PUBLIC VERSION

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN APPLICATION OF EAST KENTUCKY POWER COOPERATIVE, INC. FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR ALTERATION OF CERTAIN EQUIPMENT AT THE COOPER STATION AND APPROVAL OF A COMPLIANCE PLAN AMENDMENT FOR ENVIRONMENTAL SURCHARGE COST RECOVERY	)	CASE NO. 2013-00259

SONIA MCELORY AND SIERRA CLUB'S REPLY IN SUPPORT OF MOTION TO COMPEL AND FOR A CONTINUANCE

I. INTRODUCTION

EKPC is the sole party in this case with access to all information relating to its Application, and is trying to leverage that advantage to improperly deny Intervenors access to relevant information. In order to analyze the Application, Intervenors submitted two sets of requests for information; the initial set contained 62 questions and the supplemental set contained 47 questions. Many of the supplemental requests repeated initial requests that EKPC had unreasonably failed to answer. EKPC objected to all or a part of 22 of the 47 supplemental requests;[1] in other words, EKPC refused to answer all or a part of nearly half of the supplemental requests. After trying unsuccessfully to resolve the impasse informally, Intervenors filed a motion to compel. The motion addresses only the most egregious of EKPC's 22 refusals to answer supplemental requests.

[1] EKPC refused to answer all or a part of the following Supplemental Requests for Information: 1, 2, 3, 5, 6, 7, 9, 12, 13, 14, 15, 31, 32, 33, 34, 35, 36, 37, 38, 43, 44, and 46.

EKPC's response to the motion to compel invents several new categories of objections that have absolutely no precedent in Commission orders, case law, or rules. Although the Commission is not bound by the Kentucky Rules of Civil Procedure, the Commission often considers those Rules as persuasive authority.[2] Kentucky Rule of Civil Procedure 26.02(1) authorizes "discovery regarding any matter, not privileged, which is relevant to the subject matter," including information "reasonably calculated to lead to the discovery of admissible information."

EKPC barely attempts to argue that the requested information is somehow not relevant. Instead, EKPC attempts to justify its refusal to provide information on the grounds that it disagrees with the substantive arguments the information might support; that Intervenors purportedly do not need the information; and that Intervenors could produce their own estimates that might approximate the information they seek from EKPC. Yet EKPC has failed to cite a single court decision, Commission Order, or provision of the Kentucky Rules of Civil Procedure to support such objections. Such failure is not surprising given that the discovery rules do not permit a party to refuse to provide relevant information simply because the party disagrees with the opposing party's substantive arguments, or because a party thinks the information is not needed, or because a party could come up with its own estimates of the opposing party's numbers. Yet these newly-invented "objections" are the backbone of EKPC's response to the motion to compel.

Unfortunately, EKPC has treated discovery as an opportunity to use its control over the flow of information to its own advantage, rather than treating discovery as it is intended: as a

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[2] *See, e.g.*, In the Matter of Application of Louisville Gas and Electric Company for Certificates of Public Convenience and Necessity and Approval but 2011 Compliance Plan for Recovery by Environmental Surcharge, Order, Case No. 2011-00162 (Ky. P.S.C., Sept. 1, 2011).

way to level the playing field and get at the truth by ensuring that all parties have access to the same information relevant to a case. Instead of providing either a legitimate objection to data requests or producing the information, EKPC has stonewalled. Having failed to produce relevant information that is critical to this case, EKPC now complains about the prospect of any changes to the schedule – changes which would have been unnecessary had EKPC simply followed the discovery rules.[3]

II. ARGUMENT

A. Supplemental Data Requests 2.5 and 2.6

Data requests 2.5 and 2.6 seek the historical and projected annual costs for the plants in EKPC's fleet, including Cooper Unit 1. EKPC defends its refusal to provide the information on three grounds, none of which has any merit.

First, EKPC insists that the historical costs are irrelevant because the Commission must judge the reasonableness of the proposed project on a forward-looking basis, based on future rather than historical costs. But EKPC continues to ignore that the historical costs are relevant because they are necessary in order to assess the reasonableness of the Cooperative's projection of the costs and profitability of the future operation of Cooper Unit 1 under the proposed environmental compliance plan. EKPC is claiming that Cooper Unit 1 will face certain costs for retrofitting and future operations, and that those costs are reasonable to incur both standing alone and in comparison to the cost of other projects. But neither the Commission nor other parties can

[3] EKPC also mischaracterizes the record by claiming that a brief delay in the schedule was necessary because Sierra Club had not entered into a confidentiality agreement. In reality, on October 3, Sierra Club sent a draft non-disclosure agreement ("NDA"), based on the agreement the parties had entered in the proceeding on EKPC's 2012 Integrated Resource Plan in docket 2012-00149, but EKPC did not respond until October 21. Sierra Club sent executed copies of the NDA to EKPC's counsel three days later. Any delay related to the need for an NDA was caused by EKPC's own conduct, not Sierra Club's.

judge the reasonableness of projected costs in a vacuum – the historical, actual costs are important benchmarks for evaluating the reasonableness of the projections. As such, the historical costs are highly relevant.

