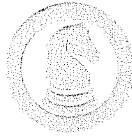

STOLL·KEENON·OGDEN

PLLC

2000 PNC PLAZA
500 WEST JEFFERSON STREET
LOUISVILLE, KY 40202-2828
MAIN: (502) 333-6000
FAX: (502) 333-6099
www.skofirm.com

KENDRICK R. RIGGS
DIRECT DIAL: (502) 560-4222
DIRECT FAX: (502) 627-8722
kendrick.riggs@skofirm.com

June 3, 2010

RECEIVED
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PUBLIC SERVICE
COMMISSION

VIA HAND DELIVERY

Jeff DeRouen
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, KY 40601

RE: ***Application of Kentucky Utilities Company for an Adjustment of Base Rates***
Case No. 2009-00548

Application of Louisville Gas and Electric Company for an Adjustment of Electric and Gas Base Rates
Case No. 2009-00549

Dear Mr. DeRouen:

Enclosed please find and accept for filing two originals and ten copies of the Joint Response of Kentucky Utilities Company and Louisville Gas and Electric Company to the Attorney General's Motion to Dismiss in the above-referenced matters. Please confirm your receipt of this filing by placing the stamp of your Office with the date received on the enclosed additional copies and return them to me in the enclosed self-addressed stamped envelope.

Should you have any questions please contact me at your convenience.

Yours very truly,

Kendrick R. Riggs

KRR:ec
cc: Parties of Record

400001.134411/635301.1

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF KENTUCKY UTILITIES COMPANY FOR AN ADJUSTMENT OF BASE RATES	)))	**CASE NO. 2009-00548**

In the Matter of:

APPLICATION OF LOUISVILLE GAS AND ELECTRIC COMPANY FOR AN ADJUSTMENT OF ITS ELECTRIC AND GAS BASE RATES	))))	**CASE NO. 2009-00549**

JOINT RESPONSE OF KENTUCKY UTILITIES COMPANY AND LOUISVILLE GAS AND ELECTRIC COMPANY TO THE ATTORNEY GENERAL'S MOTION TO DISMISS

Kentucky Utilities Company ("KU") and Louisville Gas and Electric Company ("LG&E") (collectively, "Companies") respectfully submit this Response to Attorney General's ("AG") Motion to Dismiss ("Motion"), filed with the Commission on June 2, 2010.

I. Introduction

The AG's Motion asks the Commission to summarily dismiss the pending cases based on an acquisition that has not yet closed or even been approved by this Commission. Our customers and our obligation to serve them will be the same regardless of whether the Companies are ultimately acquired by PPL. The ultimate ownership of LG&E and KU is completely irrelevant to the determination of fair, just and reasonable rates under KRS Chapter 278. The record of evidence shows the Companies are earning an insufficient return on their investments to serve customers.

LG&E and KU are the Companies seeking to increase their rates. The Commission itself, along with the other intervenors, has thoroughly studied LG&E's and KU's delivery of service, financial health and other relevant matters. The records of evidence in these proceedings are

voluminous and it is that evidence that must form the basis of this Commission's review and ultimate decision. The AG has proffered no evidence nor offered any legal precedent to support the bare assertion that the possibility of a change in the ultimate ownership of a utility should prevent this Commission from ruling in a pending rate proceeding. The AG has presented no authority to prohibit the Companies from continuing to litigate these cases until concluded by the Commission's final order.

II. The Speculations and Assumptions in the AG's Motion Do Not Provide Any Reasonable Basis of Support for the Relief the AG's Requests.

The AG's Motion requests the Commission to summarily dismiss two actively prosecuted rate proceedings on the basis of nothing more than speculations and assumptions about the possible financial impact of an announced, but far from consummated acquisition. In contrast to the bare assertions in the AG's motion, there simply is no support in law or fact for the AG's Motion; even a cursory review of the three authorities the AG cites in his Motion reveals they do not, in fact, support the Motion's arguments.

