

# Goss ◻ Samford PLLC



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May 5, 2014

RECEIVED  
MAY 5 - 2014  
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 Reply in Support of Motion to Compel of East Kentucky Power Cooperative, Inc., South Kentucky Rural Electric Cooperative Corporation, Cumberland Valley Electric, Inc., Farmers Rural Electric Cooperative Corporation, Blue Grass Energy Corporation, Big Sandy Rural Electric Cooperative Corporation, Licking Valley Rural Electric Cooperative Corporation, Inter-County Energy Cooperative Corporation, Nolin Rural Electric Cooperative Corporation and Clark Energy Cooperative, Inc. to Grayson Rural Electric Cooperative Corporation. Please return a file-stamped copy to me.

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

Sincerely,

David S. Samford

Enclosures

M:\Clients\4000 - East Kentucky Power\1800 - Grayson Litigation\  
Correspondence\Ltr. to Jeff Derouen (2012-00503) - 140505

**COMMONWEALTH OF KENTUCKY**  
**BEFORE THE PUBLIC SERVICE COMMISSION**

**RECEIVED**  
MAY 5 - 2014  
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. 2012-00503  
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. )

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**JOINT MOVANTS' REPLY IN SUPPORT OF THEIR MOTION TO COMPEL**

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Come now the Respondent and Intervenors, East Kentucky Power Cooperative, Inc. ("EKPC"), South Kentucky Rural Electric Cooperative Corporation, Cumberland Valley Electric, Inc., Farmers Rural Electric Cooperative Corporation, Blue Grass Energy Corporation, Big Sandy Rural Electric Cooperative Corporation, Licking Valley Rural Electric Cooperative Corporation, Inter-County Energy Cooperative Corporation, Nolin Rural Electric Cooperative Corporation and Clark Energy Cooperative, Inc. (collectively, the "Joint Movants"), by and through counsel, and for their Reply to the Response filed herein by the Petitioner, Grayson Rural Electric Cooperative Corporation ("Grayson"), to Joint Movants' Motion to Compel, hereby state as follows:

## **I. Grayson's Response is Untimely**

Joint Movants filed their Motion to Compel with the Kentucky Public Service Commission (the "Commission") on April 8, 2014. Pursuant to 807 KAR 5:001, Section 5(2), Grayson was required to file its Response "no later than seven (7) days from the date of filing" of Joint Movants' Motion. Grayson filed its Response well beyond the permitted timeframe (*to wit*, on April 28, 2014), and it neither sought nor obtained Commission approval to do so. Grayson's blatant and total disregard for the rules established by this Commission should not be condoned, and its Response should be rejected as untimely.

## **II. Grayson's Response Lacks Substantive Merit**

Joint Movants' Motion requests that the Commission enter an Order compelling Grayson to: (i) provide complete and accurate supplemental responses to Joint Movants' First Request for Information; and (ii) make available, at Grayson's cost and EKPC's convenience, Carol Hall Fraley ("Ms. Fraley") and Bryan Poling ("Mr. Poling") (Ms. Fraley and Mr. Poling may be referred to herein collectively as the "Deponents") and instruct the pair to fully respond to deposition questions concerning the "Memorandum of Understanding and Agreement Regarding Alternative Power Sources" (the "MOU"). Because Grayson's counterargument with respect to these issues is largely unresponsive and wholly unpersuasive, Joint Movants are entitled to the relief they request.

### **A. Joint Movants' First Request for Information**

The original deadline by which Grayson was to respond to Joint Movants' First Request for Information was November 15, 2013. Grayson provided belated, incomplete and insufficient responses on or about November 26, 2013. By letter dated January 21, 2014,<sup>1</sup> counsel for Joint

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<sup>1</sup> A copy of this letter was attached as **Exhibit A** to Joint Movants' Motion to Compel and is referred to herein as the "January 21<sup>st</sup> Letter."

Movants detailed the deficiencies of Grayson's responses and requested that Grayson supplement its responses on or before February 4, 2014. By letter dated January 27, 2014,<sup>2</sup> counsel for Grayson indicated that supplemental information/documentation—or at least appropriate responses of some kind—would be forthcoming. Grayson provided no such responses, and now contends that it “has complied in all respects with the discovery requests of EAST KENTUCKY.”<sup>3</sup> This statement is simply false.

