC; (2) Authorization To Enter Into The Agreement; (3) The Grant Of Certain Declaratory Relief; And (4) The Grant Of All Other Required Approvals and Relief* at 2 Case No. 2013-00144 (Filed April 10, 2013) ("Petition").

of the REPA, along with the terms of other REPAs entered into by the Company's affiliates.<sup>4</sup> As such, he has personal knowledge of the effect that public disclosure of confidential information would have on Kentucky Power's competitive efforts in securing renewable resources.<sup>5</sup> Based upon that experience, as well as his investigation, Mr. Godfrey detailed both the basis for and the nature of the competitive injury that Kentucky Power could sustain upon release of the confidential information:

- The market for renewable energy products is extremely competitive<sup>6</sup> and the Company faces strong and growing competition for the most advantageous agreements.<sup>7</sup>
- The information for which confidential treatment is requested "is sought by other potential suppliers"<sup>8</sup> as a means of obtaining a commercial advantage.
- Public disclosure "would establish certain benchmarks in future negotiations...."<sup>9</sup>
- These benchmarks could then be used to establish the starting point for future negotiations.<sup>10</sup> In essence, public disclosure would require the Company to begin negotiations by bidding against itself.<sup>11</sup>
- Potential suppliers also could use the confidential information to "cherry-pick" the most advantageous terms of the REPA.<sup>12</sup>
- The public disclosure of the existence of certain contracts terms (or their absence) would signal the Company's willingness to depart, at least under certain conditions, from standard terms and conditions.<sup>13</sup>

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<sup>4</sup> Affidavit of Jay F. Godfrey at ¶ 2.

<sup>5</sup> *Id.* at ¶ 5.

<sup>6</sup> Petition at 2; Affidavit of Jay F. Godfrey at ¶ 9.

<sup>7</sup> Petition at 2.

<sup>8</sup> Affidavit of Jay F. Godfrey at ¶ 8.

<sup>9</sup> *Id.* at ¶ 10.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at ¶ 11.

<sup>13</sup> Petition at 3-4.

- The confidential information is subject to a confidentiality agreement with ecoPower.<sup>14</sup> Such agreements are customary; maintaining the confidentiality of the confidential information is “a necessary prerequisite to AEPSC and Kentucky Power being able solicit the widest possible response” to solicitations for renewable contracts.<sup>15</sup> Public disclosure of the confidential information will “discourag[e] potential future bidders from submitting bids because of concern that confidential terms will become public knowledge.”<sup>16</sup>

There is *no* evidence to the contrary in the record.

## 2. The Commission’s Order

The Commission nevertheless concluded that “the disclosure of the terms and conditions of the proposed REPA would not subject Kentucky Power to an unfair competitive disadvantage in the future, given the highly unique circumstance surrounding the execution of the REPA.”<sup>17</sup>

In support of this conclusion the Commission identified six such purportedly unique circumstances:

- (a) The intermittent negotiations over a two-year period that resulted in the REPA;<sup>18</sup>
- (b) The enactment of KRS 278.271, which provides for full-cost recovery of the REPA costs following Commission-approval;<sup>19</sup>
- (c) The absence of a request for proposal for biomass resources by Kentucky Power;<sup>20</sup>
- (d) The fact that “the transaction at bar is that of one seller and one buyer;”<sup>21</sup>
- (e) The importance of the economic benefits associated with the REPA in the Company’s decision to enter into the agreement;<sup>22</sup> and

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<sup>14</sup> Affidavit of Jay F. Godfrey at ¶ 16.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at ¶ 13.

<sup>17</sup> Order at 3-4.

<sup>18</sup> *Id.* at 4

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

- (f) The Commission’s need “to be able to fully and specifically address the cost impact of the REPA in its final determination of this matter.”<sup>23</sup>

Although the Company agrees that the ecoPower REPA presents a unique opportunity for the Company, and as with any two-party contract involves one seller and one buyer, none of these purported unique features of the agreement are relevant to the question of the competitive injury that Kentucky Power could suffer, or constitute substantial evidence of the absence of such injury.

#### ARGUMENT

1. The Uniqueness Of the ecoPower REPA Does Not Mitigate, Much Less Eliminate, The Competitive Injury Kentucky Power Is Likely To Suffer As A Result Of The Public Disclosure Of The Confidential Information.

