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October 4, 2013

RECEIVED

OCT 04 2013

**PUBLIC SERVICE
COMMISSION**

Via Hand-Delivery

Mr. Jeffrey Derouen
Executive Director
Kentucky Public Service Commission
P.O. Box 615
211 Sower Boulevard
Frankfort, KY 40602

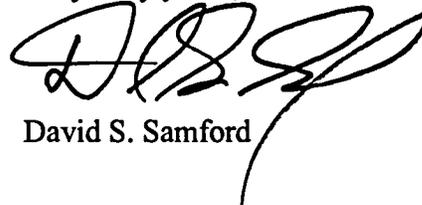
Re: In the Matter of: Petition and Complaint of Grayson RECC for an Order Authorizing Purchase of Electric Power at the Rate of Six Cents Per Kilowatts of Power vs. a Rate in Excess of Seven Cents Per Killowatt Hour Purchased From East Kentucky Power Cooperative Under a Wholesale Power Contract as Amended Between Grayson RECC and East Kentucky Power Cooperative, Inc.
PSC Case No. 2012-00503

Dear Mr. Derouen:

Enclosed please find for filing with the Commission in the above-referenced case an original and ten (10) copies of the Response to Motion to Amend and Objection to Filing of Notice on behalf of East Kentucky Power Cooperative, Inc. Please return a file-stamped copy to me.

Do not hesitate to contact me if you have any questions.

Very truly yours,



David S. Samford

Enclosures

M:\Clients\4000 - East Kentucky Power\1800 - Grayson Litigation\
Correspondence\Ltr. to Jeff Derouen (2012-00503) - 131004

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OCT 04 2013

PUBLIC SERVICE
COMMISSION

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

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OCT 04 2013

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)
EXCESS OF SEVEN CENTS PER KILOWATT)
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.)

CASE NO. 2012-00503

**EAST KENTUCKY POWER COOPERATIVE, INC.'S
RESPONSE IN OPPOSITION TO PETITIONER'S MOTION TO AMEND**

AND

**OBJECTION TO PETITIONER'S NOTICE OF FILING
OF ADDITIONAL PROOF OF NOTICE**

Comes now East Kentucky Power Cooperative, Inc. ("EKPC"), by counsel, and tenders its Response to the Motion to Amend the November 19, 2012 Petition and Complaint ("Petition"), filed by the Petitioner, Grayson Rural Electric Cooperative Corporation ("Grayson") and its Objection to Grayson's Notice of Filing of Additional Proof of Notice, respectfully stating as follows:

I. Summary of Facts

Grayson filed a Notice of Amendment in this proceeding on September 11, 2013, which purported to amend the Petition by substituting a new long-term power purchase proposal for the

agreement that was originally filed as part of Grayson's Petition. EKPC filed an Objection to the Notice of Amendment on September 24, 2013, which, *inter alia.*, pointed out: (1) an application cannot be amended via the filing of a notice under 807 KAR 5:001, Section 4(5);¹ (2) Grayson's Notice was materially deficient because it included only a draft, non-binding term sheet for the new agreement, not a mutually binding contract as was filed with Grayson's Petition; (3) the new long-term power purchase proposal for which Grayson seeks approval is: (a) entirely different from the agreement which was proposed in 2012; and (b) did not appear to even be subject to Amendment 3 of the 1964 Wholesale Power Contract ("WPC"); and (4) Grayson's repudiation of the Memorandum of Understanding ("MOU"), which was negotiated by EKPC's Members to resolve lingering disputes about the interpretation and implementation of Amendment 3, has the effect of preventing Grayson from acquiring the product which it now seeks to acquire.²

On September 30, 2013, Grayson filed its Motion to Amend "to perfect the record and to meet the concerns of East Kentucky Power Cooperative," requesting that the amendment "be granted in such a way as to have all amendments relate back to the date of filing of the original complaint."³ Grayson supported its request with a citation to CR 15 and the conclusory statement that "this being an administrative proceeding, there would be no reason for the Relation Back Doctrine to not be applicable." On October 2, 2013, Grayson filed a Notice of Filing of Additional Proof of Notice, which attached another "notice" from Grayson to EKPC of an election to procure power from a non-EKPC resource.