Moreover, EKPC contradicted its own argument by admitting, on page 4 of its Response, that cost data "for the entire EKPC fleet has been provided." EKPC thus admits that historical costs are relevant at the fleet-wide level. If that is true, then the unit-level historical costs, especially for Cooper Unit 1, are relevant as well.

Contrary to EKPC's argument, the Commission's Order in case 2011-00162 does not support its refusal to answer requests 2.5 and 2.6. In that case, Kentucky Industrial Utility Customers, Inc. ("KIUC") filed a motion to compel Louisville Gas and Electric Company ("LG&E") to respond to data requests seeking information relating to financial projections and statements regarding both LG&E's environmental compliance plan and its overall rate base. The Commission granted KIUC's motion to compel with regards to the former category, holding that "KIUC is entitled to discovery with respect to information related to the estimated costs of LG&E's proposed Environmental Compliance Plan, including those cost projections through 2016."[4] The Commission denied the motion with respect to the latter, finding that financial projections "not limited to environmental compliance, such as LG&E's rate base growth and future overall capital expenditures" were outside the scope of that proceeding.[5]

The Commission's Order in 2011-00162 supports granting the motion to compel. Intervenors have not asked for the rate base growth information and overall financial information that KIUC sought, and which the Commission determined were irrelevant. Instead, Intervenors'

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[4] *In the Matter of Application of Louisville Gas and Electric Company for Certificates of Public Convenience and Necessity and Approval of its 2011 Compliance Plan for Recovery by Environmental Surcharge*, Order at 6, Case No. 2011-00162 (Ky. P.S.C., Sept. 1, 2011).

[5] *Id.*

supplemental requests 2.5 and 2.6 seek information relating to the costs of EKPC' proposed environmental compliance plan—information which the Commission held is relevant and discoverable in an environmental compliance plan case. [6]

Second, EKPC claims that it already provided the requested information because it provided the fleet-wide costs and the base case costs (in which Cooper Unit 1 is retired). EKPC asserts that Intervenors can figure out the costs at Cooper Unit 1 by simply subtracting the base case costs from the fleet-wide costs. While theoretically possible, the problem with using this method is that the result is inconsistent with other information EKPC has provided—which is why it is critical for EKPC to provide directly the unit-specific costs.

For example, if one subtracts the base case costs (provided in response to Intervenors' Initial Request 13) from the fleet-wide costs (provided in response to Staff Initial Request 5), the implied costs for Cooper Unit 1 are inconsistent with the capacity factors EKPC provided in response to Intervenors' Supplemental Request 15. Moreover, the base case generation provided in response to Staff Initial Request 5 does not match what was provided in response to Intervenors' Supplemental Request 13. These inconsistencies were pointed out on pages 21-23 and page 51 of Tyler Comings' direct testimony. Directly providing the unit-specific costs will help to clear up and address these inconsistencies.

Lastly, EKPC defends its refusal to provide the most basic information on costs at Cooper Unit 1 by invoking the slippery slope argument, conjuring up the fearsome specter of never-ending discovery requests. At best, this argument is a red herring, especially given that Intervenors are only entitled to the two rounds of already submitted information requests. In

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[6] *In the Matter of Application of Louisville Gas and Electric Company for Certificates of Public Convenience and Necessity and Approval of its 2011 Compliance Plan for Recovery by Environmental Surcharge*, Order at 6, Case No. 2011-00162 (Ky. P.S.C., Sept. 1, 2011).

addition, EKPC's slippery slope argument ignores the fact that the heart of this case is EKPC's claim that the proposed project is reasonable and should be approved because the costs of the proposed retrofit project are lower than all other projects. Yet EKPC has refused to provide the unit-specific historical and projected costs for Cooper Unit 1 even though such information is fundamental to EKPC's underlying claim that the Cooper Unit 1 project is economic.

It is specious to deny access to such basic information on the grounds that, if such information is provided, Intervenors could want more information (especially given that, as noted, Intervenors are not entitled to submit additional data requests to EKPC in this proceeding). EKPC's rationale could be used to deny any discovery request. In any event, EKPC has no basis for claiming that the Intervenors would be unsatisfied with the basic information requested since that information has never been provided.