- (a) The Purported Unique Characteristics Of The REPA Are Irrelevant To Question Of Whether Kentucky Power Will Suffer Competitive Injury.

To constitute substantial evidence, a matter must first be evidence.<sup>24</sup> That is, the matter must first be “something of substance and relevant consequence, and not vague, uncertain, or irrelevant matter, not carrying the quality of proof, or having fitness to induce conviction.”<sup>25</sup>

Respectfully, none of the claimed unique characteristics of the REPA relied upon by the Commission in concluding that Kentucky Power will not suffer competitive injury are relevant to the existence of such injury, and by definition cannot constitute substantial evidence sufficient to support the Commission’s decision.

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Damron v. Greene*, 86 S.W.2d 996, 997-998 (Ky. 1935).

<sup>25</sup> *Id.*

(i) The Period Over Which The Contract Was Negotiated.

Whether a contract is negotiated over two years or two hours is wholly divorced from the question of whether the public disclosure of the prices and other critical terms of the contract will result in competitive injury. What is important are the terms of the contract. Certainly, there is no evidence in the record bridging that logical gap. Nor did the period over which the wind renewable energy purchase agreement at issue in Case No. 2009-00545 was negotiated apparently enter into the decision to grant confidential treatment to that agreement.<sup>26</sup>

(ii) The Importance Of Economic Benefits To The Company's Decision To Enter Into The REPA.

The importance of the economic benefits flowing from the Company's investment in its service territory to Kentucky Power's decision to enter into the agreement likewise has no relevance to the competitive injury resulting from the public release of the confidential information. Again, there is no evidence linking the two and the order itself does not suggest such a linkage. Indeed, no clearer evidence of the lack of relevance of the role played by the economic benefits flowing from the ecoPower project in the Company's decision-making to the question of competitive injury exists than the fact that the Company made public in its application<sup>27</sup> and supporting testimony<sup>28</sup> its reliance on the economic benefits and its evidence

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<sup>26</sup> Letter, *In the Matter of: The Application For Approval Of Renewable Energy Purchase Agreement For Wind Energy Resources Between Kentucky Power Company and FPL Illinois Wind, LLC.*, Case No. 2009-00545 (Ky. P.S.C. February 11, 2010)

<sup>27</sup> Application of Kentucky Power Company, *In The Matter Of: The Application Of Kentucky Power Company For: (1) The Approval Of The Terms And Conditions Of The Renewable Energy Purchase Agreement For Biomass Energy Resources Between The Company And ecoPower Generation-Hazard LLC; (2) Authorization To Enter Into The Agreement; (3) The Grant Of Certain Declaratory Relief; And (4) The Grant Of All Other Required Approvals and Relief* at ¶ 24 Case No. 2013-00144 (Filed April 10, 2013).

<sup>28</sup> Testimony of Gregory G. Pauley, *In The Matter Of: The Application Of Kentucky Power Company For: (1) The Approval Of The Terms And Conditions Of The Renewable Energy Purchase Agreement For Biomass Energy Resources Between The Company And ecoPower Generation-Hazard LLC; (2) Authorization To Enter Into The Agreement; (3) The Grant Of Certain Declaratory Relief; And (4) The Grant Of All Other Required Approvals and Relief* at 7-8 Case No. 2013-00144 (Filed April 10, 2013)

concerning such benefits. In sum, the Company's recognition that ecoPower facility will confer significant economic benefits on service territory has no bearing on whether the forced disclosure of the REPA terms will provide other sellers of renewable products with an unfair competitive advantage in future negotiations with the Company and its affiliates.

(iii) The Statutory Basis For Cost-Recovery.

Even less relevant to the question of the risk of competitive injury is the Company's ability under KRS 278.271 to recover its costs during the initial term of the REPA. The Company is not claiming that disclosure of the confidential terms and conditions of the contract will affect its ability to recover the REPA costs. Nor is it arguing that cost recovery (or its absence) either increases or decreases the unfair competitive disadvantage it will suffer if the confidential information is released. In sum, the competitive injury the Company could sustain as a result of the disclosure of confidential information is wholly unrelated to the statutory basis for the Company's request for cost recovery, or the extent to which the Commission allows recovery of the REPA costs.