¹ Commission precedent holds that a complainant is an applicant and bears the burden of proof. *See In the Matter of the Office of the Attorney General, Commonwealth of Kentucky v. Atmos Energy Corporation*, Order, Case No. 2005-00057 (Ky. P.S.C. Feb. 9, 2007).

² EKPC adopts and incorporates its Objection herein, as if set forth in full.

³ Motion, p. 2.

II. Argument

Grayson has now moved for Commission approval to amend its Petition, however, its proffered amended complaint is still materially deficient because the long-term power purchase proposal giving rise to the need to amend the Petition is not attached. Even if a definitive agreement was attached, however, Grayson has offered no justification for granting the Motion to Amend and, even if the Motion to Amend was granted, there is no factual or legal basis for it to be allowed to relate back to the original filing date of the Petition. Moreover, Grayson's latest filing – a Notice of Filing of Additional Proof of Notice – is nothing more than a brazen effort to mask a multitude of prior and ongoing errors by Grayson in its previous attempts to give proper notice under Amendment 3. Accordingly, it should be disregarded.

A. Grayson's Proffer of an Amended Complaint is Still Materially Deficient

While Grayson now seeks to comply with the Commission's regulations for amending an application, its efforts continue to be materially deficient. Attaching a copy of the agreement for which Commission approval is sought to an application under KRS 278.300 is a basic and obvious filing requirement.⁴ Nevertheless, Grayson has yet to produce a copy of the long-term power purchase agreement for which it is now seeking approval. This omission is particularly puzzling in light of Grayson's repeated references to the terms of the agreement in its September 11, 2013 Notice of Amendment, a September 26, 2013 letter to EKPC,⁵ a September 27, 2013 press release,⁶ and its September 30, 2013 Motion to Amend. Until such time as Grayson files

⁴ See 807 KAR 5:001, Section 17(1)(d) ("If a contract has been made for the acquisition of property...copies thereof shall be annexed to the petition.").

⁵ A copy of this letter was attached to Grayson's Notice of Filing of Additional Proof of Notice (filed Oct. 2, 2013).

⁶ A copy of the press release is attached hereto and incorporated herein as Exhibit 1.

the agreement for which it requests Commission approval, its Motion to Amend the Petition is materially and fatally deficient.

B. Grayson Also Fails to Demonstrate Why its New Proposal Should be Considered an Amendment of its Petition

Even if Grayson were to produce the agreement in question, it still has not demonstrated that the request for approval of same would be appropriate in this proceeding as opposed to a separate filing under KRS 278.300. The ability of a party to file an amended application is determined at the discretion of the Commission and, under 807 KAR 5:001, Section 4(5), may only be granted for “good cause shown.” Grayson has not offered any cause for why its new long-term power purchase proposal should be deemed to be an amendment of its November 19, 2012 Petition. To the contrary, the facts strongly suggest that the abandoned Magnum Drilling of Ohio, Inc. (“Magnum”) contract and the newly proposed long-term power purchase proposal are so unique and separate as to bear no reasonable relationship to one another. First, the parties are different. Second, the scope and magnitude of the transactions are different. Third, the very concept of the two commercial relationships is fundamentally different. Fourth, the operational impact of the two arrangements is very different. Fifth, the location of settlement and power delivery are different. Sixth, the latest proposal does not even appear to be subject to Amendment 3. This is not a situation, as Grayson suggests, where the name of the counterparty and the price term can be freely substituted without such amendments having further implications. Until, at a minimum, it is shown that the new long-term power purchase agreement which Grayson has apparently entered into is in fact subject to Amendment 3, its motion to amend the Petition to include approval of that agreement in the Commission’s investigation of the proper interpretation and implementation of Amendment 3 should be denied and Grayson should be directed to file a new application under KRS 278.300.

C. Grayson's Request to Have the Amended Complaint Relate Back to the November 19, 2012 Petition is a Non Sequitur Argument

Grayson's argument that its "amended complaint" should relate back to the date of its filing of the original Petition is a non sequitur argument that must be rejected. Under 807 KAR 5:001, Section 4(5), an amendment will not relate back unless the Commission orders otherwise. Yet Grayson's Motion to Amend offers no substantive reason why the September 2013 filing of its new contract proposal should relate back to the November 2012 filing of its contract with Magnum. As pointed out previously, the facts simply do not support such a conclusion. While Grayson very evidently desires to keep the Commission's review of its newest long-term power purchase proposal tied to the Commission's investigation of the proper interpretation and implementation of Amendment 3, it has not articulated any basis for doing so.

