

# Goss ■ Samford PLLC



Attorneys at Law

**David S. Samford**

david@gosssamfordlaw.com

(859) 368-7740

April 14, 2015

RECEIVED

APR 14 2015

PUBLIC SERVICE  
COMMISSION

***Via Hand-Delivery***

Mr. Jeffrey Derouen  
Executive Director  
Kentucky Public Service Commission  
P.O. Box 615  
211 Sower Boulevard  
Frankfort, KY 40602

Re: In the Matter of: An Examination of the Application of the Fuel  
Adjustment Clause of East Kentucky Power Cooperative, Inc.  
from November 1, 2012 through October 31, 2014  
PSC Case No. 2014-00451

Dear Mr. Derouen:

Enclosed please find for filing with the Commission in the above-referenced case an original and ten (10) copies of East Kentucky Power Cooperative, Inc.'s Response to Motion to Strike regarding the above-styled matter. Please return a file-stamped copy to me.

Do not hesitate to contact me if you have any questions.

Very truly yours,

David S. Samford

Enclosures

M:\Clients\4000 - East Kentucky Power\1700 - FAC Cases\  
Correspondence\Ltr. to Jeff Derouen - 150414

**COMMONWEALTH OF KENTUCKY**  
**BEFORE THE PUBLIC SERVICE COMMISSION**

**RECEIVED**

APR 14 2015

PUBLIC SERVICE  
COMMISSION

**IN THE MATTER OF:**

**AN EXAMINATION OF THE APPLICATION )  
OF THE FUEL ADJUSTMENT CLAUSE OF )  
EAST KENTUCKY POWER COOPERATIVE, )  
INC. FROM NOVEMBER 1, 2012 THROUGH )  
OCTOBER 31, 2014 )**

**CASE NO. 2014-00451**

---

**EAST KENTUCKY POWER COOPERATIVE, INC.'S  
RESPONSE TO MOTION TO STRIKE**

---

Comes now East Kentucky Power Cooperative, Inc. ("EKPC"), by and through counsel, pursuant to 807 KAR 5:001 Section 5(2) and other applicable law, and for its Response to Grayson Rural Electric Cooperative Corporation's ("Grayson") Motion to Strike, respectfully states as follows:

Once again, Grayson has made a filing that is procedurally improper, materially false and substantively unsupported by any fact, law or rationale. Every single paragraph of Grayson's Motion demonstrates either a fundamental misunderstanding of the Commission's rules and procedures or a lack of diligence on Grayson's part in preparing its filing, or both. Though it is time-consuming to do so, EKPC must respond to each such error in order to highlight the extent to which Grayson's motion is simply the latest salvo in a "scorched earth" litigation strategy that is wasteful, distracting and unnecessary. Grayson's Motion should itself be rejected for filing as procedurally improper or, at most, accepted as a public comment lacking evidentiary status under 807 KAR 5:001 Section 4(11)(e).

## 1. GRAYSON'S FIRST CLAIM

**The within action, by Order entered February 5, 2015, notice of which was not sent to Grayson nor any indication that it was sent to any other member of EKPC, contained an assertion in numerical paragraph 13 that the record in three other cases, including 2014-00226, was incorporated into the within proceeding.<sup>1</sup>**

The Commission's Order establishing this proceeding was entered on February 5, 2015, and allowed any third-party a full three (3) weeks to come forward and file a timely motion for intervention under 807 KAR 5:001 Section 4(11). Even an untimely motion for intervention would potentially have been considered. However, Grayson chose not to seek intervention in this proceeding for whatever reason. Accordingly, Grayson lacks standing to file any motion in this case and its April 6<sup>th</sup> filing is clearly not authorized by the Commission's rules. It is inconceivable that a utility, which has been regulated by this Commission since 1951,<sup>2</sup> would be unaware of this fundamental requirement – a requirement that is not unique to administrative law, but foundational to the very notion of due process itself.<sup>3</sup>

Moreover, Grayson's implicit claim that it was unaware of the existence of this proceeding is simply not credible. EKPC published notice of the hearing in this matter as required by 807 KAR 5:001 Section 9 and sent actual notice of the hearing to the managers of its sixteen Members on March 24, 2015.<sup>4</sup> Grayson is itself a party to a companion case involving

---

<sup>1</sup> Grayson's Motion, ¶ 1.

