

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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 ) CASE NO.  
ASSETS; (2) APPROVAL OF THE ) 2012-00578  
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

On May 28, 2013, Kentucky Power Company ("Kentucky Power") filed a Memorandum of Understanding Regarding Stipulation and Settlement Agreement ("MOU") entered into by and among Kentucky Power; Kentucky Industrial Utility Customers, Inc. ("KIUC"); and Sierra Club, Alexander Desha, Tom Vierheller, and Beverley May (collectively "Sierra Club"). At Kentucky Power's request, Kentucky Power, KIUC, Sierra Club, the Attorney General ("AG"), and Commission Staff met on May 16, 22 , and 24, 2013 for the purpose of allowing the parties to discuss the issues in this case and to consider the possibility of a settlement. As a result of these three meetings, Kentucky Power, KIUC, and Sierra Club have reached a non-unanimous

agreement in principle regarding settlement of the case. Given that the evidentiary hearing on this matter was scheduled to begin May 29, 2013, the MOU provides that there was not sufficient time for Kentucky Power, Sierra Club, and KIUC to prepare and obtain client approval and execution of a final stipulation and settlement agreement prior to the commencement of the scheduled evidentiary hearing. The MOU was executed and submitted for the purpose of memorializing the non-unanimous settlement agreement.

In an e-mail dated May 27, 2013 to the parties to this matter and to Commission Staff counsel, counsel for Kentucky Power expressed the company's desire to have the evidentiary hearing go forward as scheduled on May 29, 2013 for the purpose of considering the merits of the company's application in this matter and to have a subsequent hearing scheduled to consider the merits of the non-unanimous settlement agreement. Kentucky Power's counsel indicated that the company's witnesses would be arriving from Ohio, Oklahoma, and Illinois on May 27 and 28, 2013 in anticipation of the hearing beginning May 29, 2013. If a continuance is requested by the AG, most of these witnesses would need to be brought back a second time and the rescheduling of the hearing would be problematic given those witnesses' commitments as well as the Commission's busy hearing calendar. Kentucky Power's counsel also contends that the AG would not be prejudiced with a bifurcated hearing held at a later date on the non-unanimous settlement agreement. Rather, the additional hearing would allow the AG a full and fair opportunity of cross-examining all the witnesses in an orderly fashion.

In a response e-mail dated May 28, 2013 to all parties of record, the AG expressed that he is not requesting a continuance of the hearing and is prepared to

proceed with a hearing on the application as filed by Kentucky Power. The AG, however, opposes a second evidentiary hearing on the non-unanimous settlement agreement. The AG notes that a non-unanimous settlement agreement should not be afforded a hearing that is separate and apart from the hearing on the merits of the company's application and claims that to do so would be contrary to Kentucky statute, case law, and administrative regulation. The AG concludes that he is ready to proceed with one evidentiary hearing on the application consistent with Kentucky law.

Kentucky Power's May 27, 2013 e-mail and the AG's response e-mail of May 28, 2013 are attached hereto as Appendices A and B, respectively, and are deemed to be filed as part of the record of this matter.

Having reviewed the concerns expressed by both Kentucky Power and the AG, the Commission finds that delaying the evidentiary hearing will allow the record to be more fully developed. The rebuttal testimony filed in support of Kentucky Power's application discusses a Request for Proposals issued on March 28, 2013, seeking 250 MW of long-term capacity and energy, with bids to be submitted by June 11, 2013.<sup>1</sup> The details of the bids submitted in response to this solicitation should provide useful information regarding the current availability and pricing of long-term generation, and will assist the Commission in investigating the reasonableness of Kentucky Power's proposed purchase of 50 percent of the Mitchell Generating Station. Consequently, we will require Kentucky Power to file by June 28, 2013, an analysis of the bids received in response to the March 28, 2013 solicitation.

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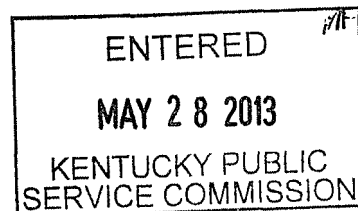
<sup>1</sup> Rebuttal Testimony of Gregory G. Pauley at 20.

Therefore, the formal, evidentiary aspect to the hearing scheduled to begin May 29, 2013 should be continued until July 10, 2013. However, the public comment portion of the May 29, 2013 hearing should go forward as scheduled in light of the fact that the hearing has been widely publicized in Kentucky Power's service territory and to allow those members of the public an opportunity to provide comments to be included in the record of this matter.