Without an underlying factual basis, Grayson's legal analogy of the Commission's discretion to the principles set forth in CR 15 is simply unpersuasive. If the Civil Rules did apply to Commission proceedings, which they do not,⁷ then Grayson still fails to satisfy the criteria of CR 15.03(1), which states, "Whenever the claim or defense asserted in the amended pleading *arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading*, the amendment relates back to the date of the original pleading." (emphasis added). At the risk of belaboring the point, it must again be emphasized that Grayson's new proposal is an entirely separate transaction and has nothing to do with the Magnum deal. Likewise, the alleged conduct of which Grayson complains in its Petition has nothing to do with its new proposal.⁸ There is similarly no occurrence which ties the Magnum contract to the new proposal – they have nothing to do with one another. It simply defies the

⁷ See KRS 278.310.

⁸ Grayson alleges that EKPC failed to perform its obligations under Amendment 3 with regard to the Magnum contract. See Grayson's Petition, ¶¶ 14-17 (filed Nov. 19, 2012).

laws of logic for Grayson to claim that its recent request for approval to enter into a new contract should be deemed to have been effective ten months *before* Grayson actually entered into the contract in question.

D. Grayson's Notice of Filing of Additional Proof of Notice is Similarly Deficient

EKPC also objects to Grayson's Notice of Filing of Additional Proof of Notice, which was filed on October 2, 2013. The September 26, 2013 correspondence from Carol Fraley to Tony Campbell is inconsistent with the term sheet attached to Grayson's September 11, 2013 Notice of Amendment in at least one material respect. In the September 11th filing, Grayson indicated that it would be purchasing 10 MW of energy from an alternative source, whereas the September 27th letter fails to specify the exact amount of power that it intends to purchase. More troubling is Grayson's repeated insistence that it has given EKPC proper notice under Amendment 3, when in fact its five attempts to do so have all been materially deficient in multiple respects. In fact, recent correspondence from EKPC's Senior Vice President of Power Supply chronicles the numerous deficiencies in Grayson's various "notices".⁹ The essential point is that a notice which is itself defective cannot cure the deficiencies in prior notices, nor can a defective notice relate back to a prior notice which was itself defective. EKPC therefore denies that either the September 9, 2013 or September 27, 2013 correspondence from Grayson satisfy the notice requirements of Amendment 3 and further denies that either of these pieces of correspondence could appropriately relate back to any prior purported notice. Grayson has yet to provide full and complete notice of any Amendment 3 proposal to EKPC. The latest Notice of Filing of Additional Proof of Notice is incorrect to the extent that it suggests otherwise.

⁹ A copy of this letter is attached hereto as Exhibit 2.

III. Conclusion

In the absence of a consensus between EKPC's Members as to whether to adopt the MOU, Amendment 3 must be applied strictly according to its terms. By disregarding Commission regulations which require the filing of a contract that is subject to review under KRS 278.300, Grayson has also created an issue as to whether its newest contract proposal is even subject to Amendment 3. Nevertheless, under no scenario can this new long-term power purchase proposal be fairly or reasonably said to arise from the same conduct, transaction and occurrences complained of in Grayson's November 19, 2012 Petition. Grayson's recent attempt to "prove" that it has given notice to EKPC simply raises more questions than it answers, but one thing is clear – Grayson still fundamentally does not understand Amendment 3 or how its own actions and litigiousness are preventing it from doing the very thing which it seeks to accomplish.

WHEREFORE, on the basis of the foregoing, EKPC respectfully requests the Commission to enter an order:

- (1) Denying Grayson's Motion to Amend and requiring Grayson to file a new application for approval of its most recent proposal under KRS 278.300; or
- (2) In the alternative, granting Grayson's Motion to Amend but not authorizing such amendment to relate back to the filing of the November 19, 2012 Petition.

This 4th day of October, 2013.

