COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF KENTUCKY POWER COMPANY)
FOR (1) A CERTIFICATE OF PUBLIC CONVENIENCE)
AND NECESSITY AUTHORIZING THE TRANSFER)
OF AN UNDIVIDED FIFTY PERCENT INTEREST IN)
THE MITCHELL GENERATING STATION AND)
ASSOCIATED ASSETS; (2) APPROVAL OF THE)
ASSUMPTION BY KENTUCKY POWER COMPANY)
OF CERTAIN LIABILITIES IN CONNECTION WITH)
THE TRANSFER OF THE MITCHELL GENERATING)
STATION; (3) DECLARATORY RULINGS;)
(4) DEFERRAL OF COSTS INCURRED IN)
CONNECTION WITH THE COMPANY'S EFFORTS)
TO MEET FEDERAL CLEAN AIR ACT AND)
RELATED REQUIREMENTS; AND (5) ALL OTHER)
RELIEF REQUIRED APPROVALS AND RELIEF)

CASE NO. 2012-00578

**ATTORNEY GENERAL'S REPLY TO
KENTUCKY POWER COMPANY REGARDING
PETITION FOR REHEARING**

The Attorney General for the Commonwealth of Kentucky, Jack Conway ("Attorney General"), by and through counsel of the Office of Rate Intervention, for his reply to Kentucky Power Company's response in opposition to his Petition for Rehearing states as follows:

A. Kentucky Law Warrants and Authorizes the Attorney General's Petition for Rehearing

A reconsideration and rehearing of this matter is warranted under Kentucky law. KRS 278.400 clearly authorizes any party to apply for rehearing with respect to ***"any of the matters determined"*** by the Kentucky Public Service Commission ("Commission"). KRS 278.400 (Emphasis supplied.) In his petition for rehearing pending decision by the Commission, the Attorney General has outlined clear errors of fact and law justifying the Commission to reconsider its Order dated October 7, 2013 ("Commission Order"), granting Kentucky Power

Company's ('Kentucky Power," "KPCo" or "the Company's") request to acquire an undivided fifty (50) percent interest in the Mitchell Generating Station ("Mitchell Plant") and related assets currently owned by an unregulated affiliate, Ohio Power Company ("OPCo"). For the reasons set forth in his original petition and further examined herein, the Attorney General requests that the Commission reconsider and reexamine its Order, permit rehearing of key issues and correct manifest errors that directly impact Kentucky Power's ratepayers.

Kentucky Power's repeated assertions that the Attorney General "stood mute" [1] in this proceeding is an utterly false depiction of the hearings and pleadings presented in this matter. This patently false accusation belies both the record before this Commission, which clearly demonstrates that the Attorney General has been *the only party* granted intervention, *who refused to settle* with Kentucky Power and its corporate parent, American Electric Power ("AEP"). The Attorney General has consistently stood up to the corporate self-interest and bullying tactics demonstrated by Kentucky Power and its corporate parent. The Attorney General's advocacy has been the most vigorous and ardent voice for the ratepayers and has argued that that the public interest – the ratepayers' interests – is by law the primary concern in these proceedings.

Kentucky Power's argument that "public policy" demands a denial of reconsideration and rehearing is again in furtherance of its own corporate interest and timetable to move an asset from an unregulated market to a regulated market with a guaranteed rate base and return.

[1] Kentucky Power's Response In Opposition To Attorney General's Petition for Rehearing, *In The Matter Of: Application Of Kentucky Power Company For (1) A Certificate Of Public Convenience And Necessity Authorizing The Transfer Of An Undivided Fifty Percent Interest In The Mitchell Generating Station And Associated Assets; (2) Approval Of The Assumption By Kentucky Power Company Of Certain Liabilities In Connection With The Transfer Of The Mitchell Generating Station; (3) Declaratory Rulings; (4) Deferral Of Costs Incurred In Connection With The Company's Efforts To Meet Federal Clean Air Act And Related Requirements; And (5) All Other Relief Required Approvals And Relief*, Case No. 2012-00578 (Ky. P.S.C. November 6, 2013) at 11, 31-32. ("KPCo Response")

This argument is best countered by Judge Wilhoit's prescient dissent in *Nat'l-Southwire Aluminum Co. v. Big Rivers Elec. Corp.*[2]*:* to wit, this argument

> fails to furnish persuasive precedent as to why our policy, ***which forces an equal balancing of the right of the public to be served at a reasonable charge*** against the right of the utility to a fair return on the value of its property used in that service, ***should be exchanged for a policy more heavily weighted toward ensuring investors a return on their investment***.

