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VIA OVERNIGHT MAIL

May 29, 2008

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PUBLIC SERVICE COMMISSION

Ms. Stephanie Stumbo
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, Kentucky 40602

RE: In the Matter of:
An Investigation of the Energy and Regulatory Issues in Section 50 of Kentucky's 2007 Energy Act, Case No. 2007-00477

Dear Ms Stumbo:

Enclosed please find an original and 12 copies of the Brief of Duke Energy Kentucky Inc. in the above-referenced case.

Please date-stamp and return the two extra copies and return to me in the overnight envelope provided.

Sincerely,

Rocco O. D'Ascenzo.
Senior Counsel

ROD/bsc
Enclosures

cc: All parties of record (w/encl.)

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MAY 30 2008
PUBLIC SERVICE COMMISSION

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:)
)
AN INVESTIGATION OF THE)
ENERGY AND REGULATORY ISSUES) CASE NO. 2007-00477
IN SECTION 50 OF KENTUCKY'S 2007)
ENERGY ACT)

BRIEF OF DUKE ENERGY KENTUCKY, INC.

TO THE HONORABLE PUBLIC SERVICE COMMISSION:

Please accept for filing in the above-captioned proceeding the Brief of Duke Energy Kentucky, Inc.

Respectfully submitted,

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TABLE OF CONTENTS

BRIEF OF DUKE ENERGY KENTUCKY, INC.

I. BACKGROUND

The Public Service Commission ("Commission") initiated the above-styled proceeding by Order dated November 20, 2007 ("November Order").[1] The purpose of the proceeding is to investigate the energy and regulatory issues enumerated by the General Assembly in Section 50 of House Bill 1, enacted during the 2007 Second Extraordinary Session ("the Act").[2] The General assembly directed the Commission to examine four specific issues:

1. Eliminating impediments to the consideration and adoption by utilities of cost-effective demand management strategies for addressing future demand prior to Commission consideration of any proposal for increasing generating capacity;

2. Encouraging diversification of utility energy portfolios through the use of renewables and distributed generation;

3. Incorporating full-cost accounting that considers and requires comparison of lifecycle energy, economic, public health, and environmental costs of carious strategies for meeting future energy demand; and

4. Modifying rate structures and cost recovery to better align the financial interests of the utility with the goals of achieving energy efficiency and lowest life-cycle energy costs to all classes of ratepayers.

The Commission ordered the six jurisdictional electric utilities and cooperatives that own generation as parties to the proceeding and chose an independent consultant, Overland Consulting, to review the Commission's authority and to make findings and recommendations regarding the energy-related issues in the Act. Following a thorough investigation, Overland Consulting ("Overland") presented its recommendations in a report titled "Review of the Incentives for Energy Independence Act of 2007 Section 50," filed March 4, 2008 ("Overland

[1] *In the Matter of an Investigation of the Energy and Regulatory Issues in Section 50 of Kentucky's 2007 Energy Act*, Case No. 2007-00477, (Order)(November 20, 2007).
[2] *Id.*

Report"). On April 30, 2008, the Commission held a public hearing, during which DE-Kentucky and several other stakeholders presented testimony.

DE-Kentucky recognizes and applauds the Commission's initiative in this proceeding to investigate the issues set forth by the General Assembly. DE-Kentucky thanks the Commission for the opportunity to participate in this investigation and respectfully requests that the Commission consider the following matters in its recommendations to the General Assembly.

II. DISCUSSION

A. The Commission should Consider Eliminating Impediments to the Consideration and Adoption of Cost-effective Demand Side Management Strategies.

i. Financial incentives to implement DSM Programs must eliminate the bias toward supply side investment.

Kentucky's demand side management model ("DSM") as set forth in Kentucky Revised Statue ("KRS") 278.285, provides a solid foundation for energy efficiency offerings.[3] As recognized in the direct Testimony of Witness Lonnie Bellar submitted on behalf of Big Rivers Electric Corporation, DE-Kentucky, East Kentucky Power Cooperative, Inc., Kentucky Power Company, Kentucky Utilities Company and Louisville Gas and Electric Company, (collectively "Joint Parties"), Kentucky's utilities and cooperatives have implemented many innovative DSM programs.[4] Yet, despite this model being in effect for several years, challenges remain to implementing cost-effective energy efficiency (which includes DSM) programs with widespread customer participation, and encouraging significant utility investment.[5] Simply put, supply-side investment incentives are more favorable than demand-side investment incentives, both from the utility's and investor's perspectives, due to the utility's opportunity to earn a reasonable return

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[3] KY. REV. STAT. ANN. § 278.285 (Michie 2008).

