COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

HAROLD BARKER; ANN BARKER AND BROOKS BARKER COMPLAINANTS	)	
V.	)	Case No. 2013-00291
EAST KENTUCKY POWER COOPERATIVE, INC. DEFENDANT	)	

REPLY IN SUPPORT OF MOTION TO STRIKE OF EAST KENTUCKY POWER COOPERATIVE, INC.

Comes now the Defendant, East Kentucky Power Cooperative, Inc. ("EKPC"), by counsel, and tenders its Reply in support of its Motion to Strike which was filed on August 28, 2014. The Complainants, Harold Barker, Ann Barker and Brooks Barker (collectively "the Barkers") filed a response to EKPC's motion to strike on September 9, 2014. In further support of its motion to strike, EKPC respectfully states as follows:

EKPC's motion to strike identified several instances where the Barkers attempted to introduce new evidence by introducing it, for the first time, in their post-hearing brief. In their response to the motion to strike, the Barkers do not deny the fact that they are attempting to introduce new evidence after the conclusion of the hearing, and actually seem quite pleased with the fact that they are doing so. The Barkers argue that they were somehow granted permission to offer new testimony and evidence in their post-hearing brief by Chairman Armstrong at the close

of the July 8, 2014 hearing. The Barkers quote Chairman Armstrong as saying "You have an agreement to submit briefs, you can do that—or do you have something alternative to that?"[1] However, this was clearly not an authorization to submit new evidence in the post-hearing Briefs. When the rest of the discussion is added, it is clear that both the Barkers' counsel and the Chairman were only discussing the presentation of additional testimony at the hearing, not in the post-hearing Briefs. The following is a transcript from the full discussion between the Barkers' counsel, Mr. Rowady, and Chairman Armstrong:

> Mr. Rowady: No sir, I think August 1st wasn't it? I think August 1st is fine Mr. Chair. What I was talking about was today for the opportunity for the Complainants to put on rebuttal testimony today in addition to the briefs that the parties will be filing on August 1st. That's what I was talking about.
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> Chairman Armstrong: They had the mic[rophone] and they exercised the ability to talk and tell their side of the story. That's been recorded.
>
> Mr. Rowady: It is sir but sometimes in the process of an adversarial proceeding such as this, information will come to light that can be challenged subsequently.
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> Chairman Armstrong: Well sometimes I'm accused of being not strict enough, but uh....
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> Mr. Rowady: I never said that Sir.
>
> Chairman Armstrong: Uh, but I think it was a good hearing, uh, I'm impressed with your clients and I think we all are and anxious to read the briefs.
>
> Mr. Rowady: Very well Sir.[2]

As one can see, the entire conversation was regarding the presentation of rebuttal testimony at the hearing, and not whether to include rebuttal testimony in the Briefs. Moreover,

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[1] Barkers' Response to Motion to Strike, p. 4 (September 9, 2014).

[2] Hearing Video Record, 15:57:00 (July 8, 2014).

none of the new evidence contained in the Barkers' Brief first came to light in the course of the hearing, as the Barkers' counsel suggested at the conclusion of the July 8, 2014 hearing.

For instance, the new expert opinion offered by Mr. Pfeiffer is nothing more than an after-the-fact attempt to revise his prior testimony in order to impose a more restrictive standard regarding the definitions of certain key statutory terms. The definitions provided in the Barkers' Brief are clearly different than the ones provided on the witness stand by Mr. Pfeiffer, whereas the definitions provided by Mr. Pfeiffer on the witness stand, while under oath, were very similar to the definitions given by EKPC's witness, Ms. Mary Jane Warner, in her direct testimony and her cross-examination at the hearing. The definitions originally given by Mr. Pfeiffer at the hearing are also similar to the dictionary definitions, from the dictionary he cited as authoritative, which EKPC quoted in its Brief. The Barkers do not dispute that the definitions provided in their Brief are different than the ones provided on the witness stand by Mr. Pfeiffer. This is a new expert opinion that cannot be provided after the close of the hearing.

In the Barkers' response, they also argue that, had they been able to present rebuttal testimony at the hearing, they would have called Ms. Warner back to the stand. At that time, they would have apparently questioned her regarding the "frequent overloading of the Avon 345/138kV 450 MVA autotransformer in June-August 2005 time period and expected future overloading" statement contained in her direct testimony on page 6 lines 15-17.[3] Mary Jane Warner was on the stand for approximately two hours during the course of the hearing in this matter. There is absolutely no reason why the Barkers could not have questioned her regarding the information contained in her direct testimony during that two hour period. The need to offer other evidence now has absolutely nothing to do with Dr. Dolloff's testimony, as the Barkers' response mistakenly alleges. In fact, the Barkers' response concedes that the real reason for the

[3] *Id.* at 2.

additional desired questioning arose from a statement contained in Ms. Warner's testimony.[4] Therefore, this new evidence is also an attempt to submit evidence into the record after the close of the hearing and should be stricken from the Barkers' Brief.

The same is true regarding the technical information provided by the Barkers in their Brief regarding human resistance to micro shocks. The Barkers' expert briefly discussed this issue very generally in his expert opinion report and, later, at the hearing in this matter, but he never provided any technical information regarding human resistance levels to support his opinion. Nor, for that matter, was he ever qualified as an expert on that technical aspect of his newly submitted evidence. Just because a general topic is briefly discussed at a hearing does not mean that very detailed and technical data can later be introduced after the hearing is closed to supplement the expert's opinion.

The last piece of new evidence the Barkers seek to introduce is the Minutes from a hearing of the Legislative Research Commission's Program Review and Investigations Committee ("LRC"), which is attached to the Barkers' Brief. The Barkers cite to the underlying LRC Report four times in their response to support the position that the Minutes from the LRC hearing should now also be introduced into the record. However, the Barkers ignore one very important distinction. The LRC Report is already in the record of this case, but the Minutes have never been referred to prior to now. These are two separate and distinct documents, both of which were created years ago and were available to the Barkers well before the hearings held in July. The fact that the LRC Report was submitted as part of the administrative record does not mean that the LRC hearing Minutes are somehow automatically boot-strapped into the record as well. The Barkers have made no effort to demonstrate why there were unable to use the LRC

[4] *Id.*

Minutes in the course of the hearing, which is the only question that matters for purposes of the Commission's rules. *See* 807 KAR 5:001, Section 11(4).

Moreover, the Barkers mischaracterize and selectively quote the Minutes as well. During the two hours that Ms. Warner was on the witness stand at the hearing, the Barkers had every opportunity to question her regarding any statements she may have made at the LRC hearing. They chose to not ask any of those questions and instead rely upon a third party's summary of Ms. Warner's statements. The Barkers also clearly misunderstand the genesis and nature of the LRC Report. For instance, they allege that the undersigned counsel was an author of LRC's Report, when the fact is the undersigned did not write any portion of LRC's Report.

The Barkers' attempt to introduce new evidence in their post-hearing Brief was not authorized by the Commission at the hearing and is clearly not allowed under 807 KAR 5:001, Section 11(4). The Barkers do not contest the key point of EKPC's motion to strike – they are improperly seeking to introduce new evidence through their post-hearing Brief. Accordingly, the offending portions of their Brief should be stricken from the record of this case.

WHEREFORE, on the basis of the foregoing, EKPC respectfully requests that its motion to strike be granted and the offending portions of the Barkers' Brief be stricken from the record in this case.

This 15th day of September, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been served, by delivering same to the custody and care of the U.S. Postal Service, postage pre-paid, this 15th day of September, 2014, addressed to the following:

Mr. Alex Rowady, Esq.
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