COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF KENTUCKY POWER COMPANY FOR APPROVAL OF ITS 2011 ENVIRONMENTAL COMPLIANCE PLAN, FOR APPROVAL OF ITS AMENDED ENVIRONMENTAL COST RECOVERY SURCHARGE TARIFF, AND FOR THE GRANT OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR THE CONSTRUCTION AND ACQUISITION OF RELATED FACILITIES	)	CASE NO. 2011-00401

ATTORNEY GENERAL'S MOTION TO ALTER OR AMEND COMMISSION'S TWO (2) ORDERS DATED MARCH 1, 2012

Comes now the intervenor, the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention, and hereby moves that the Commission alter or amend its two orders dated March 1, 2012. In support of this motion, the Attorney General states as follows:

A. Order Granting Extension of Time for Single Party

On or about January 6, 2012, Tom Vierheller, Beverly May and Sierra Club [hereinafter: "Sierra Club"] moved to intervene in the above-styled matter asserting their interest in doing so was ". . . . to help to ensure that any Certificates of Public Convenience and Necessity are approved only if they represent the best option to satisfy their members' interest in low cost energy service." [Sierra Club's January 6 Motion to Intervene, p. 1]. Moreover, the Sierra Club also asserted that its intervention would not unduly complicate or disrupt

the proceedings (Id. at pp. 5, 8). Additionally, the Sierra Club asserted at length that the Attorney General was incapable of representing the Sierra Club's interests (Id. at pp. 9-12). Four days after filing its motion to intervene, the Sierra Club propounded its initial data requests, even before the Commission granted its motion to intervene. The Sierra Club also filed supplemental data requests, and numerous other pleadings including request to admit San Francisco counsel on a *pro hac vice* basis. The record in this matter thus irrefutably establishes that the Sierra Club has been able to participate at every stage of these proceedings and has not been disadvantaged in any respect.

In its February 24, 2012 motion for an extension of time to file its testimony, the Sierra Club acknowledged that Petitioner Kentucky Power Company has provided all of the information the Sierra Club needs to file its testimony, but that it would need more time to do so. Unfortunately, nowhere in its pleading did the Sierra Club cite to the need of any other parties in this case, nor to how its motion would affect the rights of the other parties. Instead, the Sierra Club requested a *unilateral* extension of time without making any accommodations in the remaining procedural schedule for any other parties.[1] The Commission's Order of March 1 adopts the Sierra Club's position *in toto*, and grants an extension of ten (10) additional days to file its testimony despite the fact that six (6) days ago the Sierra Club acknowledges it had all of the

[1] While the Attorney General did not object to the Sierra Club's motion, the Attorney General reasonably believed that any PSC-ordered extension would be equitable and afford other intervenors the same schedule.

information it needed. The Commission's Order did not grant a similar extension to the other two intervenors in this matter, the Attorney General and Kentucky Industrial Utility Customers ["KIUC"]. As a result of the Commission's Order, the Sierra Club has been given the unprecedented, and grossly inequitable ability to file its testimony with the advantage of having reviewed, and addressing the other intervenors' testimony in this matter. Such a result puts the Sierra Club in a preferential position and gives the organization an unequal advantage, and would further set a very poor precedent which would invite judicial challenge.

Moreover, because the Sierra Club maintains that it has interests that differ from those of the Attorney General, the Attorney General will be deprived of fundamental due process by forcing him to expose his case in chief prior to another intervenor - a procedural misstep that the PSC should not allow. This prejudicial effect on the Attorney General must be cured by affording simultaneous filing of the pre-filed testimonies of the intervenors. Therefore, the Attorney General moves that the Commission amend its Order to allow all intervenors the option of filing their testimony on the same date that the Sierra Club files its testimony, should they so choose. The Attorney General has consulted in advance with counsel for KIUC, who has authorized the Attorney General to state that he has no objection to this motion.

B. Order Scheduling Notice and Hearing

The Commission's second Order dated March 1, 2012 sets the hearing in this matter for April 16, 2012. At the start of this proceeding, the Attorney

General at an informal conference stated to all parties, including Commission staff, that he would need at least ten (10) days prior to the start of the hearing in this matter in order to hold any potential settlement discussions. The Commission's Order gives only three (3) business days between the day that Petitioner's rebuttal testimony is due, and the start of the hearing. The parties will need this time to prepare for the hearing. Since the Commission, by its own precedent, requires any potential settlement to be unanimous if it is to be considered dispositive of all of the parties' issues, has prejudiced the parties' ability to reach any potential settlement of this matter, and effectively insures that there will be no settlement. Further, the Commission's Order effectively ignores the Attorney General's request that the hearing be scheduled at least ten (10) days following the date upon which the Petitioner's rebuttal testimony is due.

The Attorney General argues that the Commission's Order setting the hearing date on April 16, 2012, fails to give the parties sufficient time to both evaluate their positions and determine whether settlement negotiations could be possible or productive, and to prepare for the hearing. As a result, the Order as it now stands fails to satisfy procedural due process. As the U.S. Supreme Court has ruled, "We comment only that due process requires that notice be given sufficiently in advance of scheduled court proceedings that reasonable opportunity to prepare is afforded." (*In re Gault*, 387 U.S. 1, 33 (1967), 87 S.Ct. 1428, 18 L.Ed.2d at 549). Further, the Kentucky Supreme Court has ruled that

"procedural due process . . . requires the government to follow known and established procedures, and not to act arbitrarily or unfairly in regulating life, liberty or property." Miller v. Johnson Controls, Inc., 296 S.W.3d 392, 397 (Ky. 2009). In the instant case, the parties will not be afforded "reasonable opportunity to prepare" (*In Re Gault, supra*) for *both* the proposed April 16th hearing, and to evaluate opportunities for settlement. The Commission's actions thus force a Hobson's choice on the parties – should they even attempt to hold settlement discussions, they do so at the risk of not preparing for the hearing. One of the two must be jettisoned. The Commission must either re-schedule the hearing date, or run the risk that its actions run afoul of the parties' procedural due process rights.

For this reason, the Attorney General respectfully requests that the Commission amend its Order to re-schedule the hearing until no earlier than April 24, 2012.

Respectfully submitted,
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Certificate of Service and Filing

Counsel certifies that an original and ten photocopies of the foregoing were served and filed by hand delivery to Jeff Derouen, Executive Director, Public Service Commission, 211 Sower Boulevard, Frankfort, Kentucky 40601; counsel further states that true and accurate copies of the foregoing were mailed via First Class U.S. Mail, postage pre-paid, to:

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This 1st day of March, 2011

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