<sup>2</sup> See KRS 279.210; David Dick, *LET THERE BE LIGHT: THE STORY OF RURAL ELECTRIFICATION IN KENTUCKY*, Plum Lick Publishing, North Middletown, Ky. (2008), p. 189.

<sup>3</sup> See *City of Manchester v. Keith*, 396 S.W.2d 44, 45 (Ky. 1965) (“Obviously he had no standing in the lawsuit in the latter capacity because he was not a party in that or any other capacity. Nor did he have any standing as attorney because the circuit court in overruling the motion found that he was ‘not acting as attorney in this case,’ which we interpret as meaning that he was not an attorney for the city, special or otherwise. The circuit court very properly overruled the motion because it was nothing more than an effort by the movant to interlope in a lawsuit in which he had no standing.”).

<sup>4</sup> See EKPC Filing of Proof of Publication of Hearing Notice (filed April 3, 2015).

the review of Grayson's FAC pass-through mechanism,<sup>5</sup> which was originally set for a hearing on the same day as EKPC's hearing in this case. In fact, Grayson's own counsel filed responses to the Commission's data requests on February 26, 2015. The following day, Grayson's President and Chief Executive Officer tendered an affidavit swearing that Grayson had complied with the FAC throughout the two-year period under review. Put simply, either willfully or through neglect, Grayson failed to seek intervention in this proceeding; however, neither reason is a legitimate basis for accepting Grayson's Motion for filing or granting the relief which it seeks.

## 2. GRAYSON'S SECOND CLAIM

**Grayson is an intervening party in 2014-00226. However, Grayson was not given notice of the incorporation of that proceeding into the within proceeding.<sup>6</sup>**

Grayson confuses the concept of incorporating the administrative record of a prior case into a later case with the concept of consolidating two or more existing cases. The Commission incorporated the administrative record of Case No. 2014-00226 into this case, as it must do in order to fulfill its obligations under 807 KAR 5:056 Section 12. However, that is not the same as consolidating Case No. 2014-00226 and this matter into a single case. Grayson is a party to Case No. 2014-00226 and remains free to participate as an intervenor in that case, which is currently before the Commission following the granting of EKPC's Petition for Rehearing. Grayson's right to participate in that case has not been prejudiced in any respect. However, the Commission's decision to incorporate the administrative record from Case No. 2014-00226 into the record of this case does not confer an automatic right of intervention upon Grayson.

---

<sup>5</sup> See *In the Matter of an Examination of the Application of the Fuel Adjustment Clause of Grayson Rural Electric Cooperative Corporation from November 1, 2012 through October 31, 2014*, Order, Case No. 2014-00462 (Ky. P.S.C., Feb. 5, 2015).

<sup>6</sup> Grayson's Motion, ¶ 2.

Grayson, of course, should know this and its attempt to muddy the waters by confusing case consolidation with incorporation by reference is unavailing.<sup>7</sup> By definition, the Commission cannot conduct the mandated two year FAC review without incorporating the three prior six month review records into the two year review case.

### 3. GRAYSON'S THIRD CLAIM

**Grayson has no duty to check the Public Service Commission records on a daily basis to see if its provider of power is filing a document containing information, nor does Grayson have a duty to check the Public Service Commission records each day to see if the Commission has entered an order, in a case that affects Grayson's rights without having served a copy of that order upon Grayson.**<sup>8</sup>

Grayson's third claim is bizarre. Grayson seems to be blaming the Commission for its own failure to understand that the record of Case No. 2014-00226 was being incorporated into the record of this proceeding. Despite the fact that there is no harm that results from the incorporation of that record into this proceeding, Grayson's underlying assertion is that it has no duty to be aware of Commission proceedings involving any other utility and that the Commission has an affirmative duty to inform Grayson whenever any of its interests *might* be implicated. This idea borders on the ridiculous. How could the Commission possibly know what matters might be important to third parties, and where would the obligation which Grayson seeks to impose upon the Commission ever end?

