

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF KENTUCKY POWER)
COMPANY FOR APPROVAL OF ITS 2011)
ENVIRONMENTAL COMPLIANCE PLAN,)
FOR APPROVAL OF ITS AMENDED)
ENVIRONMENTAL COST RECOVERY)
SURCHARGE TARIFF, AND FOR THE)
GRANT OF A CERTIFICATE OF PUBLIC)
CONVENIENCE AND NECESSITY FOR THE)
CONSTRUCTION AND ACQUISITION OF)
RELATED FACILITIES)

RECEIVED

FEB 22 2012

PUBLIC SERVICE
COMMISSION

CASE NO. 2011-00401

**KENTUCKY POWER COMPANY’S RESPONSE TO THE MOTION BY TOM
VIERHELLER, BEVERLY MAY, AND THE SIERRA CLUB TO COMPEL
DISCLOSURE**

For its Response to the motion by Tom Vierheller, Beverly May, and the Sierra Club (collectively the “Sierra Club”) to compel disclosure Kentucky Power Company states:

Introduction

Sierra Club propounded 69 numbered data requests in its initial set of requests. Many of the requests involved multiple subparts. Including those subparts, Kentucky Power answered over 190 separate Sierra Club data requests. Many of the data requests required detailed or otherwise voluminous responses. For example, Kentucky Power’s Response to Sierra Club 1-1 totaled nearly 10,000 pages comprising 299 documents.

Kentucky Power worked in good faith in the limited time provided to answer all data requests – including 171 additional data requests (not including subparts) propounded by Staff, Kentucky Industrial Utility Customers, Inc. and the Attorney General – accurately and completely. When the data request appeared ambiguous to Kentucky Power, counsel contacted the propounded party’s attorneys for clarification. Kentucky Power personnel likewise worked

with the Sierra Club's consultant and Ventyx, the licensor of the STRATEGIST model, to assist the consultant in obtaining access to protected files.

Sierra Club now complains that Kentucky Power failed to answer fully five of its 69 data requests. It even goes so far as to characterize Kentucky Power's responses as "obstructive, evasive, and incomplete."¹

Notwithstanding Sierra Club's intemperate words, Kentucky Power has worked diligently to meet Sierra Club's voluminous data requests. As described below, much, if not all, of the information Sierra Club now seeks to compel was in fact produced, or is now available to it. In addition, to aid Sierra Club's work with the STRATEGIST and Aurora programs, Kentucky Power is producing with this Response certain information in a live format. Finally, as set forth below, Kentucky Power is willing to make available a knowledgeable representative for the limited purposes of assisting Sierra Club in initially executing Strategist using the .FSV files provided in response to Sierra Club 1-37.

Argument

Sierra Club's motion seeks to compel further responses to the following data requests:

- (a) Sierra Club 1-1; 1-8; 1-9.

Sierra Club seeks an order compelling Kentucky Power to produce presentations made by its ultimate corporate parent (American Electric Power Co ("AEP")), as well as the demand-side management programs of Kentucky Power's affiliate companies.

¹ Motion to Compel at 2. In footnote 2 of its motion to compel, the Sierra Club misapprehends Ms. Munsey's statements during the call. Contrary to the comment contained in the footnote, Kentucky Power did not "realize" during the call that the Sierra Club did not receive the responses to Staff and the other parties' data requests. Kentucky Power personnel placed a complete set of responses in each container that subsequently was used to deliver the responses. Beyond that it has no way of knowing what was received. Kentucky Power nevertheless agreed to re-send the responses in an obviously futile effort to avoid collateral discovery disputes.

(b) Sierra Club 1-37.

The Sierra Club asks the Company 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.”²

(c) Sierra Club 1-69:

(i) Sierra Club seeks an order from the Commission compelling “KPC to fully respond to Sierra Club 1-69 by providing all antecedent files from the Aurora and all the intermediate spreadsheets, in electronic format, and with formulae intact as originally used or created by the Company, used to generate SCW-5.”³

(ii) Sierra Club also requests an order compelling “KPC to 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.”⁴

A. The Sierra Club is Not Entitled to Discovery Concerning AEP or Any Affiliate Operating Companies that is Irrelevant to the Issues Before the Commission in this Proceeding.

The Sierra Club asks the Commission to order Kentucky Power to produce certain AEP and affiliate operating company documents that Sierra Club claims are in the custody or control of Kentucky Power. The Sierra Club’s argument misses the point. Kentucky Power does not

² *Id.* at 3.

³ *Id.* at 5.

⁴ *Id.* at 6.

object to producing AEP or affiliate operating company documents otherwise within its custody or control to the extent the requested documents are relevant to this proceeding. What Kentucky Power objects to producing, and what was not produced, were those AEP and affiliated operating company documents that are irrelevant to this proceeding.

