

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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COMMISSION

In the Matter of:

EAST KENTUCKY POWER COOPERATIVE,)
INC. APPLICATION FOR AN AMENDED)
ENVIRONMENTAL SURCHARGE)
COMPLIANCE PLAN; A REVISED)
ENVIRONMENTAL SURCHARGE TO)
RECOVER COSTS OF THIS AMENDED)
PLAN; AND A CPCN)

Case No.
2014-00252

ATTORNEY GENERAL'S POST HEARING BRIEF

Comes now the Intervenor, the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention, and states as follows for his post-hearing brief in the above-styled matter.

INTRODUCTION

East Kentucky Power Cooperative, Inc. ("EKPC") has applied for a Certificate of Public Convenience and Necessity ("CPCN") to construct a new special waste landfill, and concurrently seeks to amend its Compliance Plan for Environmental Surcharge Recovery ("ESR"). EKPC asserts that the removal of coal ash from the William C. Dale Station landfill and transfer to a new landfill to be constructed at J.K. Smith Station is necessary to comply with state and federal environmental law related to the handling and storage of coal ash. A hearing was held on 3 February 2015 at the Kentucky Public Service Commission ("the Commission") wherein EKPC presented testimony and evidence in support of its application. Following the hearing, the Commission requested that all parties limit their Post Hearing Brief's to two particular legal questions that pertain to this case. The first issue set out for EKPC and Intervenors to address was if the costs of transferring special waste material – specifically coal ash – from a preexisting landfill to a new, proposed construction landfill, can be funded through the environmental

surcharge? The second, more nuanced, question posed by the Commission staff was whether the ongoing process of moving the ash via trucks could be recovered through the environmental surcharge?

Due to the specific circumstances presented in this case, the Attorney General does not take a position on either of these questions. Rather, because the issues before the Commission present a case of first impression, the Attorney General herein simply posits that whatever decision the Commission reaches, that all similar future projects be evaluated on a strict case-by-case basis, supported by findings of fact specific to the application before it, and not based on the mere approval of or disapproval of similar past projects previously adjudged by the Commission.

DISCUSSION

The Commission has historically addressed a variety of fact intensive application requests on a case-by-case basis. The Attorney General advocates here for a similar cautious expansion of the use of ESR. Subsequent ESR applications pertaining to compliance with the U.S. Environmental Protection Agency's ("EPA") new Coal Combustion Residuals ("CCR") rule should be reviewed by the Commission on a case by case basis, and no bright line established delineating whether the ESR is a proper mechanism to recover CCR rule compliance related costs.

The Attorney General asserts that a sampling of prior Commission Orders issued on a fact specific and case-by-case basis, should lay the ground work for a cautious expansion of the use of the ESR on EKPC's Application. The following Orders provide a non-exhaustive list of prior approaches by the Commission: from the review of whether new federal regulations resulted in the federal preemption of prior Commission rulings,¹ to whether or not a company's

¹ *In re: An Investigation of the Need for Affiliate Transaction Rules and Cost Allocation Requests for all Jurisdictional Utilities*, Order, 20 December 1999, Case No. 1999-00369.

service model should maintain its status as a utility,² to what constitutes a “customer” or “consumer,”³ and finally all resource planning issues are historically reviewed on a case-by-case determination by the Commission.⁴ The Commission has the ability set forth the manner in which all new regulatory compliant construction cases can be reviewed, and the Attorney General’s position is that each and every request should be reviewed upon the specific facts and circumstances presented by that utility, and its specific Compliance Plan. No bright line rules should be set forth here with a one size fits all mentality, as no two utilities will present the same circumstances for complying with the CCR.

The Kentucky Supreme Court provided guidance in a 2001 ruling how administrative agencies must follow the precedential path set before them by their own body of prior rulings. The Court held that “while the agency may reexamine its prior decisions and depart from its precedent, it must explicitly and rationally justify such a change of position.”⁵ The Supreme Court of the United States has further proscribed executive branch administrative stare decisis to have more flexibility than courts in deviating from its prior foundations. SCOTUS reasons that:

[O]f course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court’s satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has

²² *In re: Petition of PG&E Disbursed Generating Company, LLC for Declaratory Order*, Order, 23 January 2001, Case No. 2000-00469.

³ *In re: Petition of Kentucky Mountain Power, LLC for a Declaratory Order*, Order, 19 March 2001, Case No. 2001-00007.

⁴ *In re: An Assessment of Kentucky’s Electric Generation, Transmission, and Distribution Needs*, Order, 25 September 2005, Case No. 2005-00090.

⁵⁵ *In re: Hughes & Coleman*, 60 S.W. 3d 540, 544 (Ky. 2001)(citing *State of Michigan v. Thomas*, 805 F.2d 176 (6th Cir. 1986)).

engendered serious reliance interests that must be taken into account.⁶

The Attorney General simply requests that the Commission set forth findings specific to the EKPC application before it now, and not make a precedential ruling that will affect future applications for similar amended environmental surcharges.

With the promulgation of numerous regulations by the U.S. Environmental Protection Agency (EPA) limiting the economic viability of coal-fired generation, the Commission is likely to see additional applications with similar factual scenarios as EKPC has before the Commission currently. The Attorney General cautions the Commission that any precedential decision in the instant action could hypothetically lead to alternative scenarios where immediate recovery of costs via the environmental surcharge actually hastens the retirement of coal-fired generating units.

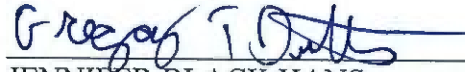
CONCLUSION

It is the position of the Attorney General that using the ESR as a recovery mechanism for costs associated with the retirement of aging coal-fired generating plants must be recognized as a new use of this recovery mechanism. Should the Commission use this tool to allow EKPC to recover costs in this specific instance, it would be a departure from prior applications and the Attorney General advocates for a non-precedential expansion based singularly on the strength of EKPC's Application. As a departure from past applications, the Attorney General would argue that a cautious case-by-case review of subsequent applications would be the most appropriate vehicle moving forward in review of new uses for the environmental surcharge.

⁶ *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, 129 S. Ct. 1800, 1811 (2009).

Respectfully submitted,

JACK CONWAY
ATTORNEY GENERAL

A handwritten signature in blue ink, appearing to read "Gregory T. Dutton", is written over a horizontal line.

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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 19 day of February, 2015



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