Prudence alone dictates that all utilities remain reasonably informed as to developments in Commission law and practice. Moreover, the Commission has made significant investments in time and resources to assure that its records and Orders are transparent and readily available to

---

<sup>7</sup> The current case stands in contrast to *In the Matter of an Examination of the Application of the Fuel Adjustment Clause of Big Rivers Electric Corporation from November 1, 2012 through October 31, 2014*, Order, Case No. 2014-00455 (Ky. P.S.C., Feb. 19, 2015), which clearly consolidated that case with a prior FAC case and joined the parties to the earlier proceeding to the new case.

<sup>8</sup> Grayson's Motion, ¶ 3.

the public in general. The Commission's website is updated many times each day with every Order that is issued and every document that is filed. The Commission's transparency exceeds that of many Courts in the Commonwealth which only make basic docket entries available to the public online. Grayson's admission that it generally does not pay attention to what is going on at the Commission speaks more to the lack of diligence and concern that Grayson gives to its regulatory obligations than it does to any perceived omission by the Commission. As stated in case law, "[t]here is a maxim as old as the law itself, *ignorantia legis neminem excusat*, 'ignorance of the law excuses no one'...."<sup>9</sup> The point is so well established in Kentucky law that the same Court wrote, "this maxim has been applied with the same rigor in this jurisdiction as elsewhere, and that one's non-action through ignorance of the law could not be allowed to extend or enlarge his legal rights."<sup>10</sup>

#### 4. GRAYSON'S FOURTH CLAIM

**It is incumbent upon the Public Service Commission to afford adequate notice and opportunity to be heard to the rate payers when it is considering what its appropriate action would be in a given case. That has not been done in the within case.<sup>11</sup>**

As stated above: (1) Grayson's own two-year FAC review case was initiated on the same day that EKPC's two-year review case began; (2) Grayson's hearing was scheduled for the same day as EKPC's hearing; (3) Grayson was given a full three weeks to file a timely motion for leave to intervene following the initiation of EKPC's case; (4) EKPC published noticed of the hearing in accordance with 807 KAR 5:001 Section 9; and (5) EKPC sent actual notice of the hearing to the managers of EKPC's sixteen Members. All five of these actions were required by the Orders

---

<sup>9</sup> See *Freeman v. Louisville & Jefferson County Planning & Zoning Com'n*, 214 S.W.2d 582, 583 (Ky. App. 1948).

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

<sup>11</sup> Grayson's Motion, ¶ 4.

entered by the Commission on February 5, 2015, in Case No. 2014-00451 and Case No. 2014-00462. What more is necessary for the Commission to give “adequate notice and opportunity to be heard”? Grayson’s allegation that it lacked any notice or an opportunity to be heard is absurd.

## 5. GRAYSON’S FIFTH CLAIM

**On March 27, 2015, a Motion was served by EKPC in 2014-00226 to establish an informal conference in said action in which Motion it was suggested that the Commission hold the informal conference at the convenience of EKPC.**

**The Motion suggested that the convenient, most suitable to EKPC date was April 7, 2015. However, more specificity was given by EKPC with respect to its suitability to attend an informal conference wherein the Motion asserted that the most convenient time would not be in the morning of April 7, 2015, but that the time to commence the informal conference be sometime after 1:00 p.m. on April 15 [sic].**

**Grayson upon receipt of the Motion served a response on March 30, 2015, objecting to the informal conference because of the short notice and the fact that the narcissistic, self-centered approach of EKPC as to when it was most suitable to EKPC to attend an informal conference, conflicted with previously scheduled Court appearances for counsel for Grayson.<sup>12</sup>**

EKPC’s March 27<sup>th</sup> motion in Case No. 2014-00226 was to request an informal conference, not to establish an informal conference as Grayson wrongfully claims. Following the granting of EKPC’s Petition for Rehearing in that case, EKPC believed that it would be helpful to have an informal conference with Grayson and Commission Staff to determine what further process was necessary to adjudicate the issues on rehearing. Moreover, due to the overlap of the issues on rehearing in Case No. 2014-00226 with those in Case No. 2014-00229,<sup>13</sup> EKPC suggested that a single informal conference to address these common issues might be most efficient. The fact that 1:00 p.m., or later, was suggested as the time to hold the requested

---

<sup>12</sup> Grayson’s Motion, ¶¶ 5-7.

