

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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In the Matter of:

Application of Kentucky Power Company for Approval of)
its Environmental Compliance Plan, Approval of its Amended) CASE NO. 2011-00401
Environmental Cost Recovery Surcharge Tariffs, and for the)
Grant of Certificates of Public Convenience and Necessity)
for the Construction and Acquisition of Related Facilities)

MOTION BY INTERVENORS TOM VIERHELLER, BEVERLY MAY, AND
SIERRA CLUB TO COMPEL DISCLOSURE

On January 27, 2012, Kentucky Power Company (“KPC” or the “Company”) served responses to Tom Vierheller, Beverly May, and Sierra Club’s (collectively “Sierra Club”) initial data requests. *See* Exhibit 1. Sierra Club requested information regarding key assumptions and analyses used by KPC to support its application, but the Company has failed to produce the requested information. In addition, a number of Sierra Club’s questions asked for data related to American Electric Power (“AEP”), the parent company of KPC. For questions related to AEP, KPC objected, claiming that “AEP is not a party to this proceeding, and is not a utility subject to the jurisdiction of the Public Service Commission of Kentucky.” The Commission should compel KPC to release all non-privileged responsive information related to the key assumptions and analyses and AEP because this information is relevant to this docket and could prove essential to the full analysis of KPC’s applications for *Certificates of Public Convenience and Necessity* (“CPCN”) and related environmental surcharges that is required by law.

I. KPC's Evasive and Incomplete Answers Are Contrary to Law.

Sierra Club has participated in CPCN cases around the country. In all of these cases, Sierra Club examines key assumptions and analyses of the applicant to determine if they are reasonable, meaning that you could draw a linear and moderately logical line between key assumptions, analyses, and conclusions. If the assumptions and/or analyses are flawed, then the resulting conclusions are typically not reasonable. In a typical case, Sierra Club would expect to see:

- a) the company's estimate (or bid) for their environmental upgrade and the estimate (or bid) for replacement capacity;
- b) a logically structured modeling analysis in which Sierra Club and other interveners could examine both the input assumptions and the output results;
- c) sensitivity analyses that demonstrate a robust conclusion, including explicit sensitivity inputs and outputs;
- d) a clearly defined analytical framework for comparing the results of model runs; and
- e) a justification of the project based on the model results.

Sierra Club propounded specific discovery under each of these categories so that it could probe KPC's analyses and conclusions. However, KPC's responses to our requests for information have been obstructive, evasive, and incomplete.

Strategist Files Missing

With regard to (b) above (a modeling analysis in which Sierra Club could examine both the input assumptions and the output results), Sierra Club Initial Request 37 (1-37) asked KPC to "provide the STRATEGIST input and output files, in machine readable format, for each alternative option the Company evaluated." KPC provided Sierra Club with either incorrect or non-working input files for Strategist. The runs appear to work for options 3, 4a, and 4b but generate errors for options 1 & 2 that are indicative of problems with the input files, rather than

the model itself. The error indicates that “no feasible combination of alternatives can be found in 2015.” Without correct input files and a working, replicable model, interveners are unable to verify the veracity of the Company’s CPCN. Further, Sierra Club was not provided with KPC’s STRATEGIST output files, even though such files were explicitly requested in 1-37. Without these output files it is impossible to confirm that Sierra Club is correctly replicating KPC’s STRATEGIST runs. An evasive or incomplete answer is considered a failure to answer. *See* KY Rule of Civ. Proc. 37(c). To remedy this omission, Sierra Club requests that the Commission compel KPC to provide the exact input files used to generate Kentucky Public Service Commission Initial Data Request 48 (“KPSC 1-48”) and that support this CPCN, as requested in Sierra 1-37 and/or make a knowledgeable KPC representative available to clarify the discrepancies between the Company filing and the STRATEGIST output.