The particular responses that Joint Movants argue require supplementation are those provided by Grayson to Request Nos. 1(a), 1(c), 1(e), 3, 5, and 10. In its Response to Joint Movants' Motion to Compel, Grayson ostensibly contends that each of these requests requires it to produce documents that either cannot be located or that do not exist. Even a cursory review of the relevant requests reveals that Grayson's position is untenable.

Request Nos. 1(a) and 1(c) ask Grayson to provide detailed descriptions of all activities performed by it and its consultants to analyze the viability of the Magnum project. Grayson responded to these requests by listing various individuals with which it spoke, but did not provide detailed descriptions of any activities performed or opinions rendered by such individuals. Request Nos. 5 and 10 ask Grayson to describe in detail the working mechanics of its apparent arrangement with Duke Commercial and to provide various load, demand, and service information concerning same. Grayson responded to these requests by providing scant and unsatisfactory detail that was largely unresponsive. Importantly, Request Nos. 1(a), 1(c), 5, and 10 do not call upon (nor necessarily require) Grayson to produce a single document.

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<sup>2</sup> A copy of this letter was attached as **Exhibit B** to Joint Movants' Motion to Compel. It states, in pertinent part, that Grayson “will continue to review [Joint Movants'] requests and try to respond appropriately as soon as possible. ... I suspect that it would be the latter part of February before we can provide appropriate responses to your requests.”

<sup>3</sup> See Grayson's Response to Joint Movants' Motion to Compel, at ¶ 1.

Clearly, Grayson's attempt to collectively characterize Joint Movants' requests as seeking unavailable documentation is unfounded.

The only request for information to which Grayson's Response can sensibly relate is Request No. 1(e). Request No. 1(e) asks Grayson to provide "all documents and electronic media of any kind in Grayson's possession, or the possession of any consultant or individual assisting or providing advice to Grayson, which were used in the [viability] analysis or which were generated as a result of such analysis." Grayson responded by simply stating that "[t]here are no written opinions or written consultative reports given by any of those individuals." While Grayson's statement may be accurate, it fails to fully respond to the request as written. Essentially, Grayson's answer only partially addresses the final clause of Joint Movants' request, *i.e.*, the request for documents that were generated as a result of viability analyses. Joint Movants' full request is much broader, and includes any and all documents and electronic media that Grayson or its consultants utilized in conducting viability analyses. If Grayson or its consultants did not conduct any analyses, or if any analyses conducted did not involve the review of a single document or result in the generation of a single document, Grayson should so state. As it stands, however, Grayson's response to Request No. 1(e) is insufficient.<sup>4</sup>

Finally, attention must be paid to Grayson's incomplete response to Joint Movants' Request for Information No. 3. Request No. 3 concerns the now-failed project by and between Grayson and Magnum Drilling of Ohio, Inc. ("Magnum"). Grayson's response to this Request references an exchange of letters between Ms. Fraley and Magnum representative Tom Crisp, and copies of

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<sup>4</sup> Grayson's response to Request No. 1(e) is also patently deficient based on Grayson's failure to include documentation that it specifically referenced and indicated was attached. The concluding paragraph of Grayson's response to Request No. 1(e) states as follows: "[i]t is believed that Jeff Brandt, as well as Mr. Linxwiler, forwarded to Grayson a written document concerning wheeling charges. Copies of those documents are attached." It does not appear that Grayson did, in fact, attach "a written document concerning wheeling charges" to its response, and thus Joint Movants requested in the January 21st Letter that a copy be provided. Grayson's Response to Joint Movants' Motion to Compel totally ignores this issue.

both letters (dated October 4, 2013, and October 29, 2013, respectively) were produced by Grayson. However, a document that Mr. Crisp stated was enclosed with his letter to Ms. Fraley—specifically, a copy of the contract between Magnum and Grayson upon which Mr. Crisp had highlighted the agreement’s expiration date—was not provided by Grayson. Joint Movants requested a copy of this enclosure in the January 21<sup>st</sup> Letter, but it has not been produced. Thus, two questions remain: where is this document, and why does it matter?