(i) Sierra Club 1-1

As Kentucky Power's Response indicates, Kentucky Power produced the responsive documents on the enclosed CD. In fact, 299 documents from both AEP and Kentucky Power,⁵ containing almost 10,000 pages, were produced.⁶

(ii) Sierra Club 1-8 and Sierra Club 1-9

Sierra Club 1-8 seeks descriptions of "current demand-side management programs offered by AEP and KPC...." Sierra Club 1-9 seeks similar information about DSM programs "to be offered by AEP and KPC..." Kentucky Power provided the requested information with respect to Kentucky Power. AEP offers no such programs. Nor does AEP, which does not provide utility service, propose to offer such programs.

Kentucky Power objected to Sierra Club's effort in its data requests to define Kentucky Power to include Kentucky Power's affiliates; that is, the other AEP operating companies. Information regarding the existing or planned DSM programs of other AEP operating companies is neither relevant nor likely to result in the discovery of admissible evidence.

⁵ Unlike Sierra Club 1-8 and Sierra Club 1-9, Sierra Club 1-1 the information requested (whether presented by AEP or Kentucky Power) appears to be limited to Kentucky Power generally, and its Big Sandy plant, specifically. To the extent Sierra Club 1-1 can be interpreted to extend to information regarding the other AEP operating companies it seeks information that is not relevant to this proceeding for the reasons set forth below in connection with Sierra Club 1-8 and Sierra Club 1-9.

⁶ Kentucky Power produced the documents despite the fact that most were completely irrelevant to these proceedings. Sierra Club's overly broad and burdensome request sought not only documents relating to the six areas identified in subparts (a)-(f) of the response but "all reports, memoranda, presentations, or other documents" In reviewing its production in preparing this Response, Kentucky Power discovered that a wholly irrelevant March 2, 2010 presentation to Moody's was inadvertently omitted from the 9,556 pages previously produced. The omitted four-page document is being filed under a separate notice of filing. Kentucky Power has now filed 300 documents comprising 9,560 pages in response to this single data request.

Kentucky law is well-established that discovery is not boundless and that it should be limited to matters relevant to the proceeding.⁷ The Sierra Club has not cleared the relevancy hurdle in this instance. Sierra Club has made no showing in its motion to compel as to why it is entitled to documents from the AEP operating companies that are irrelevant to Kentucky Power's application.⁸ Indeed, nowhere does the Sierra Club even attempt to demonstrate how existing or proposed Public Service Company of Oklahoma DSM programs, for example, have any bearing on this proceeding.

The Commission recently denied a similar request in a decision not addressed by Sierra Club. In *In the Matter of: Application of Kentucky Utilities Company For Certificates Of Public Convenience And Necessity And Approval Of Its 2011 Compliance Plan For Recovery By Environmental Surcharge*,⁹ Kentucky Industrial Utility Customers, Inc. sought to compel Kentucky Utilities to produce financial information regarding Kentucky Utilities' parent. The Commission denied the request explaining:

The Commission further finds PPL Corp. [Kentucky Utilities' ultimate parent] is not a utility subject to the Commission jurisdiction and is under no obligation to assist KU in financing the propose projects in KU's 2011 Environmental Compliance Plan. Thus, the information request by KIUC concerning the source of short-term debt available to PPL Corp., as well as any studies that address PPL Corp.'s financing requirements and plans, is not relevant to any issues in this case and does not appear calculated to lead to the discovery of relevant information. Therefore, such information is not discoverable.¹⁰

⁷ See, e.g., *Humana, Inc. v. Fairchild*, 603 S.W.2d 918, 922 (Ky. App. 1980) ("It has been a long-recognized principle that discovery must be kept within reasonable bounds and restricted to questions having substantial and material relevancy."); *Carpenter v. Wells*, 358 S.W.2d 524, 526 (Ky. 1962) ("It is the duty of the court to keep the inquiry within reasonable bounds and to restrict questions to those having substantial relevancy to a sensible investigation.").

⁸ See *Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.*, 174 F.R.D. 609, 631 (M.D. Pa. 1997) ("once an objection has been raised on relevancy grounds, the party seeking discovery must demonstrate that the request is within the scope of the relevancy standard).

⁹ Case No. 2011-00161 (Ky. P.S.C. September 1, 2011).

¹⁰ *Id.* at 6-7. The Commission's decision is fully consistent with broader Kentucky law recognizing the separate corporate existence of parents, subsidiaries, and affiliate companies. See, e.g., *Hazard Coal Corp. v. Ky. W. Va. Gas Co.*, 311 F.3d 733, 739 (6th Cir. 2002) ("Under Kentucky law, separate corporate interests, including subsidiaries and affiliates . . . are separate legal entities and must be recognized and treated as such unless there is some reason to pierce the corporate veil . . .). If anything, the principles apply with even greater force with affiliated companies.