Files Related to Monte Carlo Risk Analysis via the Aurora Model Missing

This is not the only instance of KPC providing an evasive or incomplete answer. For example, with regard to (c) (a set of sensitivity runs), Sierra Club asked for discovery regarding the Aurora model. KPC relies heavily on a Monte Carlo risk analysis via the Aurora model to justify their decision to retrofit Big Sandy 2. For instance, of the six concluding points by witness Weaver, three points (points 3, 4 & 6) are based on the output of the “robust economic analysis” and “additional risk modeling,” i.e. the Aurora model. In order to probe this sensitivity analysis, Sierra Club submitted discovery request 1-69,¹ which explicitly requested “all assumptions and workbooks, in electronic format and with all calculations operational and formulae intact”, including “output files from the Aurora model.” On February 13, 2012 (two and half weeks after

¹ Sierra Club Initial Request 69 (1-69) also explicitly sought “all assumptions and workbooks, in electronic format and with all calculations operational and formulae intact, used to prepare Exhibits SCW-1 through SCW-4.” Sierra Club addresses the incomplete response to this subsection of 1-69 later in this motion.

responses were due),² Sierra Club received files purportedly responsive to request 1-69 for “output files from the Aurora model.” The two files provided (Scott C. Weaver Exhibit 5 “SCW-5” and Scott C. Weaver Exhibit 5B “SCW-5B”) do have intact formulae but only for the purposes of generating a graph and deriving basic statistics (means and percentiles). The files (identical, but for two additional but redundant worksheets in 5B) contain long lists of cumulative present worth (CPW) values. These values, in turn link to four additional files that were not provided as per request in 1-69. These files include:

1. IRP_XMP_DGTool_V1.3_KPCO_BS1_Repower_Nov3.xlsm
2. IRP_XMP_DGTool_V1.3_KPCO_BS2_Retrofit_Nov3.xlsm
3. IRP_XMP_DGTool_V1.3_KPCO_NGCC_Replacement_Nov3.xlsm
4. IRP_XMP_DGTool_V1.3_KPCO_BS_Retirement_Nov3.xlsm

With the limited responsive documents submitted by KPC, Sierra Club cannot ascertain whether the CPW values were generated directly from Aurora, whether there is supporting evidence of where they came from, how they were generated, the inputs used in the model, or how one should interpret these one dimensional figures. Similarly, there is no information regarding the distribution of variables in the Aurora model. KPC’s flimsy answer is not

² Sierra Club counsel initially contacted KPC counsel Mark Overstreet regarding the omission of these electronic files (along with numerous other files) on Tuesday, February 7, 2012. Mrs. Henry informed Mr. Overstreet that responses to request 1-69 were a top priority for Sierra Club. On February 8, 2012, Mr. Overstreet responded regarding 1-69 that “[KPC] checked the master disc and the files are present.” Mrs. Henry and Sierra Club experts at Synapse Energy Economics once again reviewed the discovery produced to confirm that Sierra Club did not have those electronic files. On February 9, 2012, Mrs. Henry once again emailed Mr. Overstreet informing him that Sierra Club has no files or discs responsive to 1-69. On February 10, 2012, Mr. Overstreet left a voicemail message for Mrs. Henry once again informing her that the master disc that KPC has contained the requested files. Mr. Overstreet also left contact information for Lila Munsey and suggested that Mrs. Henry call her so that she could explain where the files are located. Mrs. Henry called Ms. Munsey and explained that while KPC’s master disc may have the relevant files, Sierra Club was never provided a copy of that compact disc. A telephone call with Mrs. Henry, Tyler Comings of Synapse Energy Economics, Mr. Munsey and others at KPC was held. During this call, KPC realized that Sierra Club never received responses to other parties’ discovery requests and these responses included compact discs that contained files responsive to our questions. KPC agreed to send those documents and files so that Sierra Club would receive them on Monday, February 13, 2012. It thus took Sierra Club seven days to obtain these electronic files, which were not even completely responsive to Sierra Club’s initial data requests.

responsive to Sierra Club's request, which sought "all assumptions and workbooks, in electronic format and with all calculations operational and formulae intact, used to prepare Exhibits SCW-1 through SCW-4, output files from the Aurora model." An evasive or incomplete answer is considered a failure to answer. *See* KY Rule of Civ. Proc. 37(c). Given that KPC has failed to produce "all assumptions and workbooks, in electronic format and with all calculations operational and formulae intact," including "output files from the Aurora model," KPC has failed to comply with its duty to respond to Sierra Club's discovery requests. Sierra Club request that the Commission compel KPC to fully respond to Sierra 1-69 by providing all antecedent files from the Aurora analysis and all intermediate spreadsheets, in electronic format, and with formulae intact as originally used or created by the Company, used to generate SCW-5.