Moreover, the AG's Motion appears to contend that the evidentiary threshold for having rate cases involuntarily dismissed is *lower* than what is legally required to support a pro forma adjustment to an historical test year. The relevant Commission regulation and numerous Commission orders clearly require an adjustment to be "known and measurable."[1] By the AG's own admission concerning the proposed acquisition of E.ON U.S. LLC ("EUS") by PPL

[1] 807 KAR 5:001 § 10(1)(7) ("Upon good cause shown, a utility may request pro forma adjustments for known and measurable changes to ensure fair, just and reasonable rates based on the historical test period."). *See, e.g., In the Matter of Application of Madison County Utility District for (A) Authority to Finance Construction in the Approximate Amount of $3,000,000; (B) a Certificate of Convenience and Necessity for the Construction of Water Facilities; and (C) Adjustment of Rates*, Case No. 2002-00184, Order at 8 (Jan. 27, 2003) ("[A]ny adjustment to Madison's test-year expenses must be known and measurable."); *In the Matter of the Application of Big Bear Wastewater, Inc., for an Adjustment of Rates Pursuant to the Alternative Rate Filing Procedure for Small Utilities*, Case No. 1997-00245, Order at 1 (Oct. 30, 1997) ("In evaluating pro forma adjustments, the Commission uses the rate-making criteria of known and measurable."); *In the Matter of the Application of Alton Water District for an Adjustment of Rates Pursuant to the Alternative Procedure for Small Utilities*, Case No. 8914, Order at 3 (Mar. 12, 1984) ("The Commission has a well established policy of allowing only those changes which are known and measurable in determining a utility's pro forma level of expense. Proposed adjustments thus must be accompanied by documentation sufficient in detail to show the determination of the dollar amount of the change.").

Corporation ("PPL"), "One can only speculate regarding ... the impact of the transaction on the normal, on-going operation of each utility, and speculation is not an adequate basis for setting rates."[2] He further concedes that the impact of the proposed acquisition on the Companies, if any, is not measurable.[3] In short, the AG concedes there is insufficient evidence concerning the proposed transaction to support a pro forma adjustment to the Companies' test-year results in these proceedings. The Companies respectfully submit that the Commission should follow its well-established precedent by affording such information the appropriate weight (i.e., speculative and lacking in probative value) in these proceedings rather than break with all established law by establishing a lower evidentiary threshold for involuntarily dismissing rate cases.

It is well-established that even public utilities have rights,[4] one of which is to have their rate applications heard on the merits in the time frame prescribed by KRS Chapter 278.[5] The Companies therefore respectfully request the Commission deny the AG's Motion in its entirety.

III. The Commission should deny the AG's motion to dismiss these proceedings because granting it would be arbitrary, lacking any basis in Kentucky statute, case law, rules of civil procedure, Commission precedent, or fact.

The AG's Motion presents neither a legal nor a factual basis for dismissal.

A. The Commission should deny the AG's Motion to Dismiss because there is no statutory or Commission precedent to support such a dismissal, nor is there sufficient evidence to support even a pro forma adjustment for possible PPL-EUS acquisition impacts to the Companies' test-year results.

The Companies filed their rate applications in these proceedings using historical test years.[6] The relevant Commission regulation allows for adjustments to be made to a utility's historical test year data, but only when such adjustments are "known and measurable": "Upon

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[2] AG's Motion at 3.
[3] *Id.* at 5 ("At this stage, the material impact on KU and LG&E is known (through admissions by PPL). It is not, however, measurable.").
[4] *Kentucky Power Company v. Energy Regulatory Commission of Kentucky*, 623 S.W.2d 904, 908 (Ky. 1981) ("Even a public utility has some rights, one of which is the right to a final determination of its claim within a reasonable time and in accordance with due process.").
[5] KRS 278.190(3).
[6] KRS 278.192(1) (emphasis added).

good cause shown, a utility may request pro forma adjustments for known and measurable changes to ensure fair, just and reasonable rates based on the historical test period."[7] The Commission has stated clearly and consistently that for a proposed adjustment to be "known and measurable," it must be based on more than speculation or estimates; it must be supported with verifiable numbers:

- Madison proposed to increase test-year salaries and wages by $52,110 to reflect the hiring of two new field employees. Its adjustment is based on an hourly pay rate of $10 for regular hours and $15 per hour for 400 annual overtime hours per employee.

