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**COMMONWEALTH OF KENTUCKY**

**BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

AN EXAMINATION BY THE PUBLIC SERVICE )  
COMMISSION OF THE ENVIRONMENTAL )  
SURCHARGE MECHANISM OF KENTUCKY )  
POWER COMPANY FOR THE SIX-MONTH )  
BILLING PERIODS ENDING DECEMBER 31, 2002, )  
DECEMBER 31, 2003, JUNE 30, 2004, )  
DECEMBER 31, 2004, AND DECEMBER 31, 2005, )  
AND FOR THE TWO-YEAR BILLING PERIODS )  
ENDING JUNE 30, 2003 AND JUNE 30, 2005 )

CASE NO. 2006-00128

**RESPONSE TO ATTORNEY GENERAL'S PETITION FOR REHEARING**

The Attorney General has requested that the Commission rehear or reconsider its Order of January 31, 2007. As grounds for this petition, the Attorney General notes that the Commission's January 31<sup>st</sup> Order did not provide for the collection of the environmental surcharge "subject to refund or otherwise subject to record keeping that would allow for refunds," should the Attorney General and the Kentucky Industrial Utility Customers prevail on their appeal of the Commission's previous decision allowing Kentucky Power Company ("Kentucky Power") to recover out-of-state environmental surcharge costs under the Capacity Settlement Charge of the Interconnection Agreement. (Attorney General's Petition for Rehearing at p. 1). Kentucky Power opposes the Attorney General's request. The Attorney General failed to raise the refund issue in the underlying proceeding, and it is precluded from raising it for the first time on a petition for rehearing. In addition, the Petition should be denied because the Commission cannot and should not be forced to presume that its orders will be overturned and to grant the Attorney General relief based on that presumption. Accordingly, the Attorney General's request must be denied.

## **I. STATEMENT OF FACTS**

On April 25, 2006, the Commission initiated six-month and two-year reviews of Kentucky Power's environmental surcharge as billed to customers for certain time periods. The Attorney General and Kentucky Industrial Utility Customers sought to intervene in the proceeding, and they were granted intervenor status on May 12, 2006 and May 15, 2006, respectively. While the intervenors reserved their objections regarding the out-of-state costs, they did not file any testimony and did not otherwise have any substantive participation in the review proceeding. By agreement of the parties, the case was submitted to the Commission on the record, and the Commission issued its Order on January 31, 2007. As is correctly noted by the Attorney General, the Commission's Order does not require that the rates in question be collected subject to a refund or that Kentucky Power otherwise maintain its records in a manner that might allow for a refund in the future.

## **II. ARGUMENT**

### **A. The Attorney General is Precluded from Raising the Refund Issue on Rehearing**

The Attorney General was granted full intervenor status in this matter, and either participated or was given the opportunity to fully participate in the proceedings that led to the issuance of the Commission's January 31<sup>st</sup> Order. Despite the fact that the Attorney General had a full and fair opportunity to raise the refund issue before the Commission entered its Order, he failed to do so, and he is precluded from raising it on a petition for rehearing.

KRS 278.400 authorizes any party to the proceedings to request a rehearing "with respect to any of the matters determined" at the hearing. By agreement of the parties, no hearing was held in this matter; however, the effect of the statute is the same. The only issues that may be brought before the Commission on a request for rehearing are those that were a part of the

underlying proceeding. The statute simply does not allow a party to wait after the Commission has entered its order to bring up an entirely new issue.

The purpose of KRS 278.400 is to allow a party to a proceeding to file a request for rehearing in order to bring before the Commission “additional evidence that could not with reasonable diligence have been offered on the former hearing.” It does not, however, authorize parties to bring up entirely new issues on rehearing. If the Attorney General wished to bring up the refund issue, he should have done so prior to the issuance of the Commission’s decision. All of the parties, including the Attorney General, were given a full and fair opportunity to bring such issues before the Commission before the Commission’s decision was issued. Given the fact that the Attorney General failed to raise this issue at the appropriate time, KRS 278.400 precludes him from raising it for the first time on rehearing.

**B. The Commission Should Not Order That Kentucky Power’s Collections Be Made Subject to Refund**

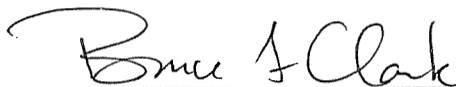
Even if the Commission finds that the Attorney General’s Petition for Rehearing is proper under KRS 278.400, the Commission should nevertheless refuse to order this cost recovery to be made subject to refund. In essence, the Attorney General asks the Commission to presume that its Order in Case No. 2005-0068 was improper and invalid. Based on that faulty assumption, the Attorney General then effectively asks the Commission to stay its own order in this case by requiring that the costs be recovered subject to refund. The Commission’s orders are presumed valid and they continue in full force unless and until an order is modified or vacated by a court of competent jurisdiction. *Com. ex rel. Stephens v. South Central Bell Tel. Co.*, 545 S.W.2d 927 (Ky. 1976). The Commission cannot and should not be asked to second-guess their own decision, which is what the Attorney General is requesting.

If the Attorney General believes that the costs in question should be collected subject to

refund, then it should appeal the Commission's January 31<sup>st</sup> Order to the Franklin Circuit Court and ask for that relief. If the court ultimately reverses the Commission's January 31<sup>st</sup> Order (or if it reverses the Commission's Order in Case No. 2005-0068), then the refund question can be addressed and briefed by the parties at that time. Until that time, it is premature and improper for the Attorney General to utilize the rehearing provisions of KRS 278.400 to plan for a contingency that may never occur and to enlist the Commission's aid to facilitate a challenge to its own Order.

For all of the foregoing reasons, Kentucky Power respectfully requests that the Attorney General's Petition for Rehearing be denied.

Respectfully submitted,



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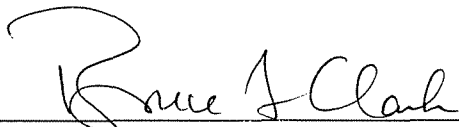
**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing was served by first class mail, postage prepaid, upon the following:

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on this 6th day of March, 2007.

  
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Counsel for Kentucky Power Company

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