Files Related to Scott C. Weaver Exhibits 1-4 Missing

In addition to the request related to the Aurora Model, Sierra Club discovery request 1-69 also explicitly asked for "all assumptions and workbooks, in electronic format and with all calculations operational and formulae intact, used to prepare Exhibits SCW-1 through SCW-4." "SCW" refers to Scott C. Weaver, who submitted directed testimony and accompanying exhibits SCW-# to support the CPCN application. This subsection of this discovery request goes to (d) above, an analytical framework for comparing the results of their model runs. In general, SCW-1 through SCW-4 are KPC's mechanism of providing analytical support for its decision to retrofit Big Sandy 2. For instance, SCW-4 shows a summary of the Company's analysis indicating that the retrofit is the least expensive option under most circumstances.

Sierra Club asked for functional working electronic files, which KPC did not provide. KPC's response to Sierra 1-69 references KIUC 1-28 (Kentucky Industrial Utilities Customers Initial Request 28), which in turn references KPSC 1-48 (Kentucky Public Service Commission

Initial Request 48). There are five Excel files in KPSC 1-48,³ corresponding, in turn to the five “Commodity Pricing” scenarios considered by KPC, each of which has five Options considered by the Company. In these files, the tabs labeled “Exhibit SCW-4x” (where x are A-E scenarios) have referential formulas leading back to large spreadsheets entitled “Costs and Emissions Summary.” These spreadsheets do not have any working formulae. Without these working formulae it is impossible to determine how the spreadsheets were derived. For instance, the spreadsheets could have been derived directly from STRATEGIST outputs (literally copied and pasted into Excel) or from another workbook in which modifications were made. Sierra Club observes that the output files it derives from STRATEGIST are not consistent with the spreadsheets in KPSC 1-48, and thus there are two feasible options:

- If the spreadsheets were produced directly from STRATEGIST, then KPC has not fulfilled Sierra 1-37 that requests the STRATEGIST output files (this would include any text files generated that produce the exact values seen in KPSC 1-48).
- If the spreadsheets were produced from other workbooks that, in turn, were derived from the STRATEGIST output, then KPC has not fulfilled Sierra 1-69 requesting the worksheets that generated Exhibit SCW-4.

We request that KPC fulfill Sierra 1-69 by providing the detailed system and unit-specific reports from its own STRATEGIST runs that are internally consistent with the spreadsheets provided in KPSC 1-48 and any additional workbooks or spreadsheets, with formulae fully intact, that were used to generate KPSC 1-48. These functional working electronic files are needed so that Sierra Club can conduct due diligence on KPC’s decision-making process. Without transparency into their mechanism and analysis, there is no reasonable mechanism for

³ As discussed above in footnote 1, Sierra Club did not receive electronic files for KIUC 1-48 until February 13, 2012.

Sierra Club, the Commission, or any other party to audit KPC's decision. The Commission should compel KPC to disclose the withheld information detailed above because they are all critical pieces of information that are necessary to evaluate the Company's CPCN applications and related environmental surcharges. The modeling analysis, sensitivity analysis, and analytical framework are critical factors in determining whether a company's decision to retrofit a plant is reasonable. If the modeling and sensitivity analysis is artificially constricted with unreasonable assumptions it does not truly reflect the costs of certain scenarios. These key assumptions and analyses can be skewed so as to favor keeping the existing unit on-line or favor retirement. Only by looking at these assumptions and analyses in depth can one determine if a conclusion is reasonable. As such, in order to analyze whether the proposed project proffered by KPC represents a reasonable and prudent decision, all parties and the Commission need to know the information regarding the STRATEGIST model, Aurora model, and underlying analytical framework that the Companies used. Without these key pieces of information, adequate assessment of the reasonableness of KPC's application is severely hindered.

II. Sierra Club is Legally Entitled to Discovery Regarding KPC's Parent Company Which is in KPC's Possession, Custody, or Control.