(iv) The Commission's Consideration Of The Application.

Kentucky Power respects the Commission's need to address the cost impact of the REPA in full and in detail in its final determination of the Company's application. But granting confidential treatment will in no way hinder the Commission's review of the REPA pursuant to KRS 278.300. The entire REPA, including the portions the Company seeks to protect, was filed with the Commission and available to the Commission and Staff. In addition, the Attorney General, who represents all of the Company's customers,<sup>29</sup> and KIUC, which represents

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<sup>29</sup> KRS 367.150(8).

Kentucky Power's largest industrial customers,<sup>30</sup> both intervened and were provided with full copies of the REPA. Staff and the two intervenors were each free to propound data requests addressing the confidential information. Indeed, KIUC filed testimony addressing the confidential provisions of the REPA.<sup>31</sup> Most importantly, Mr. Godfrey who negotiated the agreement, and who sponsored the agreement as an exhibit to his testimony, was subject to full cross-examination (along with Messrs. Pauley and Wohnhas) by the intervenors, the Staff, and the Commissioners at the August 28, 2013 hearing concerning the complete REPA, including its confidential terms and provisions. No one during the nearly five months the case was pending before the Commission's August 27, 2013 Order indicated that granting the Company's petition for confidential treatment hampered their ability to litigate the case fully, or to otherwise address the Company's request for approval in detail. Indeed, the Commission need look no further than its Order in Case No 2009-00545, where confidential treatment was granted to the Company's proposed renewable energy purchase agreement, to confirm the Commission retains its ability to address this application fully, specifically, and in detail if it were to grant confidential treatment.

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<sup>30</sup> Petition to Intervene of Kentucky Industrial Customers, Inc., *In The Matter Of: The Application Of Kentucky Power Company For: (1) The Approval Of The Terms And Conditions Of The Renewable Energy Purchase Agreement For Biomass Energy Resources Between The Company And ecoPower Generation-Hazard LLC; (2) Authorization To Enter Into The Agreement; (3) The Grant Of Certain Declaratory Relief; And (4) The Grant Of All Other Required Approvals and Relief* at ¶ 1 Case No. 2013-00144 (Filed April 12, 2013) (Listing "Air Liquide Large Industries US LP, AK Steel Corporation, Air Products and Chemicals, Inc., EQT Corporation, and Catlettsburg Refining LLC, a subsidiary of Marathon Petroleum LP" as the member of KIUC participating in the case.)

<sup>31</sup> Testimony of Lane Kollen, *In The Matter Of: The Application Of Kentucky Power Company For: (1) The Approval Of The Terms And Conditions Of The Renewable Energy Purchase Agreement For Biomass Energy Resources Between The Company And ecoPower Generation-Hazard LLC; (2) Authorization To Enter Into The Agreement; (3) The Grant Of Certain Declaratory Relief; And (4) The Grant Of All Other Required Approvals and Relief* at 11 Case No. 2013-00144 (Filed July 8, 2013).



(v) The Manner In Which The Company First Became Aware Of The Opportunity.

The fact that ecoPower approached Kentucky Power concerning the REPA on its own initiative and not in response to a request for proposal by the Company is wholly irrelevant to whether the Company will suffer competitive injury if the confidential information contained in the contract is disclosed. The Company's competitive injury flows not from the manner in which Kentucky Power was first made aware of ecoPower's proposal, but from the disclosure of the identified terms and conditions of the REPA that were negotiated following ecoPower's entreaty.<sup>32</sup> Similarly, the fact that Kentucky Power elected not to employ an RFP in connection with the REPA is neither unprecedented,<sup>33</sup> nor in any way immunizes the Company from the competitive injury likely to befall it and its affiliates if the confidential information is disclosed. Whether the REPA is the result of an RFP or not, the disclosure of the agreement's confidential terms and conditions will:

- Tend to establish a floor for future negotiations;<sup>34</sup>
- Enable suppliers to cherry-pick the most advantageous terms of the REPA without engaging in the *quid pro quo* exchange that yielded them;<sup>35</sup>
- Tip the Company's hand in future contract negotiations by revealing the Company's willingness to include certain terms in the agreement, or to forgo certain protections;<sup>36</sup> and
- Discourage suppliers from participating in future solicitations out of fear that their confidential information, which also is part of the REPA, will be disclosed, thereby reducing competition and driving up prices.<sup>37</sup>

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<sup>32</sup> Like the REPA, any contract that would have arisen as a result of a request for proposals would have involved substantial negotiations. *See* Video Recording of Proceedings, Cross-Examination of Jay F. Godfrey by Mr. Nguyen at 2:51 p.m. (approximately), August 28, 2013.

