

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE  
COMMISSION

In the Matter of:

APPLICATION OF KENTUCKY POWER COMPANY )  
FOR APPROVAL OF AN AMENDED COMPLIANCE )  
PLAN FOR PURPOSES OF RECOVERING ) CASE NO.  
ADDITIONAL COSTS OF POLLUTION CONTROL ) 2005-00068  
FACILITIES AND TO AMEND ITS ENVIRONMENTAL )  
COST RECOVERY SURCHARGE TARIFF )

**KENTUCKY POWER COMPANY'S REPLY TO  
KENTUCKY INDUSTRIAL UTILITIES CUSTOMERS, INC.'S  
RESPONSE TO KENTUCKY POWER COMPANY'S  
MOTION TO STRIKE TESTIMONY OF LANE KOLLEN**

The KIUC's response has not seriously addressed the bases for Kentucky Power Company's ("KPCo") Motion to strike the testimony of KIUC's testimony Lane Kollen. Kentucky Power's motion is based on two primary principles: 1) Mr. Kollen's testimony on the preemptive effect of the FERC-approved AEP Interconnection Agreement, on this proceeding as set forth and explained by this Commission in its order in Case No. 96-489, is improper because it goes to legal issues that are properly in the realm of the Commission and not appropriate for expert testimony; and 2) Mr. Kollen's testimony on the treatment of allowances used in off-system sales and the effect of a new IRS provision goes to matters not before the Commission in this proceeding.

**I. KIUC HAS PROVIDED NO LEGAL BASIS FOR THE COMMISSION TO ALLOW AN EXPERT WITNESS ON FINANCIAL MATTERS TO TESTIFY ON THE LEGAL PREEMPTIVE EFFECT OF A FERC ORDER ON STATE PROCEEDINGS.**

In response to KPCo's arguments that the Commission should not allow Mr. Kollen to testify as to the preemptive effect of the Interconnection Agreement as a matter of law, the KIUC responds that the Company ignores Kentucky law stating that the Commission is not bound by

formal rules of evidence. Quite to the contrary, the Company recognizes this law but also recognizes that it does not say a Commission must allow all testimony no matter the circumstance. Here the KIUC attempts not only to have its expert testify as to legal conclusions but also to testify that the Commission's earlier order on precisely the same issue says something different than the Commission has recognized for nearly ten years. The May 27, 1997 order in Case No. 96-489 (attached hereto) in its entirety is the best evidence of the Commission's.

Under Kentucky law this Commission is well within its rights to look at the normal standards for admitting expert evidence and to disallow evidence it finds is beyond the competency of the expert or unhelpful to the Commission. The Company submits that Mr. Kollen's attempt to testify on the preemptive effect of the Interconnection Agreement is both beyond his competency and unhelpful to the Commission.

The KIUC further argues that expert testimony is necessary in order to determine whether the requirements of KRS 278.183 are met. In particular, they assert that "Mr. Kollen's testimony speaks to the central issue in this case, namely whether the disaggregated environmental costs incurred by the Company through its FERC-approved agreements meet the requirements of KRS 278.183 for recovery through the environmental surcharge." KIUC Response at p. 5. Again, this argument is nothing more than an attempt to circumvent the Commission's legal determinations on this issue in Case No. 96-489, and through revisionist testimony to change the ruling made in the Commission's earlier order. In that Order, the Commission explained that the environmental costs incurred by the surplus companies are passed on to the deficit companies through the capacity charge as set forth in the FERC-approved Interconnection Agreement, and that for purposes of the KRS 278.183, such costs are to be considered reasonable.

Specifically, in Case No. 96-489 at page 13 of the May 27, 1997 Order, the Commission states: “Since Gavin is owned by Ohio Power, a portion of the FERC capacity settlement payment Kentucky Power pays each month includes a portion of the Gavin scrubber costs.” Additionally, at page 16 of that Order the Commission stated: “The Commission finds that federal preemption mandates our acceptance of the FERC jurisdictional agreements as reasonable. To the extent that environmental costs are part of the total costs Kentucky Power is allocated under the terms of these agreements, the costs must be accepted as reasonable.” Nowhere in the order, which speaks for itself, does the Commission link recovery of the Gavin scrubber costs to the Interim Allowance Agreement, as Mr. Kollen now contends. This contention is made from whole cloth and is a post hoc rationalization and recasting of a very clear decision.