<sup>13</sup> See *In the Matter of an Examination of the Application of the Fuel Adjustment Clause of Duke Energy Kentucky, Inc. from November 1, 2013 through April 30, 2014*, Case No. 2014-00229.

informal conference was made in recognition of three important facts: (1) all the witnesses who would have information relating to the issues on rehearing in both Case No. 2014-00226 and Case No. 2014-00229 would already be at the Commission's offices on April 7<sup>th</sup>; (2) the morning of April 7<sup>th</sup> would not work because of the previously scheduled FAC hearings; and (3) EKPC's Board Meeting was scheduled for the morning of April 7<sup>th</sup> and, by holding the informal conference in the afternoon, Grayson's President should also be able to attend and participate in the informal conference if she so desired. The fact that the motion requesting an informal conference was filed eleven (11) days prior to the date of the requested meeting hardly constitutes the "short notice" that Grayson alleges.

EKPC's motion was properly served upon Grayson, who filed a timely Objection that tellingly reveals another example of Grayson's disrespect for the Commission's Orders. The Objection filed on March 30, 2015 indicates that Grayson's counsel could not participate in an informal conference on April 7<sup>th</sup> because of "previously scheduled Court appearances" which apparently commanded the attention of all three attorneys in Grayson's counsel's office. However, the Commission's February 5, 2015 Order in Case No. 2014-00462, which is Grayson's own two-year FAC review case, set a hearing in that matter for April 7<sup>th</sup> at 10:00 a.m., the same time as EKPC's hearing. According to the Commission's Order, Grayson would not know whether that hearing would be cancelled until April 3, 2015, and then only in the event that no one requested the formal hearing to move forward. Thus, a full four (4) days before Grayson knew whether it would be required to attend and participate in its own two-year review hearing on April 7<sup>th</sup>, Grayson's counsel informed the Commission that Grayson could not participate in any informal conference in Frankfort on April 7<sup>th</sup>. Plainly, Grayson's counsel scheduled other commitments that directly conflicted with the Commission's February 5, 2015 Order without



informing the Commission. The record demonstrates that it is Grayson, and not EKPC, that seeks to advance and delay Commission proceedings at its own whim and desire.

The balance of Grayson's rhetoric is unprofessional and distasteful.

## 6. GRAYSON'S SIXTH CLAIM

**When looking into the matter further, the undersigned counsel discovered EKPC's response to the last data request as referenced hereinabove and learned that two separate codes of PJM billing were given considerable discussion and explanation by EKPC. This is in the response to Request No. 4 and Request 3a. In that response there is given, hearsay statements that go to a significant issue in Case No. 2014-00226, which was decided by Order entered January 30, 2015, but which has been followed by, at the request of EKPC, an Order granting rehearing. To the extent that EKPC submits testimony, as vague as it is, in the within action, in order to give explanation to matters asserted in 2014-00226 wherein Grayson was a party, but Grayson is not given the opportunity to consider the hearsay testimony, then there has been a denial of procedural due process necessitating that the Response by EKPC be stricken and that it not be considered at all by the Commission in the within proceeding. To allow explanation based upon hearsay in a matter that is outside the rules allowing cross-examination of witnesses and to allow same without appropriate time for same to be reviewed by Grayson would be absolutely reprehensible. The information submitted March 25, not having an opportunity to be reviewed by Grayson until the week of March 30, and then only by accident, the week preceding Easter, to be considered by the Commission on April 7, 2015, is a scenario that defies logic and is a scenario that should not be countenanced by the Commission.<sup>14</sup>**

Grayson's previous misleading assertions all build to the point which it seeks to make in this paragraph of its Motion to Strike: the Commission should not consider EKPC's answers to the Commission's own questions because Grayson failed to participate in this proceeding. While Grayson wraps this point in the language of due process and evidentiary rules, its wild protestations are nothing more than an attempt to cover for the fact that, despite having ample notice of this proceeding, it willingly or neglectfully chose not to participate. The Commission

---

<sup>14</sup> Grayson's Motion, ¶ 8.

must itself assess whether it has somehow denied Grayson its due process rights, which seems to be an illegitimate assertion based upon all the information described above, but EKPC cannot be faulted for answering the questions posed by the Commission. Grayson calls this “a scenario that defies logic” and that “should not be countenanced by the Commission,” but, again, this hyperbole cannot cover Grayson’s own culpability in failing to act upon what it perceives to be an important self-interest.

