

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF KENTUCKY POWER	)	
COMPANY FOR: (1) THE APPROVAL OF THE	)	
TERMS AND CONDITIONS OF THE SIXTH	)	
AMENDMENT TO THE RENEWABLE ENERGY	)	
PURCHASE AGREEMENT FOR BIOMASS	)	
ENERGY RESOURCES BETWEEN THE	)	
COMPANY AND ECOPOWER GENERATION-	)	CASE NO.
HAZARD, LLC; (2) AUTHORIZATION TO	)	2015-00190
ENTER INTO THE SIXTH AMENDMENT TO	)	
THE AGREEMENT; (3) THE GRANT OF	)	
CERTAIN DECLARATORY RELIEF; AND (4)	)	
THE GRANT OF ALL OTHER REQUIRED	)	
APPROVALS AND RELIEF	)	

ORDER

This matter is before the Commission on Kentucky Power Company's ("Kentucky Power") motion for rehearing ("Motion") of the Commission's August 27, 2015 Order dismissing its application without prejudice due to lack of jurisdiction ("August 27 Order"). In its Motion, Kentucky Power maintains that the Commission's August 27 Order is premised on a manifest error of law, repudiates Commission precedent, and results in a manifest injustice. After considering the arguments set forth in Kentucky Power's Motion, the response in opposition to rehearing ("Response") filed on behalf of Kentucky Industrial Utility Customers, Inc.'s ("KIUC"), and Kentucky Power's Reply, the Commission hereby denies Kentucky Power's Motion.

## DISCUSSION

Kentucky Power first argues that the August 27 Order results in a manifest error of law, and that under Kentucky law, the effect of an appeal is to divest a lower tribunal of jurisdiction over the order or judgment appealed only, and not over the subject matter of the order or judgment on appeal. In this vein, Kentucky Power asserts that the Commission retains jurisdiction over the subject matter of the Renewal Energy Power Agreement (“REPA”) approved October 10, 2013, (“REPA Approval Order”) and currently pending judicial review,<sup>1</sup> and therefore erred by not considering Kentucky Power’s request for approval to enter into amendments of the REPA and its request for declaratory relief as set forth in its application. Kentucky Power largely reiterates arguments that it raised in its legal memorandum filed August 3, 2015, including citation to three Kentucky Supreme Court cases. However, none of those cases support Kentucky Power’s legal proposition or otherwise persuade us to reconsider our August 27 Order. The facts of those cases (two of which are criminal law cases and one of which involved a party’s discovery rights while a summary judgment order is on appeal) markedly differ from the facts in this proceeding. Nevertheless, since those cases were not specifically addressed in our August 27 Order, we will address them at this time.

*Commonwealth v. Bailey*, 71 S.W.3d 73 (Ky. 2002), is a criminal case in which the Commonwealth appealed from the trial court’s order granting the convicted defendant a new trial. The Court of Appeals dismissed the appeal on grounds that the

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<sup>1</sup> Case No. 2013-00144, *Application of Kentucky Power Company for Approval of the Terms and Conditions of the Renewable Energy Purchase Agreement for Biomass Energy Resources Between the Company and Ecopower Generation-Hazard LLC* (Ky. PSC Oct. 10, 2013); Kentucky Court of Appeals, Case No. 2015-CA-00398-MR, *Kentucky Industrial Utility Customers, Inc. v. Kentucky Public Service Commission, et al.*

Commonwealth could appeal from the trial court's order granting a new trial only for the purpose of certifying the law, pursuant to KRS 22A.020(4).<sup>2</sup> The Kentucky Supreme Court granted discretionary review, and reversed and remanded. The Supreme Court held that KRS 22A.020(4) authorizes an appeal by the Commonwealth from a trial court order granting a new trial to a defendant and "suspends the effect of the order pending the finality of such review. If the Court of Appeals concludes from a review of the record that the trial court abused its discretion in granting a new trial, the order will be reversed and set aside, and the trial court will be directed to reinstate the verdict or judgment and sentence the defendant."<sup>3</sup> In other words, proceedings in the trial court, i.e., the grant of a new trial, must be stayed while the rulings and decisions of the trial court are reviewed on appeal. The Supreme Court reasoned, "[t]he new trial will not commence until a final appellate decision is rendered thereon; otherwise, the appeal may become moot before a decision is rendered in the appeal because, if the new trial results in an acquittal, any further prosecution against the defendant is barred by doctrine of double jeopardy."<sup>4</sup>

