

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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COMMISSION

In the Matter of:

In the Matter of the Application of East Kentucky Power)
Cooperative, Inc. for a Certificate of Public Convenience)
and Necessity for Alteration of Certain Equipment at the)
Cooper Station and Approval of a Compliance Plan)
Amendment for Environmental Surcharge Cost Recovery)

CASE NO. 2013-00259

**MOTION OF SONIA MCELROY AND SIERRA CLUB TO COMPEL EAST
KENTUCKY POWER COOPERATIVE TO RESPOND TO INTERVENORS'
SUPPLEMENTAL REQUESTS FOR INFORMATION AND
FOR CONTINUANCE OF CASE SCHEDULE
(PUBLIC VERSION)**

Sonia McElroy and the Sierra Club (collectively, "Intervenors") hereby move the Kentucky Public Service Commission ("Commission") to compel East Kentucky Power Cooperative ("EKPC" or the "Cooperative") to fully respond to Intervenors' supplemental requests for information in this proceeding, and to provide an adequate opportunity for Intervenors to file testimony in this docket. EKPC has hindered Intervenors' ability to fully determine whether the proposed project represents the most prudent path forward for the Cooperative by failing to substantively respond to a number of Intervenors' information requests regarding critical portions of EKPC's analysis. Without the requested information, Intervenors are unable to fully evaluate and comment on the reasonableness of the assumptions, projections, and analyses that went into EKPC's application for a Certificate of Public Convenience and Necessity ("CPCN"). As such, Intervenors respectfully request that the Commission compel EKPC to fully respond to Intervenors' Supplemental Data Requests 2.5, 2.6, 2.12(c), 2.14(c)-(e), 2.31(a)-(b), 2.32(a)-(b) and (d)-(h), 2.33(a)-(b) and (d), and 2.46(a) by a date certain, and to

continue the deadline for Intervenors to file testimony until 10 days after the date of such production.¹

I. Background

On August 21, 2013, EKPC filed an application for a CPCN for rerouting existing duct work for Cooper Station Unit 1 such that its emissions are able to flow to Cooper Unit 2's pollution control equipment. The filing raises a number of issues relevant to the future of Cooper Unit 1 and the costs that its ratepayers will face.

On September 20, 2013, the Commission issued a case management schedule in this docket. On September 26, 2013, Intervenors moved to intervene and, consistent with the deadline set in the case management schedule, submitted their initial information requests on October 4, 2013. Intervenors propounded specific discovery so that it could probe EKPC's analyses and conclusions. In this docket, just as with previous CPCN dockets that Sierra Club has participated in before this Commission, Sierra Club is examining the key assumptions and analyses of the applicant to determine if they are reasonable. If the assumptions and/or analyses are flawed, then the resulting conclusions are typically not reasonable.

While EKPC's responses to Intervenors' initial requests were due on October 18, counsel for EKPC contacted counsel for Intervenors and requested an informal extension until October 25, 2013 to respond. Intervenors agreed to the extension as long as the deadline for Sierra Club to file supplemental requests for information was moved from October 30, 2013 to November 4, 2013. Counsel agreed to keep all other deadlines the same.

¹ In an effort to resolve these issues without involving the Commission, counsel for Intervenors sent EKPC's counsel a letter via electronic mail regarding the inadequacy of EKPC's responses on November 18, 2013. On November 19, 2013, counsel for EKPC responded via e-mail that the Cooperative stands by its objections and responses and "[a]t this point, Sierra Club will need to file its Motion to Compel."

While the Cooperative filed some responses on October 25, 2013 as informally agreed upon by counsel, Intervenor's did not actually receive those responses, including the confidential information, until October 28, 2013. In addition, EKPC failed to produce the confidential version of its responses to the staff's initial data requests. This was especially problematic as a large portion of EKPC's responses to Intervenor's initial data requests simply referenced the confidential responses to staff's initial data requests. After Intervenor's followed up with EKPC, the confidential version of the responses to staff's initial data requests were finally produced by EKPC on October 30, 2013,

EKPC's responses to Intervenor's initial data requests were inadequate in numerous respects. In an effort to resolve these issues without involving the Commission, counsel for Intervenor's sent EKPC's counsel a letter via electronic mail regarding the inadequacy of the responses on October 31, 2013. On November 4, 2013, two and half weeks after responses were originally due, and on the same day that Intervenor's supplemental data requests for information were due, EKPC provided supplemental responses regarding some of the inadequacies in EKPC's responses to Sierra Club's initial data requests.

