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JUN 22 2015

PUBLIC SERVICE  
COMMISSION

**VIA HAND DELIVERY**

June 22, 2015

Mr. Jeff Derouen  
Executive Director  
Kentucky Public Service Commission  
211 Sower Blvd.  
Frankfort, KY 40601

Re: In the Matter of Harold Barker, Ann Barker And Brooks Barker v. East Kentucky Power Cooperative, Inc., Case No. 2013-00291.

Dear Mr. Derouen:

Enclosed please find for filing in the above-referenced case an original and ten (10) copies of East Kentucky Power Cooperative, Inc.'s, response to the Complainants' motion to compel. Please return a file-stamped copy to me.

Please do not hesitate to contact me if you have any questions.

Sincerely,



L. Allyson Honaker

Enclosures

cc: Alex Rowady (with enclosures)

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	)	

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RESPONSE TO MOTION TO COMPEL

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Comes now the Defendant, East Kentucky Power Cooperative, Inc. ("EKPC"), pursuant to 807 KAR 5:001 Section 5 and other relevant law, by counsel, and for its response to the Complainants' Motion to Compel states as follows:

An evidentiary hearing was held in this matter on July 1, 2014, and concluded on July 8, 2014. Pursuant to the Commission's Order entered on July 24, 2014, both EKPC and the Complainants filed Briefs on August 15, 2014. The testimony was closed in this case on July 8, 2014, when the second full day of the public hearing concluded. Therefore, discovery in this matter has long since been closed and the Complainants are not entitled to any further information in this matter.

On December 9, 2014, more than five months after the hearing in this matter, the Complainants filed a Request for Load Data. The Complainants requested voltage and load data

for certain transmission lines on specific dates and times. Each such request was for a date and time after the hearing in this matter was completed. Also, on this same date, the Complainants filed a counter-offer that was unreasonable on its face and attached a three month old letter dated September 26, 2014, from Fred J. Farris, a neighbor.

Both the request for load data and the letter attached to the Counteroffer are attempts to introduce new evidence into the record of this case after the hearing. Asking the Commission to consider such information for the first time at this point in the proceeding is inappropriate and a violation of due process. 807 KAR 5:001, Section 11(4) clearly states:

Except as expressly permitted in particular instances, the commission shall not receive in evidence or consider as a part of the record a book, paper, or other document for consideration in connection with the proceeding after the close of the testimony.

The testimony was closed in this case on July 8, 2014, when the second full day of the public hearing concluded. Nevertheless, the Complainants' Counteroffer includes a vague, unverified letter, which is hearsay, and is not permissible under the Commission's rules.

Moreover, the information contained in the letter from Mr. Farris was available to the Complainants before they even filed their Complaint in July of 2013. There is no excuse that can be made for not presenting this information, if they believed it to be important to their case, before or at the hearing. The Complainants had the opportunity to call Mr. Farris as a witness at the hearing in this matter. Had Mr. Farris been called as a witness in the matter, EKPC would have had an opportunity to cross-examine him. The only evidence in the record regarding Mr. Farris was introduced by EKPC. Mary Jane Warner testified at the hearing that Mr. Farris would not agree for the structure located in the Complainants' front yard to be moved to his property.<sup>1</sup> Discussions were held regarding eliminating the structure in the front yard of the Complainants

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<sup>1</sup> See HVR 13:34:50 (July 8, 2014).

which would require only minimal changes on Mr. Farris' property. That was agreed to by Mr. Farris and that is what in fact took place.<sup>2</sup>

Any new evidence sought to be introduced at this late date is in violation of 807 KAR 5:001, Section 11(4) and should be stricken from the record – a conclusion supported by ample Commission precedent. For instance, the Commission has previously held that information submitted after the evidentiary record has closed and which could have been, with reasonable diligence, filed prior to the hearing, was not admissible under 807 KAR 5:001, Section 11(4).<sup>3</sup> In fact, just three days after the conclusion of the hearing in this matter, the Commission entered an Order in another proceeding which struck exhibits and portions of an applicant's brief due to the fact that the filed information amounted to new evidence and the intervenors did not have an opportunity to question or challenge the information presented for the first time.<sup>4</sup> In another recent case, the Commission held that a water district's attempt to introduce evidence after the close of testimony, which was otherwise available at the time of the hearing, "deprived the intervenors of notice" of an issue, as well as "any opportunity to address this evidence or to confront the Water District's claim of conflicting positions."<sup>5</sup> The Commission further stated that "[s]uch notice and

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<sup>2</sup> See HVR 13:34:50 (July 8, 2014).

