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AUG 24 2007
PUBLIC SERVICE
COMMISSION

Via Overnight Mail

August 23, 2007

Beth A. O'Donnell, Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, Kentucky 40602

Re: Case No. 2006-00507

Dear Ms. O'Donnell:

Please find enclosed the original and twelve (12) copies of the BRIEF OF KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC. PURSUANT TO THE KENTUCKY PUBLIC SERVICE COMMISSION'S ORDER OF AUGUST 21, 2007 to be filed in the above-referenced matters. By copy of this letter, all parties listed on the Certificate of Service have been served.

Please place this document of file.

Very Truly Yours,



Michael L. Kurtz, Esq.
BOEHM, KURTZ & LOWRY

MLKkew
Attachment
cc: Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by mailing a true and correct copy, by first-class postage prepaid mail, unless otherwise noted, to all parties on the 23rd day of August, 2007.

Timothy C. Mosher
American Electric Power
101A Enterprise Drive
P. O. Box 5190
Frankfort, KY 40602

Honorable Mark R. Overstreet
Stites & Harbison
421 West Main Street
P. O. Box 634
Frankfort, KY 40602-0634



Michael L. Kurtz, Esq.

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COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

AUG 24 2007

PUBLIC SERVICE
COMMISSION

In The Matter Of: An Examination Of The Application of the Fuel :
Adjustment Clause of Kentucky Power Company From November 1, 2004 :
Through October 31, 2006 :

Case No. 2006-00507

**BRIEF OF KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC.
PURSUANT TO THE KENTUCKY PUBLIC SERVICE COMMISSION'S
ORDER OF AUGUST 21, 2007**

On August 21, 2007 the Kentucky Public Service Commission ("the Commission") issued an Order requiring the Interveners in the above-captioned matter to submit a Memorandum of Law regarding the lawfulness of the relief sought by Kentucky Power given the August 1, 2007 Opinion and Order entered by the Franklin Circuit Court in the matter of *Commonwealth of Kentucky, ex rel. Gregory D. Stumbo, Attorney General, v. Public Service Commission and Union Light, Heat and Power Company*, Civil Action 06-CI-269. In accordance with this Order, the Kentucky Industrial Utility Companies, Inc. ("KIUC") submits the below Memorandum of Law.

MEMORANDUM OF LAW

The Franklin Circuit Court's decision has no immediate impact on the validity of the Fuel Adjustment Clause ("FAC") and is not relevant to this FAC review case. While the Franklin Circuit Court states that there is no inherent authority to perform interim single-issue rate adjustments without statutory authorization¹ this language is editorializing by the Court and is not a necessary part of the its decision. The Circuit Court's opinion held that (1) KRS 278.509 is unconstitutional and (2) the

¹ *Commonwealth of Kentucky, ex rel. Gregory D. Stumbo, Attorney General, v. Public Service Commission and Union Light, Heat and Power Company*, Civil Action 06-CI-269, p. 6.

Commission does not otherwise possess the authority to authorize an AMRP for Duke Energy Kentucky. Any statements in the opinion broader than those holdings are not binding on the Commission.

The Circuit Court's decision is also an unpublished opinion. CR 76.28(4)(c) prohibits unpublished decisions from being "*cited or used as authority in any other case in any court of this state.*" The Commission should not undertake a review of Kentucky's various surcharges and surcredits on the basis that an unpublished opinion of the Franklin Circuit Court contains *obiter dicta* questioning the validity of single-issue rate adjustments.

KIUC believes that Kentucky Power's FACs can and should continue unless and until their lawfulness is brought before a Court or this Commission for consideration. KIUC does not render an opinion regarding the merits of the Court's decision or its ultimate fate on further appeal.

Respectfully submitted,



Michael L. Kurtz, Esq.

Kurt J. Boehm, Esq.

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**COUNSEL FOR KENTUCKY INDUSTRIAL
UTILITY CUSTOMERS, INC.**

August 23 , 2007