The holding in *Bailey* actually supports our August 27 Order. Likewise here, Kentucky Power's proposed amendments to the REPA would be rendered moot if the Court of Appeals was to conclude that approval of the REPA is not lawful in accordance with KRS 278.271. As KIUC points out in its Response, proceeding to address Kentucky Power's application during the pending appeal would introduce the possibility that an appeal addressing the original REPA would be taking place in the Court of Appeals while an appeal addressing the amended REPA is taking place in the Franklin

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<sup>2</sup> *Id.* at 74.

<sup>3</sup> *Id.* at 85.

<sup>4</sup> *Id.*

Circuit Court. Further adding to the uncertainty and jurisdictional complexity is the possibility that KIUC's appeal of the REPA Approval Order might reach the Kentucky Supreme Court. Avoiding this potentially tenuous and haphazard situation bred the long-standing rule in Kentucky that "[i]t is axiomatic that two courts cannot exercise jurisdiction over the same issue at the same time."<sup>5</sup>

Kentucky Power next cites to *Commonwealth v. Steadman*, 411 S.W.3d 717 (Ky. 2013), another criminal case, in which the Kentucky Supreme Court distinguished general subject matter jurisdiction, which refers to a court's power over an entire category or class of cases, from particular jurisdiction, which refers to a court's authority to adjudicate a specific case. The Commission is well aware of this legal distinction, and its August 27 Order in no way contravenes the holding in *Steadman*. The Commission acknowledged in its August 27 Order that it has subject matter jurisdiction, generally speaking, to consider applications of the kind filed by Kentucky Power. Yet, the Commission was required to decline jurisdiction in this particular instance based on judicial precedent, given that appellate review of the legality of the REPA which Kentucky Power seeks to amend is pending before the Court of Appeals. Contrary to Kentucky Power's assertion, the Commission has not obviated or shirked its "duty to exercise its statutory jurisdiction." But in this instance, Kentucky Power is requesting the Commission to assert jurisdiction over the same contract issue that is pending before the Court of Appeals, and that relates not simply to subject matter jurisdiction but also to particular jurisdiction. In accordance with relevant legal authority on the issue of

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<sup>5</sup> *Young v. Richardson*, 267 S.W.3d 690, 697 (Ky. App. 2008).

jurisdiction, the August 27 Order invited Kentucky Power to refile its application once the legality of the REPA Approval Order has been finally adjudicated.

Thirdly, Kentucky Power cites to *Commonwealth, Fin. & Adm. Cabinet v. Wingate*, 460 S.W.3d 843 (Ky. 2015), a case concerning whether discovery should be stayed in the trial court pending appellate resolution of an appeal of a trial court order granting partial summary judgment. In *Wingate*, a health insurer brought a declaratory judgment action seeking a ruling that it had a right to terminate its Medicaid managed care contract with the Cabinet, without penalty, prior to the contract's expiration. The insurer subsequently filed a breach of contract action against the Cabinet and the two actions were consolidated. The trial court entered partial summary judgment in favor of the Cabinet, finding that the insurer was not entitled to terminate the contract early. The insurer appealed, the Cabinet cross-appealed and, while the appeal was pending, the insurer sought to conduct pre-trial discovery relating to its rights under the Medicaid contract. However, the trial court stayed discovery until resolution of the partial summary judgment appeal.