Respectfully submitted,



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david@gosssamfordlaw.com

Counsel for East Kentucky Power Cooperative, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing filing was served on the following via depositing same in the custody and care of the U.S. Mail, postage prepaid, this 4th day of October, 2013:

W. Jeffrey Scott, Esq.
W. Jeffrey Scott, P.S.C.
P. O. Box 608
Grayson, Kentucky 41143

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Bardstown, KY 40004-0609

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Counsel for East Kentucky Power Cooperative, Inc.



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News

9/27/2013

PRESS RELEASE

Grayson Rural Electric Cooperative Corporation, an electric distribution cooperative in Northeast Kentucky serving six counties, Lewis, Greenup, Carter, Rowan, Elliott and Lawrence announced today that it was seeking to buy a portion of their electric power from Duke Energy at a substantial savings to its members. "Duke Energy can sell Grayson RECC power for our members at a rate of over \$.03 per kilowatt hour less than what we must pay East Kentucky Power Cooperative" said Carol Hall Fraley, President and CEO of Grayson Rural Electric Cooperative Corporation. Fraley added, "This can save our members, many of whom live in the poorest and most economically distressed counties of the state, potentially one million dollars per year".

"We look forward to East Kentucky Power Cooperative in Winchester, Kentucky working hand in hand with Grayson Rural Electric to save our members a substantial amount of money," Fraley said.

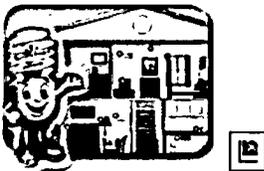
Grayson Rural Electric Cooperative serves over fifteen thousand meters in Northeast Kentucky and has been in existence since 1950 serving rural homes and farms.

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Grayson Rural Electric
 109 Bagby Park
 Grayson, Ky 41143-1292
 606.474.5136

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October 2, 2013

Ms. Carol Ann Fraley
President and Chief Executive Officer
Grayson Rural Electric Cooperative Corporation
106 Bagby Park
Grayson, KY 41143-1292

RE: Amendment 3 "Notice" Dated September 26, 2013

Dear Ms. Fraley:

Please accept this in response to your letter dated September 26, 2013, purporting to give notice on behalf of Grayson Rural Electric Cooperative Corporation ("Grayson") to East Kentucky Power Cooperative, Inc. ("EKPC") regarding Grayson's intent to procure power from a non-EKPC resource. EKPC continues to be willing to work with you to assure that Amendment 3 is complied with, so that you may move forward in securing the regulatory approvals and operational commitments necessary to achieve your goal. However, for the reasons set forth herein, EKPC does not accept your September 26, 2013 correspondence as meeting the minimum notice requirements of Amendment 3 to the 1964 Wholesale Power Contract ("WPC"). EKPC also does not agree with your statement that the September 26th correspondence can somehow be given retroactive effect.

Amendment 3 Notice Requirements

The notice requirements of Amendment 3 are relatively simple, but they are purposefully inflexible. This is because the removal or addition of significant load(s) to a utility system requires a degree of planning and preparation that enables the transition to be seamless and transparent to retail customers. In order to remove load from the Wholesale Power Contract through an election under Amendment 3, Grayson must: (1) identify the amount of load being served from a non-EKPC resource; (2) identify the load(s) to be served by the non-EKPC resource (including the hourly measurement of demand for each such load(s) during EKPC's annual peak hour during the thirty-six calendar months preceding the election); (3) state the date and time when the designated load(s) will commence being served by the non-EKPC resource; and (4) indicate whether the load(s) to be served by the non-EKPC resource involve the acquisition of new territory currently served by another power supplier or municipal utility.

Your September 26th letter is not sufficient when measured against these notice requirements. First, Grayson has not identified the amount of power which it intends to procure

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from the non-EKPC resource. This information is necessary to determine: (1) whether the election is in fact permitted under Amendment 3; and (2) the length of time in which advance notice of the effective date of an election under Amendment 3 must be given. The September 26, 2013 letter is vague and indefinite with regard to the amount of load to be served from the non-EKPC resource and states only that Grayson intends to acquire energy "in an amount *not to exceed* 15% of the rolling average of its coincident peak demand... (emphasis added)." While this cap would appear to make the election appropriate under Amendment 3, it is impossible to determine whether the 90 day notice requirement or the 18 month notice requirement is applicable. This is an important consideration as EKPC must know how much capacity to offer into the PJM Interconnection, LLC ("PJM") market once that capacity is no longer reserved for Grayson's departed load(s). Given the inconsistency in Grayson's prior "notices" with regard to the amount of load to be served by the non-EKPC power supply (discussed below), EKPC would prefer to not speculate as to the amount of non-EKPC power supply which Grayson is seeking to acquire.