On November 4, 2013, consistent with the informal extension agreed on by counsel, Intervenor's filed supplemental data requests for information on EKPC. On November 15, 2013, EKPC filed with the Commission its responses to Intervenor's supplemental data requests, but a number of these responses contained objections or incomplete answers that hindered Intervenor's ability to properly assess the Cooperative's analyses and conclusions. EKPC's improper objections and incomplete answers fall into three categories: (1) requests that EKPC erroneously claimed are irrelevant to the CPCN, (2) requests that EKPC improperly objected to as "overly broad," and (3) requests that EKPC simply failed to answer. In order to ensure an open and

transparent evaluation of the EKPC's CPCN application, Intervenor request the Commission compel EKPC to provide full responses to each of Intervenor's supplemental data requests that are listed below.

II. The Commission Should Reject EKPC's Unsupported Claims That Certain of Intervenor Requests Seek Information That is Irrelevant to the CPCN Proceeding or are Overly Broad.

EKPC attempted to justify a refusal to substantively respond to several requests on the erroneous basis that those requests seek irrelevant information or are overly broad. The Commission should compel EKPC to respond to these requests.

a. Intervenor's Supplemental Data Request 2.6

In Intervenor's Supplemental Data Request 2.6, Intervenor asked EKPC for its "projected annual cost for each year of the NPV [net present value] analysis associated with each plant." EKPC objected to providing this information on the grounds that the projected costs for all EKPC plants are irrelevant to whether the Commission should grant a CPCN for the ductwork project at Cooper unit 1. EKPC further claims to have provided projected costs for Cooper unit 1 in its response to Staff's Initial Data Request 5.

The Commission should compel EKPC to provide the requested data for at least Cooper Unit 1 because such data is plainly relevant to the question of whether EKPC's proposed duct project is a least cost option for bringing that unit into compliance with the federal Mercury and Air Toxics Standard ("MATS") To justify its CPCN application, EKPC carried out economic modeling of a base case, which assumed the retirement of Cooper Unit 1, and approximately 60 different scenarios to compare to the base case. Through such modeling, EKPC identified the Net Present Value ("NPV") Analysis of each scenario (including the base case), in order to determine which alternative or scenario represented the most prudent compliance option. The

NPV analysis, which was provided in response to Staff's Initial Data Request 5 and belatedly produced to intervenors, evaluates the costs of each scenario for the entire fleet and does not provide a unit-by-unit breakdown of costs. So EKPC's response to Staff's Initial Data Request 5 does not provide the information requested in intervenors' Supplemental Data Request 2.6.

This was not the first time that intervenors requested this information so that it can properly assess the modeling done by the Cooperative. Intervenors' Initial Data Request 13 sought this information, and EKPC responded by providing the cost breakdown for the base case. The problem is that the base case assumes the retirement of Cooper unit 1, so the information produced in response to intervenors' Initial Data Request 13 does not contain the costs for Cooper unit 1. EKPC has repeatedly failed to provide the projected annual costs (variable O&M, fixed O&M, fuel costs, depreciation, interest, capital additions, and other costs) for Cooper unit 1 that were used in the modeling that supposedly justifies the Cooperative's proposed project. Without such information for at least Cooper unit 1, intervenors cannot fully evaluate the model results for each scenario.

b. Intervenors' Supplemental Data Request 2.5

In intervenors Supplemental Data Request 2.5, intervenors sought a "breakdown of EKPC's historical annual costs from 2003 through 2013 associated with each plant." EKPC objected to providing this information on the grounds that the historical costs for EKPC plants are irrelevant because the CPCN should be judged on a forward-looking basis.

The Commission should compel EKPC to respond to this request with regards to at least Cooper unit 1 because such information is relevant to assessing the reasonableness of the projections of future costs for Cooper unit 1 (the information sought in intervenors' Supplemental Data Request 2.6), which, in turn, are critical to evaluating the various options for

EKPC to comply with MATS. Moreover, the Commission should compel EKPC to provide the historical costs for all plants in EKPC's fleet since EKPC's modeling only looks at the entire fleet as a whole rather than on a unit-by-unit basis. Without information on the costs for each plant in the EKPC fleet, intervenors cannot fully evaluate the modeling results for each scenario

c. Intervenors' Supplemental Data Requests 2.31(a)-(b), 2.32(a)-(b), and 2.33(a)-(b).