<sup>33</sup> *Id.* at 3:08 p.m. (approximately), August 28, 2013. (Five most recent contracts not the result of an RFP.)

<sup>34</sup> Affidavit of Jay F. Godfrey at ¶ 10.

<sup>35</sup> *Id.* at 11.

<sup>36</sup> Petition at 3-4.

Each of these would put Kentucky Power and its customers at a competitive disadvantage in future negotiations.

- (vi) The Fact That the REPA Is A Two-Party Contract Between “One Seller And One Buyer.”<sup>38</sup>

While acknowledging the Company’s evidence of the highly competitive market for renewable energy purchase agreements, the Commission nevertheless concluded that the REPA was unique, and thus there was no risk of competitive injury from the public disclosure of its full terms and conditions because the REPA ultimately was a two-party agreement:

Notwithstanding Kentucky Power’s characterization of the market for renewable energy purchase power agreements as being extremely competitive and occasioned by multiple sellers of renewable energy seeking the highest prices for their power, *the transaction at bar is that of one seller and one buyer. The uniqueness of this REPA is also reflect in the fact that that Kentucky Power did not issue a request for proposal for such renewable resource, but instead was approached by ecoPower.*<sup>39</sup>

But almost every REPA, indeed most contracts, are between two parties, and involve the sale of a product or service by a single seller to a single buyer. Nothing in the Commission’s Order, the record in this case, or otherwise, even hints that the disclosure of the terms and conditions of a contract between two parties is incapable of causing a competitive disadvantage. Indeed, the wind power purchase agreement granted confidential treatment in Case No. 2009-00545 was a two-party contract negotiated by Kentucky Power and the developer following the completion of an RFP. In sum, the number of parties to an agreement is no more indicative of the likelihood of competitive injury if the confidential terms and conditions are publicly disclosed than the number of pages contained in the agreement.

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<sup>37</sup> Affidavit of Jay F. Godfrey at ¶ 16.

<sup>38</sup> Order at 4.

<sup>39</sup> *Id.* (emphasis supplied).

The purportedly unique circumstances identified by the Commission in its Order, and upon which it premised its determination that “the disclosure of the terms and conditions of the REPA would not impose upon Kentucky Power any unfair competitive advantage [*sic*] in future negotiations involving renewable energy purchase power agreements”<sup>40</sup> are irrelevant to the existence of such competitive injury and thus cannot constitute substantial evidence sufficient to support the Commission’s decision. Accordingly, Kentucky Power respectfully requests that the Commission grant rehearing and amend its Order to provide confidential protection to the identified terms and conditions of the REPA.

2. The Commission’s Need To Fully And Specifically Address The Cost Impact Of The REPA And The General Assembly’s Enactment of KRS 278.271 Cannot Support The Commission’s Decision To Deny Confidential Treatment.

The General Assembly has determined that the policy of the Kentucky Open Records Act “is that free and open examination of public records is in the public interest...”<sup>41</sup> Such free and open examination serves two purposes: it gives substance to “the public’s right to expect its agencies properly to execute their statutory functions,”<sup>42</sup> and provides “impetus for an agency steadfastly to pursue the public good.”<sup>43</sup> But the public’s right of inspection is not without limitation: “[t]he General Assembly further recognizes that while all government agency records are public records for the purpose of their management, *not all these records are required to be open to public access*, as defined in this chapter, *some being exempt under KRS 61.878.*”<sup>44</sup> Among these exceptions are KRS 61.878(1)(c)(1). It protects confidential records furnished to

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<sup>40</sup> *Id.*

<sup>41</sup> KRS 61.871.