Second, Grayson has not designated the load(s) which the non-EKPC power supply will serve. This information is necessary to assure that Grayson receives the appropriate supply of power from EKPC so that a balance is maintained between the demand for power in the portion of Grayson's service territory that continues to be served by EKPC and the supply of that power by EKPC. We also anticipate that this information will be required by PJM as well. The MOU was developed to accommodate standard market products like block energy purchases because attempting to serve load with a standard market product will incur significant expenses and penalties. As a result of Grayson's repudiation of the Memorandum of Understanding ("MOU") that was negotiated by and between the Members of EKPC, Grayson must adhere to the contractual obligation to designate load(s).

Third, Grayson has not indicated the date upon which it intends to take power from the non-EKPC resource, which will have the effect of reducing EKPC's supply of power to Grayson by a corresponding amount. Without this information, it will be impossible for EKPC to fulfill its obligations for operating in the PJM market in order to mitigate any penalties and unnecessary charges. This information is also required to assure that Grayson has complied with the advance notice requirements described above and to allow EKPC to timely sell additional capacity in the PJM market and balance its Financial Transmission Rights portfolio.

The fourth notice requirement would appear to be inapplicable based upon what I understand about your current proposal.

In summary, without knowing the amount of power to be acquired from the non-EKPC resource, the date upon which this will happen, or the load(s) to be served by the non-EKPC resource, it is impossible for EKPC to assure that Grayson's customers are reliably and adequately supplied with power.

Relation of the September 26th Letter to Grayson's Prior "Notices"

Another issue raised in your September 26th letter is the extent to which it may relate back to the four prior "notices" tendered by Grayson. This is, of course, a legal question which must ultimately be answered by the Public Service Commission ("Commission") and the July 17, 2013 Order entered by the Commission in your complaint case indicates that they are aware of the problems with Grayson's purported "notices." While the Commission proceeding provides an appropriate venue for resolving the issue, EKPC does not believe that your September 26th letter can be deemed to be effective as of the date of any of the prior "notices."

First, Amendment 3 contemplates Grayson giving: (1) an "election" to purchase energy and capacity from a non-EKPC resource; or (2) a "cancellation" of such an election. It does not contemplate the giving of an "amended", "supplemental", "replacement" or "superseding" election or cancellation. The reason that only elections and cancellations are permitted under Amendment 3 should be self-evident: taking and returning load(s) to or from a utility or balancing authority requires significant planning and preparation. In the absence of certainty as to whether specific loads must be served, reliability is unnecessarily risked and the ability of utility and grid operators to make critical decisions in a timely manner is compromised. Amendment 3's notice obligations, which I have described above, are necessarily rigid.

Second, even if an amended, supplemented, replacement or superseded election was permissible under Amendment 3, it is by no means clear that any of the four prior notices tendered by Grayson were sufficient to constitute an effective election, for the following reasons.

Grayson's original election was dated June 22, 2012 and appropriately addressed to Tony Campbell, EKPC's President and Chief Executive Officer. However, the June 22nd correspondence indicated that Grayson intended to procure 10.7 MW of power from Magnum Drilling of Ohio, Inc. ("Magnum"). This amount of power significantly exceeded the amount of alternative power to which Grayson could be entitled under Amendment 3 and, therefore, could not technically be considered an Amendment 3 proposal. Moreover, the June 22nd letter did not designate the load(s) to be served by Magnum or the date upon which the transfer of the service obligation would occur. Thus, the originally proposed Magnum transaction was not an actual Amendment 3 project and, even if it had been, it failed to satisfy two key notice requirements. The June 22nd election was plainly defective.