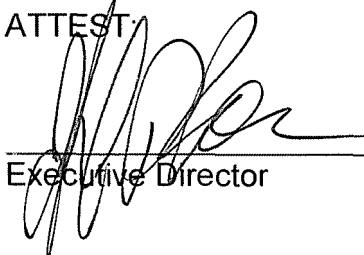
IT IS THEREFORE ORDERED that:

1. The formal evidentiary hearing scheduled to begin May 29, 2013 shall be continued until July 10, 2013, at 10:00 a.m. Eastern Daylight Time, in Hearing Room 1 of the Commission's offices for the purpose of taking evidence and cross-examination on Kentucky Power's application and any non-unanimous settlement agreement.
2. The May 29, 2013 hearing shall commence solely for the purpose of taking public comments.
3. Kentucky Power shall file no later than June 28, 2013, an analysis of the net present value revenue requirements of the bids received in response to the March 28, 2013 solicitation.

By the Commission



ATTEST:

  
Executive Director

APPENDIX A

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE  
COMMISSION IN CASE NO. 2012-00578 DATED **MAY 28 2013**

## Nguyen, Quang D (PSC)

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**From:** Overstreet, Mark R. <MOVERSTREET@stites.com>  
**Sent:** Monday, May 27, 2013 6:17 PM  
**To:** Raff, Richard (PSC); Nguyen, Quang D (PSC); Michael L. Kurtz Esq. (mkurtz@bklawfirm.com); Jody Kyler Cohn (jkylercohn@bklawfirm.com); Kurt Boehm (KBoehm@bklawfirm.com); Hans, Jennifer (KYOAG); Howard, Dennis (KYOAG); Cook, Larry (KYOAG); Shannon Fisk (sfisk@earthjustice.org); 'robb.kapla@sierraclub.org' (robb.kapla@sierraclub.org); childerslaw81@gmail.com  
**Subject:** Case No. 2012-00578 May 29 Hearing and Witnesses

Richard:

You asked that I provide the Commission and Staff with the anticipated order in which the Company will call its witnesses. Subject to the usual exigencies of litigation, Kentucky Power anticipates calling its witnesses in the following order:

- (a) John McManus
- (b) Greg Pauley
- (c) Karl McDermott
- (d) Scott Weaver
- (e) Matt Fransen
- (f) Mark Becker
- (g) Karl Bletzacker
- (h) Phil Nelson
- (i) Jeff LaFleur
- (j) Bob Walton
- (k) Ranie Wohnhas

Prior to the hearing being rescheduled to begin May 29<sup>th</sup>, Mr. McManus committed to chair a panel in Washington D.C. beginning on May 30<sup>th</sup>. It is not an obligation that can be passed to someone else, and thus he is listed out of the order he might otherwise be called because he needs to leave Frankfort by mid-afternoon on the 29<sup>th</sup> to make his commitment in Washington.

Second, it is unclear to me whether the Attorney General has or will ask the Commission to continue the May 29<sup>th</sup> hearing. If such a request has or is made, I ask that the following information be considered by the Commission. The Company's witnesses are arriving Monday night and Tuesday morning in anticipation of the hearing beginning on Wednesday. A continuance would require that nine of these eleven witnesses be brought back in from Columbus, Oklahoma, and Illinois a second time. In addition, some of Kentucky Power's witnesses will also testify in next week's Virginia hearing and West Virginia's hearing in early July. Many of Kentucky Power's witnesses also have other commitments throughout the next several weeks. Finally, it is my understanding that the Commission has a number of hearings and other commitments scheduled throughout the next two months that could make rescheduling difficult.

Even if a bifurcated hearing on a non-unanimous settlement is uncommon, the Attorney General has not identified any prejudice he will suffer if the Commission were to proceed in such a fashion. To the contrary, it would appear that doing so would aid the Commission's consideration of both the application and the Stipulation and Settlement Agreement by allowing a full and fair

consideration of both in an orderly fashion. The Attorney General will have a full opportunity at the hearing on the to be submitted Stipulation and Settlement Agreement to cross-examine all Company witnesses sponsoring testimony or data request responses on the Stipulation and Settlement Agreement.

Mark

APPENDIX B

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE  
COMMISSION IN CASE NO. 2012-00578 DATED MAY 28 2013



## Nguyen, Quang D (PSC)

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**From:** Howard, Dennis (KYOAG) <dennis.howard@ag.ky.gov>  
**Sent:** Tuesday, May 28, 2013 10:32 AM  
**To:** Overstreet, Mark R.; Raff, Richard (PSC); Nguyen, Quang D (PSC);  
mkurtz@bkllawfirm.com; jkylercohn@bkllawfirm.com; KBoehm@bkllawfirm.com; Hans,  
Jennifer (KYOAG); Cook, Larry (KYOAG); sfisk@earthjustice.org;  
robb.kapla@sierraclub.org; childerslaw81@gmail.com  
**Subject:** RE: Case No. 2012-00578 May 29 Hearing and Witnesses

Mark, Richard and all:

I address Mark's substantive comments in the following order. The OAG does not request a continuance of the hearing. We are prepared to proceed with a hearing on the application as filed pursuant primarily to KRS 278.020.