A policy that advances AEP's shareholders to the detriment of the interests of Kentucky ratepayers is not in the public interest at all.

Further, Kentucky Power and its parent, AEP, are the source of the "piecemeal"[3] approach to solving issues associated with Kentucky Power's now pressing environmental compliance problems with coal generation in Kentucky. This piecemeal approach has resulted in a delay of more than five years,[4] multiple proceedings[5] and the favoring of AEP's shareholders over Kentucky ratepayers. The Attorney General fully embraces the regulatory duty expressed by Chairman Armstrong, which requires the careful balancing of interests between the need to generate clean, safe and reliable energy and protect the interests of the ratepayers. Further, the Attorney General agrees with the Chairman's remarks and shares his concern that Kentucky Power and its parent, AEP, ignored the pressing needs of Kentucky Power's customers, failed to be forthright with the Commission as its state regulator and with the public, yet now wants the

[2] *Nat'l-Southwire Aluminum Co. v. Big Rivers Elec. Corp.*, 785 S.W.2d 503, 519 (Ky. Ct. App. 1990) (Wilhoit concurring in part, dissenting in part and filing a separate opinion).

[3] KPCo Response at 14.

[4] Testimony of Munczinski on Cross-Examination and summary by and exchange with Chairman Armstrong, July 12, 2013, Video Transcript of Evidence ("VTE") at 5:06:25 – 5:08:50.

[5] *In the Matter of Application of KPCo for Approval of its 2011 Environmental Compliance Plan, for Approval of its Amended Environmental Cost Recovery Surcharge Tariff, and for the Grant of a CPCN for the Construction and Acquisition of Related Facilities*, Case No. 2011-00401, ("Kentucky Power's Big Sandy Retrofit Case"); *In the Matter of: Application of Kentucky Power Company for Approval of the Terms and Conditions of the REPA for Biomass Energy Resources between KPCo and ecoPower Generation-Hazard LLC, etc.*, Case No. 2013-00144 (Order October 10, 2013); *In the Matter of: Application of KPCo for a General Adjustment of Electric Rates,* Case No. 2013-00197, Application (July 1, 2013) ("Kentucky Power's Rate Increase Case").

Commission to help it with its "bottom-line,"[6] after deregulation in Ohio. However, the Attorney General must respectfully disagree with the Commission's October 7, 2013 Order in this matter, because it fails to achieve the Chairman's professed goal – a fair balancing of the interests between the utility and the ratepayers.[7] The ratepayers have not been treated fairly by Kentucky Power, its corporate parent or by the Commission's Order.

Conversely and in direct opposition to this Kentucky Power's corporate-driven agenda, the Attorney General has consistently demanded ***independently verifiable proof*** of the best and least-cost solution for Eastern Kentucky. Such proof has still not been forthcoming or properly evidenced in Commission findings. Therefore, the Attorney General seeks the Commission's reconsideration and rehearing of this matter.

B. The Commission's Order Erroneously Relied on Evidence That Could Not Be Independently Verified; KPCo May Not Shift Its Burden To Demonstrate Least-Cost

Kentucky Power's attempt to shift its burden regarding the weight of the evidence should be patently rejected by the Commission in its consideration of whether reconsideration and rehearing is necessary. The question presented is not whether the Attorney General did or did not present evidence to controvert Kentucky Power's assertions of fact. Neither the Attorney General nor the ratepayers he represents carry the statutory burden to demonstrate need and least-cost in the underlying proceeding. That burden falls squarely *and only* on Kentucky Power.

As advised by the Kentucky Court of Appeals, this burden-shifting is not permissible even in the context of reconsideration, rehearing or even on appeal. For example, the Court has held:

> Repeated references are made to uncontradicted evidence and to the fact that no evidence to the contrary was introduced by the Commission. The circuit judge ruled that the Commission was required to come forward with an affirmative case whenever the applicant makes what might be termed a prima facie case before the agency. We believe the circuit court committed reversible error because it thereby

[6] *Id.* VTE at 5:06:25 – 5:08:50.
[7] *Id.*

> would shift the burden of proof from the applicant to the Commission. This would place the Commission in an adversary position. Standing alone, unimpeached, unexplained and unrebutted evidence may or may not be so persuasive that it would be clearly unreasonable for the board to be convinced by it. *Lee, supra.* ***There are some questions and circumstances in which no evidence is required to support a negative finding.***
>
> The Commission had no duty to refute evidence submitted to it by an applicant who had the burden of proof. We believe the better rule to be employed by the circuit court in its review of the Commission's decision is that when all the evidence has been heard and reasonable men differ in the conclusion to be drawn, the question should be left to the trier of fact. *Lee v. Tucker*, Ky., 365 S.W.2d 849 (1963). KRS 278.440 provides that the circuit court shall decide this kind of appeal upon the evidence submitted to the Commission as shown by the transcript and no other evidence shall be received.

