

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

An Application of East Kentucky Power Cooperative, Inc.)
For a Certificate of Public Convenience and Necessity)
For Construction of an Ash Landfill at J.K. Smith)
Station to Receive impounded ash from William C. Dale)
Station, and for Approval of a Compliance Plan)
Amendment for Environmental Surcharge Recovery)

CASE NO.
2014-00252

RECEIVED

**POST HEARING BRIEF OF GRAYSON RURAL
ELECTRIC COOPERATIVE CORPORATION**

FEB 2 2015
PUBLIC SERVICE COMMISSION

RESPECTFULLY SUBMITTED,

W. JEFFREY SCOTT, P.S.C.

BY: 

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I hereby certify that the original, plus ten (10) copies, of the Brief of GRECC was filed with the Public Service Commission with a copy served upon all parties of record on February 18, 2015.

1. Mr. Jeff Derouen, Kentucky Public Service Commission, 211 Sower Boulevard, P.O. Box 615, Frankfort, KY 40602-0615
2. Hon. David S. Samford, Hon. Mark Goss, Goss-Samford, PLLC, 2365 Harrodsburg Road, Suite B-325, Lexington, KY 40504
3. Hon. Gregory T. Dutton Assistant Attorney General, Office of the Attorney General Utility and Rate Intervention Division, 1024 Capital Center Drive, Suite 200 Frankfort, Kentucky 40601-8204.
4. Patrick Woods, East Kentucky Power Cooperative, Inc., PO Box 707, Winchester, KY 40392-0707.
5. Hon. Quang D. Nguyen, Kentucky Public Service Commission, 211 Sower Boulevard, P.O. Box 615, Frankfort, KY 40602-0615.


Will J. Matthews

I. Introduction and Background

East Kentucky Power Cooperative, Inc. (Hereinafter EKP) filed an application with the Kentucky Public Services Commission for a Certificate of Public Convenience and Necessity for Construction of an Ash Landfill at J.K. Smith Station, The Removal of Impounded Ash from William C. Dale Station for Transport to J.K. Smith and Approval of a Compliance Plan Amendment for Environmental Surcharge Recovery (Hereinafter Application). Grayson Rural Electric Cooperative Corporation (hereinafter Grayson) intervened so its rights and concerns could be heard. Grayson is an electric distribution cooperative serving its members in the counties of Carter, Greenup, Elliott, Lawrence, Lewis, and Rowan in northeast Kentucky. Grayson is a member/owner of East Kentucky Power (EKP) and its members stand to be affected by the Application.

In the instant proceeding, EKP has sought to implement a mechanism for the removal of the coal ash that is currently being stored at the William C. Dale Generating Station (Hereinafter Dale) and to impose an environmental surcharge on ratepayers pursuant to KRS 278.183. In its Application, EKPC contends that it will not be able to economically meet federal environmental air quality standards at Dale because of the federally-mandated Mercury and Air Toxics Standards. As a result EKPC indicates that it will decommission Dale. Kentucky law prohibits the maintenance of a waste disposal facility without a permit under KRS 224.40-305. Therefore, EKPC contends it should be entitled to a certificate of public convenience and necessity to carry out its plan and to impose the costs of said plan on the ratepayers via an environmental surcharge found in KRS 278.183. Namely, EKPC is asking the Commission for approval to recover the estimated costs of the project, being \$26,962,000, from the ratepayers by imposing on them a surcharge. This number is delineated in page 22 of the Application. The pertinent issue is whether KRS 278.183 permits a surcharge for each of the line-item costs alleged to be necessary by EKPC.

II. Argument

A hearing was held in this matter on February 3, 2015, at which various representatives of EKP offered testimony. EKPC's last witness Isaac Scott the Pricing Manager for EKPC - answered questions about, among other things, the transfer of coal ash from Dale to the Hancock Creek Inert Landfill. (See February 3, 2015 Hearing Disc at 14:31:15) Mr. Scott indicated that the costs of the transfer of the coal ash to Hancock was recorded on EKPC's books as a general expense and there was no recovery for said costs by virtue of the surcharge. Mr. Scott opined that the transfer of coal ash predated the environmental surcharge but more importantly he stated it was booked as a regular expenditure through their accounting system. (Disc at 14:31:25) Mr. Scott did not appear to recall if the costs were passed to the ratepayers in a rate case but certainly did not affirm that they were. On behalf of EKPC, Mr. Scott stated that he believed the entire costs of the projects should be allowed under the surcharge because such treatment fits within the surcharges definition of other actions. (See KRS 278.183(1)). Grayson does not believe that said reliance on the undefined portion of the statute is sufficient. Moreover, Grayson does not believe that said reliance on the undefined portion of the statute is sufficient to recover all the expense items identified on page 22 of the Application.