<sup>42</sup> *Kentucky Board of Examiners of Psychologists v. The Courier-Journal and Louisville Times Co.*, 826 S.W.2d 324, 328 (Ky. 1992).

<sup>43</sup> *Id.*

<sup>44</sup> KRS 61.8715 (emphasis supplied).

agencies if their public disclosure “would permit an unfair commercial advantage to competitors of the entity that disclosed the records.”<sup>45</sup> It is this exception upon which the Company premised its motion and that the Commission addressed in its Order.

The exception provided by KRS 61.878(1)(c)(1), like the other exceptions to the Open Records Act, represents the General Assembly’s balancing of the public’s right to know and the public benefit from full disclosure on the one hand, and the harm caused to others from the public disclosure of the certain records. It is the General Assembly’s right, as with all matters of public policy, to strike that balance.<sup>46</sup> The General Assembly has done so through the enactment of KRS 61.878(1)(c)(1), and that balance may not be modified by the courts<sup>47</sup> or administrative agencies,<sup>48</sup> no matter how strictly a statutory exception is to be construed.<sup>49</sup>

Although the Commission’s “need to be able to fully and specifically address the cost impact of the REPA in its final determination of this matter”<sup>50</sup> is consistent with the broad purpose of the Open Records Act, the General Assembly has determined through its enactment of KRS 61.878(1)(c)(1) that such a need is subordinate to the competing public good in avoiding bestowing on the Company’s competitors an unfair commercial advantage through disclosure of the confidential terms and conditions of the REPA. The Commission is without the authority to reorder that priority, or to supplant the express terms of KRS 61.878(1)(c)(1) or the General

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<sup>45</sup> KRS 61.878(1)(c)(1). The exception is also subject to certain other requirements. Nothing in the Commission’s August 27, 2013 Order suggests that these requirements were not satisfied by the Company’s petition.

<sup>46</sup> *Benningfield v. Zinnsmeister*, 367 S.W.3d 561, 566 (Ky. 2012).

<sup>47</sup> *Id.*

<sup>48</sup> *Caneyville Volunteer Fire Dep’t. v. Green’s Motorcycle Salvage, Inc.*, 286 S.W3d 790, 807 (Ky. 2009) (“Shaping public policy is the exclusive domain of the General Assembly.”)

<sup>49</sup> *See* KRS 61.871.

<sup>50</sup> Order at 4.

Assembly's determination in enacting the exception that such information is not subject to public disclosure. Indeed, the Commission is proscribed by both the Kentucky Constitution<sup>51</sup> and KRS 13A.130(1)(a), (b)<sup>52</sup> from doing so. Moreover, if the General Assembly had intended to carve out an exception to the protections provided by KRS 61.878(1)(c)(1) for those instance where the disclosure of otherwise protected information is deemed necessary by the Commission or other agency for the agency's performance of its statutory function it would have so provided.<sup>53</sup>

Nor may the Commission rely upon the General Assembly's 2013 enactment of KRS 278.271 as a basis for failing to accord confidential treatment in accordance with KRS 61.878(1)(c)(1), or to support its determination that public disclosure of the confidential information will not result in competitive injury to the Company and its affiliates. The statute does not create an exception to KRS 61.878(1)(c)(1). Moreover, nothing in KRS 278.271 addresses the Open Records Act, purports to exempt biomass purchase power contracts from KRS 61.878(1)(c)(1), or addresses competitive injury or unfair commercial advantage. Certainly, KRS 278.271 does not and cannot impliedly repeal KRS 61.878(1)(c)(1). There is no conflict between the two statutes, nor any other basis for finding such a repeal or limitation of KRS 61.878(1)(c)(1).<sup>54</sup>

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<sup>51</sup> *Robertson v. Schein*, 204 S.W.2d 954, 957-958 (Ky. 1947).

<sup>52</sup> The statute provides: An administrative body shall not by internal policy, memorandum, or other form of action:

- (a) Modify a statute or administrative regulation;
- (b) Expand upon or limit a statute or administrative regulation....

<sup>53</sup> *Hale v. Commonwealth*, 396 S.W.3d 841, 849 (Ky. 2013).

<sup>54</sup> *Osborne v. Commonwealth*, 165 S.W.3d 645, 649 (Ky. 2006) ("In short, courts must use repeal by implication as a last resort when the repugnancy of the conflict can admit no other reasonable construction.")