The AEP operating companies (Kentucky Power's affiliates) likewise are not parties to this proceeding, they likewise are not subject to the Commission's jurisdiction, their DSM programs likewise are not subject to Commission review or approval, and the requested information likewise is irrelevant to the issues in this case.

The information Sierra Club seeks is not discoverable and its motion should be denied.

B. Kentucky Power's Response to the Sierra Club 1-37 Was Complete.

Sierra Club sought in Sierra Club 1-37 "STRATEGIST input and output files, in machine readable format, for each alternative option the Company evaluated." The requested information (both the input and output files) was provided by Kentucky Power in the .FSV files previously provided Sierra Club's consultant. Kentucky Power nevertheless is willing to make, Mark A. Becker, who is knowledgeable concerning STRATEGIST and the files that were provided, available to work with *a non-attorney representative of the Sierra Club for the limited purposes of assisting Sierra Club in initially executing Strategist using the .FSV files provided in response to Sierra Club 1-37. Under no circumstances shall any attorney be on the call.* In addition, Mr. Becker will not be available for further discovery or assistance beyond the limited purpose indicated above.

Arrangements for the offered assistance should be made by counsel for Sierra Club contacting counsel for Kentucky Power Company.

C. Sierra Club Now Has The Information Requested In Sierra Club 1-69.

Kentucky Power has fulfilled its obligations with respect to the Aurora Modeling Files and the Weaver Exhibit Files. In addition, Kentucky Power is supplementing its Response with certain additional "live" spreadsheets.

1. Aurora Modeling Files. (Sierra Club 1-69)

The Sierra Club challenges Kentucky Power's initial response to initial data request 69 (1-69).¹¹ Specifically, the Sierra Club contends that Kentucky Power failed to produce four files:

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

The information was provided by Kentucky Power on February 20, 2012 in response to Sierra Club 2-34(a) (input files) and Sierra Club 2-35(b) (output files).¹²

Although the data is present, Kentucky Power was required to make certain modifications to the files to comply with the terms of its licensing agreement with EPIS, Inc., the owner of the Aurora modeling software. These modifications included the removal of macros and raw data sheets, and the removal of formulas that would have produced an error as a result of the removal of the raw data sheets. The macros and raw data sheets would reveal the proprietary structure of the model output database files in violation of Kentucky Power's licensing agreement. Kentucky Power has sought confidential treatment of this information through a petition filed with the Commission on February 20, 2012. As set forth in the petition for confidential treatment, Kentucky Power will provide the files to the Sierra Club in unmodified form upon confirmation from EPIS, Inc. that Kentucky Power is authorized to release the information.

¹¹ *Id.* at 3.

¹² The names of the files as provided to the Sierra Club are: IRP_XMP_DGTool_KPCO_BS1_Repower.xlsx; IRP_XMP_DGTool_KPCO_BS2_Retrofit.xlsx; IRP_XMP_DGTool_KPCO_NGCC_Replacement.xlsx; and IRP_XMP_DGTool_KPCO_BS_Retirement.xlsx

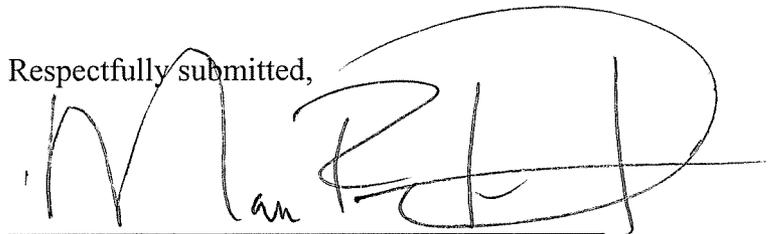
2. Weaver Exhibit Files. (Sierra Club 1-69)

The Sierra Club 1-69 also 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.” The Sierra Club argues that Kentucky Power failed to provide “functional working electronic files” and that certain of the spreadsheets produced by Kentucky Power “do not have any working formulae.”¹³

Kentucky Power believes it fully responded to the Sierra Club’s data request 1-69 concerning the Weaver Exhibit files by providing information sufficient for the Sierra Club to create self-generated STRATEGIST and Aurora model runs. Kentucky Power nevertheless is supplementing its response today under a separate notice of filing with a CD containing “live” spreadsheets linking the STRATEGIST outputs to Mr. Weaver’s Exhibits SCW-4A, SCW-4B, SCW-4C, SCW-4D, and SCW-4E.

Wherefore, Kentucky Power requests that the Commission deny the Sierra Club’s motion to compel.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark R. Overstreet', is written over a horizontal line. The signature is stylized and somewhat cursive.

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COUNSEL FOR KENTUCKY POWER
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¹³ Motion to Compel at 5-6.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by overnight or hand delivery, upon the following parties of record, this 22nd day of February, 2012.

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A handwritten signature in black ink, appearing to read "Mark R. Overstreet", written over a horizontal line. The signature is stylized and cursive.

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