While only Grayson may answer the first inquiry, the importance of the highlighted contract is not difficult to ascertain. As this Commission recalls, EKPC previously moved to dismiss the instant action as moot due to the expiration of the Magnum/Grayson contract on or about February 28, 2013, according to its own terms.<sup>5</sup> Grayson filed a response to EKPC’s motion wherein it averred that “[Grayson] and Magnum entered into a verbal understanding for the extension [of the Magnum/Grayson contract] for a period of time beyond the date of February 28, 2013.”<sup>6</sup> The document enclosed with Mr. Crisp’s letter is relevant because it will corroborate deposition testimony acquired in this matter<sup>7</sup> that plainly indicates Grayson misrepresented the status of the Magnum/Grayson contract in its response to EKPC’s motion to dismiss.<sup>8</sup> Clearly, the date highlighted by Mr. Crisp (*i.e.*, the contract’s expiration date) is highly probative information, and Joint Movants are entitled to the document as requested.

Joint Movants request an Order compelling Grayson to immediately provide complete and accurate responses to their First Request for Information. Grayson has had ample opportunity to comply with Joint Movants’ requests, but instead has embraced a methodology of obfuscation

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<sup>5</sup> See EKPC’s Motion to Dismiss as Moot (filed April 29, 2013).

<sup>6</sup> See Grayson’s Response to EKPC’s Motion to Dismiss as Moot (filed May 17, 2013).

<sup>7</sup> See Deposition of Carol Hall Fraley (January 6, 2014), relevant portions of which are attached hereto as **Exhibit A**.

<sup>8</sup> *Id.*, at 64 (“Q: Was there any verbal extension that you’re aware of on that February date? A: No. No.”).

and employed tactics designed to delay. Grayson's Response to Joint Movants' Motion to Compel is neither responsive nor persuasive, and Joint Movants are entitled to the relief they request.

### **B. Deposition Testimony regarding the MOU**

In its Response to Joint Movants' Motion to Compel, Grayson contends that evidence regarding the MOU is irrelevant to the instant action and that, therefore, certain of its representatives need not answer deposition questions concerning the subject.<sup>9</sup> Notably, Grayson's Response includes no discussion of the relevant Rules of Civil Procedure, fails to cite any case law or statutory law, and completely and conveniently ignores the fact that no less than eight (8) of Grayson's directors answered questions about the MOU during their respective depositions. To the extent Grayson's Response provides any substantive argument, it falls well short of convincing.

As discussed by Joint Movants, Kentucky's Rules of Civil Procedure describe three (3) situations, and *only* three (3) situations, when an attorney may instruct his or her client not to answer a question posed at a deposition: (1) when necessary to preserve a privilege; (2) to enforce a limitation on evidence directed by the court (or, in this case, the Commission); or (3) to present a motion under CR 30.04.<sup>10</sup> None of these situations is present in this matter, and Grayson does not even attempt to argue otherwise. It is apparent that Grayson purposely avoids

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<sup>9</sup> As discussed in Joint Movants' Motion to Compel, Grayson's counsel repeatedly opined during the depositions of Ms. Fraley and Mr. Poling that the MOU was evidence of a compromise/offer to compromise under Kentucky Rule of Evidence ("KRE") 408. Based in part on this erroneous belief, counsel for Grayson instructed the Deponents not to answer questions about the MOU. Grayson's Response to Joint Movants' Motion to Compel makes no mention of KRE 408 and does not attempt to counter any arguments made by Joint Movants regarding same; clearly, Grayson's counsel has wisely chosen to abandon his previous position and apparently acknowledges that KRE 408 does not provide grounds for instructing a deponent not to answer a question.

<sup>10</sup> CR 30.03(3).

any mention of the Civil Rules because said Rules permit broad inquiry by the deposing party and specifically state that “[e]vidence objected to shall be taken subject to the objections.”<sup>11</sup>

Grayson’s contention that the MOU is irrelevant to the subject matter involved in this action is thoroughly misguided. The MOU pertains to off-system power purchases under Amendment 3, and Grayson has made the provisions and interpretation of Amendment 3 foremost issues in this case. An examination of the MOU, as well as a discussion of the considerations and negotiations that resulted in the MOU, may shed light on the real or perceived deficiencies in Amendment 3 that underlie the present action. The fact that the MOU has not been executed by the various distribution cooperatives is of little import; the document was negotiated, it exists, and Ms. Fraley and Mr. Poling have particular knowledge and opinions with respect to it. Ms. Fraley helped lead the negotiations on the MOU. The MOU is certainly relevant to the subject matter involved in this action.