In another seminal environmental surcharge case, the Supreme Court of Kentucky interpreted the statute in conjunction with the legislative history behind it. *Kentucky Indus. Utility Customers, Inc. v. Kentucky Utilities Co.*, 983 S.W.2d 493 (Ky. 1998). "The legislative intent of the statute was to promote the use of high sulfur Kentucky coal by permitting utilities to surcharge their customers for the cost of a scrubber which is part of a power plant that cleans high sulfur coal in order to meet the acid rain provisions of the Federal Clean Air Act amendments of 1990." *Id at* p. 496. "The Commission has discretion in working out the balance of interest necessarily involved

...” *Id at* p. 498 (Internal citations omitted). Here the Commission is faced with having to interpret KRS 278.183 and “The policy and purpose of the statute must be considered in determining the meaning of the words used.” *Id at* p. 500 (Internal citations omitted).

The Application strives to convince the Commission that the surcharge is warranted because of the need to become compliant with new environmental laws. The statute “was only intended to apply to the Utility's future obligation to comply with new environmental laws.” *Id at* p. 500. The statute in Footnote 6 of the Application indicates that the statutory mechanism for disposal of waste, including special waste, in Kentucky was codified in 1983. According to paragraph 9 of the Application the statutory framework for disposal of utility waste was promulgated in 1992. The Dale plant and the coal ash storage problem arising from it are pre-existing. According to EKPC witness Jerry Purvis the new EPA regulations on coal ash that were introduced in December of 2014 are not going to have an impact on the project and they were not even mentioned in the application because it was filed in September of 2014. The Application acknowledges that Dale may be used up until April 16, 2015. In point of fact, however, EKPC has determined that, based upon directives it receives from PJM that Dale will be operational for another sixteen months beyond February 2015. Therefore, the requested relief is purely speculative as there is no end in sight to the use of Dale, especially considering that PJM has requested its continued operation for what appears to be, an indefinite period

EKPC is attempting to stretch the bounds of the environmental surcharge statute by requesting that all the costs associated with EKPC's perceived inability to run the Dale Plant be included in the environmental surcharge. The expenses of the coal ash removal projects cannot be included as an environmental surcharge because the generation of the coal ash and the operation of the Dale plant that resulted in the coal ash happened a long time ago. As the Kentucky Supreme Court indicated, the statute's intent was for the utility providers to be able to pass on to the

ratepayers the costs of having scrubbers. *Id.* at p. 496. The only EKPC witness that testified in regards to the rates and the effect the surcharge will have on them was Mr. Scott. Mr. Scott testified that he believed the costs should be considered as part of the “other actions” language in KRS 278.183. The burden of proof lies with EKPC here. *Energy Regulatory Commission v. Kentucky Power Company*, Ky. App., 605 S.W. 2d 46, 50 (1980). EKPC has not met its burden of establishing that each line item identified in page 22 of the Application should be included in an environmental surcharge imposed on ratepayers. The record, including the testimony of Mr. Scott, reflects that EKPC treated a previous removal of coal ash as an expense on its books. EKPC has not provided any reason why it should be entitled to deviate from treating the costs of the coal ash from Dale as an expense on its books. Using the statute whenever it is convenient does not serve the purpose of promoting the use of Kentucky coal but instead exploits the ratepayers. Speculation over what may happen at the Dale plant is insufficient to impose the costs of the projects on the ratepayers.

The overall financial condition of EKPC was not allowed to be addressed at the hearing in this case with EKPC relying upon and the Commission agreeing that *Kentucky Industrial Utility Customers, Inc. vs. Kentucky Utilities Company*, *supra*, was sufficient authority to not have to consider the overall financial condition. That case has language consistent with that position but also states that the Commission can authorize the imposition of just and reasonable rates and, in fact, should. Such a request has heretofore been made by Intervenor, Grayson, with its motion that it filed in EKPC rate case 2010-167. That motion was filed in the spring of 2014 on which there has been no Commission action undertaken. Since EKPC is seeking the requested relief on a discretionary basis rather than upon required compliance with existing and newly promulgated EPA regulations then the Commission would be justified in drawing an inference that the action

is sought in order to manipulate margins and TIER that would be relevant in the PSC case numbered 2010-167.

III. Conclusion

EKPC has failed to establish that the need to remove the coal ash and construct a landfill is based on a new environmental law. The geographical problems of the current location of the coal ash do not warrant imposition of the costs of the projects EKPC wants permission to implement. The Commission should deny EKPC's request for approval of an Environmental Compliance Plan amendment for purposes of recovering the costs of the Project through EKPC's Environmental Surcharge. In the alternative, Grayson requests that only the J.K. Smith landfill construction costs be imposed, if any, as a surcharge because this is arguably the only portion of the costs that deals with prospective compliance with a new environmental regulation.

WHEREFORE, Grayson prays for an order rejecting the application of the surcharge and for all other relief to which it may appear to be entitled.

RESPECTFULLY SUBMITTED,

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