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August 4, 2011

VIA HAND DELIVERY

Jeff DeRouen
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, KY 40601

RE: ***Application of Kentucky Utilities Company for Certificates of Public Convenience and Necessity and Approval of its 2011 Compliance Plan for Recovery by Environmental Surcharge***
Case No. 2011-00161

Application of Louisville Gas and Electric Company for Certificates of Public Convenience and Necessity and Approval of its 2011 Compliance Plan for Recovery by Environmental Surcharge
Case No. 2011-00162

Dear Mr. DeRouen:

Enclosed please find and accept for filing two originals and fifteen copies each of Kentucky Utilities Company's and Louisville Gas and Electric Company's Joint Response to the Motion to Compel Discovery of the Kentucky Industrial Utility Customers, Inc. in the above-referenced matters.

Please confirm your receipt of these filings by placing the stamp of your Office with the date received on the enclosed additional copies and return them to me via our office courier.

Should you have any questions please contact me at your convenience.

Yours very truly,

Kendrick R. Riggs

KRR:ec
Enclosures
cc: Parties of Record
400001.139563/749351.1

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF KENTUCKY UTILITIES COMPANY FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND APPROVAL OF ITS 2011 COMPLIANCE PLAN FOR RECOVERY BY ENVIRONMENTAL SURCHARGE	))))))	**CASE NO. 2011-00161**

In the Matter of:

APPLICATION OF LOUISVILLE GAS AND ELECTRIC COMPANY FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND APPROVAL OF ITS 2011 COMPLIANCE PLAN FOR RECOVERY BY ENVIRONMENTAL SURCHARGE	))))))	**CASE NO. 2011-00162**

JOINT RESPONSE OF KENTUCKY UTILITIES COMPANY AND LOUISVILLE GAS AND ELECTRIC COMPANY TO THE MOTION TO COMPEL DISCOVERY OF THE KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC.

Kentucky Utilities Company ("KU") and Louisville Gas and Electric Company ("LG&E") (collectively, the "Companies") respectfully request that the Commission deny the Motion to Compel Discovery of the Kentucky Industrial Utility Customers, Inc. ("KIUC") ("Motion"). KIUC offers no justifiable reason for requiring the Companies to disclose speculative financial projections as part of an environmental surcharge proceeding in which no forecasted expenses have been sought by the Companies.

KIUC's position here is reminiscent of its failed arguments in *KIUC v. Kentucky Utilities Co.*, 983 S.W.2d 493 (Ky. 1998), in which the Kentucky Supreme Court held that evidence of an electric utility's "overall financial condition" is irrelevant to an environmental surcharge case. In *KIUC,* KIUC attempted to expand the scope of environmental surcharge proceedings beyond the

specific issues framed by KRS 278.183 by arguing that the utility's entire financial condition must be considered by the Commission before it approves a surcharge for qualified environmental costs. The Supreme Court rejected KIUC's argument, explaining that expanding the scope of environmental surcharge proceedings to include matters beyond those contemplated by KRS 278.183 "would frustrate the legislative action in authorizing a utility surcharge provision." *Id.* at 498. Once again, KIUC attempts to clutter the record with extraneous information concerning the Companies' future financial projections, and the future financing capacity of PPL. Such information would expand the proceeding far beyond what the General Assembly intended and contrary to the requirements of KRS 278.183 and the *KIUC* decision.

The Commission should deny the Motion because (1) controlling precedent from the Kentucky Supreme Court and the Commission's own rulings establishes that financial projections are not relevant when a utility is not seeking to recover forecasted costs and (2) the requested information is not relevant to an environmental surcharge proceeding, it is not discoverable as a matter of law.