Expert testimony almost ten years later cannot change these basic principles. To allow legal argument through an expert witness, in particular a witness who is not an expert on the law, is inappropriate, prejudicial, and usurps the role of the Commission. No principle of Kentucky law prohibits the Commission from excluding such testimony. Cf. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 583 (Ky. 2000) (courts have discretion in determining the admissibility of expert testimony “to choose among reasonable means of excluding expertise that is fausse [false] and junky.”) Numerous other courts have recognized the impropriety of such attempted expert legal testimony. See, e.g. *A.T. Kearney v. International Business Machines*, 73 F.3d 238, 244 n.4 (9<sup>th</sup> Cir. 1995) (declaring that expert testimony should be confined to knowledge of factual matters rather than legal conclusions); *Herbert v. Lisle Corp.*, 99 F.3d 1109, 1117 (Fed. Cir. 1996) (“Incorrect statements of law are no more admissible through ‘experts’ than are falsifiable scientific theories.”); and *Textron, Inc. v. Barber Colman Co.*,

903 F. Supp. 1546, 1552 (W.D.N.C. 1995) (“not every opinion offered by an expert is an expert opinion.”)

**II. THE COMMISSION IS WITHOUT JURISDICTION TO CONSIDER THE OTHER ARGUMENTS RAISED BY KIUC’S EXPERT IN HIS PROFFERED TESTIMONY.**

It is a fundamental principle of Kentucky law that administrative agencies only have those powers granted by the Legislature through statute. *See Lexington-Fayette Urban County Health Dept. v. Lloyd*, 115 S.W.3d 343 (Ky. App. 2003). Here the powers of this Commission in this proceeding are defined by the provisions of KRS 178.183. The statute plainly provides that the utility must present a plan to the Commission before imposing a surcharge and the Commission must conduct a hearing and approve the rate and surcharge. KRS 278.183. Nowhere does the statute allow an intervenor by way of expert testimony to inject into the proceeding issues relating to matters already approved by the Commission which are not raised by the petition or application. Nonetheless, the KIUC is now asking this Commission to reconsider in this proceeding the way it has handled allowances consumed in off-system sales even though nothing in this plan relates to this activity, and the Interim Allowance Agreement is not at issue in the Company’s amendment to the Plan.

The KIUC further asks this Commission to require the Company to treat what is plainly a “tax deduction” as a change in “tax rate” in determining revenue requirements. Again, however, there is no rate of reform issue raised by the Company’s request to have the plan amendment approved. (*See Wagner Testimony*, p. 8, l. 8-10.) Moreover, again this is a purely legal argument that does not require expert testimony even if it were relevant to the issues in the proceeding.

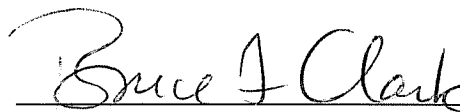
Finally, it is not a matter of the Company “incorrectly fail[ing] to include them in its Application” for they are not at issue in this Application. KIUC Response at p. 8, 11. 8-10.

Rather, what is occurring here is that the KIUC is attempting to use its right to present legitimate expert testimony relating to the amendments to the Company's plan to circumvent rulings in prior orders and the directives of the statutes as to proper procedures.

### III. CONCLUSION

Kentucky Power asks this Commission to recognize that the Company's Motion does not address an instance where an expert's opinion may be slightly broader than his area of expertise so that, in the exercise of the agency's discretion, it can allow the evidence in without fear of substantial harm. Rather, this Motion is being made because the Intervening Party is attempting through the testimony of an expert witness to get the Commission to change a longstanding conclusion of law and to consider matters that are not properly before the agency. Accordingly, the Company asks this Commission to reject the proffered expert testimony and keep the proceedings focused on the matters properly at issue.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing Reply of Kentucky Power Company to Kentucky Industrial Utilities Customers, Inc.'s Response to Kentucky Power Company's Motion to Strike Testimony of Lane Kollen was served via United States Postal Service, First Class Mail, postage prepaid, and via e-mail to Mr. Kurtz, upon:


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on this the 18<sup>th</sup> day of July, 2005.

  
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Bruce F. Clark