Energy Regulatory Comm'n v. Kentucky Power Co., 605 S.W.2d 46, 50 (Ky. Ct. App. 1980).

Under this standard, the Commission's reliance on KPCo's "stacking analysis"[8] of the conforming responses to the Big Sandy Unit 1 request for proposals ("RFP") to support its finding that the acquisition of a 50 percent interest in the Mitchell Plant was the best and least-cost option for KPCo's ratepayers was patently unreasonable. Neither the stacking analysis nor the proprietary modeling presented by Kentucky Power could be independently verified by the Commission – the trier of fact. The Commission's acceptance of Kentucky Power's *ipse dixit* conclusion that the Mitchell transfer – which will still ultimately resort in a substantial rate increase – is least-cost cannot be verified by even by the so-called independent expert retained by Kentucky Power,[9] let alone by the Commission. As such, there is no reasonable conclusion that Kentucky Power met its burden under Kentucky law. Reconsideration and rehearing is

[8] Commission Order at 21-22.

[9] Testimony of McDermott on Cross by Commission, July 11, 2013, VTE at 6:58 – 7:02 pm (admitting that he made no independent, objective appraisal separate from AEP's internal proxy modeling evaluation and result; he "did not verify or quantify any of the assumptions" adopted by AEP and specifically made by Witness Weaver using internal proprietary modeling; and he saw the Kentucky Commission's role and the hearing process to "kick the tires on the model," but saw no need for an independent, third-party evaluation.)

therefore paramount to afford and ensure due process and a fair, just and reasonable result for Kentucky ratepayers.

C. The Commission's Order Fails To Demonstrate Adequate Review of AEP's Superseding Operating Agreement, Thereby Failing To Protect Kentucky Ratepayers.

Kentucky Power advocates that a rubber-stamp review of the modified ownership structure of the Mitchell Plant and its Superseding Operating Agreement is all that is necessary for "full protection for the Company and its customers."[10] Again, Kentucky Power suggests that the burden to demonstrate that customers will be protected falls to the Attorney General. This passive approach to state regulation of utilities should not stand.

The Commission failed to consider whether the Superseding Operating Agreement,[11] violates Kentucky state law and/or federal law regarding affiliate transactions or otherwise creates the potential for a Kentucky regulated utility, such as KPCo, to be joined with a market-regulated power sales affiliate, AEP Generation Resources, in a manner that will transfer benefits to the affiliate and its stockholders to the detriment of KPCo's captive, retail ratepayers. The Federal Energy Regulatory Commission ("FERC") has, however, considered these dangers in past waiver cases.[12] Further, the fundamental ownership structure being rubber-stamped by the Commission has not yet been approved by FERC.[13]

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[10] KPCo Response at 20.

[11] *See American Electric Power Service Corporation ("AEPSC")*, Request of AEPSC for Waiver of Certain Affiliate Restrictions and Expedited Treatment, FERC Docket Nos. ER13-238, ER13-239 and ER14-86 (October 15, 2013); filed by letter with this Commission on October 22, 2013 (Case No. 2013-00578).

[12] *First Energy Corp.*, 136 FERC ¶ 61216 (F.E.R.C.), 2011 WL 4529931 (Sept. 29, 2011); *see also, Virginia Elec. & Power Co. Dominion Energy Mktg., Inc. Dominion Nuclear Connecticut, Inc. Dominion Energy Kewaunee, Inc. Dominion Energy Brayton Point, LLC Dominion Energy Manchester St., Inc. Dominion Energy New England, Inc. Dominion Energy Salem Harbor, LLC Dominion Retail, Inc. Elwood Energy, LLC Fairless Energy, LLC Kincaid Generation, L.L.C. Nedpower Mt. Storm, LLC State Line Energy, L.L.C. Fowler Ridge Wind Farm LLC*, 142 FERC ¶ 61103 (Feb. 8, 2013)

[13] The Attorney General patently objects to Kentucky Power's characterization that his office "failed…to protest or comment in the companion FERC proceeding in which the Superseding Operating Agreement was filed." KPCo

