

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION AND COMPLAINT OF GRAYSON	)	
RURAL ELECTRIC COOPERATIVE	)	
CORPORATION FOR AN ORDER	)	
AUTHORIZING PURCHASE OF ELECTRIC	)	
POWER AT THE RATE OF SIX CENTS PER	)	
KILOWATTS OF POWER VS A RATE IN	)	CASE NO.
EXCESS OF SEVEN CENTS PER KILOWATT	)	2012-00503
HOUR PURCHASED FROM EAST KENTUCKY	)	
POWER COOPERATIVE UNDER A	)	
WHOLESALE POWER CONTRACT AS	)	
AMENDED BETWEEN GRAYSON RURAL	)	
ELECTRIC COOPERATIVE CORPORATION	)	
AND EAST KENTUCKY POWER	)	
COOPERATIVE INC.	)	

ORDER

Pending before the Commission are two motions to dismiss this investigation: one filed jointly by Grayson Rural Electric Cooperative Corporation (“Grayson”) and East Kentucky Power Cooperative, Inc. (“EKPC”); the other filed by Shelby Energy Cooperative, Inc. (“Shelby Energy”). This investigation was initiated by the Commission in response to the filing by Grayson of a complaint and petition relating to the interpretation of a 2003 amendment (known as “Amendment 3”) to its contractual agreement with its wholesale power supplier, EKPC. As discussed below, we will grant the motions and dismiss this case. In doing so, we commend Grayson, EKPC, and EKPC’s 15 other member distribution cooperatives (“Members”) for working together collectively to resolve this contractual issue in a reasonable and efficient manner.

## BACKGROUND

Grayson and the 15 other Members are member/owners of EKPC and, until 2003, were contractually obligated to purchase their entire wholesale power requirements from EKPC. In 2003, Grayson and the other 15 Members entered into Amendment 3 with EKPC to allow each of the 16 Members to purchase a limited quantity of power from alternative sources. As discussed in more detail in our July 17, 2013 Order opening this investigation, the issues to be investigated in this case included “whether Amendment 3 requires or a need exists for a methodology for sharing among all Members the allocation of alternative sourced power authorized under Amendment 3.”<sup>1</sup>

More specifically, we described this issue in the July 17, 2013 Order as follows:

Amendment 3 authorizes EKPC’s Members to purchase power and energy from someone other than EKPC, within the following limits: (a) up to a total of 5 percent of EKPC’s highest coincident peak demand in the past 36 months; and (b) up to 15 percent of each Member’s highest coincident peak demand in the past 36 months. Thus, while each Member has the right to purchase 15 percent of its coincident peak demand from a supplier other than EKPC, if each Member chose to do so, the total of all the Members’ non-EKPC purchases would equal 15 percent of EKPC’s peak demand; whereas Amendment 3 explicitly limits the aggregate of the Members’ non-EKPC purchases to no more than 5 percent of EKPC’s peak demand. The majority of the current controversy arises from this alleged inconsistency in the wording of Amendment 3, and that there appears to be no methodology or criteria, either contained in Amendment 3 or separately agreed to by the Members, to be used for allocating the right to purchase non-EKPC power among the 16 Members when one Member seeks to purchase more than 5 percent of its coincident peak load, thereby effectively

---

<sup>1</sup> July 17, 2013 Order at 20.

limiting the other Members' total purchases to less than 5 percent of their respective coincident peak loads.<sup>2</sup>

In establishing this investigation, we recognized that EKPC's 15 Members other than Grayson might be impacted by the issues in this case, so we served a copy of the July 17, 2013 Order on each Member and invited Members to intervene individually or jointly. Thirteen of EKPC's 15 Members did intervene.<sup>3</sup> An informal conference was held at the Commission's offices on August 8, 2013, and the parties agreed on dates for conducting discovery, which consisted of written requests for information and the taking of depositions. Extensive discovery was conducted by the parties, and ultimately a joint motion to dismiss was filed by Grayson and EKPC.

#### DISCUSSION

The joint motion to dismiss filed by Grayson and EKPC states that the parties to this investigation have each executed a settlement agreement resolving all issues outstanding in this investigation, as well as certain issues in other proceedings involving Grayson and EKPC. Shelby Energy subsequently filed its own motion to dismiss, stating that it joins in the motion to dismiss as filed by Grayson and EKPC. In response to these motions, the Commission entered an Order on June 19, 2015, directing Grayson and EKPC to file a copy of the settlement agreement that was referenced in their joint motion to dismiss. In response to that Order, EKPC filed on June 22, 2015, a three-page Memorandum of Understanding, dated May 15, 2015, and signed by the

---

<sup>2</sup> *Id.* at 2–3.