[4] *In the Matter of an Investigation of the Energy and Regulatory Issues in Section 50 of Kentucky's 2007 Energy Act*, Case No. 2007-00477, (Direct Testimony of Lonnie Bellar)(February 29, 2008).

[5] *In the Matter of an Investigation of the Energy and Regulatory Issues in Section 50 of Kentucky's 2007 Energy Act*, Case No. 2007-00477, (Direct Testimony of Theodore Schultz at 3)(February 29, 2008).

on and of its capital investments. The utility presently faces a disincentive to invest in energy efficiency because it lowers its capital investment opportunities. To increase the utility's investment in energy efficiency, the perception of energy efficiency must evolve and the incentives for utilities to invest must become equal to, if not greater than, the expected benefits of supply-side investment. To accomplish this task the earnings impact for energy efficiency investment must be at least equivalent to supply-side investment.

The Overland Report acknowledges that the future of utility-sponsored DSM is tied directly to utility incentives and rate design.[6] The Overland Report highlights the need for parity between demand-side and supply-side investments in several "high priority" recommendations, which include changing the DSM incentive mechanism to allow capitalization of utility energy efficiency expenditures and higher investment returns.[7] Overland's proposal to change the utility's incentives, while intended to spur new energy efficiency and DSM investment, does not focus on the value created through the reduction of capacity costs and delaying new generation investment. Although DE-Kentucky agrees with Overland that proper incentives for DSM implementation should be results-driven, DE-Kentucky respectfully submits that Overland's recommendation is neither the only, nor the best approach to achieving the desired result.

ii. Energy Efficiency Programs Should Focus on Value to the Customer.

The Overland Report acknowledges that successful DSM initiatives bring value to customers by, among other things, reducing capacity costs, delaying investment in generation and transmission infrastructure, and providing improvements to reliability.[8] According to Overland, these benefits have not been explicitly recognized in the current DSM filings in

[6] *In the Matter of an Investigation of the Energy and Regulatory Issues in Section 50 of Kentucky's 2007 Energy Act,* Case No. 2007-00477, (Overland Report at 48)(March 4, 2008)
[7] *Id.* at 106.
[8] *Id.* at 46.

Kentucky.[9] As the Commission considers energy efficiency programs on a going forward basis, it should consider approving such mechanisms that are results-driven and which truly focus on value given to customers.

In his direct Testimony, DE-Kentucky's witness Theodore Schultz describes a model that is consistent with the issues identified in the Overland Report, in which energy efficiency is viewed as a long-term supply side management tool with a focus on value to the customer.[10] Under this model, utilities are compensated based upon actual savings achieved, meaning customers will only pay for capacity and energy savings actually realized.[11] This model would provide utilities with additional flexibility to adopt and implement energy efficiency programs to react to both new technology and customer interests. The goal of this new energy efficiency approach is to achieve all cost-effective reductions in electricity in a way that enhances customer satisfaction and ensures the utility is financially whole relative to the generation alternative.[12] The risks, as well as the benefits rest upon the utility's ability to implement cost-effective and successful energy efficiency programs.

Under this model, utilities would be compensated for successful energy efficiency programs based upon the results they deliver at a price directly linked to the value created for customers, namely, an amortization and return on a percentage of the avoided costs in implementing the alternative supply-side resource.[13] Compensation based upon "watts saved" provides a direct link and reasonable balance between the benefits achieved in reducing electric load and the utility's need to continue to attract capital and maintain earnings. On cross-examination, Overland agreed that allowing a return on avoided costs would help to equalize the

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[9] *Id*

[10] *In the Matter of an Investigation of the Energy and Regulatory Issues in Section 50 of Kentucky's 2007 Energy Act*, Case No. 2007-00477, (Direct Testimony of Theodore Schultz at 6)(February 29, 2008).

[11] *Id*

[12] *Id*

[13] *Id* at 5.

disparity between supply-side and demand-side energy efficiency investments.[14] A significant benefit of this model is that rate payers are not saddled with paying for ineffective programs simply because they are part of a utility's energy efficiency offerings.