  The Commission does not dispute whether or not Madison's work force is currently adequate. However, any adjustment to Madison's test-year expenses must be known and measurable. Madison currently has not hired the new employees nor has it indicated their hiring other than to state that it will occur subsequent to the effective date of the rates proposed in this case. The Commission has found no evidence in the record definitive enough to find this adjustment known and measurable. It is therefore denied.[8]

- The 24 percent increase [in new customer expense] was calculated based on an increase in revenue of $132,960 over the test year level of $548,353. Although a minimal increase in some expenses is likely to occur, it is Staff's opinion that these expenses will not necessarily increase in direct proportion to an increase in revenues or in customer level. The proposed adjustments do not meet the rate-making criteria of being known and measurable and, therefore have been disallowed in the determination of Whitley County's revenue requirement.[9] [The Commission subsequently adopted the Staff Report as the findings of the Commission.[10]]

- The Company proposed to increase its transportation cost by $1,000 based on the aging of its equipment. Since this amount is only an estimate and does not meet the known and measurable criteria of the Commission, it has been disallowed for rate-making purposes.[11]

- Alton proposed an adjustment to increase its electric expense by $400 based upon an estimated 15 percent increase. The Commission has a well-established policy of allowing only those changes which are known and measurable in determining a utility's pro forma level of expense. Proposed adjustments thus must be accompanied by documentation

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[7] 807 KAR 5:001 § 10(7).

[8] *In the Matter of Application of Madison County Utility District for (A) Authority to Finance Construction in the Approximate Amount of $3,000,000; (B) a Certificate of Convenience and Necessity for the Construction of Water Facilities; and (C) Adjustment of Rates*, Case No. 2002-00184, Order at 8 (Jan. 27, 2003) (emphasis added).

[9] *In the Matter of an Adjustment of Rates of the Whitley County Water District*, Case No. 2000-00001, Order Appx. B (Staff Report) at 5 (June 19, 2000) (emphasis added).

[10] *In the Matter of an Adjustment of Rates of the Whitley County Water District*, Case No. 2000-00001, Order at 2 (July 18, 2000).

[11] *In the Matter of an Adjustment of Rates of the Spears Water Company, Inc.*, Case No. 9067, Order at 11 (Nov. 21, 1984) (emphasis added).

> sufficient in detail to show the determination of the dollar amount of the change. Examples of such documentation could be: notice of price changes received from suppliers, copies of invoices, board resolutions regarding wage increases, etc. The Commission finds that Alton's proposed electric adjustment is neither known nor measurable and has disallowed it herein.[12]

The speculative assertions in the AG's Motions do not begin to meet the well-established and consistently applied "known and measurable" requirement.

To paper over the speculative assertions, the AG's Motion misstates what the Kentucky Court of Appeals said in *Energy Regulatory Commission v. Kentucky Power Company.*[13] Though the AG claims the court's opinion supports his assertion that "[t]here is no presumption that the information set forth in an application for a change in rates is reasonable for setting rates,"[14] the opinion actually says nothing of the kind. First, the ultimate subject matter of the opinion was a Commission proceeding concerning an application for "a certificate of public convenience and necessity and authority to borrow funds to purchase an interest in an Indiana electric steam generating plant," not a rate application.[15] Second, the actual holding of the opinion was quite narrow:

> This Court reverses the judgment of the circuit court and remands this matter to the Energy Regulatory Commission because the Commission has made only conclusions of law and has failed to make findings of specific evidentiary facts as required by *Marshall County v. So. Central Bell Tel. Co.*, Ky., 519 S.W.2d 616 (1975). In order to sustain or reverse an order of the Commission it is necessary that there be a finding of specific evidentiary facts. Furthermore, it has been repeatedly held that where the validity of an order of an administrative body depends on a determination of fact, the absence of findings of basic evidentiary facts is fatal to such an order. *Marshall, supra.*[16]

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[12] *In the Matter of the Application of Alton Water District for an Adjustment of Rates Pursuant to the Alternative Procedure for Small Utilities*, Case No. 8914, Order at 3 (Mar. 12, 1984) (emphasis added).
[13] 605 S.W.2d 46 (Ky. App. 1980).
[14] AG Motion at 2.
[15] 605 S.W.2d at 48.
[16] *Id.* at 49.

Everything that came later in the opinion, including the page the AG cited, was *dicta*.[17] Third, the AG's Motion appears to misunderstand the page of the opinion it cites, which concerns the appropriate standard for courts to use when reviewing the decisions of administrative agencies, ***not*** how administrative agencies ought to treat the evidence presented to them.[18] So there is, in fact, no authority to support the AG's proposition; rather, KRS 278.192(1) and 807 KAR 5:001 § 10(7) establish the contrary proposition, which is that accurate historical test-year data and adequately supported "known and measurable" adjustments are indeed proper bases upon which to establish the reasonableness of proposed rates.