In intervenors' Supplemental Data Requests 2.31(a)-(b), 2.32(a)-(b), and 2.33(a)-(b), intervenors requested documents that EKPC reviewed relating to potential compliance costs at Cooper unit 1 and/or Cooper unit 2 regarding the Clean Water Act section 316(b) rule, the forthcoming coal combustion residuals rule under the Resource Conservation and Recovery Act, and forthcoming Clean Water Act effluent limitations guidelines, respectively. EKPC objected to each of these questions on the grounds that the request is overly broad and seeks information that is irrelevant.

The Commission should compel EKPC to respond to this request because likely future environmental costs are relevant to the question of whether EKPC's proposal to continuing investing in and operating Cooper unit 1 represents the least cost compliance approach. EKPC has modeled the operation of Cooper unit 1 through 2040, a projected life of 25 years from the anticipated 2016 in-service date for the proposed remediation project. EKPC has argued that the proposed duct work project is the most prudent and least cost option for compliance, but it has acknowledged that it did not factor future environmental compliance costs into the NPV analyses used to evaluate projects, and has stated that it is impossible to estimate such compliance costs. *See* EKPC responses to intervenors' Initial Data Requests 59-61. EKPC, however, has admitted that it has reviewed documents pertaining to future environmental compliance costs at Cooper unit 1, yet the Cooperative refuses to produce the documents that were reviewed. *See*

EKPC responses to Intervenor's Supplemental Data Requests 31, 32, 33. Intervenor's Supplemental Requests 2.31(a)-(b), 2.32(a)-(b), and 2.33(a)-(b) seek those documents that EKPC reviewed regarding potential environmental compliance costs at Cooper unit 1. The request is narrow in scope, pertaining to documents EKPC reviewed regarding three discrete environmental rules, and is not overly broad.

Moreover, the requests are relevant. Estimating all of the capital and operating and maintenance ("O&M") costs Cooper unit 1 will incur over the next 25 years and the lifetime of the proposed ductwork, is central to determining which alternative represents the least cost option for compliance. Future environmental compliance costs are a key component of these capital and O&M costs. The fact that EKPC believes that the Commission should not consider costs for future environmental rules does not mean that information relating to those costs is irrelevant for discovery purposes. EKPC is entitled to make its substantive argument during briefing, but it must produce information in discovery on any relevant topic—even relating to arguments with which it disagrees.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED], information regarding estimates of those future environmental compliance costs is plainly relevant to this proceeding.

d. Intervenor's Supplemental Data Requests 2.32(d)-(h) & 2.33(d)

In Intervenor's Supplemental Data Requests 2.32(d)-(h) and 2.33(d), Intervenor sought information regarding the current and future handling of coal combustion residuals and liquid

waste streams, respectively. EKPC objected on the grounds that such requests are overly broad and/or pertain to irrelevant matters.

The Commission should compel EKPC to answer as the requests are narrowly drawn to pertain to documents relating to the handling of specific waste streams at Cooper units 1 and/or 2. As such, the request is not overly broad. Moreover, the requested information is relevant since it pertains to future costs at Cooper unit 1 that EKPC would face during the lifetime of the proposed compliance project. It is beyond dispute that the units will face costs regarding coal combustion residuals (“CCR”) and liquid wastes – costs which EKPC has refused to factor into the analysis upon which its present application is based. EKPC would incur such compliance costs, however, during the lifetime of the proposed ductwork project, and thus such costs are relevant to assessing the reasonableness of the proposed project relative to other alternatives.

III. The Commission Should Compel EKPC To Respond to A Number of Intervenor’s Initial Data Requests for which It Failed to Provide Responsive Documents.

EKPC failed to actually respond to several questions without stating an objection. The Commission should compel EKPC to respond to these requests.

a. Intervenor’s Supplemental Data Request 2.2(c)

In Intervenor’s Supplemental Data Request 2.12(c), Intervenor sought the projected annual generation by each of EKPC’s coal units for each year of the NPV analysis. EKPC’s response references back to its supplemental response to Intervenor’s Initial Data Request 1.15d which, in turn, directs back to EKPC’s response to Staff’s Initial Data Request 5.