Under the model supported by Mr. Schultz, utility customers would never pay the utility more than the cost avoided regardless of the programs actual cost, so customers do not pay for programs that would be considered inefficient.[15] Mr. Schultz discussed this in detail on cross examination in reference to a chart contained in the Overland Report.[16] The chart depicts supposed costs of DE-Kentucky's current refrigerator replacement program, which offers low income customers an opportunity to reduce energy consumption through the installation of a more efficient appliance.[17] Initially, it should be noted that the chart contained on page 46 of the Overland Report does not provide the proper context for the program's true costs because it does not reflect program savings over time. The chart only considers the program costs and kWh savings for the first year, ignoring the fact that the actual savings will continue over the life of the appliance. When one considers the savings over the life of the appliance, the program costs are actually much lower, approximately one tenth of what is stated in the Overland Report. This fact was confirmed by the Commission when it approved DE-Kentucky's current offering of DSM programs in Case No. 2007-00369, and found that DE-Kentucky's refrigerator replacement program was demonstrated as cost-effective over time.[18]

Regardless of the accuracy of the information presented in the aforementioned Overland Report chart, however, it is not in dispute that utility efficiency programs produce varying levels

[14] Hearing Transcript at 200.
[15] *Id.* at 149-151.
[16] *Id. citing* page 46 of the Overland Report.
[17] Overland Report at 46.
[18] In re the Annual Cost Recovery Filing for Demand Side Management By Duke Energy Kentucky, Inc., Case No 00369, (Order)(May 14, 2008).

of results.[19] If a utility is compensated based upon avoided costs for actual savings achieved, customers would never be required to pay for inefficient programs. Thus, the concerns expressed during the cross-examination of Mr. Schultz about customers paying for what appeared to be ineffective DSM programs under the existing DSM model, actually provide a strong argument in favor of the new model that Mr. Schultz advocated.

Although the Commission has broad authority to approve the approach to energy efficiency recommended by Mr. Schultz under the current statute, nonetheless, the Commission should consider recommending a clarification to the statutory language to expressly recognize this new model.

iii. Other DSM impediments identified by the Overland Report should be addressed.

The Overland Report also makes several recommendations regarding what it perceives as impediments to DSM programs.[20] These include, among other things, developing DSM program evaluation standards, measurement guidelines, consumer education, cost allocation, and accelerated procedural schedules.[21] These recommendations are reasonable providing that such guidelines do not constrain Kentucky's utilities from considering innovative approaches to energy efficiency and becoming leaders in program development. For example, any standard evaluation criteria or program guideline should still afford the utility sufficient flexibility to implement a variety of options for all customer classes.

The Overland Report also recommends that the rules governing the industrial-customer exclusion from utility-sponsored DSM programs be standardized and that there be some verification of such customers' actual energy efficiency efforts before they can receive the

[19] Overland Report at 46.
[20] Overland Report at 53-58.

exemption.[22] The Commission should take this recommendation to heart and require some form of self-certification for industrial customers. Moreover, to the extent an industrial customer opts out of the utility sponsored programs, such customer should also not be able to share in the system-wide benefits achieved. Utilities should be permitted to take the exclusion into consideration as part of the cost-of-service study performed in a base rate case.

However, DE-Kentucky does not agree that the Commission should have the broad authority to manage utilities' DSM efforts by directing utilities to implement specific programs.[23] As supported in the Supplemental Testimony of Mr. Schultz, program development should be left to the individual utilities, which are in the best position to determine program offerings that best suit particular load profiles and customer needs.[24] A program that succeeds in one service territory may not be appropriate in another. Indeed, a mandated DSM program may actually be harmful to a particular utility and its customers if the mandated program does not fit in a particular territory. Overland conceded on cross-examination that if the Commission were to adopt this particular recommendation, it would be reasonable to have an opt-out provision for utilities if they could make a showing that a particular program would not be cost-effective or successful in a particular jurisdiction.[25] Given that Overland itself recognizes the potential problems with a Commission-ordered DSM program, DE-Kentucky respectfully asserts that such top-down, program specific mandates are unnecessary and should not be adopted by the Commission.

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[21] *Id*
[22] Overland report at 56.
[23] *Id.* at 54
[24] Supplemental Testimony of Theodore Schultz at 4.
[25] *Hearing Transcript at 201.*

B. Encouraging Diversification of Utility Energy Portfolios Through the use of Renewables and Distributed Generation.

This Commission has previously and recently addressed issues regarding statewide renewable and distributed generation standards in Administrative Case No. 2007-00300. Overland makes several recommendations regarding the use of renewables and distributed generation. Use of renewable alternatives to fossil generation is possible solution to managing and reducing the carbon footprint. However, the desire to encourage renewable alternatives must be balanced with the costs and financial risks of such resources and the ultimate impact to customer rates.

