

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF KENTUCKY POWER)
COMPANY FOR APPROVAL OF AN)
AMENDED COMPLIANCE PLAN FOR)
PURPOSES OF RECOVERING ADDITIONAL) CASE NO. 2005-00068
COSTS OF POLLUTION CONTROL)
FACILITIES AND TO AMEND ITS)
ENVIRONMENTAL COST RECOVERY)
SURCHARGE TARIFF)

O R D E R

On July 5, 2005, Kentucky Power Company ("Kentucky Power") filed a motion to strike the prepared direct testimony of Lane Kollen, the witness for Kentucky Industrial Utility Customers, Inc. ("KIUC"). The motion states that the entire testimony of witness Kollen is neither relevant nor material because it: (1) addresses issues that have been decided as a matter of law in prior cases; (2) argues issues that are entirely legal, and therefore beyond the scope of the witness's expertise; and (3) raises issues not before the Commission in this case.

More specifically, the Kentucky Power motion states that the testimony of witness Kollen presents a purely legal argument that federal preemption is not applicable to any of the environmental project costs sought to be recovered in this proceeding. Citing the Commission's prior decision in Kentucky Power's first environmental surcharge case,¹

¹ Case No. 1996-00489, The Application of Kentucky Power Company d/b/a American Electric Power to Assess a Surcharge Under KRS 278.183 to Recover Costs of Compliance with the Clean Air Act and Those Environmental Requirements Which Apply to Coal Combustion Wastes and By-Products.

the motion argues that: (1) the Commission previously determined that due to federal preemption, it could not deny surcharge recovery of any environmental project costs paid for by Kentucky Power under tariffs approved by the Federal Energy Regulatory Commission; and (2) the facts of this case require the Commission to apply the same principles of federal preemption, despite the KIUC witness's attempts to differentiate the facts in this case. Further, the motion argues that the issues in the Kollen testimony regarding the treatment of SO₂ allowances consumed in off-system sales and the need to adjust the allowed return to reflect certain 2005 state and federal tax changes, are issues that were not raised by Kentucky Power in its application and that such issues cannot be raised by an intervenor.

In response to the motion to strike, KIUC states that the Commission is not bound by the technical rules of evidence, that a motion to strike testimony before an administrative body is a fairly extraordinary request, and that the Commission routinely accepts expert testimony from non-lawyers on regulatory issues such as federal preemption, fair rate of return, and the filed rate doctrine. KIUC also argues that the Kollen testimony is not of a purely legal nature, but that it addresses whether the facts set forth in Kentucky Power's application satisfy the requirements of KRS 278.183 for environmental cost recovery through a surcharge.

KIUC further argues that the Commission's decision in Case No. 1996-00489 on federal preemption was limited to the facts presented therein, and that the facts and circumstances now presented are distinguishable. Regarding the claim that the Kollen testimony raises two new issues that are beyond the scope of the Kentucky Power application, KIUC claims that its testimony identifies errors that were included in

Kentucky Power's application and that those errors need to be corrected to be consistent with prior Commission precedent and applicable tax laws.

Kentucky Power filed a reply, arguing that: (1) KIUC had provided no basis for allowing an expert witness on financial issues to provide testimony on the legal issue of federal preemption; and (2) the Commission has no jurisdiction to consider the two issues raised by KIUC but not included in Kentucky Power's application.

Based on the motion and being otherwise sufficiently advised, the Commission finds that the application of the doctrine of federal preemption to the environmental costs at issue in this case cannot be determined without fully considering the nature of those costs and whether sufficient facts exist to satisfy the requirements for surcharge recovery under KRS 278.183. Thus, the Commission cannot determine whether the principle of federal preemption applies to the facts in this case until such time as all of the facts have been heard and the evidentiary record fully developed. While the Commission recognizes that KIUC witness Kollen is not an attorney, he has frequently provided expert testimony here on financial issues and he is qualified to testify on factual issues relating to the environmental surcharge.

In addition, the Commission has traditionally accepted expert testimony from financial witnesses on mixed issues of law and fact, particularly with respect to regulatory issues such as the constitutional requirements for a fair rate of return on utility property dedicated to the public service. Here, KIUC may provide expert financial testimony on the application of: (1) the requirements for environmental cost recovery by surcharge under KRS 278.183; and (2) the doctrine of federal preemption to the facts and circumstances presented in this case.

The Commission further finds that the issues raised in Kollen's testimony regarding adjustments to reflect the economic benefit of certain SO₂ allowances and recent federal and state income tax changes are also issues of fact which relate to Kentucky Power's entitlement to surcharge cost recovery under KRS 278.183. Once the evidentiary record has been fully developed, Kentucky Power will have an opportunity through its post-hearing brief to present its legal arguments on all these issues.

IT IS THEREFORE ORDERED that Kentucky Power's motion to strike the testimony of KIUC witness Kollen is denied.

Done at Frankfort, Kentucky, this 26th day of July, 2005.

By the Commission

ATTEST:



Executive Director