And it is ignoring the "known and measurable" standard that is one of several fundamental flaws in the AG's Motion. It asks the Commission to ignore the thousands of pages of actual test-year data and analysis from the Companies and the intervenors in the record of these proceedings, and instead to determine as a substantive matter that no change in any of the Companies' base rates, up or down, is appropriate at this time, all on the basis of what the AG's Motion concedes is "speculation" and "not ... measurable."[19] Because this would not pass the evidentiary muster for approving a pro forma adjustment to an historical test year; it cannot begin to be sufficient to justify dismissing the Companies' applications in these proceedings.

Such a dismissal would also be contrary to clear and recent Commission precedent concerning the rate impacts of proposed mergers. In its order approving an acquisition of Kentucky-American Water Company ("KAWC"), the Commission refused the AG's request to compel KAWC to "reduce its base rates by $1.5 million within 5 business days of the merger

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[17] *See id.* at 49 ("In reversing and remanding for the above reasons, we choose to decide also other issues raised in this appeal to clarify the law and thereby prevent, if possible, the necessity of further review after remand."). The AG's citation was to page 50 of the opinion.
[18] 605 S.W.2d at 50.
[19] AG Motion at 3, 5.

closing and prohibit KAWC from applying for an increase in its base rates for 17 months from the transaction closing date."[20] It stated:

> Any adjustment in rates based upon these [merger] savings must be supported by the evidence, not mere speculation. ...

The Commission should deny the AG's pending motion for the same reasons.

The AG's Motion selectively attributes certain quotes from a PPL press release and a publicly available presentation as "admissions" that the cost of providing service as reflected in the pending rate cases will somehow be materially changed by the proposed acquisition of E.ON U.S. LLC. This is simply incorrect. The investment presentation quotes referenced in the AG's Motion are comparing the financial position of PPL before and after the proposed transaction for the purpose of showing how the acquisition, if consummated, rebalances PPL's portfolio. It, in no way, is a comparison between PPL and E.ON AG or E.ON U.S. ownership, and certainly is not referencing any impact on LG&E and KU. Indeed, the evidence presented in the joint application for approval of the change of control in the ownership of KU and LG&E clearly demonstrates great efforts were taken by PPL in the structure of the transaction to preserve the status quo of the holding company E.ON U.S. and its two utility subsidiaries.[21] Further, both of the PPL documents the AG cites as containing "admissions by PPL" contain this language: "[A]ctual results may differ materially from the results discussed in the statements." Neither document contains specific claims about financial impacts on LG&E or KU; indeed, all of the claimed impacts the AG Motion cites are from statements directed to anticipated impacts on PPL *if and when* the acquisition occurs. And, both documents note that the parties must obtain a number of state and federal regulatory approvals, including one from this Commission, before

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[20] *In the Matter of Application for Approval of the Transfer of Control of Kentucky-American Water Company to RWE Aktiengesellschaft and Thames Water Aqua Holdings GmBH*, Case No. 2002-00018, Order at 15 (May 30, 2002).

[21] *In the Matter of: Joint Application of PPL Corporation, E.ON AG, E.ON US Investments Corp., E.ON U.S. LLC, Louisville Gas and Electric Company and Kentucky Utilities Company For Approval of an Acquisition of Ownership and Control of Utilities*, Case No. 2010-00204

the acquisition can occur—and there is no assurance the approvals, if they come at all, will come on terms acceptable to the parties. All of which makes any potential financial impact on the Companies from the proposed transaction not just "speculation" and "not ... measurable," but also clearly unknown.

In sum, the Commission should refuse to dismiss the Companies' applications in these proceedings because there simply is no legal or factual support for such action. By the AG's own admission, he cannot muster the evidentiary support necessary for a "PPL Acquisition Adjustment" to the Companies' historical test-year results in these proceedings because the potential financial impacts of the acquisition, if any, are "speculation" and "not ... measurable." Yet granting the AG's Motion would in practical effect be approving a kind of super-pro-forma adjustment, dwarfing all of the data and analysis offered by the Companies and intervenors in the records of these proceedings. The AG has clearly not made a showing adequate for such a dramatic result.

B. The Commission should deny the AG's Motion to Dismiss because KRS Chapter 278 does not allow it, and because it would deprive the Companies of their statutory right to be heard on their applications "as speedily as possible" and to place their rates into effect by a time certain.