The Commission should compel EKPC to respond to this request as none of those responses provide the projected annual generation for Cooper unit 1. Instead, EKPC’s response to Staff’s Initial Data Request 5 presents information for the entire EKPC fleet as a whole, not

unit-by-unit. In addition, the reference to the base case analysis is unresponsive since the base case assumes the retirement of Cooper unit 1. As a result, the projected annual generation for Cooper unit 1 is not provided in the base case analysis. Therefore, EKPC's supplemental response to Intervenor's Initial Data Request 1.15d and response to Staff's Initial Data Request 5 are not responsive to Intervenor's Supplemental Data Request 2.12(c).

b. Intervenor's Supplemental Data Request 2.14(c)-(e)

[REDACTED]

c. Intervenor's Supplemental Data Request 2.46

In Intervenor's Supplemental Data Request 2.46, Intervenor sought production of the contract in which Andritz guarantees that after the proposed ductwork project is completed, the modified flue gas desulfurization system will meet certain emissions limits and performance levels. EKPC failed to produce the requested contract and, instead, cited back to a two-page

letter in which Andritz notes the guarantee “subject to the unit performance parameters specified in the contract documents.” EKPC did not set forth any objection to production of the requested contract.

The Commission should compel EKPC to produce the contract as EKPC did not raise any objections, nor are there any viable objections to producing it. The contract is relevant to this proceeding because EKPC relies on this Andritz guarantee to support its claim that the proposed project will meet the MATS limits. Yet without production of the contract, there is no way for the Commission or Intervenors to evaluate that purported guarantee and understand under what conditions it applies. In addition, Intervenors have entered a confidentiality agreement with EKPC in order to prevent the disclosure of confidential business information so there are no legitimate concerns regarding protection of confidentiality for failing to produce the requested contract.²

IV. The Commission Should Continue the Deadline for the Filing of Intervenor’s Testimony.

The current case management schedule requires that Intervenors file testimony on November 25, 2013.³ EKPC’s failure to fully answer Intervenors’ data requests has hindered Intervenors’ ability to fully evaluate the reasonableness of the Cooperative’s application for a CPCN and related environmental surcharges. Moreover, EKPC’s refusal to provide critical information has presented Intervenors from fully developing their testimony. As such, Intervenors request that the Commission establish a date certain by which EKPC will be required to provide complete responses to the requests for information discussed above, extend the

² Moreover, the Commission’s rules prohibit a party from failing to respond to a discovery request solely on the grounds that the information requested is confidential. *See* 807 KAR 5:001 §13(6)(a).

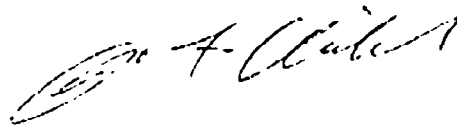
³ Separate from this motion to compel, counsel for EKPC and counsel for Intervenors informally agreed to extend the deadline for Intervenors’ testimony to November 27, 2013. Counsel for EKPC contacted counsel for Gallatin Steel Company and Gallatin Steel’s counsel did not oppose the proposed extension. A Joint Motion to Extend the deadline in this docket will be filed soon.

deadline for Intervenor to file testimony until 10 days after such date of production, and extend all other remaining dates in the case management schedule accordingly.

V. Conclusion

For the foregoing reasons, Intervenor request that the Commission compel EKPC to fully respond to Intervenor's Supplemental Data Requests 2.5, 2.6, 2.12(c), 2.14(c)-(e), 2.31(a)-(b), 2.32(a)-(b) and (d)-(h), 2.33(a)-(b) and (d), and 2.46(a) by a date certain, to continue the deadline for Intervenor to file testimony until 10 days after the date of such production, and to extend all other remaining dates in the case management schedule accordingly

Respectfully submitted,



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Dated: November 21, 2013

CERTIFICATE OF SERVICE

I certify that I had filed with the Kentucky Public Service Commission and served a copy of this **MOTION OF SONIA MCELROY AND SIERRA CLUB TO COMPEL EAST KENTUCKY POWER COOPERATIVE TO RESPOND TO INTERVENORS SUPPLEMENTAL REQUESTS FOR INFORMATION AND FOR CONTINUANCE OF CASE SCHEDULE** via electronic mail and U.S. Mail on November 21, 2013 to the following:

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