I. Speculative financial projections are not relevant in proceedings based upon actual and historical costs.

The Companies are not seeking, nor could they seek, to recover the forecasted costs of the projects contained in their respective environmental compliance plans. KRS 278.183(2) prohibits recovery pursuant to the surcharge until *after* actual costs have been incurred, and provides that the costs will be trued-up by the Commission during statutorily prescribed review proceedings.[1] Despite this clarity, KIUC has submitted data requests that attempt to require the Companies to provide various financial projections, as well as information supporting those

[1] KRS 278.183(3).

projections.[2] KIUC has even requested information regarding the short-term debt available to PPL, the Companies' parent company, and PPL's financing requirements for the next five years.[3] None of this information is at all relevant to the proceeding at hand.[4]

KIUC's Motion ignores Commission precedent (as well as other legal precedent, for it cites none) regarding the discoverability of financial projections where the utility is not seeking to recover forecasted costs. In PSC Case No. 90-158,[5] an LG&E rate case, the Commission made its position on this issue clear. The Attorney General had submitted data requests seeking budgetary information for historic, current, and future time periods. During the September 6, 1990 rate case hearing, the Commission denied the Attorney General's motion to compel production of future budget information because LG&E "has used an historic test year; not a forecast test year. Consequently, LG&E's budgets are not relevant to this case."[6] The Commission likewise noted that the projections "would include significantly more than just the known and measurable adjustments ... ."[7]

In response to the Attorney General's subsequent Motion to Reconsider,[8] the Commission affirmed its common-sense ruling:

> As the Commission recognized in its prior ruling, budgets will vary for a myriad of reasons, not the least of which is the validity of the budgeting process itself. Inquiries into LG&E's budgeting process, and the basis for projecting revenues and expenses, are all

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[2] *See* Nos. 1-6, 1-7 and 1-8 to KU and Nos. 1-7, 1-8 and 1-9 to LG&E.

[3] *See* Nos. 1-11 and 1-14 to KU and Nos. 1-12 and 1-15 to LG&E.

[4] The irrelevance of the requests for future financing capacity to this proceeding is highlighted by the fact that KRS 278.300 specifically requires the Companies to initiate a separate proceeding to issue any "any securities or evidences of indebtedness."

[5] *In the Matter of: Adjustment of Gas and Electric Rates of Louisville Gas and Electric Company* (Case No. 90-158) Order, September 21, 1990 at 1.

[6] *Id.* at 2.

[7] *Id.*

[8] *Id.* at 1-2.

> highly complex areas that bear no relevancy to the task in this rate case—the normalization of an historic test year and the analysis of known and measurable pro forma adjustments. Therefore, the Commission will affirm its decision to deny production of the budget documents.[9]

The Commission's order is clear, its reasoning impeccable: budgetary information and financial projections are not only irrelevant to proceedings involving actual costs or historical costs, but would inappropriately introduce into the record information of questionable validity. The budgeting process itself is inherently speculative and actual results will vary for a "myriad" of reasons.[10]

The issue of recoverable costs under the environmental surcharge mechanism is directly analogous to a rate proceeding based on an historical test year where the Companies' financial projections are irrelevant to the actual and historical costs for which the Companies had proposed adjustments. The financial projections were correctly deemed irrelevant by the Commission in the 1990 rate case and the very same factors that compelled that decision likewise support denial of KIUC's Motion in this proceeding.

II. The financial projections are irrelevant and therefore not discoverable under Kentucky Rules of Civil Procedure.

While ignoring the Commission's previous order regarding the relevance of speculative financial projections, KIUC summarily argues that the financial projections fall within the

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[9] *Id.* at 3.

[10] In a variety of contexts, the Commission has refused to consider speculative information because it has no evidentiary value. *See, e.g., In the Matter of: Application for Approval of the Transfer of Control of Kentucky-American Water Company to RKE Aktiengesellschaft and Thames Water Aqua Holdings GMBH* (Case No. 2002-00018) Order, May 30, 2002 at 17 (stating that an actual mechanism to track merger savings, rather than speculation as to future events, would be used to calculate those savings); *In the Matter of: An Investigation into the Reasonableness of the Earnings of Brandenburg Telephone Company, Inc.* (Case No. 92-563) Order, March 25, 1994 at 5 (refusing to consider additions to rate base for future construction "because the timing and cost of the proposed headquarters are both speculative").

definition of "relevant" as the term is used in Kentucky Rule of Civil Procedure 26.02(1).[11] KIUC does not explain *why* the projections are relevant; it merely claims that if it obtains them, it *might* learn something that *will* be relevant: "[i]nformation used to develop financial projections of the Companies' regulated rate base growth and future capital expenditures ... may lead to the discovery of additional information regarding the costs associated with the Companies' 2011 Environmental Compliance Plan."[12] KIUC makes no serious effort to buttress its contention that something relevant to this case may turn up if it is permitted to obtain information that, pursuant to Commission precedent, is *wholly irrelevant in itself.* It simply claims it has now demonstrated that the requested discovery is relevant and will lead to the discovery of admissible evidence.[13] KIUC is in error.