The portions of KRS Chapter 278 concerning rate cases contain no provision permitting the Commission to dismiss a rate application due to "changed circumstances" or anything of the like. Instead, those provisions clearly grant: (1) utilities a right to file new rate schedules upon proper notice;[22] (2) the Commission a right and a responsibility to review such filings thoroughly and decide upon them with all reasonable speed;[23] and (3) utilities a right to place their proposed rates into effect no later than ten months after filing them absent final Commission orders prescribing other rates.[24] The effect of all other KRS Chapter 278 rate case provisions is either

[22] KRS 278.180.
[23] KRS 278.190(1)-(3).
[24] KRS 278.190(3).

to abbreviate the proceedings,[25] or to allow a utility's proposed rates to go into effect before the Commission has fully decided the case.[26] In short, the clear design of KRS Chapter 278 is to require the Commission to render its final decision upon a utility's rate application by a time certain.

As a creature of statute, the Commission lacks any authority not granted to it expressly or by necessary implication, constraining it to follow the statutory design for rate cases.[27] Therefore, when the Commission accepted these cases as filed on January 29, 2010,[28] and later set them for hearing,[29] it set in motion a statutorily defined process that may be terminated only by: (1) a timely final order on the merits of these cases; (2) ten months having passed from the date of filing; or (3) granting a motion by the Companies voluntarily to dismiss the cases without prejudice.[30]

Granting the AG's motion to dismiss without prejudice would gut that design. It would abrogate the statutory injunction that the Commission decide upon all rate applications speedily, "and in any event not later than ten (10) months after the filing of such schedules."[31] If the Commission were able to dismiss such applications without prejudice, this time constraint would

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[25] *See, e.g.*, KRS 278.180(1) ("[T]he commission may, in its discretion, based upon a showing of good cause in any case, shorten the notice period from thirty (30) days to a period of not less than twenty (20) days.").
[26] KRS 278.190(2).
[27] *See Commonwealth ex rel. Stumbo v. Kentucky Public Service Commission*, 243 S.W.3d 374, 378 (Ky. App. 2007) ("Although the Commission is granted sweeping authority to regulate public utilities pursuant to the provisions of KRS Chapter 278, it is nonetheless a creature of statute. Therefore, it 'has only such powers as granted by the General Assembly.' *PSC v. Jackson County Rural Elec. Co-op., Inc.*, 50 S.W.3d 764, 767 (Ky. App. 2000)."); *Holsclaw v. Stephens*, 507 S.W.2d 462, 470 (Ky. 1973) ("In contrast with the wide scope of authority of the General Assembly, the political subdivisions of the Commonwealth are creations of the General Assembly and possess only those powers which have been granted to them expressly plus those powers necessarily implied or incident to expressly granted powers as to enable them to carry out the expressed powers.").
[28] *In the Matter of Application of Kentucky Utilities Company for an Adjustment of Base Rates*, Case No. 2009-00548, Letter of Linda Faulkner, Filings Division Director, to Lonnie E. Bellar (Feb. 8, 2010); *In the Matter of Application of Louisville Gas and Electric Company for an Adjustment of Its Electric and Gas Base Rates*, Case No. 2009-00549, Letter of Linda Faulkner, Filings Division Director, to Lonnie E. Bellar (Feb. 8, 2010).
[29] *In the Matter of Application of Kentucky Utilities Company for an Adjustment of Base Rates*, Case No. 2009-00548, Order (Feb. 16, 2010); *In the Matter of Application of Louisville Gas and Electric Company for an Adjustment of Its Electric and Gas Base Rates*, Case No. 2009-00549, Order (Feb. 16, 2010).
[30] *See* KRCP 41.01(1).
[31] KRS 278.190(3).

be of no force or effect. Presumably, that is why no such statutory authority exists, and it is presumably why counsel for the Companies could find no Commission authority to support the AG's involuntary motion to dismiss an actively prosecuted rate case.

Dismissing the Companies' applications in these proceedings without prejudice would also deprive the Companies of their statutory rights under KRS 278.190. In particular, KRS 278.190(3) gives a utility the right to place its rates into effect without further Commission review if the Commission does not issue a final order on its application within ten months after the utility filed its rate application. The power to dismiss a rate application without prejudice but against the utility's will robs the utility of its due process right to be heard and to have the Commission issue a final order on the merits of its rate application before being deprived of what would otherwise be its right to put its proposed rates into effect at the end of ten months. As Kentucky's highest court aptly said, "Even a public utility has some rights, one of which is the right to a final determination of its claim within a reasonable time and in accordance with due process."[32] Because it would deny the Companies their statutorily enumerated due process rights in these proceedings, the Companies respectfully request the Commission not to dismiss their rate applications, with or without prejudice.