Wherefore, Kentucky Power Company respectfully requests that the Commission:

- (1) Grant rehearing of the Commission's August 27, 2013 Order denying confidential treatment to the identified terms and provisions of the REPA;
- (2) Grant confidential treatment for the identified confidential information contained in the REPA;
- (3) Continue to withhold the identified confidential information from the public record during the pendency of this motion, and, if the Commission denies the requested relief, for a reasonable period thereafter to allow the Company to avail itself of its right to seek relief from the Franklin Circuit Court, including injunctive relief during the pendency of any appeal; and
- (4) Grant the Company any further relief to which it may be entitled.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark R. Overstreet', written over a horizontal line.

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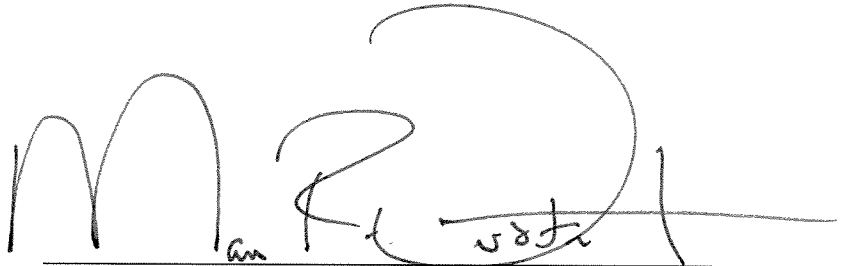
**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing was mailed by first class mail, postage prepaid, on the following:

Michael L. Kurtz  
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on this the 16<sup>th</sup> day of September, 2013.

A handwritten signature in black ink, appearing to read 'Mark R. Overstreet', written over a horizontal line.

Mark R. Overstreet

# **Attachment**



COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF KENTUCKY POWER	)	
COMPANY FOR APPROVAL OF THE TERMS	)	
AND CONDITIONS OF THE RENEWABLE	)	
ENERGY PURCHASE AGREEMENT FOR	)	CASE NO.
BIOMASS ENERGY RESOURCES BETWEEN	)	2013-00144
THE COMPANY AND ECOPOWER	)	
GENERATION-HAZARD LLC; AUTHORIZATION	)	
TO ENTER INTO THE AGREEMENT; GRANT	)	
OF CERTAIN DECLARATORY RELIEF; AND	)	
GRANT OF ALL OTHER REQUIRED	)	
APPROVALS AND RELIEF	)	

ORDER

The matter is before the Commission upon a petition filed by Kentucky Power Company ("Kentucky Power"), pursuant to 807 KAR 5:001, Section 13, seeking confidential treatment of certain terms and provisions of a Renewable Energy Purchase Agreement for Biomass Energy Resources ("REPA") entered into between Kentucky Power and ecoPower Generation-Hazard LLC ("ecoPower"). The terms and provisions at issue in this petition include the rates to be paid by Kentucky Power over the 20-year term of the contract. Kentucky power contends that the information sought to be kept confidential is generally recognized as confidential and would permit an unfair commercial advantage to competitors if the information were required to be disclosed. Thus, Kentucky Power argues that the subject information is exempt from public disclosure pursuant to KRS 61.878(1)(c)(1).

Kentucky Power asserts that the market for renewable energy purchase power agreements is extremely competitive and that it faces strong competition for the most

advantageous agreements. Kentucky Power points out that pricing and other contract terms are vigorously negotiated by suppliers and purchasers and that, in negotiating such agreements, Kentucky Power seeks to obtain the lowest reasonable cost upon the most advantageous terms.

Kentucky Power contends that the information at issue is highly confidential, noting that it takes all reasonable measures to prevent its disclosure to the public, as well as to persons within the company who do not have a need for the information. Kentucky Power also contends that disclosure of the price and terms included in the REPA would allow other potential suppliers to establish benchmarks in future negotiations and enable those suppliers to gain an unfair advantage to the detriment of Kentucky Power and its customers. Kentucky Power argues that disclosure of such terms would compromise its ability to negotiate and obtain the lowest reasonable cost for its customers on the most favorable terms.