By instructing Deponents not to answer questions concerning the MOU, counsel for Grayson violated Kentucky’s Rules of Civil Procedure and impermissibly restricted EKPC’s right to conduct discovery. Based on the facts and law described herein and in Joint Movants’ Motion to Compel, Deponents should be required to appear for supplemental depositions and answer EKPC’s questions concerning the MOU.

WHEREFORE, Joint Movants respectfully request that (i) Grayson’s Response to their Motion to Compel be rejected and disregarded as untimely; and (ii) their Motion to Compel be sustained and the relief requested therein be granted without delay.

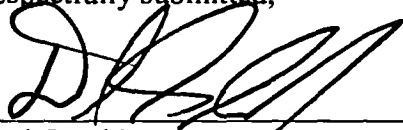
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<sup>11</sup> CR 30.03(2).



This 5<sup>th</sup> day of May, 2014.

Respectfully submitted,



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*Counsel for Joint Movants*

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing was served by depositing same into the custody and care of the U.S. Postal Service, postage pre-paid, on this the 5<sup>th</sup> day of May, 2014, addressed to the following individuals:

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

Don Prather  
Mathis, Riggs & Prather, P.S.C.  
500 Main Street, Suite 5  
Shelbyville, KY 40065

Clayton O. Oswald  
Taylor, Keller & Oswald, PLLC  
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Taylor County RECC  
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James M. Crawford  
Crawford & Baxter, PSC  
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Carrollton, KY 41008

Salt River Electric Cooperative Corp.  
111 West Brashear Avenue  
P. O. Box 609  
Bardstown, KY 40004-0609

  
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*Counsel for Joint Movants*

Witness: Carol Hall Fraley

1 COMMONWEALTH OF KENTUCKY  
2 BEFORE THE PUBLIC SERVICE COMMISSION  
3 CASE NO. 2012-00503

4 IN THE MATTER OF:

5 PETITION AND COMPLAINT OF GRAYSON RURAL  
6 ELECTRIC COOPERATIVE CORPORATION FOR AN  
7 ORDER AUTHORIZING PURCHASE OF ELECTRIC  
8 POWER AT THE RATE OF SIX CENTS PER  
9 KILOWATTS OF POWER VS A RATE IN EXCESS  
10 OF SEVEN CENTS PER KILOWATT HOUR PURCHASED  
11 FROM EAST KENTUCKY POWER COOPERATIVE UNDER  
12 A WHOLESALE POWER CONTRACT AS AMENDED BETWEEN  
13 GRAYSON RURAL ELECTRIC COOPERATIVE CORPORATION  
14 AND EAST KENTUCKY POWER COOPERATIVE, INC.

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15 **WITNESS: CAROL HALL FRALEY**

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16 The deposition of CAROL HALL FRALEY was  
17 taken before Jolinda S. Todd, Registered  
18 Professional Reporter, CCR(KY) and Notary Public in  
19 and for the State of Kentucky at Large, at the  
20 offices of Grayson Rural Electric Cooperative  
21 Corporation, 109 Bagby Park, Grayson, Kentucky on  
22 Monday, January 6, 2014, commencing at the  
23 approximate hour of 12:30 p.m. Said deposition was  
24 taken pursuant to Notice, for all purposes as  
25 permitted by the applicable rules.

Witness: Carol Hall Fraley

1 will be planned for the Board and key  
2 personnel.