Sierra Club's initial requests for information include the following:

Initial Request 1: Please provide all reports, memoranda, presentations, or other documents provided to stockholders, investors, banks, investment firms, investment brokers or dealers, investment analysts, bond rating agencies from either KPC or AEP or the like between 2005 and 2012 (inclusive) including:

- a. the environmental compliance status of either unit of the Big Sandy plant,
- b. past, present or future environmental compliance of the Big Sandy plant,
- c. litigation or settlements concerning the Big Sandy plant, to the extent not covered by attorney-client privilege,
- d. past, present or future need for the Big Sandy plant, or the need for or plans for capital additions to the Coal Plants, whether for environmental compliance or otherwise, and

- e. any other matter that could affect the costs or output of the Big Sandy plant.
- f. To the extent not already provided in response to the above request, please provide any agendas, handouts, minutes, documents prepared for or resulting from each meeting of KPC or AEP with stockholders, investors, banks, investment firms, investment brokers or dealers, investment analysts, bond rating agencies or the like at which the matters listed above were discussed in any way.
- g. Please continue to provide any such documentation as listed in (a)-(f) above as generated in 2012 on a regular basis.

Initial Request 8: Please describe current demand-side management (DSM) programs offered by AEP and KPC, including demand-response, interruptible load, and efficiency programs.

Initial Request 9: Please describe proposed DSM programs to be offered by AEP and KPC, including demand-response, interruptible load, and efficiency programs. Please note the cost, MW or MWh reductions, expected life, and penetration of these programs. Please describe if or how these programs are incorporated into the current case, and provide workpapers showing such, if applicable.

In response to each of these requests, KPC objected to producing the requested documents because “AEP is not a party to this proceeding, and is not a utility subject to the jurisdiction of the Public Service Commission of Kentucky.” *See* KPC Response to Sierra Club Initial Requests Questions 1, 8, and 9. KPC does not claim that it is not in possession, custody, or control” of the requested documents, or challenge their relevance to this proceeding. Instead, KPC objects on the ground that it should not have to produce the AEP documents because AEP is a non-party.

The Commission should compel KPC to produce the requested documents because KPC is “a unit of American Electric Power.”⁴ On KPC’s website there is an “About Kentucky Power” page on which the Company identifies itself solely through its relationship with AEP:

Kentucky Power is part of the American Electric Power system, which is one of the largest electric utilities in the United States, delivering electricity to more than

⁴ <https://www.kentuckypower.com/info/facts/>

5 million customers in 11 states. AEP ranks among the nation's largest generators of electricity, owning nearly 38,000 megawatts of generating capacity in the U.S. AEP also owns the nation's largest electricity transmission system, a nearly 39,000-mile network that includes more 765 kilovolt extra-high voltage transmission lines than all other U.S. transmission systems combined. AEP's transmission system directly or indirectly serves about 10 percent of the electricity demand in the Eastern Interconnection, the interconnected transmission system that covers 38 eastern and central U.S. states and eastern Canada, and approximately 11 percent of the electricity demand in ERCOT, the transmission system that covers much of Texas. AEP's utility units operate as AEP Ohio, AEP Texas, Appalachian Power (in Virginia and West Virginia), AEP Appalachian Power (in Tennessee), Indiana Michigan Power, Kentucky Power, Public Service Company of Oklahoma, and Southwestern Electric Power Company (in Arkansas, Louisiana and east Texas). AEP's headquarters are in Columbus, Ohio. For more information, see our corporate web site, AEP.com.⁵

Moreover, KPC's CPCN Application shows how dependent KPC is on AEP, as KPC cites to AEP over two hundred times. For instance, one of the reasons the company gives for the need to retrofit the Big Sandy power plant is the consent decree entered into by AEP and its affiliated operating companies, including KPC. *See* CPNC Application at 5. There are hundreds of other references to AEP, including the AEP Pool Service Companies; AEP Interconnection agreement; AEP fleet-wide comparisons, such as to capacity rate and monthly fixed operating rate; the phased approach that AEP is taking to install scrubbers fleetwide; AEP's overall construction program; the "steps AEP takes to ensure that they are reasonable and necessary;" the AEP Quality Assurance/Quality Control Manual and "AEP's Project Schedule Management Process." In fact, KPC's application is supported by the testimony of three individuals who work for AEP or American Electric Power Service Corporation, a wholly owned subsidiary of AEP.⁶ Moreover, KPC and AEP have the same director.⁷ *See e.g., Advance Labor Service, Inc. v.*

⁵ <https://www.kentuckypower.com/info/facts/>

⁶ See Direct Testimony of John M. McManus at 1, Direct Testimony of Robert L. Walton at 1, and Direct Testimony of Scott C. Weaver at 1.

