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March 21, 2007

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PUBLIC SERVICE
COMMISSION

Elizabeth O'Donnell
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, Kentucky 40601

**RE: An Examination of the Application of the Fuel Adjustment Clause of
Kentucky Utilities Company From November 1, 2004 Through October 31,
2006**
KPSC Case No. 2006-00509

Dear Ms. O'Donnell:

Enclosed please find and accept for filing the original and ten copies of Kentucky Utilities Company's Reply to KIUC's Response to KU's Motion to Strike First Set of Data Requests Question No. 14 in the above-referenced matter. Please confirm your receipt of this filing by placing the stamp of your Office with the date received on the enclosed additional copies and return them to me in the enclosed self-addressed stamped envelope.

Should you have any questions or need any additional information, please contact me at your convenience.

Very truly yours,



Kendrick R. Riggs

KRR/ec
Enclosures
cc: Parties of Record

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

**AN EXAMINATION OF THE APPLICATION)
OF THE FUEL ADJUSTMENT CLAUSE OF)
KENTUCKY UTILITIES COMPANY FROM) **CASE NO. 2006-00509**
NOVEMBER 1, 2004 THROUGH)
OCTOBER 31, 2006)**

**REPLY TO KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC.’S RESPONSE
TO KENTUCKY UTILITIES COMPANY’S MOTION TO STRIKE
KENTUCKY INDUSTRIAL UTILITIES CUSTOMERS, INC.’S
FIRST SET OF DATA REQUESTS QUESTION NO. 14**

Kentucky Industrial Utility Customers, Inc.’s March 8, 2007 “Reply of KIUC to the Motion to Strike of Kentucky Utilities Company”¹ misses the point of Kentucky Utilities Company’s (“KU”) Motion to Strike Question No. 14 of Intervenor Kentucky Industrial Utility Customers, Inc.’s (“KIUC”) First Set of Data Requests to KU (“Question No. 14”).² The simple fact remains that KIUC premised Question No. 14 upon a rate case settlement agreement, approved in its entirety by this Commission, which agreement explicitly states that it and its terms are not precedent and are not to be cited in any proceeding before any tribunal. For that reason, it remains appropriate for the Commission to strike Question No. 14. In further support of this Reply, KU states as follows:

On February 23, 2007, KU filed with the Public Service Commission (“PSC” or “Commission”) its Motion to Strike Question No. 14 of Intervenor Kentucky Industrial Utility

¹ *In the Matter of an Examination of the Application of the Fuel Adjustment Clause of Kentucky Utilities Company from November 1, 2004, through October 31, 2006*, Case No. 2006-00509, Reply of KIUC to the Motion to Strike of Kentucky Utilities Company (“KIUC Response”) (March 8, 2007).

² *In the Matter of an Examination of the Application of the Fuel Adjustment Clause of Kentucky Utilities Company from November 1, 2004, through October 31, 2006*, Case No. 2006-00509, Motion to Strike Question No. 14 of Intervenor Kentucky Industrial Utility Customers, Inc.’s First Set of Data Requests to KU (“Motion to Strike”) (February 23, 2007).

Customers, Inc.’s First Set of Data Requests to KU.³ As grounds for its Motion, KU argued that Question No. 14 violates the settlement agreement Duke Energy Kentucky (“DEK”) entered into with the intervenors during DEK’s most recent base rate case (“DEK Settlement Agreement”),⁴ which agreement explicitly stated that its terms were not to be admissible or treated as precedent in any other proceeding before any tribunal.⁵

On March 8, 2007, KIUC responded to KU’s Motion to Strike with what KIUC styled its “Reply of KIUC to the Motion to Strike of Kentucky Utilities Company.”⁶ Concerning the argument KU raised in its Motion to Strike, KIUC’s response argues: (1) though the DEK Settlement Agreement provided that no part thereof would be admissible or have precedential effect in any other proceeding before any tribunal, Question No. 14 and the attachment thereto (“Attachment”) are admissible because they were not part of the DEK Settlement Agreement *per se*;⁷ (2) KIUC does not claim that the attachment to Question No. 14 is precedent,⁸ and (3) KU cannot assert that Question No. 14 or the Attachment is inadmissible because KU was not a party to the DEK Settlement Agreement.⁹ As set out in greater detail below, all of KIUC’s arguments are without merit.

Beginning with KIUC’s argument that the contents of Question No. 14 and the Attachment are not part of the DEK Settlement Agreement *per se*, such an argument ignores the

³ *In the Matter of an Examination of the Application of the Fuel Adjustment Clause of Kentucky Utilities Company from November 1, 2004, through October 31, 2006*, Case No. 2006-00509, Motion to Strike Question No. 14 of Intervenor Kentucky Industrial Utility Customers, Inc.’s First Set of Data Requests to KU (“Motion to Strike”) (February 23, 2007).