B. Supplemental Data Requests 2.31(a)-(b), 2.32(a)-(b), and 2.33(a)-(b)

EKPC admitted in discovery that it had reviewed documents relating to the costs at Cooper Units 1 and 2 to comply with certain pending EPA regulations, but then refused to answer data requests 2.31(a)-(b), 2.32(a)-(b), and 2.33(a)-(b), which seek the documents it reviewed. Sierra Club takes the position that EKPC was unreasonable in its admitted failure to consider the cost to comply with pending EPA environmental regulations such as the effluent limitations guidelines ("ELG"), coal combustion residuals rule ("CCR"), and the cooling water intake rule ("316(b)"). Since EKPC admits that its application included no costs for compliance with these pending and soon-to-be-finalized rules, and that EKPC has not estimated such compliance costs, Sierra Club seeks to probe the reasonableness of the company's default assumption that these rules will have zero costs, and also to develop alternative estimates of the cost of complying with these seem to be finalized rules. Toward those ends, Sierra Club asked

for documents that EKPC acknowledges it reviewed pertaining to the cost at Cooper Unit 1 to comply with the ELG, CCR, and 316(b) rules.

EKPC defends its refusal to produce documents it reviewed pertaining to future environmental compliance costs at Cooper Unit 1 on three grounds: (1) the requests are too broad; (2) the costs are too speculative for the Commission to consider; and (3) Sierra Club has enough expertise to develop cost estimates without the requested information.

EKPC mischaracterizes the data requests in its attempt to portray the requests as seeking random statements about future rules. In reality, each request is narrowly tailored to seek documents reviewed by EKPC relating to compliance costs for a specific EPA rule at two specific units, Cooper Units 1 and 2. The request might be overly broad if they sought all documents EKPC reviewed regarding these EPA rules, but instead the requests were narrowly drawn to seek documents pertaining to cost estimates at only Cooper Units 1 and 2. The fact that there may be "numerous" documents that satisfy the requests does not make the requests overly broad.

EKPC's argument that the information is irrelevant because future environmental compliance costs should not be considered in this case continues to confuse its discovery obligations with its views of the merits of the case. EKPC is entitled to argue in its testimony and its briefing that it was reasonable to completely ignore costs that the company is likely to incur at Cooper Unit 1 due to regulations that EPA has proposed and is under court orders to finalize by dates certain. But whether EKPC acted reasonably in doing so is relevant to whether the Commission should approve the CPCN, and Intervenors are entitled to discovery on any relevant matter.

Moreover, the compliance costs are no more speculative than any other future costs that EKPC estimated. For each of these three rules, EPA has issued a proposed rule setting out compliance options and EPA faces a legal deadline for issuing the final rule. EKPC's case rests on estimates of future costs – coal costs, natural gas costs, energy prices, etc. – that are not certain. EKPC has provided no reason why the future environmental compliance costs that Cooper Unit 1 will face are any more speculative than the future fuel, energy, and other costs that the unit will face.

Finally, EKPC makes the cynical suggestion that Intervenors can develop their own cost estimates without the information EKPC refuses to provide. This argument is self-defeating, because by suggesting that Intervenors could properly present their own cost estimates in this case, EKPC admits that the costs to comply with other environmental rules are within the scope of this case. Furthermore, the accuracy of any such cost estimates will be improved if Intervenors have access to the information in the possession of the company. It is cynical to suggest that Intervenors produce their own cost estimates while at the same time refusing to provide information on which those estimates might be based.

C. Supplemental Data Requests 2.32(d)-(h) and 2.33(d)

Requests 2.32(d)-(h) and 2.33(d) seek analyses and information regarding the current handling of coal combustion residuals and liquid wastes at Cooper Units 1 and 2. EKPC's two reasons for refusing to provide the requested information are contradictory and meritless. EKPC claims on the one hand that pending EPA regulations with deadlines to promulgate final rules are so speculative that any information regarding the costs to comply with these rules are irrelevant to this case. As stated above, EKPC confuses its merits arguments with its discovery obligations. CR 26.02(1) allows discovery on any relevant matter, regardless of whether the party disagrees with the substantive argument that the information might be used to support. Furthermore, as

noted above, EKPC's suggestion that it would be proper for Sierra Club to present such cost estimates in this case is an admission that the costs to comply with proposed, soon to be finalized environmental rules are relevant – the exact opposite of EKPC's first argument. Moreover, Sierra Club's estimates of compliance costs at Cooper Units 1 and 2 could be more accurate if EKPC provides the information requested in 2.32 and 2.33 regarding the current handling of liquid wastes and coal combustion residuals, which is why Sierra Club asked for the information. Finally, Intervenors are entitled to probe the credibility of EKPC's claim that future environmental compliance costs cannot be estimated by receiving the documents EKPC reviewed concerning such cost estimates.

D. Supplemental Data Request 2.12(c)

EKPC defends its refusal to provide projected annual generation on a unit-specific basis on the grounds that it provided the aggregate generation for the entire fleet, and generation for the base case in which Cooper Unit 1 is retired; EKPC claims that subtracting the base case from the fleet-wide generation yields the generation for Cooper Unit 1. As explained above on pages 5-6, while this is true in theory, it is wrong in practice because of the inconsistencies in the information provided by EKPC. Directly providing the unit-specific costs and generation will help to clear up and address these inconsistencies.