Because the speculative financial projections sought by KIUC are irrelevant to the matter to be decided in this proceeding, the general law of discovery in Kentucky further supports the Commission's prior order denying discovery of financial projections as discussed above. "It has been a long-recognized principle that discovery must be kept within reasonable bounds and restricted to questions having substantial and material relevancy." *Humana, Inc. v. Fairchild*, 603 S.W.2d 918, 922 (Ky. App. 1980). *See also Carpenter v. Wells*, 358 S.W.2d 524, 526 (Ky. 1962) ("It is the duty of the court to keep the inquiry within reasonable bounds and to restrict questions to those having substantial relevancy to a sensible investigation.") (quoting, with

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[11] The suggestion contained in the penultimate paragraph of KIUC's Motion that the Companies' objections to the requests are somehow improper is also without merit. *See* Motion, p. 4. While it is, of course, for the Commission to decide discovery disputes that are brought before it by motion, paragraph 7 of the Commission's June 28, 2011 orders in both cases expressly provides for the right to make objections: "Any objections or motions relating to discovery or procedural dates shall be filed upon four business days' notice or the filing party shall explain, in writing, why such notice was not possible." Similarly, the Kentucky Rules of Civil Procedure expressly provide for the statement of objections "in lieu of an answer" when responding to discovery requests. Kentucky Rule of Civil Procedure 23.01(2).

[12] Motion, p. 3.

[13] *Id.*

approval, *Foremost Promotions v. Pabst Brewing Co.*, 15 F.R.D. 128 (N.D. Ill. 1953)); *Proctor & Gamble Distributing Co. v. Vasseur*, 275 S.W.2d 941, 944 (Ky. 1955) (noting that "discovery, like all matters of procedure, has ultimate and necessary boundaries" and denying discovery where matters inquired of "have no relevancy to the merits").

To the extent that KIUC desires information that actually *will* furnish "information regarding the costs associated with the Companies' 2011 Environmental Compliance Plan," such information is already part of the record in this proceeding. In responding to the Attorney's General First Data Requests, the Companies produced over *eighteen thousand (18,000) documents* involving "any and all documents, emails, correspondence, memorandum, reports, letters, studies, analyses, conclusions, or opinions that relate to the preparation of the application."[14] Thus, all responsive and non-privileged materials regarding the applications and its contents, including the costs associated with the same, are already part of the record in these proceedings.

Notwithstanding the already extensive records in these cases, because additional information regarding the Companies' projected capital expenditures and availability of short term debt to PPL Corporation's short-term debt will be contained in PPL Corporation's Form 10-Q[15] that will be publicly filed with the SEC on or about August 5, the Companies - without waiving their objections to the data requests[16] - will supplement their responses to KIUC's data request with the information from the Form 10-Q filing. Other information sought by KIUC is,

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[14] *See* AG's Initial Requests to KU Nos. 1-2 and 1-5 and the AG's Initial Requests to LG&E Nos. 1-2 and 1-6 and the Companies' responses to same.

[15] Form 10-Q is a Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934. This will be the first Form 10-Q filed by PPL Corporation to include information for LG&E and KU.

[16] *See* Nos. 1-6, 1-7, 1-11 to KU and Nos. 1-7, 1-8 and 1-12 to LG&E.

however, speculative and irrelevant, as well as confidential, and the Companies urge the Commission to uphold its previous precedent and deny KIUC's motion to compel production.

III. Compelling production of the information will harm the Companies.

The financial projections KIUC seeks to discover are not only irrelevant; they are highly confidential documents that, if revealed to an intervenor such as KIUC, even under a confidentiality agreement, [17] would cause irreparable adverse consequences to the Companies in this and future proceedings. Among the documents responsive to the data requests are a five-year plan the Companies have created that contains a range of financial projections regarding many components of the Companies' business. There is a corresponding ten-year plan, as well. Accompanying the plans are reports that identify financial assumptions that include the Companies' best guesses as to future regulatory disposition of rate applications. The sensitivity of these documents, as well as the real possibility that KIUC would unfairly use them as leverage in future, unrelated Commission disputes,[18] cannot be understated.