KIUC filed a response objecting to Kentucky Power's request that the designated terms and conditions of the REPA be granted confidentiality. Citing to Case No. 97-197,<sup>1</sup> KIUC contends that Kentucky Power bears the burden of producing tangible evidence demonstrating unfair competitive advantage to justify an exemption from the public disclosure requirements. KIUC argues that Kentucky Power has failed to produce tangible evidence of competitive harm if such information were to be publicly disclosed and has brought forward mere conjectures as to the company's being potentially disadvantaged by public disclosure of the REPA price and conditions. Lastly, KIUC asserts that the circumstances of Kentucky Power's proposed REPA make it

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<sup>1</sup> Case No. 97-197, *Petition of Kentucky Utilities Company for Confidential Protection of Certain Information Contained in Barge Transportation and Coal Purchase Contracts* (Ky. PSC Mar. 18, 1998).

particularly important for the entire record to be publicly available. KIUC notes that, if approved, Kentucky Power would be able to recover the cost of the REPA over the entire 20-year term pursuant to KRS 278.271. KIUC also notes that the REPA was not obtained through a Request for Proposal, but instead was a product of negotiations between a single seller and a single buyer.

In its reply, Kentucky Power argues that KIUC's objection was not timely filed in accordance with 807 KAR 5:001, Section 13(2)(f), which requires any response to a petition for confidentiality be filed within seven days from the date the motion was filed. Kentucky Power also contends that it provided specific grounds as to why those identified portions of the REPA should be entitled to confidential treatment in accordance with the requirements of 807 KAR 5:001, Section 7. As further support for its request, Kentucky Power cites to the Commission's approval of its request for confidential treatment of a purchase power agreement for wind resources in Case No. 2009-00545.<sup>2</sup>

Having reviewed the pleadings, the relevant record, and being otherwise sufficiently advised, the Commission finds that Kentucky Power has failed to establish that the information identified in its petition is entitled to confidential treatment pursuant to KRS 61.878(1)(c)(1). Although Kentucky Power proffers that such information is confidential and that disclosure of such information would place it at a competitive disadvantage in negotiating future similar contracts, the Commission finds disclosure of the terms and provisions of the proposed REPA would not subject Kentucky Power to an unfair competitive advantage in the future, given the highly unique circumstances

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<sup>2</sup> Case No. 2009-00545, *Application for Approval of Renewable Energy Purchase Agreement for Wind Energy Resources Between Kentucky Power Company and FPL Illinois Wind, LLC* (Ky. PSC Feb. 11, 2010).

surrounding the execution of the REPA. As revealed in discovery responses, Kentucky Power was approached by ecoPower over a period of two plus years regarding the willingness of Kentucky Power to purchase power from the proposed biomass facility. After the enactment of KRS 278.271, which authorizes a utility to request full cost recovery over the entire REPA term and after evaluating the financial and accounting impacts of the REPA, as well as the economic development and fuel diversity benefits of the project, Kentucky Power agreed to enter into the purchase power agreement with ecoPower.

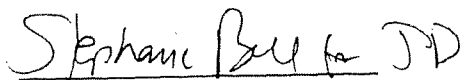
Notwithstanding Kentucky Power's characterization of the market for renewable energy purchase power agreements as being extremely competitive and occasioned by multiple sellers of renewable energy seeking the highest prices for their power, the transaction at bar is that of one seller and one buyer. The uniqueness of this REPA is also reflected in the fact that Kentucky Power did not issue a request for proposal for such renewable resource, but was instead approached by ecoPower. Further, as indicated by Kentucky Power, the REPA was consummated, in large part, due to the perceived economic benefits associated with the facility's being a biomass plant located in Kentucky and within Kentucky Power's service territory.

In light of the unique facts and circumstances which led to the execution of the REPA, the Commission finds that disclosure of the terms and conditions of the REPA would not impose upon Kentucky Power any unfair competitive advantage in future negotiations involving renewable energy purchase power agreements. This is particularly so given the Commission's need to be able to fully and specifically address the cost impact of the REPA in its final determination of this matter.

By the Commission

ENTERED   
AUG 27 2013  
KENTUCKY PUBLIC  
SERVICE COMMISSION

ATTEST:

  
Executive Director

Case No. 2013-00144

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