<sup>3</sup> The 13 Members of EKPC that intervened in this investigation are Big Sandy RECC, Blue Grass Energy Corporation, Clark Energy Corporation, Inc., Cumberland Valley Electric, Inc., Farmers Rural Electric Cooperative Corporation, Fleming-Mason Energy Cooperative, Jackson Energy Cooperative Corporation, Inter-County Energy Cooperative, Licking Valley Rural Electric Cooperative Corporation, Nolin Rural Electric Cooperative Corporation, Owen Electric Cooperative, Inc., Shelby Energy Cooperative, Inc., and South Kentucky Rural Electric Cooperative Corporation.

respective chairmen of the boards of directors of Grayson and EKPC. That document set forth numerous issues on which Grayson and EKPC had either already reached agreement or would work together in good faith to do so. One of those issues was Amendment 3, and EKPC agreed to seek approval from all 16 Members of a previously negotiated Amendment 3 Memorandum of Understanding (“Amendment 3 MOU”) which “would successfully resolve lingering uncertainties regarding the operation of Amendment 3 to EKPC’s Wholesale Power Agreement.”<sup>4</sup>

EKPC followed through with its commitment to have its 16 Members approve the Amendment 3 MOU, and on September 30, 2015, EKPC filed copies of the Amendment 3 MOU as signed by each of its 16 Members. The Amendment 3 MOU includes provisions relating to, among other matters, the limits on the quantities of alternative-source power that can be acquired by each Member, the length of term for which the alternative-source power can be acquired, the advance notice that must be provided by a Member before acquiring alternative-source power, and a prohibition against EKPC’s imposing a specific charge to recover lost demand revenue only from a Member electing to acquire alternative-source power. The Amendment 3 MOU also includes a statement that none of its provisions is intended to modify any of the express terms of Amendment 3.

With respect to the limits on the quantities of alternative-source power that can be acquired by each Member, the Amendment 3 MOU states generally that:

1. If, at the time a Member elects to acquire power from an alternative source, the aggregate load of all Members being served by alternative sources would

---

<sup>4</sup> See May 15, 2015 Memorandum of Understanding, attached to EKPC’s June 22, 2015 Notice of Filing, at 3.

be less than 2.5 percent of EKPC's highest coincident peak demand in the past 36 months, the electing Member may acquire up to 15 percent of its highest coincident peak demand in the past 36 months.

2. If, at the time a Member elects to acquire power from an alternative source, the aggregate load of all Members being served by alternative sources would be equal to or greater than 2.5 percent of EKPC's highest coincident peak demand in the past 36 months, the electing Member may acquire up to 5 percent of its highest coincident peak demand in the past 36 months.

3. If, at the time a Member elects to acquire power from an alternative source, the aggregate load of all Members being served by alternative sources would be greater than 5 percent of EKPC's highest coincident peak demand in the past 36 months, the electing Member may not acquire the alternative source power unless the load to be served by the alternative source is reduced so the 5 percent threshold is not exceeded.

Based on a review of the evidence of record and being otherwise sufficiently advised, the Commission finds that the Amendment 3 MOU is comprehensive in nature, does not violate any legal or regulatory principle, and results in a reasonable resolution of all issues to be investigated in this case. As we noted in our July 17, 2013 Order initiating this case, any written agreement that contains provision relating to utility rates and service, as those terms are defined under KRS 278.010(12) and (13) respectively, is within the Commission's jurisdiction. In addition, KRS 278.160(1) requires a utility to have on file with the Commission "schedules showing all rates and conditions for service established by it and collected or enforced," while Commission regulation 807

KAR 5:011, Section 13, requires each utility to file with the Commission “a copy of all special contracts entered into governing utility service that establish rates, charges, or conditions of service not included in its general tariff.” Thus, in granting the pending motions to dismiss, we will require EKPC to file in the Commission’s Tariff Filing System one copy of the Amendment 3 MOU with the signature pages of each of its 16 Members.