E. Supplemental Data Request 2.14(c)-(e)

Request 2.14(c)-(e) seeks basic information on self-build proposals submitted in response to the RFP, such as descriptions of the proposals. EKPC claims in its response to the motion to compel that it provided the same information for its self-build options as it did for all other proposals submitted in response to the RFP. But EKPC's response to the motion to compel is directly contrary to the objection it originally raised. EKPC's objection to answering supplemental request 2.14(c) states that "EKPC objects to providing detailed descriptions of any

proposal other than the selected alternative." EKPC's responses to 2.14(d) and 2.14(e) referred back to the response to 2.14(c). EKPC seems to have objected to so many requests that it cannot even keep its story straight, except to insist that it simply does not want to release the requested information.

Furthermore, EKPC's claim that it provided the same information for all self-build options as for other proposals is contradicted by EKPC's discovery responses. EKPC has not provided even the most basic information about the other self-build proposals, such as an overview of what the proposals would have entailed. The table below appears in the "EKPC Case Mapping" tab in the workbook produced in response to Staff Initial Request 5.

The names for the self-build proposals— —show up throughout the workbook, but EKPC has never provided basic descriptions of what the proposals involved or breakdowns of the costs for each proposal. Intervenors cannot assess whether EKPC properly considered these proposals without first knowing what the proposals are. By contrast, EKPC has

provided summaries of other proposals. In short, EKPC has not provided the same information for these other self-build proposals as it has for other proposals. The grounds for not providing the requested information have no basis in fact or law and should be rejected.

F. Supplemental Data Request 2.46

EKPC has not even attempted to provide an objection to data request 2.46, which asked EKPC to produce the contract in which Andritz guaranteed that the air quality control systems would achieve certain emissions limits. EKPC has not claimed that the contract is privileged, or irrelevant, or that the request is overly broad. Instead, EKPC now contends that a two-page letter referencing the contract is a sufficient response to a data request seeking production of the contract itself.

The contract with Andritz goes to the heart of EKPC's case, since the contract purportedly guarantees that after the proposed environmental compliance project is complete, the air quality control systems will meet the emissions limits necessary to comply with the MATS rules which are the very reason for the project. Intervenors are entitled to see the actual contract rather than be forced to rely on representations made by EKPC and Andritz about what is in the contract. The two-page letter referencing the contract does not include all of the actual contract terms and provisions or enable Intervenors to evaluate the terms, limits, or conditions on the guarantee that is reportedly included in the contract.

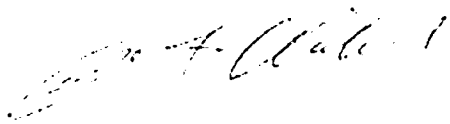
EKPC's position amounts to the assertion that it can summarize documents rather than having to produce the actual documents. There is no support for that position in the law and it runs counter to the very purpose of discovery, which is to enable parties to probe the truthfulness of the other side's contentions. The whole point of discovery is that a party does not have to rely on the opposing party's word as to what a document contains.

In sum, the contract relates to a relevant issue, EKPC has not even attempted to provide an objection to producing it, and therefore EKPC must produce it.

III. CONCLUSION

For the foregoing reasons, and those set forth in their initial motion, Intervenors respectfully request that the Commission grant their Motion to Compel Responses to Intervenors' Supplemental Requests for Information and Continuance of Case Schedule.

Respectfully submitted,



Joe Childers, Esq.
Joe F. Childers & Associates
300 Lexington Building
201 West Short Street
Lexington, Kentucky 40507
Phone: 859-253-9824
Fax: 859-258-9288

Shannon Fisk
Managing Attorney
Earthjustice
1617 John F. Kennedy Blvd., Suite 1675
Philadelphia, PA 19103
(215) 717-4522
sfisk@earthjustice.org

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

Matthew Gerhart

PUBLIC VERSION

Senior Associate Attorney
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
mgerhart@earthjustice.org

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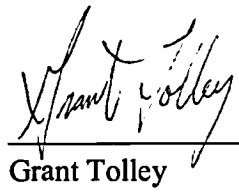
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply in Support of Motion to Compel and for a Continuance was sent by first class mail and electronic mail on December 4, 2013 to the following:

Mark David Goss
Goss Samford, PLLC
2365 Harrodsburg Road, Suite B325
Lexington, KY 40504

Patrick Woods
East Kentucky Power Cooperative, Inc.
4775 Lexington Road
P. O. Box 707
Winchester, KY 40392-0707

Michael L. Kurtz
Kurt J. Boehm
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202



Grant Tolley