The Attorney General vehemently oppose a second evidentiary hearing on the so-called partial-settlement, which is merely an attempt to present a less-than-unanimous stipulation of fact. Under statute, case law, and administrative regulation, an evidentiary hearing on an application provides all parties the right to introduce relevant evidence and proceed with appropriate examination of same. A partial stipulation should not be afforded the characterization of a separate document (or in the case by inference an amended application) upon which a separate hearing should be conducted. Stated in simplest terms, the document which the parties wish to be tendered is contrary to the Commission administrative regulation regarding stipulations which leads to a separate evidentiary hearing.

To deviate from the historical approach heretofore taken by the Commission on settlements would unduly prejudice the Attorney General by forcing him to surrender his Due Process rights in a proper evidentiary hearing under KRS 278.020 and then participate in a separate evidentiary concerning a non-unanimous evidentiary stipulation, a stipulation that does not conform to administrative regulations. The comments by Mr. Overstreet that the Attorney General would have the opportunity to pursue discovery on the settlement suggests a procedure that varies from that to which the Attorney General is entitled.

KRS 278.190(3) assigns the applicant "the burden of proof to show that the increased rate or charge is just and reasonable." It is not necessary for the Attorney General to prove that the applicant's request is inappropriate. *Energy Regulatory Commission v. Kentucky Power*, 605 S.W.2d 46, 50 (Ky.App. 1980). With regard to the applicant's ability to present evidence in support of its request, "Common sense dictates that there can be no stipulation, or settlement, without the consent of all the parties." *Kentucky American Water Company v. Com. Ex. Rel. Cowan*, 847 S.W.2d 737, 741 (Ky. 1993). Thus, a "non-unanimous settlement" is an oxymoron.

With regard to stipulations of fact for an evidentiary hearing, by reference to the Commission's rules of procedure, specifically, 807 KAR 5:001 Section 9 (6) (Stipulation of facts): "By a stipulation in writing filed with the commission, the parties to a proceeding or investigation by the commission may agree upon the facts or any portion of the facts involved in the controversy, which stipulation

shall be regarded and used as evidence in the hearing.” A “non-unanimous” stipulation of fact is equally as troublesome to common sense and as equally unlawful.

There is no requirement for the Attorney General to agree with the requests of the applicant, there is no requirement for the Attorney General to disprove the reasonableness of the requests of the applicant, there is no ability to force a stipulation or settlement without the consent of the parties. Through the plain language of 807 KAR 5:001 Section 9 (6)), a stipulation of fact requires “the parties” collectively, rather than a portion of the parties to indicate agreement in writing. An evidentiary hearing is scheduled in this proceeding. The Attorney General is entitled to an evidentiary hearing procedure that conforms to statute, case law, and the administrative regulations. The applicant has no entitlement to fashion a procedure convenient to itself. There is no requirement that the Attorney General agree to a deviation from the law and surrender his Due Process rights.

If the applicant and other parties wish to coordinate their advocacy (including waiving cross-examination, filing identical briefs if not a joint brief, etc.) and convey to the Commission their agreement upon the findings of fact to be drawn from the evidence as well as the conclusions that the Commission should reach, then the applicant and any of the other parties are free to do so. The applicant and other parties have no entitlement to submit a non-unanimous stipulation much less suggest that their less than unanimous agreement warrants special treatment or procedural consideration.

The applicant and the other parties may not seek to relieve or suspend the lawful procedure for arguing findings of fact and conclusions of law on any contested issue nor may the applicant in coordination with less than all the parties switch the focus of the inquiry into the reasonableness of their less than unanimous viewpoint. Moreover, the applicant may not force upon any non-agreeing party a so-called partial-settlement or less than unanimous stipulation of evidence. 807 KAR 5:001 Section 9 (6). The applicant has an opportunity to present evidence, conduct discovery upon and cross-examine the evidence in opposition, and present its argument. The applicant has no right to submit a non-unanimous stipulation. *Kentucky American Water Company v. Commonwealth Ex. Rel. Cowan*. The applicant has no right to bypass or render null 807 KAR 5:001 Section 9 (6) through submission of a non-unanimous stipulation.

Based on the above, the Attorney General objects to and opposes a second or bifurcated hearing as contrary to law. If the signatory parties seek to present their views and coordination of advocacy, they may do so through the traditional hearing and briefing process. The Attorney General is ready to proceed with the one evidentiary hearing on this application that is called for under statute, case law, and administrative regulation.

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Mark

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