## 7. GRAYSON’S SEVENTH CLAIM

**It is unclear in the Response of EKPC to Commission Staff’s Request for Information as to whether EKPC is intending to assert additional fuel charges that would need to be examined by Grayson or if it is simply relying upon those that have already been discussed. For example, in Response 4a EKPC asserts that “both billing line items 2370 and 1370 should be included in the calculation of the FAC, EKPC has not done so to date, but concurs that it should have included both codes.” This could impact the decision in 2014-00226 and is something about which Grayson would be entitled to give some consideration as a rate payer and try to learn the ramifications of such billing. In Response 4d EKPC even asserts that there may even be more billing items that would need to be added. If the list goes on and on then, and without appropriate regulation by the Commission, and some question being asked by the rate payer when the rate payer is given proper notice of Commission action, then EKPC will continue its improper attempts to bill its ratepayers on the backs of those least able to afford it.<sup>15</sup>**

Grayson’s next claim is based upon an entirely false premise. It essentially claims that because Grayson (by its own inaction) was unable to participate in Case No. 2014-00451, then costs and expenses will be passed along to it without any Commission oversight. Of course, this is also untrue. The Commission has been vigilant in seeking to understand and ascertain the nature of PJM’s billing codes and continues to determine which of these costs are recoverable

---

<sup>15</sup> Grayson’s Motion, ¶ 9.

through the FAC and which are better recovered through some other rate mechanism.<sup>16</sup> The Commission, not Grayson, is EKPC's regulator as to rates and services. EKPC's position on which PJM billing codes represent fuel expenses is well-stated in its testimony, responses to Commission data requests and in the hearing record itself. The Commission does not require Grayson's input, which is generally offered without any direct knowledge of PJM's processes, to address the questions before it.

Likewise, Grayson also asserts without any foundation or support, that "EKPC will continue its improper attempts to bill its ratepayers on the backs of those least able to afford it." It is a logical fallacy to claim that EKPC is seeking to bill ratepayers who are "least able to afford it." EKPC's rates are charged uniformly within customer classifications approved by the Commission, pursuant to KRS 278.030(3). EKPC does not have any rate that is means-tested or imposed regressively as Grayson implies. In fact, EKPC has made significant efforts to help the most economically distressed portions of its service territory by offering incentive rates for economic development,<sup>17</sup> which Grayson does not appear to have yet decided to offer in its own service territory. The more probative question concerns the extent to which Grayson's own policies and practices have resulted in the imposition of unnecessary costs and expenses upon its own Members. The Commission has already highlighted several areas of particular concern.<sup>18</sup> A brief review of its most recent annual report suggests that Grayson's financial affairs have not

---

<sup>16</sup> Grayson appears to be confused concerning the scope of the Commission's Order in Case No. 2014-00226. There, the Commission stated only that certain costs incurred through PJM could not be recovered through the FAC, not that these costs could not be recovered through some other rate mechanism or base rates.

<sup>17</sup> See *In the Matter of the Application of East Kentucky Power Cooperative, Inc. for Approval of an Economic Development Rider*, Order, Case No. 2014-00034 (Ky. P.S.C., June 20, 2014).

<sup>18</sup> See *In the Matter of the Application of Grayson Rural Electric Cooperative Corporation for an Adjustment of Electric Rates*, Order, Case No. 2012-00426, pp. 14-16 (Ky. P.S.C., July 31, 2013) (expressing significant concerns over Grayson's increasing payroll expense, Director's compensation, delayed response to a deteriorating financial condition and inconsistent financial data reporting).

significantly improved during the two and a half years it has been initiating a seemingly never-ending series of wide-ranging legal skirmishes against EKPC and its other Members.<sup>19</sup> To best protect the backs of its ratepayers, getting its own house in order should be Grayson's first priority.

