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TREVOR L. EARL

July 29, 2010

RECEIVED

JUL 30 2010

PUBLIC SERVICE
COMMISSION

Mr. Jeff Derouen
Executive Director
Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, Kentucky 40602-0615

RE: Case No. 2010-00146

Dear Mr. Derouen:

Enclosed for filing is an original and 11 copies of the MXenergy's Responses to AARP's First Set of Discovery Requests in the above-referenced action. Please return a file-stamped copy in the enclosed envelope. Please contact me should you have any questions or concerns pertaining to the same.

Sincerely,



Trevor L. Earl
Counsel for Intervenor,
MXenergy

TLE:kac
Enclosures

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE
COMMISSION

In the Matter of:

AN INVESTIGATION OF NATURAL GAS)
RETAIL COMPETITION PROGRAMS)

CASE NO. 2010-00146

**MXENERGY'S RESPONSES TO AARP'S
FIRST SET OF DISCOVERY REQUESTS**

Pursuant to the Scheduling Order adopted by the Commission in this case, Intervenor MXenergy submits the following responses to the AARP's requests.

Request for Information 1

To the extent that the testimony filed on behalf of your company includes calculations of savings that any of your members have provided to customers over the costs they would otherwise have paid under regulated utility gas service, please provide all workpapers of each such calculation or estimate, in executable spreadsheet form, with identification of all relevant source material.

Response: MXenergy did not file any testimony in this action. Therefore, it has no documents or other information responsive to this request.

Request for Information 2

To the extent that the testimony filed on behalf of your company asserts that terms and conditions for retail gas choice in Kentucky are more onerous and fees and charges are higher than in other jurisdictions, please provide any analysis or other evidence that demonstrates that the Kentucky terms, conditions, fees or charges are: (a) not cost-based; (b) unjust; or (c) unreasonable.

Response: MXenergy did not file any testimony in this action. Therefore, it has no documents or other information responsive to this request.

Request for Information 3

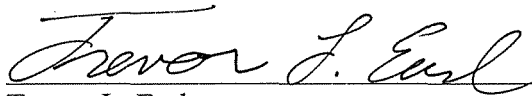
Is it the position of your company that supervision by the Kentucky Public Service Commission of the competitiveness of the retail supply market in Kentucky is: (a) within the jurisdiction of the Commission; and (b) provides a state action protection against application of anti-trust laws to that market? Please provide your reasoning and relevant citations to support your position on these questions.

Response: 3(a) MXenergy objects to this request to the extent it seeks a legal opinion or judicial admission. Subject to this objection and reserving its right to assert any arguments concerning jurisdiction of the Commission in the future, MXenergy states that the Commission has taken a broad view of its jurisdiction under KRS Chapter 278. Without seeking to define the “supervision of the competitiveness of retail [gas] supply market in Kentucky,” MXenergy states that KRS 278.010(3)(b) includes in the definition of “utility” any person who produces, manufactures, stores, distributes, sells or furnishes natural gas. KRS 278.040 provides the Commission with jurisdiction to regulate the utilities and also to regulate rates and services of utilities. As such, certain aspects of the retail gas supply market are regulated by the Commission. However, the Commission appears to have the discretion to decline to exert jurisdiction over some aspects of the retail gas supply market. *See, e.g.*, KRS 278.010(21).

3(b). MXenergy is unable to take a position on the question as posed because the state action immunity under *Parker v. Brown*, 317 U.S. 341 (1943), and succeeding cases, is fact specific to the circumstances of each case, and we do not now know the shape of the potential regulatory scheme. In order to be able take a position on the applicability of state action immunity from antitrust scrutiny, MXenergy or anyone else, including a court, would have to apply the two-part standard in

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) – (1) the challenged restraint must be “one clearly articulated and affirmatively expressed as state policy,” and (2) “the policy must be ‘actively supervised’ by the state itself.” MXenergy understands that regulation by the Kentucky Public Service Commission may, if it meets these criteria, bring activity by participants in the regulated market under that supervision within the state action doctrine. *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 63, 65 (1985).

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served via U.S. Mail, sufficient first class postage prepaid on this 29th day of July, 2010 to:

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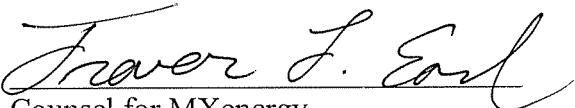
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