⁴ *In the Matter of Application of Union Light, Heat and Power Company d/b/a Duke Energy Kentucky for an Adjustment of Electric Rates*, Case No. 2006-00172, Order at Appx. B (“DEK Settlement Agreement”) (December 21, 2006).

⁵ DEK Settlement Agreement at 9.

⁶ *In the Matter of an Examination of the Application of the Fuel Adjustment Clause of Kentucky Utilities Company from November 1, 2004, through October 31, 2006*, Case No. 2006-00510, Reply of KIUC to the Motion to Strike of Kentucky Utilities Company (“KIUC Response”) (March 8, 2007).

⁷ KIUC Response at 1-2.

⁸ KIUC Response at 2.

⁹ KIUC Response at 3.

terms of the DEK Settlement Agreement and elevates form over substance. The DEK Settlement Agreement explicitly stated:

33. Admissibility and Non-Precedential Effect. Neither the Settlement Agreement nor any of the terms shall be admissible in any court or Commission except insofar as such court or Commission is addressing litigation arising out of the implementation of the terms herein or the approval of this Settlement Agreement. This Settlement Agreement shall not have any precedential value in this or any other jurisdiction.¹⁰

Notably, KIUC's response does not contest KU's characterization of the Attachment as "a handout from an informal conference in Case No. 2006-00172 for the purpose of discussing the implementation of the then-approved DEK Settlement Agreement."¹¹ That is to say, KIUC has not contested that the Attachment, upon which Question No. 14 is premised, explicitly addresses the terms of the DEK Settlement Agreement. To argue that such a document does not fall under the prohibition on the admissibility of the DEK Settlement Agreement's "terms" is to strain the commonsense understanding of "terms" beyond its breaking point; it is a textbook example of elevating form over substance. The Commission should refuse KIUC's invitation to empty formalism and strike Question No. 14 for what it is: a violation of the letter and spirit of the DEK Settlement Agreement.

Turning next to KIUC's argument that KU cannot assert that Question No. 14 or the Attachment is inadmissible because KU was not a party to the DEK Settlement Agreement, KU's replies: The DEK Settlement Agreement was not merely an agreement between the parties thereto. The Commission approved all the agreement's terms in its final order in that proceeding,¹² thus the terms of the DEK Settlement Agreement have effect and applicability

¹⁰ DEK Settlement Agreement at 9 (emphasis added).

¹¹ Motion to Strike at 2.

¹² *In the Matter of Application of Union Light, Heat and Power Company d/b/a Duke Energy Kentucky for an Adjustment of Electric Rates*, Case No. 2006-00172, Order at 10 (December 21, 2006).

beyond that case and the parties thereto, just as does any Commission order. Moreover, no part of the two paragraphs from the DEK Settlement Agreement that KU quoted in its Motion apply only to parties to the agreement;¹³ rather, the DEK Settlement Agreement paragraph titled, “No Admissions,” states that no part of the agreement is to be construed as an admission by any party thereto, which is not the same as saying that the DEK Settlement Agreement applies only to its signatories.¹⁴ Thus, KIUC’s argument that the DEK Settlement Agreement applies only to the parties thereto is erroneous and is no obstacle to striking Question No. 14.

Finally, KIUC’s argument that KIUC does not claim that the attachment to Question No. 14 is precedent,¹⁵ though literally true, is meritless nonetheless. Logically and rhetorically, the only reason for couching Question No. 14 in the terms and context of the DEK Settlement Agreement and the Attachment is to imbue the terms of Question No. 14 with the authority of precedent. KIUC could have worded Question No. 14 without reference to DEK and could have omitted the Attachment entirely and still asked the same question. (It is also worthy of note that Question No. 14 does not seek data at all, but seeks to know whether KU is “willing to accept” certain kinds of arrangements. Question No. 14 is also objectionable on this ground.) Thus, KIUC’s plain intent in referring to the DEK settlement talks and the Attachment was to imbue the “alternatives” presented in Question No. 14 with the authority of precedent; it is equally plain that such an approach violates the letter and spirit of the DEK Settlement Agreement, necessitating that the Commission strike Question No. 14.

In summary, the simple fact remains that KIUC premised Question No. 14 upon the DEK Settlement Agreement, approved in its entirety by this Commission, which agreement explicitly states that it and its terms are not precedent and are not to be cited in any proceeding before any

¹³ Motion to Strike at 1-2.

¹⁴ DEK Settlement Agreement at 9.

¹⁵ KIUC Response at 2.

tribunal. For that reason, it remains appropriate for the Commission to grant KU's Motion to Strike Question No. 14 of Intervenor Kentucky Industrial Utility Customers, Inc.'s First Set of Data Requests to KU.

Dated: March 21, 2007

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing Reply was served, via United States mail, postage prepaid, and electronic mail to the following persons on the 21st day of March 2007:

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