## 8. GRAYSON'S EIGHTH CLAIM

**In addition, Grayson respectfully submits that the Commission should make an inquiry into whether appropriate notice of the hearing has been published by EKPC. The Proof of Notice filed April 3 would seem to indicate publication in the Cincinnati Enquirer, the Louisville Courier Journal, and another unidentified newspaper. One could guess that the third unidentified newspaper is the Lexington Herald. However, one could only guess as there is no indication as to what newspaper in which the third notice was published. Furthermore, if the Lexington Herald is the actual paper, then an inquiry should be made as to whether that newspaper is one of "general circulation" in "each area in which it provides service". For example, many rural areas in Eastern Kentucky do not have delivery of the Lexington Herald, same being provided only in, in many instances, certain municipalities but not in a wide rural area where the distribution cooperatives that own EKPC provide service.<sup>20</sup>**

Grayson's final claim is equally unsupported and again exhibits a fundamental unfamiliarity with the Commission's rules and regulations. First, the "unidentified newspaper" publication referenced by Grayson is in fact the Lexington Herald-Leader, which is confirmed by the words "Lexington Herald-Leader" set forth in the upper right-hand corner of the copy of page B6 of the Wednesday, March 25, 2015 edition that was attached to EKPC's April 3, 2015 proof of publication filing. With that mystery solved, the second point that should be made is that EKPC tendered actual notice to Grayson's President in the form of a memorandum from Tony Campbell, dated March 24, 2015, a copy of which was also attached to EKPC's April 3,

---

<sup>19</sup> Grayson's 2013 Annual Report on file with the Commission reveals that it ended the year with only \$75,344.92 in cash, placing it in a precarious financial situation. Grayson's 2014 Annual Report is not yet available for review.

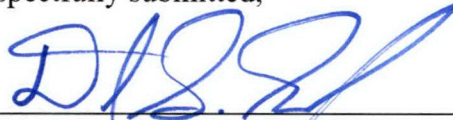
<sup>20</sup> Grayson's Motion, ¶ 10.

2015 filing. These notices fully comply with the Commission's notice requirements set forth in 807 KAR 5:001 Section 9. Finally, paragraph four of the Commission's Order in Case No. 2014-00462 (Grayson's two-year FAC review case) required Grayson to itself give public notice of its concurrently scheduled April 7, 2015 hearing. The proof of publication of said notice was ordered to be filed on or before April 3, 2015, however, Grayson did not get around to filing the proof of publication of notice until April 13, 2015 – ten (10) days late. Again, the pattern that continues to emerge is that Grayson will quickly invoke the Commission's jurisdiction and authority when it believes it has a chance to attack and vilify EKPC, but it just as quickly disregards the Commission's jurisdiction and authority whenever it finds the Commission's mandates to be inconvenient. This double-standard should not be allowed to continue in order to protect all of EKPC's Members' ratepayers.

WHEREFORE, on the basis of the foregoing, East Kentucky Power Cooperative, Inc. respectfully requests the Commission to reject fGrayson's Motion to Strike for filing on the basis that it is procedurally improper or, in the alternative, to treat the document as a public comment that lacks evidentiary value under 807 KAR 5:001 Section 4(11)(e).

This 14th day of April, 2015.

Respectfully submitted,



---

Mark David Goss  
David S. Samford  
GOSS SAMFORD, PLLC  
2365 Harrodsburg Road, Suite B325  
Lexington, KY 40504  
(859) 368-7740  
*mdgoss@gosssamfordlaw.com*  
*david@gosssamfordlaw.com*

*Counsel for East Kentucky Power Cooperative, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing filing was served on the following via depositing same in the custody and care of the U.S. Mail, postage prepaid, this 14<sup>th</sup> day of April, 2015:

W. Jeffrey Scott, Esq.  
W. Jeffrey Scott, P.S.C.  
P. O. Box 608  
Grayson, Kentucky 41143

Lawrence Cook, Esq.  
Assistant Attorney General  
700 Capital Building, Suite 118  
Frankfort, KY 40601-3449



*Counsel for East Kentucky Power Cooperative, Inc.*

M:\Clients\4000 - East Kentucky Power\1700 - FAC Cases\Drafts\  
EKPC's Response to Grayson's Motion to Strike (2014-00451) - 150407.docx