IV. Conclusion

The AG's Motion to Dismiss lacks any Commission precedent. It asks the Commission to involuntarily dismiss an actively prosecuted rate proceeding on the basis of what the AG admits are speculative notions about the possible financial impact of a hypothetical merger. That is less evidence than would be necessary to support a pro forma adjustment to an historical test year's operating results. Therefore, the AG's Motion to Dismiss makes a request that is absurd

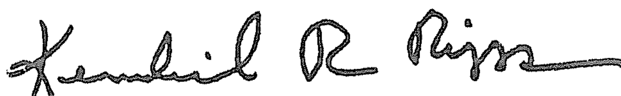
[32] *Kentucky Power Company v. Energy Regulatory Commission of Kentucky*, 623 S.W.2d 904, 908 (Ky. 1981) ("Even a public utility has some rights, one of which is the right to a final determination of its claim within a reasonable time and in accordance with due process.").

on its face and wholly at odds with KRS Chapter 278 and decades of Commission precedent. The Companies respectfully request the Commission to deny it.

WHEREFORE, Kentucky Utilities Company and Louisville Gas and Electric Company respectfully request the Commission to deny the Attorney General's Motion to Dismiss.

Dated: June 3, 2010

Respectfully submitted,



Kendrick R. Riggs
W. Duncan Crosby III
Deborah T. Eversole
Stoll Keenon Ogden PLLC
2000 PNC Plaza
500 West Jefferson Street
Louisville, Kentucky 40202-2828
Telephone: (502) 333-6000

Robert M. Watt III
Monica H. Braun
Stoll Keenon Ogden PLLC
300 West Vine Street
Lexington, Kentucky 40507-1801
Telephone: (859) 231-3000

Allyson K. Sturgeon
Senior Corporate Attorney
E.ON U.S. LLC
220 West Main Street
Louisville, Kentucky 40202
Telephone: (502) 627-2088

Counsel for Kentucky Utilities Company and
Louisville Gas and Electric Company

400001.134411/634890.5

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served via U.S. mail, first-class, postage prepaid, this 3rd day of June 2010 upon the following persons:

Dennis G. Howard II
Lawrence W. Cook
Paul D. Adams
Assistant Attorneys General
Office of the Kentucky Attorney General
Office of Rate Intervention
1024 Capital Center Drive, Suite 200
Frankfort, KY 40601-8204

David C. Brown
Stites & Harbison PLLC
400 West Market Street, Suite 1800
Louisville, KY 40202-3352

Michael L. Kurtz
David F. Boehm
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202

Iris G. Skidmore
Bates & Skidmore
415 W. Main Street, Suite 2
Frankfort, KY 40601

Lisa Kilkelly
Eileen Ordover
Legal Aid Society
416 W. Muhammad Ali Blvd., Suite 300
Louisville, KY 40202

Laurence J. Zielke
Zielke Law Firm, PLLC
1250 Meidinger Tower
Louisville, KY 40202

Gardner F. Gillespie
Dominic F. Perella
Hogan Lovells US LLP
555 Thirteenth Street, N.W.
Washington, DC 20004

Carroll M. Redford III
Miller, Griffin & Marks, PSC
271 W. Short St., Ste. 600
Lexington, KY 40507

Holly Rachel Smith
Hitt Business Center
3803 Rectortown Rd.
Marshall, VA 20115

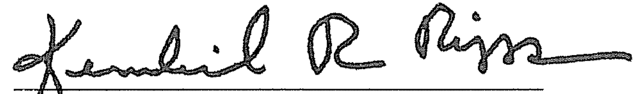
James T. Selecky
BAI Consulting
16690 Swingley Ridge Road, Suite 140
Chesterfield, MO 63017

Robert A. Ganton
Regulatory Law Office
U.S. Army Legal Services Agency
901 N. Stuart Street, Suite 525
Arlington, VA 22203-1837

Steven A. Edwards, Esq.
Administrative Law Division
Office of Staff Judge Advocate
1310 Third Avenue Room 215
Fort Knox, KY 40121-5000

Tom FitzGerald
Liz D. Edmondson
Kentucky Resources Council, Inc.
P.O. Box 1070
Frankfort, KY 40602

Matthew R. Malone
William H. May, II
Hurt, Crosbie & May PLLC
The Equus Building
127 West Main Street
Lexington, KY 40507



Counsel for Kentucky Utilities Company
and Louisville Gas and Electric Company