The Overland Report explains that the difficulties in securing financing of renewable resources is directly linked to the limited opportunities for cost recovery, and recommends the adoption of an RFP process for all resources based upon an integrated resource plan.[26] DE-Kentucky agrees that the limited opportunity to recover costs for investment in renewable projects is a serious impediment to widespread implementation. However, Overland's RFP recommendation does not directly address the problem, which is the ability to recover all costs (both demand and energy) associated with any new project. As DE-Kentucky witness Diane Jenner explained in her testimony and under cross-examination, a formalized RFP process for every new resource addition is unnecessary and, if not appropriately flexible, may have the effect of adding cost rather then reducing cost for customers.[27] Customers are best served by a resource-planning process that affords utilities flexibility in resource acquisitions. While RFPs are a useful tool for utilities to find ways to meet load requirements, they may not be the best tool in every circumstance. The investing utility itself is undoubtedly in the best position to

[26] Overland Report at 72.
[27] *In the Matter of an Investigation of the Energy and Regulatory Issues in Section 50 of Kentucky's 2007 Energy Act,* Case No. 2007-00477, (Direct Testimony of Diane Jenner at 5)(April 1, 2008).

determine whether an RFP process would be beneficial in any particular set of circumstances. Therefore an RFP mandate for all resources is not in the best interests of either the utilities or customers.

C. The Commission Should Not Encourage a Full Cost Accounting Model in Evaluating Resources for Meeting Future Energy Demand.

One of the issues identified by the General Assembly was whether to compel utilities to perform some form of full cost accounting that considers, among other things, economic and public health as part of the strategies for meeting energy demand. Nearly every party to the proceeding, including Overland, agreed that the Commission should not recommend or consider a full cost accounting model to meet future energy demand.[28] The definition of "full cost accounting" is nebulous and any calculation of such costs is speculative. There is no industry-wide accepted and definitive list of cost categories under a "full cost accounting" paradigm. The Sierra Club, who advocated the implementation of full cost accounting, does not dispute this fact. On cross-examination, Mr. McMullen, on behalf of the Sierra Club, recommended that the Commission should hold a full administrative evidentiary hearing to determine what external costs should be considered.[29] Clearly, any process to develop such a comprehensive list of cost categories would be contentious and unwieldy, to say the least. The proposed list would be both obscure and infinite. Assuming such a list could even be agreed upon by a majority of stakeholders, developing a valuation methodology would, at best, be an exercise in pure speculation.

The use of full cost accounting is of concern for a number of reasons. As Witness Bellar explained, the concept of full cost accounting includes the consideration of factors that, by their very nature, are intangible and incapable of objective calculation and are more appropriately

[28] Overland Report at 96.
[29] Hearing Transcript at 95.

dealt with on a national policy level.[30] The Overland Report acknowledges the risks of recognition of externalities under a full cost accounting model as "arbitrarily and improperly" causing energy costs in Kentucky to increase, jeopardizing utility credit quality and hampering economic development.[31] The Commission should not require or consider a full cost accounting model in meeting future energy demand. Traditional accounting principles present a fair, objective, and understandable methodology to evaluate the true costs of resource planning and have already achieved wide spread industry acceptance.[32]

D. The Commission Should Consider Modifying Rate Structures and Cost Recovery to Better Align the Financial Interests of the Utility with the Goals of Achieving Energy Efficiency and Lowest Life-cycle Energy Costs to all Classes of Ratepayers.

The Commission should also give serious consideration to modification to existing rate structures to further energy efficiency and reduce costs. The simplest way to accomplish this goal is to mitigate the effects of regulatory lag in cost recovery. DE-Kentucky witness Paul Smith makes several recommendations in his direct testimony that are on point.[33] Mr. Smith discusses the desire for clarification to the Commission's authority to review and approve alternative modes of regulatory ratemaking and general tracking and cost-recovery mechanisms, as well as the benefits of such authority for both utilities and customers.[34] Tracking mechanisms and alternative forms of regulation allow utilities to receive timely recovery of costs, including capital investments, while reducing the impact and frequency of comprehensive base rate cases, which entail considerable costs that are passed on to ratepayers.[35] Tracking mechanisms are particularly beneficial where particular categories of costs are likely to change or fluctuate more

[30] Direct Testimony of Lonnie Bellar on Behalf of Joint Parties at 6.
[31] Overland Report at 96.
[32] *See* Direct Testimony of Lonnie Bellar at 6.
[33] *In the Matter of an Investigation of the Energy and Regulatory Issues in Section 50 of Kentucky's 2007 Energy Act*, Case No. 2007-00477, (Direct Testimony of Paul Smith at 5-6)(February 29, 2008).
[34] *Id.*
[35] *Id.*

rapidly than other cost categories. In such cases, it is inefficient to require utilities to initiate a full general base rate proceeding to review all cost categories, including those that are unlikely to have changed, in order to address unique fluctuations in a particular narrowly defined cost category. Indeed, the Commission has long recognized the value of such trackers for volatile cost categories in the context of fuel–adjustment clauses, purchased gas clauses, and the successful implementation of a variety of other tracker mechanisms, including those that directly flow savings back to customers.