Grayson then tendered an "amended notice" on August 9, 2012 wherein it decreased the amount of power proposed to be procured from Magnum from 10.7 MW to 5.0 MW. However, the August 9th "amended notice" again failed to designate the load(s) which would be served by Magnum and failed to identify the date upon which the election would become effective. The August 9th letter said only that Grayson would purchase 5 MW of power from Magnum "commencing in the year 2012." The August 9th "amended notice" was also defective. It is worth noting that if Grayson is correct that the August 9th "amended notice" was proper, then Magnum should have begun delivering power to Grayson on or about November 9, 2012 – ten days before Grayson sought approval for the transaction from the Commission. Obviously, this did not happen.

On January 18, 2013, Grayson tendered a third "notice" purporting to elect to purchase an additional 4.4 MW of power from Magnum. However, the January 18th correspondence again failed to designate the load(s) to be served by Magnum and did not specify the date when the additional power would be acquired. The omission of an effective date was made more significant in light of the fact that the purchase of any additional power over and above 5 MW would trigger the lengthier 18 month notice requirement in Amendment 3, thereby invalidating the August 9th notice which Grayson failed to act upon in any event. Again, Grayson's January 18th "notice" was defective in its own right.

As you are aware, the EKPC Board's Strategic Issues Committee did not take any formal position with regard to these three "notices" because the Members of EKPC – including Grayson – were engaged in active negotiations to resolve lingering disputes about Amendment 3 throughout the period in question. In light of these negotiations, the delay in considering these "notices" was, in all cases, either requested or consented to by Grayson.

Grayson's fourth correspondence concerned its current proposal and was dated September 9, 2013. Instead of being sent to Mr. Campbell, however, the letter was sent to EKPC's retained regulatory and litigation counsel. Amendment 3 very clearly specifies that an election is to be made by "notice to the Seller," which is EKPC. Moreover, the substance of the September 9th letter was again plainly insufficient to constitute notice under Amendment 3. First, without explanation, it substituted an entirely different counterparty, an entirely different proposal, and an entirely different transactional concept for that which was the subject of the three prior Amendment 3 "notices". Second, the amount of alternative power referenced in the attached draft term sheet was in excess of the amount permitted under Amendment 3. Third, the non-binding, draft term sheet indicated only an "optional start date of January 1, 2014." Fourth, neither the correspondence nor the attachment designated what load(s) would be served by the non-EKPC resource.

With these considerations in mind, EKPC is unable to concur with the statement in your fifth letter, dated September 26, 2013, that Grayson "has complied with the notice provisions set forth in the Amendment to the Wholesale Power Contract between it and [EKPC], dated November 21, 2003." All of Grayson's elections, notices, amended notices and supplemental notices have failed to provide the basic and essential information required by Amendment 3. Moreover, when your counsel contacted EKPC's in-house legal staff on or about September 26, 2013, he was advised that EKPC would provide you with the precise information required by Amendment 3 upon request. Instead, Grayson chose to ignore that offer of assistance and sought to cure the several deficiencies in the September 9, 2013 letter that were pointed out in EKPC's Objection to Grayson's Notice of Amendment in the complaint case before the Commission. Again, however, the September 26th correspondence is not appropriate notice under Amendment 3. While it reduces the amount of non-EKPC power supply Grayson plans to utilize under Amendment 3, it still fails to designate the load(s) to be served by the non-EKPC resource as well as the date that this service will become effective. A notice which is itself defective cannot cure the deficiencies in prior notices, nor can a defective notice relate back to a prior notice which was itself defective.

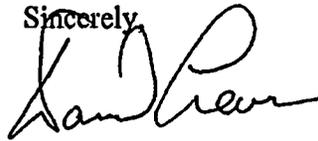
Ms. Carol Ann Fraley
October 2, 2013
Page 5

The Path Forward

It is my hope that the foregoing discussion will provide you with adequate information to tender a full and complete election under Amendment 3. Once EKPC receives a notice that is compliant with Amendment 3, we will bring this to the EKPC Board Strategic Issues Committee's attention. If a full and complete election is received by the close of business on Friday, October 4, 2013, we will be able to present that to the Strategic Issues Committee at their next meeting, which is scheduled for October 7, 2013.

Should you have any questions, please feel free to contact me.

Sincerely,



David Crews
Senior Vice President
of Power Supply