3 THE WITNESS: Well, Mr. Haight taught me to  
4 write those minutes.

5 BY MR. SAMFORD:

6 Q Are you the one that keeps the  
7 minutes?

8 A No. Priscilla. Priscilla. I  
9 always write down what we're going to do.

10 Q So --

11 MR. SCOTT: A covered dish will be brought.

12 THE WITNESS: Smack him. He's been here so  
13 long he's slap happy.

14 MR. SAMFORD: Been waiting for somebody to  
15 say that. I am kidding, of course.

16 A Go ahead. Go ahead.

17 Q So the Magnum contract terminated  
18 at some point?

19 A Yes.

20 Q Can you tell me when that was  
21 precisely?

22 A I think it was set up for a year.  
23 I can't remember.

24 Q We actually have the contract  
25 here. There's a couple of dates which -- just to

1 draw your attention to. There's a date in  
2 Paragraph 17, and then there's another date --  
3 there's another date in Paragraph 8, and I think  
4 those are one day apart. One's March 1st and the  
5 other is February 28.

6 A Yes.

7 Q But there's a couple different  
8 ways that that contract could terminate on either  
9 of those dates. Is that in fact the date that the  
10 contract terminated?

11 A I believe it was the end of  
12 February.

13 Q So there was, I think, a effort,  
14 maybe, to verbally -- or to extend the agreement,  
15 and I think the board had even authorized a 90-day  
16 extension, perhaps.

17 A Yes.

18 Q But I assume some documentation  
19 to that effect was sent over to Mr. Crisp of  
20 Magnum?

21 A I believe that Mr. Scott talked  
22 to their attorney, and that was to be forthcoming  
23 and then we never did receive it.

24 Q Okay. And so there never was any  
25 written extension?

1 A Not that -- no, not that I'm  
2 aware.

3 Q Was there any verbal extension  
4 that you're aware of on that February date?

5 A No. No.

6 Q Let me refer you to a document  
7 that was used at our last set of depositions. It  
8 was Exhibit 4.

9 Would you just look at that and tell me what  
10 that document is?

11 A It looks like a letter from  
12 Mr. Crisp that I -- this may have been a response  
13 to the letter where I attempted to bill him for the  
14 moneys that we had spent trying to get this put  
15 together.

16 Q Okay. And so the first paragraph  
17 there, it says, "Please find enclosed a copy of the  
18 contract" --

19 A Uh-huh (affirmative).

20 Q -- "between Magnum and Grayson  
21 Rural Electric. You will find that I have  
22 highlighted the expiration date."

23 And the contract was not attached to the  
24 documents. This was a document that we received  
25 from Grayson in response to our data request --

Witness: Carol Hall Fraley

1 A Uh-huh (affirmative).

2 Q -- but the attached contract  
3 wasn't. Do you happen to know what the highlighted  
4 expiration date was?

5 A I believe it was the  
6 February 28th date.

7 Q It would have certainly either  
8 been that date or the --

9 A Right, or March 1st.

10 Q Uh-huh (affirmative). Right.  
11 And then the next paragraph says, I think, in the  
12 second sentence -- I'm sorry, the first sentence.  
13 "During the time period it took Grayson to gain  
14 approval to purchase off-system power from Magnum  
15 the initial term of the agreement had expired by  
16 several months."

17 What approval is he referring to there?

18 A I don't know, because -- I think  
19 it was the effort to gain approval, is what it  
20 should have said, because he knew we never did get  
21 approval or any -- any help from East Kentucky to  
22 do that.

23 Q Okay. Is it possible that he's  
24 referring to the approval from the PSC?

25 A No, because we don't have that.

1 We don't have formal approval from them either.

2 Q But, I mean, he's talking there  
3 about the effort, as you said --

4 A I think so.

5 Q -- to get the approval.

6 So could the letter be referring to your  
7 efforts to get approval from the PSC?

8 MR. SCOTT: Note my objection. There's no  
9 way that she -- the deponent not being the  
10 author --

11 THE WITNESS: No.

12 MR. SCOTT: -- of the letter could be able  
13 to answer that question.

14 A Right. I don't -- I don't know.

15 BY MR. SAMFORD:

16 Q I think we covered the Magnum  
17 contract. Let me move on to Amendment 3.

18 Just in very broad strokes tell me your  
19 understanding of how Amendment 3 operates and what  
20 rights Grayson as a member would have under  
21 Amendment 3.

22 A We believe under Amendment 3 we  
23 can take 15 percent of our total for the -- an  
24 average, on the last three years from an off-system  
25 source.