Although DE-Kentucky believes the Commission already possesses ample statutory authority to adopt such tracker mechanism as it finds in its discretion to be just and reasonable, recent litigation experience shows that not all stakeholders agree.[36] Overland discusses the need for clarification in its report, stating in relevant part "the degree of KPSC authority in setting rates, including surcharge mechanisms, should be settled by the legislative intent of the powers granted by the General Assembly."[37] The legislative intent regarding the Commission's breadth of authority should be clarified.

In addition, the Commission should recommend a restructure to the current appellate procedure in Kentucky. The Overland Report briefly discusses the uncertainty created by the multiple appellate levels and the operating and financial risks to utilities.[38] To address this uncertainty and risk, DE-Kentucky submits that Commission appeals should bypass the circuit court and go directly to the Court of Appeals. As explained by Mr. Smith, this would provide a greater degree of certainty and efficiency in reaching final resolution of disputed matters.[39] This approach would mirror the procedure employed under a variety of regulatory schemes. The more

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[36] *Id.*
[37] Overland Report at 98.
[38] Overland Report at 98.
[39] Direct Testimony of Paul Smith at 9-10.

layers that exist in the appellate process, the greater the time and expense all parties incur in reaching a conclusion.[40] Review of Commission decisions typically does not require new fact finding or the taking of new evidence or testimony. Instead, such proceedings are limited to review of the record of proceedings before the Commission to evaluate the sufficiency of the evidence to support Commission factual findings, as well as review of any legal questions raised during the Commission proceedings. These are quintessentially appellate functions, which do not require the specialized competence of the circuit court as a fact finder. This process should be streamlined to provide greater efficiency and regulatory certainty.

E. The Commission Should Not Implement a Public Benefits Fund

In Direct Testimony, Witnesses Susan Zinga and Andrew McDonald of the Sierra Club, urge the Commission to implement a Public Benefits Fund for energy efficiency and DSM programs.[41] Specifically, Ms. Zinga recommends that this fund be set as a per kilowatt-hour ("kWh") charge for all customers at a level sufficient to fund a statewide fund of approximately $41 million.[42] DE-Kentucky respectfully submits that such a recommendation is neither necessary nor in the best interests of customers.

Ms. Zinga's recommendation is not based upon any independent or relevant analysis of the effectiveness or potential benefits of programs.[43] Ms. Zinga does not offer any specific recommendations concerning the basic administration of such a fund in Kentucky.[44] Her recommendation is based solely upon studies performed in other states, without any credible analysis to determine whether other states' results could be repeated or are comparable in Kentucky.

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[40] *Id*

[41] *In the Matter of an Investigation of the Energy and Regulatory Issues in Section 50 of Kentucky's 2007 Energy Act*, Case No. 2007-00477, (Direct Testimony of Susan Zinga)(April 1, 2008);

[42] *Id.* at 9-10.

[43] Hearing Transcript at 58, 60

[44] *Id*

Currently, Kentucky's DSM and energy efficiency initiatives are developed by utilities and the stakeholders in their particular territories. The benefit of the current system is that the utility and stakeholders in the service territory work in a collaborative fashion with a common goal of designing programs that best suit the particular needs in a territory. Customers pay a rate that is going directly toward funding programs in their territory. The Commission reviews the cost effectiveness of these programs on an annual basis. The current system has resulted in many programs which have benefited Kentucky's utility customers.

A statewide public benefits system would likely result in programs that may not be as efficient or useful in a particular utility's service territory, but nonetheless would be paid for by all customers. The Commission should reject this recommendation.

III. CONCLUSION

DE-Kentucky thanks the Commission for allowing its participation in this proceeding and commends the Commission for its efforts to perform a thorough review of the four issues identified by the General Assembly. However, the Commission should remain mindful that not all of the recommendations presented in this proceeding by the various parties are consistent with the best interests of all stakeholders and would unnecessarily and unreasonably inflate utility rates. In developing its recommendations to the General Assembly, the Commission should carefully balance the interests of all stakeholders, including both the utilities and customers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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