<sup>3</sup> See, *In the Matter of the Application of Kentucky Power Company for (1) a Certificate of Public Convenience and Necessity Authorizing the Transfer to the Company of an Undivided Fifty Percent Interest in the Mitchell Generating Station and Associated Assets; (2) Approval of the Assumption by Kentucky Power Company of Certain Liabilities in Connection with the Transfer of the Mitchell Generating Station; (3) Declaratory Rulings; (4) Deferral of Costs Incurred in Connection with the Company's Efforts to Meet Federal Clean Air Act and Related Requirements; and (5) All Other Required Approvals and Relief*, Order, Case No. 2012-00578, (Ky. P.S.C., Nov. 26, 2013).

<sup>4</sup> *In the Matter of the Application of Water Service Corporation of Kentucky for an Adjustment of Rates*, Order, Case No. 2013-00237, (Ky. P.S.C., July 11, 2014).

<sup>5</sup> *In the Matter of the Application of Jessamine-South Elkhorn Water District for a Certificate of Public Convenience and Necessity to Construct and Finance a Waterworks Improvements Project Pursuant to KRS 278.020 and 278.300*, Order, Case No. 2012-00470, pp. 4-5 (Ky. P.S.C., Apr. 30, 2013).

opportunity are the essence of due process.”<sup>6</sup> Furthermore, in striking a letter filed by a witness after the close of testimony, the Commission held in Case No. 1989-00349 that “[t]he Commission must ensure that all parties to its proceedings are afforded due process. Despite the relaxed nature of Commission proceedings, each party must still have the opportunity to confront and cross examine adverse witnesses....”<sup>7</sup> EKPC did not have the opportunity to cross-exam Mr. Farris on his unverified, hearsay letter attached to the Counteroffer. Furthermore, the language included in the unverified letter is extremely vague and gives no specific information regarding when discussions with EKPC took place.

The Complainants cannot wait five (5) months after the close of the testimony to request new information from EKPC and then wait another six (6) months to seek to compel responses to their untimely requests. Allowing the Complainants to introduce new evidence five months after the hearing in this case, and to issue new data requests five months after the hearing in this matter is unreasonable and is unsupported by law.

WHEREFORE, on the basis of the foregoing, EKPC respectfully requests that the Commission deny the Complainant’s Motion to Compel.

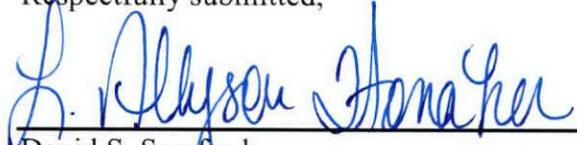
This 22<sup>nd</sup> day of June, 2015.

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<sup>6</sup> *Id.*

<sup>7</sup> *In the Matter of Kentucky Utilities Company v. Henderson-Union Rural Electric Cooperative Corporation*, Order, Case No. 89-349, (Ky. P.S.C., May 21, 1990).

Respectfully submitted,



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and

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East Kentucky Power Cooperative, Inc.  
4775 Lexington Road  
P.O. Box 707  
Winchester, KY 40392-0707

*Counsel for East Kentucky Power  
Cooperative, Inc.*

### **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 22<sup>nd</sup> day of June 2015, addressed to the following:

Mr. Alex Rowady, Esq.  
212 South Maple Street  
Winchester, KY 40391



*Counsel for East Kentucky Power  
Cooperative, Inc.*