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August 29, 2007

VIA FACSIMILE AND MAIL

Public Service Commission  
Ms. Beth O'Donnell  
Executive Director  
211 Sower Blvd.  
P.O. Box 615  
Frankfort, KY 40602

RECEIVED

AUG 30 2007

PUBLIC SERVICE  
COMMISSION

RE: CASE NO. 2007-003048

Dear Ms. O'Donnell:

Enclosed please find an original Citipower's Memorandum of Law Regarding Lawfulness of Relief and ten copies as it relates to the above-mentioned matter.

Should you have any questions regarding this matter, please do not hesitate to contact me.

Sincerely,



Robert L. Brown III

RLB/ca

Enclosures

RECEIVED

AUG 30 2007

PUBLIC SERVICE  
COMMISSION

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PURCHASED GAS ADJUSTMENT OF  
CITIPOWER

CASE NO. 2007-00348

CITIPOWER'S MEMORANDUM OF LAW REGARDING  
LAWFULNESS OF RELIEF

On August 21, 2007, the Public Service Commission ("PSC") in the above-styled action issued a *sua sponte* Order requiring Citipower, LLC ("Citipower") to file a responsive Memorandum of Law regarding the lawfulness of the relief it seeks pursuant to that portion of its tariff known as the "Purchased Gas Adjustment Clause" in light of the August 1, 2007 Opinion and Order entered by the Franklin Circuit Court, Division I in the matter of *Commonwealth of Kentucky, ex rel. Gregory D. Stumbo, Attorney General v. Public Service Commission and Union Light, Heat & Power Co.*, Civil Action Number 06-CI-269. Citipower, by and through its counsel, states as follows:

RELIEF SOUGHT

Citipower respectfully requests the PSC to ignore the plea of the Office of Rate Intervention of the Attorney General of the Commonwealth of Kentucky ("Attorney General") that the PSC is "prohibited from providing the relief Citipower seeks".

INTRODUCTION

The PSC has requested briefs that address the legality of the relief requested by Citipower under 807 KAR 5:056 (eff. 1982), the PSC's fuel adjustment clause ("FAC") regulation. The Attorney General has intervened and requested stoppage to the

Citipower rate adjustment, along with stoppage in other similarly structured rates of other utilities, in light of comments contained in a non-final, unpublished trial court opinion. Citipower does not dispute the authority of the Attorney General to intervene, nor does it dispute the Attorney General's discretion in determining which matters to review and intervene into.

The Franklin Circuit Court in *Commonwealth ex rel Stumbo v. Public Service Comm'n*, No. 06-CI-269 (Fr. Cir. Ct., August 1, 2007) rejected a surcharge for recovery of gas pipeline replacement costs, ("Franklin Ruling"). The Franklin Ruling does not adjudicate any rate case regarding Citipower nor does it adjudicate a rate mechanism specific to Citipower.

Among its peers and credit-ranking agencies the PSC is among the nation's most well received state regulatory agencies. The PSC enjoys a reputation of stability, consistency and reasonableness. This reputation has been developed over decades of operations, with numerous adjustments through legislative changes and court decisions. FAC type decisions have been in effect for at least 20 years under PSC review and provide rate stability for both Kentucky citizens and utilities, and provide stable gas supplies for small utilities. FAC type decisions also assist in lowering rates for customers due to the inherent decrease in expenses as opposed to full rate cases.

Citipower purchased the natural gas utility assets of McCreary Natural Gas System, Inc., a farm tap system, on September 26, 1996. Citipower came under the Kentucky Public Service Commission's jurisdiction in November 1997, a year after the purchase. Citipower currently services 390 accounts in one of Kentucky's least populated counties in Kentucky (17,080 residents and a civilian labor force of 6,310 as of the 2000 census), and provides gas utility to a county where the per capita income is listed at \$9,896, making it one of the poorest counties in the United States.

## CITIPOWER POSITION STATEMENTS

### **I. THE DEMAND FOR PROHIBITION IS INAPPROPRIATE AND NOT RECOGNIZED UNDER KENTUCKY JURISPRUDENCE RULES OF LAW.**

As the Franklin Ruling is now under appeal to the Kentucky Court of Appeals it has no force and effect of binding law due to the “Stay of Proceedings” doctrine. In addition, even if the Franklin Ruling were not under an appeal, said ruling is inapplicable to Citipower, (in essence it is *dicta* relative to Citipower), and not binding authority as recognized by Kentucky jurisprudence and the policy of *stare decisis*.

### **II. THE FUEL ADJUSTMENT CLAUSE IS LAWFUL**

Statutory authority for the PSC to allow and regulate FAC rates for Citipower can be found in KRS § 446.080 and KRS § 278.030(1). It is unambiguous that the PSC regulations are to be construed liberally to effectuate the intent of the legislature pursuant to KRS § 446.080. KRS § 278.030(1) requires rates to be fair, just, and reasonable. Furthermore, 807 KAR 5:056, a specific procedure established by the Commission to set a rate, exists pursuant to statutory authority. In addition, applicable and binding judicial precedent exists supporting the PSC’s ability to set variable rates. In *National-Southwire Aluminum Co. v. Big Rivers Electric Corp.*,<sup>1</sup> the Court upheld as lawful separate variable rates for smelters based on the fluctuating price of world aluminum, an extraordinary basis for setting a utility rate, explaining at length why the Commission is, and must be, accorded discretion in finding ways to meet the “just and reasonable” statutory standard.

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<sup>1</sup> 785 S.W.2d 503 (Ky. App. 1990).

### III. PUBLIC POLICY DICTATES DENIAL OF THE ATTORNEY GENERAL'S POSITION

Citipower is governed by the PSC through proven methods of regulation and the ratepayers and residents of Kentucky are the ultimate beneficiaries of such a relationship. Disallowance of the FAC would result in disruption of operations, unnecessary increased costs, increased risk of gas supply shortages, and diminishment of PSC authority; all to the detriment of the PSC, Citipower, and Citipower customers. No benefit is derived from the expansion of the Franklin Rule to Citipower's operations and public policy is best served by a denial of the Attorney General's position.

### CONCLUSION

The unpublished opinion of the Franklin Circuit Court is not binding precedent with regard to Citipower pursuant to jurisprudence doctrines of *dicta* and *stare decisis*. The actions of Citipower and the PSC with respect to the FAC in question are valid, binding and products of appropriate legislative and judicial authority. Furthermore, the relief requested by the Attorney General would be detrimental to public policy. Accordingly, the PSC is not required to apply the decision of the Franklin Circuit Court as binding precedent and should ignore the plea of the Attorney General that the PSC is "prohibited from providing the relief Citipower seeks".

Respectfully Submitted,



Law Offices of  
Robert L. Brown III  
1005 South Main Street  
Corbin, Kentucky 40701  
Telephone: (606) 528-3073  
*Attorney for Citipower, LLC*

**CERTIFICATE OF SERVICE AND FILING**

Counsel certifies that the foregoing was served by facsimile and the original and ten photocopies were mailed to:

Beth O'Donnell  
Executive Director  
Public Service Commission  
211 Sower Boulevard  
Frankfort, Kentucky 40601;

Counsel further states that he forwarded a true and accurate copy of the foregoing by mailing via First Class U.S. Mail, postage pre-paid to the Attorney General, Office of Rate Intervention, Attention Dennis Howard, 1024 Capital Center Drive, 200, Frankfort, Kentucky 40601, and via electronic mail to the following e-mail address:

[dennis.howard@ag.ky.gov](mailto:dennis.howard@ag.ky.gov)



Robert L. Brown III