⁷ Mr. Michael G. Morris serves on the Board of Directors for AEP and is the chairman of the Board for KPC.

Hartford Acc. & Indem. Co., 60 F.R.D. 632 (N.D.Ill.1973) (corporation required to produce books and records of sister corporation with same directors and shareholders).

Despite KPC's primary self-identification as only a unit of AEP and its consistent reliance on AEP and its resources to justify the proposed retrofit project, KPC claims that it does not have to answer data requests regarding AEP because "AEP is not a party to this proceeding, and is not a utility subject to the jurisdiction of the Public Service Commission of Kentucky."

KPC's objection fails, however, because the standard for responding to discovery is not whether AEP is a party to this litigation but whether KPC and its proffered witnesses – the majority of whom work for AEP and rely on standard AEP retrofit policies and procedures to support their recommendation – are in possession, custody or control of the requested documents. Under the Kentucky Rules of Civil Procedure, a party is required to produce documents within its "possession, custody, or control." KY Rule of Civ. Proc. 34.01; compare with Fed. Rule of Civ. Proc. 34 (The federal rules also require a party to produce documents within its "possession, custody, or control."). "[C]ourts have consistently held that documents are deemed to be within the "possession, custody or control" for purposes of Rule 34 if the party has actual possession, custody or control, or has the legal right to obtain the documents on demand." *In re Bankers Trust Co.*, 61 F.3d 465, 469 (6th Cir. 1995) (internal citation omitted); *Weck v. Cross*, 88 F.R.D. 325, 327 (N.D. Ill.1980). Thus, legal ownership of the document is not determinative. *In re Bankers Trust Co.*, 61 F.3d 465, 469 (6th Cir. 1995) (internal citation omitted); *see also In re Sunrise Sec. Litig.*, 109 B.R. 658, 661 (E.D.Pa.1990); *Weck*, 88 F.R.D. at 327. This obligation to produce applies regardless of whether the documents relate to a non-party. *See Edwards v. Hickman*, 237 S.W.3d 183 (Ky.,2007) (court upheld a

motion to compel discovery against a non-party corporation because the corporation that was a party was in possession, custody or control of the documents); *Metropolitan Property & Cas. Ins. Co. v. Overstreet*, 103 S.W.3d 31, 46 (Ky. 2003) (although discovery could not be served on a non-party, a court can compel a party to the suit to produce documents in its possession, custody and control related to that non-party); *Hubbard v. Rubbermaid, Inc.*, 78 F.R.D. 631 (D.Md.1978) (stating that the nonparty status of wholly owned subsidiaries does not shield their documents from production, since the crucial factor is that the documents must be in the custody, or under the control of, a party to the case). Therefore, if KPC is in possession, custody or control of the documents requested by Sierra Club, KPC must turn them over even if the documents relate to AEP, a non-party to these proceedings.

Conclusion

The Commission should compel the Companies to release the documents requested regarding the key assumptions and analyses behind KPC's application, as Sierra Club, the Commission, and the other parties are hindered in their ability to fully evaluate the reasonableness of the Company's application for Certificates of Public Convenience and Necessity and related environmental surcharges without the requested information. Second, the Commission should compel KPC to produce documents regarding AEP, even though AEP is not a party, to the extent that KPC is in possession, custody or control of these documents.

Respectfully submitted,



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Dated: February 17, 2012

CERTIFICATE OF SERVICE

I certify that I mailed a copy of Intervenor Tom Vierheller, Beverly May, and Sierra Club's **Motion to Compel** by First Class U.S. Mail on February 17, 2012 to the following:

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