The insurer filed a petition for a writ of prohibition, which the Court of Appeals granted on the basis that the trial court's suspension of discovery amounted to an impermissible indefinite stay on discovery without a pressing need to do so. The Kentucky Supreme Court granted discretionary review and vacated the Court of Appeals' decision on grounds that the trial court did not abuse its discretion by temporarily staying discovery pending the resolution of matters pertaining to the partial summary judgment in the appellate courts. The Supreme Court held that the issuance of a stay was proper, not because the trial court lost subject matter jurisdiction over

pending claims that remained, but because under *Garnett v. Oliver*, 242 Ky. 25, 45 S.W.2d 815 (1931), “if the appeal from the particular order or judgment does not bring the entire cause into the appellate court . . . further proceedings in the conduct of the cause may properly be had in the lower court.”<sup>6</sup> The Supreme Court noted the difference between subject matter jurisdiction and particular case jurisdiction and distinguished the holding in *City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990).<sup>7</sup> The Court found *Garnett*, and not *Stallings*, to be the controlling authority, since the insurer’s appeal and the Cabinet’s cross-appeal did not “bring the entire cause into the appellate court[.]”<sup>8</sup> Accordingly, the Supreme Court held that the trial court retained jurisdiction over pending claims not being appealed. Nonetheless, the Court held that the temporary abatement of discovery pending the appeal would not result in “great injustice or irreparable injury,” as required to implicate the need for the extraordinary remedy of issuance of a writ of prohibition. As a result, the Supreme Court vacated the Court of Appeals’ grant of the writ. Here, the entire REPA is on appeal, and the entire cause has been brought into the appellate court. Therefore, the holding in *Wingate* is not dispositive of the issue at hand.

To summarize, Kentucky Power’s application is not a criminal matter, nor does it involve an interlocutory order or a writ of prohibition. To read the holdings of the aforementioned cases as permitting the Commission to approve an amendment to a power-purchase contract currently under appellate review would broadly misconstrue

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<sup>6</sup> *Id.* at 817.

<sup>7</sup> Therein, the Court held that the filing of a notice of appeal under CR 73.01(2) divests the circuit court of particular case jurisdiction and transfers that authority to the appellate court.

<sup>8</sup> 460 S.W.3d at 849 (quoting *Garnett*, 45 S.W.2d at 817).

the Supreme Court's rulings. Thus, the Commission correctly decided not to rely on these cases in its August 27 Order.

Kentucky Power further asserts that the August 27 Order is "at war" with past Commission action.<sup>9</sup> This statement is inaccurate. Kentucky Power cites to *Kentucky Public Service Commission v. Commonwealth*, 324 S.W.3d 373 (Ky. 2010), an administrative law case addressing five consolidated Orders of the Commission which approved a public utility's applications to allow the utility to adjust its rates by imposing a surcharge or rider aimed at recovering costs associated with the utility's program to accelerate improvement of its gas distribution mains. Kentucky Power points out that the Attorney General appealed each of the Commission Orders approving a surcharge or rider and, while the appeals were pending, the Commission continued to approve the utility's annual applications for adjustments to the rider. Kentucky Power argues that the Commission's actions in that case demonstrate its authority to exercise jurisdiction to act on applications, even though related appeals are pending appellate review. Yet, the Commission's exercise of continuing jurisdiction to approve a series of discrete riders or surcharges under its plenary authority granted by KRS 278.030 and 278.040 is distinguishable from Kentucky Power's present request for the Commission to approve an amendment to a 20-year contract, the legality of which is being challenged on appeal. The former relates to subject matter jurisdiction since each rider or surcharge was a separate, stand-alone tariffed rate, whereas the latter relates to particular case jurisdiction since only the amendment, which cannot stand alone, is presented for review while the underlying contract is pending review by the Court of Appeals.

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<sup>9</sup> Kentucky Power's Motion for Rehearing at 1.

Kentucky Power also claims the August 27 Order is at odds with the Commission's exercise of jurisdiction in Kentucky Power's most recent two-year fuel adjustment clause ("FAC") review proceeding.<sup>10</sup> FAC review proceedings are governed by 807 KAR 5:056, which subjects a utility's FAC to review at six-month and two-year intervals. The two-year review period encompasses the current six-month period and the previous three six-month periods. In Kentucky Power's most recent FAC case, the Commission argued before the Franklin Circuit Court that review of appeals from the Commission's six-month FAC review should be abated, since the six-month period at issue was still under review by the Commission as part of the pending proceeding involving the two-year review period. As a result, the issue in dispute in the appeal may be impacted by the Commission's ultimate Order in the two-year review case.

