



EAST KENTUCKY POWER COOPERATIVE

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**PUBLIC SERVICE  
COMMISSION**

January 5, 2009

HAND DELIVERED

Mr. Jeff Derouen  
Executive Director  
Public Service Commission  
211 Sower Boulevard  
Frankfort, Kentucky 40602

Re: PSC Case No. 2008-00409

Dear Mr. Derouen:

Please find enclosed for filing with the Commission in the above-referenced case an original and ten copies of the Reply of East Kentucky Power Cooperative, Inc. ("EKPC") to Comments of Kentucky Industrial Utility Customers ("KIUC").

Very truly yours,

A handwritten signature in black ink, appearing to read "David A. Smart".

David A. Smart  
General Counsel

Enclosures

Cc: Parties of Record

**COMMONWEALTH OF KENTUCKY**  
**BEFORE THE PUBLIC SERVICE COMMISSION**

**In the Matter of:**

<b>GENERAL ADJUSTMENT OF ELECTRIC RATES</b>	)	<b>PSC CASE NO.</b>
<b>OF EAST KENTUCKY POWER</b>	)	<b>2008-00409</b>
<b>COOPERATIVE, INC.</b>	)	

**REPLY OF EAST KENTUCKY POWER COOPERATIVE, INC. (“EKPC”)**  
**TO COMMENTS OF KENTUCKY INDUSTRIAL UTILITY**  
**CUSTOMERS (“KIUC”)**

In its comments, KIUC asserts that EKPC’s alternative motion seeking the creation of a regulatory asset, or, to shorten the statutory suspension period to allow EKPC to place all or a portion of its proposed rates into effect on April 1, 2009, subject to refund, should be denied because it fails to meet the legal burden of proof, and because it fails to establish a material impairment or damage of EKPC’s credit or operations. While EKPC strongly maintains its entitlement under the statutory scheme to all of the relief requested in its motion, it suggests that such decision should now be deferred until the Commission decides all issues in the underlying general rate case.

**LEGAL STANDARD/BURDEN OF PROOF**

In the first paragraph of its comments, KIUC states that “. . . [EKPC’s] request for an accounting order and the alternative of interim rate relief are functionally equivalent and are both subject to the same legal standard and burden of proof. . .”

Elsewhere, on page 2, KIUC states “[t]he extraordinary remedy of raising rates on consumers before a hearing should be applied only if the utility has met its burden of proof with clear and convincing evidence” (emphasis added).

There are substantial flaws with both of these arguments. First, the request to establish a regulatory asset is brought by EKPC pursuant to KRS 278.220. The Commission has previously interpreted that statutory section to require utilities to obtain its approval for accounting adjustments before establishing any expense as a new regulatory asset.

Second, the alternative request to shorten the statutory suspension period to allow rates to go into effect April 1, 2009, subject to refund, is brought under the authority of KRS 278.190(2). These are two separate and distinct statutes providing for two separate and distinct types of relief. It is simply incorrect to lump them together.

Neither of these statutory sections provides a certain legal standard by which requests made under them are to be measured. Due to the “extraordinary” nature of the relief requested, KIUC would unilaterally impose a “clear and convincing” evidence standard. There is nothing in either statute to support this position, nor does KIUC cite any Commission or other authority for it. In the absence of a clear statement of legislative intent as to the legal standard to be applied, the normal “preponderance of the evidence” standard found in all administrative proceedings should be applied rather than the “clear and convincing evidence” standard asserted by KIUC.

Moreover, there are adequate safeguards built into both KRS 278.190(2), relating to statutory suspension, and the mechanism by which a regulatory asset is created and later adjudged which are intended to prevent harm to ratepayers. These take the forms of customer refunds in the statutory suspension context; and, in the case of the creation of a regulatory asset, the denial of the accruals from ultimately being placed into rates. With such safeguards at the Commission’s disposal, any permanent economic prejudice which might be suffered by ratepayers should be of nominal concern.

**MATERIAL IMPAIRMENT OR DAMAGE**  
**OF CREDIT OR OPERATIONS**

The motion and supporting testimony of Mr. Seelye are replete with assertions that EKPC's overall financial situation is placed at much greater risk if the relief requested is not granted. See, paragraph 2 of EKPC's motion: "It is critical for EKPC to address this situation..."; also, "... if [these expenses are] not recovered, [it] could jeopardize EKPC's ability to earn sufficient net margins in 2009 to meet its loan covenants..."; see also, paragraph 9: "Due to EKPC's urgent need . . . for dealing with its potential shortfall in net margins . . . EKPC requests expedited review . . ."; see also, testimony of William Steven Seelye, page 4, lines 5-12: "Because of its difficult financial situation, EKPC can ill afford not to recover these costs . . ."