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[17] Because one principal source of the harm that would result from disclosure of the requested, confidential information is KIUC's own knowledge of and future use of the information, a confidentiality agreement with KIUC would not effectively address the Companies' objection based upon confidentiality. Additionally, a confidentiality agreement without a significant liquidated damage clause and corresponding bond or supporting collateral would be insufficient to protect the Companies from the substantial liability that they could incur pursuant to the Securities Exchange Act of 1934 if there were an inadvertent disclosure of the confidential information *by any party*. Finally, while a confidentiality agreement may be an appropriate tool to help balance the competing interests of parties with respect to confidential information *that is also relevant*, the potential availability of such an agreement does not justify the discovery of irrelevant, confidential information. *See, e.g.,* 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2043 (3d ed. 2011) ("If it is established that confidential information is being sought, the burden is on the party seeking discovery to establish that the information is sufficiently relevant and necessary to his case to outweigh the harm disclosure would cause to the person from whom he is seeking the information.").

[18] In *Carpenter v. Wells*, the Kentucky Supreme Court specifically held that discovery requests made to gain information to be used in another proceeding, or "a collateral purpose," are "condemned" and should be denied. *Carpenter v. Wells*, 358 S.W.2d 524, 527 (Ky. 1962); Philipps, 6 *Kentucky Practice*, § 26.02, p. 603 (West 2005) ("Discovery should be denied when the purpose of the request is to gather information for use in proceedings other that the pending suit[.]") (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 353 n.17 (1978) ("In deciding whether a request comes within the discovery rules, a court is not required to blind itself to the purpose for which a party seeks information. Thus, when the purpose of a discovery request is to gather information for use in proceedings other than the pending suit, discovery properly is denied.").

As noted in the Commission's order in Case No. 90-158, budgetary information will differ from actual results for a myriad of reasons as financial projections are, by definition, speculative. If KIUC or any other intervenor were permitted to review this information, it would be able to determine when the Companies anticipate filing rate cases, their expected revenues and other highly confidential information. The effect of permitting intervenors to review this information would mean that such parties would subsequently evaluate the Companies' ensuing decisions and actual revenues in comparison to the projections contained in the documents the Companies have prepared and argue that the Commission should do the same in any rate filings. To quote an oft-cited but accurate adage, one cannot un-ring a bell. It is patently unfair to compel production of these irrelevant documents, in light of the substantial harm that will inure to the Companies and the taint the information would create in future cases. Furthermore, such mandated production would almost certainly result in unreasonable, unintended consequences: quite simply, if the Commission departs from its prior orders and finds that intervenors can require the Companies to disclose their financial projections, the Companies and other utilities will have a perverse incentive to minimize their robust projection processes.

There is no need to create such an incentive. As demonstrated in the previous sections of this Response, the information sought is not relevant under Commission law or the Civil Rules. Moreover, it is specifically not relevant to a KRS 278.183 proceeding.

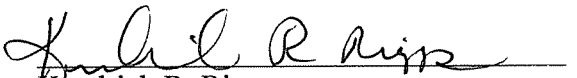
Conclusion

As demonstrated by the prior order of the Commission regarding the relevance of speculative financial projections and the prior holding of the Kentucky Supreme Court regarding the inquiry into the overall financial condition of an utility in environmental surcharge proceedings, the budget projections sought by KIUC are, as a matter of law, irrelevant to this proceeding. KIUC is not entitled to clutter the record with information that has no bearing on the

reasonableness of the surcharge pursuant to the provisions of KRS 278.183. Because the production of the requested financial projections is irrelevant, and because its production would necessarily harm the Companies, KIUC's Motion should be denied.

Dated: August 4, 2011

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Joint Response was served via U.S. mail, first-class, postage prepaid, this 4th day of August 2011 upon the following persons:

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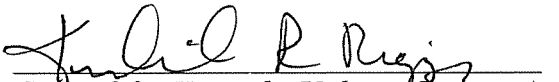

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