There are also three petitions for confidentiality pending before the Commission. The first two, filed on July 26, 2013, and on July 29, 2013, by Owen Electric Cooperative, Inc. (“Owen Electric”), and Fleming-Mason Energy Cooperative (“Fleming-Mason”), respectively, request confidential protection for an earlier draft version of the Amendment 3 MOU and for a PowerPoint presentation describing the major provisions of that version of the Amendment 3 MOU. With respect to these petitions, the Commission finds that EKPC filed an unredacted copy of the Amendment 3 MOU here on September 30, 2015. Thus, this public disclosure of the document waives any claim of confidentiality that might otherwise be applicable to the Amendment 3 MOU or earlier versions and summaries of major provisions. For these reasons, these two petitions should be denied.

The third request for confidentiality, filed on January 6, 2015, by Grayson, was styled as an Amended Petition and requests confidential protection of a draft agreement for the purchase of power by Grayson from Morgan Stanley Capital Group, Inc. (“Morgan Stanley”). On April 20, 2015, EKPC filed a Response to Grayson’s Amended Petition (“EKPC’s Response”), raising numerous objections, including claims that Grayson had not satisfied the legal requirements of either the Commission or the Open

Records Act for granting confidential protection of the purchase power contract. More specifically, EKPC's Response notes that Grayson seeks confidentiality on the basis that public disclosure "would permit an unfair commercial advantage to competitors of the entity with whom Grayson proposes to contract,"<sup>5</sup> whereas the statutory exemption from public disclosure applies only to documents "which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records."<sup>6</sup> The Commission finds that Grayson's request for confidentiality of its purchase power agreement with Morgan Stanley should be denied, because Grayson has not satisfied the statutory requirement to show that public disclosure would permit an unfair commercial advantage to competitors of Grayson.

IT IS THEREFORE ORDERED that:

1. The motions to dismiss filed jointly by Grayson and EKPC and by Shelby Energy are granted.
2. The petitions for confidentiality filed on July 26, 2013, July 29, 2013, and January 6, 2015, are denied.
3. The material denied confidentiality shall not be placed in the record for 33 days to allow for the filing of a request for rehearing pursuant to KRS 278.400 or an action for review pursuant to KRS 278.410.
4. EKPC shall file within 20 days of the date of this Order, using the

---

<sup>5</sup> See Grayson's Amended Petition at 8.

<sup>6</sup> See EKPC's Response at 8, and KRS 61.878(1)(c)(1).

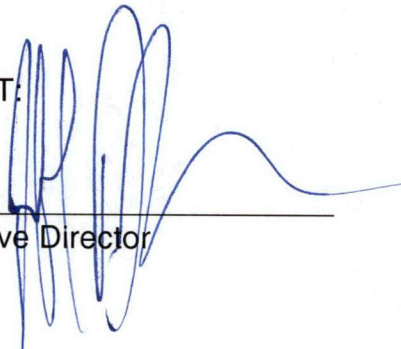
Commission's Tariff Filing System, one copy of the Amendment 3 MOU with the signature pages of each of its 16 Members.

- 5. This case is closed and removed from the Commission's docket.

By the Commission

ENTERED AL  
DEC 18 2015  
KENTUCKY PUBLIC  
SERVICE COMMISSION

ATTEST:



Executive Director



\*Honorable James M Crawford  
Crawford & Baxter, P.S.C. Attorneys at Law  
523 Highland Avenue  
P. O. Box 353  
Carrollton, KENTUCKY 41008

\*Patrick C Woods  
Director, Regulatory & Compliance  
East Kentucky Power Cooperative, Inc.  
P. O. Box 707  
Winchester, KY 40392-0707

\*East Kentucky Power Cooperative, Inc.  
4775 Lexington Road  
P. O. Box 707  
Winchester, KY 40392-0707

\*Grayson R.E.C.C.  
109 Bagby Park  
Grayson, KY 41143

\*Clayton O Oswald  
Jackson Energy Cooperative Corporation  
115 Jackson Energy Lane  
McKee, KY 40447

\*Honorable Donald T Prather  
Mathis, Riggs & Prather, P.S.C. Attorneys at Law  
500 Main Street  
Suite 5  
Shelbyville, KENTUCKY 40065

\*David S Samford  
Goss Samford, PLLC  
2365 Harrodsburg Road, Suite B325  
Lexington, KENTUCKY 40504

\*Honorable W. Jeffrey Scott  
Attorney At Law  
P.O. Box 608  
311 West Main Street  
Grayson, KENTUCKY 41143