It is true that if the Commission ultimately fails to grant the relief requested, it is unlikely that EKPC would be placed in an immediate default situation with either its loan covenants under its RUS and CFC and/or private credit facility financing. However, the statutory scheme does not contemplate that either an imminent or actual default be presented for relief to be granted. Rather, what must be shown is that EKPC's credit or operations will be materially impaired or damaged. EKPC has met this requirement. Specifically, EKPC has shown that it would be materially impaired and damaged by the inability to ever recover through rates the depreciation expenses, interest and TIER, fixed operation and maintenance expenses, property taxes, and property insurance expenses associated with the first two months of commercial operation of Spurlock 4. During the two months between the commercial operation of Spurlock 4 and the effective date of the new rates, assuming the full six-month suspension period, EKPC will incur the following non-environmental costs (Response 4, Page 2 of 2 of East Kentucky Power Cooperative, Inc. to Commission Staff's Information Requests from Informal Conference Held on November 13, 2008):

Depreciation Expenses	\$ 1,835,563
Interest and TIER requirements	\$ 4,575,275
Fixed O&M Expenses	\$ 919,733
Tax Expenses	\$ 388,793
Property Insurance Expense	\$ <u>62,809</u>
Total	\$ <u>7,782,173</u>

The inability to recover these costs through rates will result in a further deterioration in EKPC's already low members' equity percentage which is projected to be only 6.8% during April and May 2009. (Response 2 of East Kentucky Power Cooperative, Inc. to Commission Staff's Information Requests from Informal Conference Held on November 13, 2008). EKPC should, at a minimum, be allowed to establish a regulatory asset to provide recovery of these costs.

There can be no question that the types of costs which EKPC seeks to recover in its motion as a result of the Spurlock 4 Unit coming on line are properly recoverable. The real dispute lies in whether they are recoverable under either of the methods requested by EKPC. To hold that they are not will result in those otherwise legally recoverable costs being lost forever to the substantial detriment of EKPC.

**EKPC HAS SOUGHT RECOVERY OF ITS SPURLOCK 4  
ENVIRONMENTAL COSTS THROUGH THE  
ENVIRONMENTAL SURCHARGE**

In its Comments, KIUC incorrectly asserts that EKPC has not sought recovery of its Spurlock 4 environmental investment through the environmental surcharge statute. KRS 278.183. In Case Number 2008-00115, *In the Matter of: The Application of East Kentucky Power Cooperative, Inc. for Approval of an Amendment to its Environmental Compliance Plan and Environmental Surcharge*, issued September 29, 2008, the Commission adopted the

Settlement Agreement entered on August 6, 2008, by and between EKPC and KIUC. Part 4 of the Settlement Agreement provided that the changes to EKPC's Environmental Compliance Plan and Environmental Surcharge would be effective for service rendered on and after November 1, 2008. EKPC began recovering a return on the Construction Work in Progress (CWIP) related to the environmental assets of Spurlock 4 on November 1, 2008.

### CONCLUSION

In light of the Commission's Order in Case Number 2008-00436, rendered on December 23, 2008, approving the establishment of a regulatory asset related to purchased power replacement costs for unscheduled outages at its power plants, any urgency or exigency that might have existed at the time this request was made has now been somewhat mitigated, such that EKPC is prepared for the Commission to defer its ruling on this motion until it issues its Order in the underlying general rate case. EKPC is appreciative that the Commission afforded EKPC's request in Case No. 2008-00436 expedited treatment; and considering the Commission's heavy caseload does not wish to maintain that this motion must also be decided with the same urgency.

**WHEREFORE, East Kentucky Power Cooperative, Inc.** hereby reasserts its request that the Commission issue an order granting the requested approval for accounting practices to establish a regulatory asset, or, in the alternative, shortening the suspension period in the case to allow EKPC to place all or a portion of its proposed rates into effect on April 1, 2009, subject to refund if the amount exceeds the permanent rate increase granted to EKPC in this case. However, EKPC now suggests that such decision should be deferred until the Commission decides all issues in the general rate case.

Respectfully submitted,

  
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David A. Smart

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing was served by U.S. Mail, postage prepaid, on January 5, 2009 to the following:

Hon. Michael L. Kurtz  
Attorney at Law  
Boehm, Kurtz & Lowry  
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Counsel for East Kentucky Power Cooperative, Inc.