The FERC's grants of affiliate waivers in the past have specifically addressed the dangers of regulated, franchised utilities jointly owning generation with market-based merchant affiliates. For example, in a 2011 matter, FERC addressed First Energy Corporation's ("FE") application "seeking waiver of the affiliate restriction against sharing employees that engage in fuel procurement to permit employees of FE Solutions to procure fuel for the entire First Energy generation fleet."[14] While FERC did grant the waivers for the purposes of maximizing shared resources, it relied on the assurance by FE that this resource sharing was distinguishable from a 50-50 full joint ownership, where the competing interests of the regulated and unregulated affiliates (with no controlling interest) could generate risk to captive customers.[15] Moreover, where the regulated, franchised utility does not constitute the majority owner – i.e. at least 51% -- there is an even ***greater risk*** that the market-based affiliate, generating income for the benefit of the shareholders of the corporate parent, will simply pre-empt the best interests of captive ratepayers. Examples of the risks inherent in the arrangement proposed by KPCo, AEP Generation Resources and AEP Service Corporation include but are not limited to cross-subsidization, fuel procurement decisions that do not take into account the economic interests of the captive customers' state (i.e. Kentucky) and the potential for anti-competitive behavior.

Response at 24 n 85. On October 30, 2013, on the same date as his Petition for Rehearing, the Attorney General filed his Motion for Leave to Intervene along with comments expressing his concern regarding the affiliate waivers sought by AEP. This filing was made well in advance of the November 5, 2013 preliminary due date for comments. The FERC has yet to rule on the Attorney General's intervention motion, nor has the FERC preempted or prevented additional protest and/or briefing opportunities in the matter. *See AEP*, FERC Docket No. ER14-86. Further, as recognized by FERC, the Attorney General along with Kentucky Industrial Utility Customers ("KIUC") (collectively "Kentucky Protesters") previously filed their protest in the related Docket No. ER13-28-000, *see* Order Authorizing Disposition of Jurisdictional Facilities (April 29, 2013) and various interrelated Section 205 filings pending before the Commission (Dockets ER13-233 to 237), thereby preserving the interests of Kentucky ratepayers in those related proceedings to which the Superseding Operating Agreement seeks to amend.

[14] *First Energy, supra* at n 10.

[15] *Id., see also* Request of First Energy Corp. For Waiver of Certain Affiliate Restriction Requirements (March 8, 2011), in which First Energy specifically argued this distinction in structure would ensure that West Virginia's captive retail customers would be protected and even benefit from the arrangement.

Finally, the common characteristic evaluated by FERC in favor of waiving affiliate restrictions is careful oversight by the state regulator.[16] Contrary to that important factor, Kentucky Power advocates that the Kentucky Public Service Commission exercise no jurisdiction or relevant oversight to protect Kentucky ratepayers. Without this key component of careful oversight by the state regulator, there is no protection for captive ratepayers, and the Commission committed a clear error in its analysis of the revised structure of the Mitchell Plant ownership.

Therefore, even presuming the Commission refuses to reconsider its adoption of Kentucky Power's least-cost analysis without independent verification as argued above, reconsideration, rehearing, modification and/or clarification of the Commission's October 7, 2013 Order is patently necessary to ensure the proper exercise of state regulatory authority over the new Mitchell Plant's Superseding Operating Agreement and structure. Without this necessary clarification, the Commission abdicates its duty under the law.

CONCLUSION

WHEREFORE, the Attorney General respectfully requests that the Commission issue an order granting the Attorney General's application for rehearing on the matters described herein and in his Petition, and granting the Attorney General all other relief requested or to which the law requires for a full and fair hearing on these matters.

Respectfully submitted,

JACK CONWAY
ATTORNEY GENERAL

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[16] *See* Attorney General's Petition for Rehearing at 10, citing *Dominion Companies/Virginia Power*, 142 FERC ¶ 31103 (Feb. 8, 2013) at n 27 and *see First Energy, supra* ("the First Energy Companies explain that annual review of the procurement of coal for Mon Power by the West Virginia Public Service Commission further protects retail captive customers." *First Energy Corp.*, 136 FERC ¶ 61216 (Sept. 29, 2011)

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Certificate of Service and Filing

Counsel certifies that an original and ten photocopies of the foregoing were served and filed by hand delivery to Jeff Derouen, Executive Director, Public Service Commission, 211 Sower Boulevard, Frankfort, Kentucky 40601; counsel further states that true and accurate copies of the foregoing were mailed via First Class U.S. Mail, postage pre-paid, to:

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This 12th day of November, 2013.

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