The Commission's position in that FAC case is consistent with its August 27 Order in this case. In both cases, the Commission recognized that it and the Courts cannot have jurisdiction over the same issues at the same time. To avoid piecemeal litigation, and to permit the parties to exhaust their administrative remedies, the Commission asserted in the FAC case that appeals of six-month FAC Orders, which the Court has declared to be "conditional upon affirmation in the final two-year review,"<sup>11</sup> should be either abated until conclusion of the Commission's two-year FAC case or dismissed without prejudice. The Franklin Circuit Court agreed with the Commission's position and abated the six-month FAC appeals. Similarly here, the Commission held that it cannot have jurisdiction over the current REPA which is a particular case, for

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<sup>10</sup> Case No. 2014-00450, *An Examination of the Application of the Fuel Adjustment Clause of Kentucky Power Company from November 1, 2012 Through October 31, 2014* (Ky. PSC Feb. 5, 2015).

<sup>11</sup> *Kentucky Industrial Utility Customers, Inc. v. Kentucky Public Service Comm'n et al.*, 201 P.U.R. 4th 381 (Ky. Cir. Ct. 2000).



purposes of reviewing an amendment to the current REPA, while simultaneously the Court of Appeals is reviewing the legality of the current REPA. Were the Commission to find that the amendment is reasonable and approve it, the Court of Appeals' review of the current REPA would be rendered moot, since the amended REPA would then supplant the current REPA as the approved contract. With respect to Kentucky Power's reliance on its most recent FAC case, the Commission notes that Kentucky Power may choose to file a motion with the Court of Appeals to abate the appeal of the current REPA or request a remand so that the Commission regains the jurisdiction to review an amendment; but unlike the conditional six-month FAC Orders, our 2013 approval of the REPA was not conditional.

On a final note, in response to Kentucky Power's assertion that the Commission's consideration of its requested Order date and the requested evidentiary hearing was irrelevant to the "only salient analysis" the Commission should have performed, this Commission does not review cases in a vacuum. Kentucky Power's application clearly requested that the Commission issue an Order no later than August 28, 2015, in order to satisfy the predicate set forth in the proposed amendments to the REPA that a final and non-appealable Order be issued on or before October 1, 2015. Kentucky Power made that date relevant, and Kentucky Power cannot now fault the Commission for considering that request and for finding it to be unachievable due to its dependency upon appellate resolution of the REPA, over which the Commission has no control.

Our reference to the existence of a factual dispute concerning the effect of Kentucky Power's proposed amendment simply serves to illustrate that Kentucky

Power's request would require the Commission to conduct a fact-extensive proceeding to examine whether Kentucky Power's application would materially alter the terms of the REPA. Such an inquiry is inherently intertwined with appellate review of the REPA's legality, and thus supports our determination that we lack the authority to adjudicate this particular case at this time. Indeed, Kentucky Power's Motion for Rehearing concedes as much: it states that Kentucky Power's "requested relief requires the Commission to evaluate the Sixth Amendment against relevant legal authority and, in the case of the requested declaratory relief, to evaluate the amendments **against** the REPA Approval Order." (Emphasis in original motion).<sup>12</sup> Similarly, Kentucky Power's application in this case requested a declaration that none of the Second through the Seventh Amendments to the REPA have altered or changed the REPA Approval Order.<sup>13</sup> In effect, Kentucky Power acknowledges that review of its application would necessitate review of the REPA and any impact on our REPA Approval Order which is pending review before the Court of Appeals. Such review necessarily requires review of the particular case pending on appeal, which we decline to perform at this time.

In summary, the requests set forth in Kentucky Power's application are contingent upon, and directly related to, the REPA Approval Order currently being reviewed by the Court of Appeals. As a result, the Commission must wait until the appellate court has ruled on the REPA Approval Order before it can proceed to addressing the merits of Kentucky Power's application. Once the original REPA Approval Order is no longer pending appellate review, Kentucky Power is free to refile its application.

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<sup>12</sup> Kentucky Power's Motion for Rehearing at 3.

<sup>13</sup> Kentucky Power's Application at 14.

IT IS THEREFORE ORDERED that Kentucky Power's Motion for Rehearing is denied.

By the Commission

ENTERED  
OCT 06 2015  
KENTUCKY PUBLIC  
SERVICE COMMISSION

ATTEST:

  
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Executive Director

Case No. 2015-00190

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