Andy Beshear
Governor

Rebecca W. Goodman
Secretary
Energy and Environment Cabinet

Commonwealth of Kentucky
Public Service Commission
211 Sower Blvd.
P.O. Box 615
Frankfort, Kentucky 40602-0615
Telephone: (502) 564-3940
Fax: (502) 564-3460
psc.ky.gov

Kent A. Chandler
Chairman

Mary Pat Regan
Commissioner

November 23, 2022

PARTIES OF RECORD

Re: Case No. 2022-00283

Attached is a copy of a letter that is being filed in the record of the above-referenced case. If you have any comments you would like to make regarding the contents of the memorandum, please do so within five days of receipt of this letter.

If you have any questions, please contact Nancy J. Vinsel, General Counsel, at 502-782-2582 or nancy.vinsel@ky.gov.

Sincerely,

Linda C. Bridwell, PE
Executive Director

Attachment

Andy Beshear
Governor

Rebecca W. Goodman
Secretary
Energy and Environment Cabinet

Commonwealth of Kentucky
Public Service Commission
211 Sower Blvd.
P.O. Box 615
Frankfort, Kentucky 40602-0615
Telephone: (502) 564-3940
Fax: (502) 564-3460
psc.ky.gov

Kent A. Chandler
Chairman

Mary Pat Regan
Commissioner

November 23, 2022

Parties of Record

Re: Kentucky Power Company, Case No. 2022-00283.

Through this letter it is my intent to respond to the merits of Kentucky Power's Motion to Recuse. Although my recusal was sought by motion, I do not believe an order by the commission addressing the substance of that motion is permissible. There is no provision under law whereby the Commission can determine the participation in a proceeding of any individual Commissioner, and indeed, certain provisions of KRS Chapter 278 support an opposite conclusion, that certain actions related to the Commission's functions may be taken by less than the entire Commission.[1] Of course, it has been long held that the Commission speaks only through its orders. As such, given that acting on the disqualification of a single member of the Commission seems beyond the power of the Commission, this letter should serve as the substantive response to the pending motion.

The relevant motion seems to make two primary arguments in support of my recusal: 1) my participation is a *de facto* violation of state and federal due process rights, and 2) law and regulations concerning judicial conduct inform my need to recuse. Both arguments depend on applying judicial canons and precedents involving judges in contested, adversarial legal proceedings. By attempting to foist upon the Commission rules inapplicable to its Commissioners and then expand even those inapplicable rules beyond their intended use, the pleading ignores fundamental distinctions between the case at hand and the facts and circumstances of nearly every case cited; namely, the Commission is not a court and the Commissioners are not judges.

As an initial matter, had I believed I was disqualified from participating in this case at hand I would have recused myself from even participating in the order initiating the matter. Although I appreciate Kentucky Power bringing forward what it believes to be reasons for my disqualification, I find no merit in the arguments the utility advances. As such, I intend to continue participating in this matter.

Kentucky Power's initial argument is that due process is guaranteed under the U.S. and Kentucky Constitutions. That is of course true. However, the section advancing that argument selectively quotes from a number of federal and state court cases touching on the impartiality of a decision maker in judicial proceedings,[2] the requirement judges act "with no actual bias against the defendant or interest in the outcome of his particular case,"[3] the right against arbitrary government action as protected by Section 2 of the

[1] KRS 278.080.
[2] *Citing Johnson v. Mississippi*, 403 U.S. 212, 215-216 (1971).
[3] *Quoting Bracy v. Gramley*, 520 U.S. 899, 904-905 (1997).

Kentucky Constitution,[4] and finally on the idea that even without any real bias a judge should disqualify based on the "appearance of impartiality"[5] or any "doubt of qualification."[6] The argument goes on to cite three recusals or instances where reviewing courts found disqualification was necessary and the failure to recuse were denials of rights under the Fourteenth Amendment to the U.S. Constitution. In both instances where a reviewing court held a federal administrative agency fact finder should have recused, both agency members had participated in actual investigations directly leading to the underlying proceedings. This is not the case here. The single recusal of a Kentucky PSC Commissioner cited by Kentucky Power was a circumstance in which a Commissioner was on an organization's advisory board and the issue before the Commission was whether and at what amount should Kentucky gas consumers fund the organization. Importantly, nowhere in the three pages making its first argument did Kentucky Power state, argue or even insinuate the applicability of any case or precedent to the current demand of my recusal.

The pleading makes no claim that my participation violates any constitutional rights, nor does it explain why my prior engagements present the appearance of impartiality here. Additionally, Kentucky Power draws no parallel between the current situation and those where a federal agency was found to have violated the Fourteenth Amendment. Although the implication of recounting generalized conclusions regarding due process may be that Kentucky Power believes my participation here violates the utility's rights, that is their argument to make. What the utility has put forth in that regard fails to provide any meaningful argument for my recusal. The inapplicability of judicial proceedings to the case at hand are more fully addressed below. Finally, although not cited by Kentucky Power, with regard to impartiality there is a Kentucky Supreme Court case that is directly on point as to what may or may not be a due process violation in administrative proceedings. In *Hilltop Basic Resources, Inc. v. County of Boone*, the Kentucky Supreme Court held that the "right to an impartial tribunal is distinctly judicial in concept and function and is derived from the fundamental right of every criminal defendant to receive a fair trial."[7] The Court provided significant insight into the distinctions between what is required in a judicial context, versus administrative and legislative matters. Given Kentucky Power's reliance on presenting law regarding due process in judicial proceedings, I feel it is important to recite a large portion of the Court's holding.

> In allegiance to this concept of always endeavoring to ensure completely fair and unbiased determinations of guilt or innocence, judicial officers are held to very stringent guidelines and rules of conduct in order to ensure the highest possible degree of impartiality in both fact and appearance.

[4] *Citing Smith v. O'Dea*, 939 S.W.2d 353, 357 (Ky. App. 1997).
[5] *Wells v. Walter,* 501 S.W.2d 259, 260 (Ky. App. 1973).
[6] *Dotson v. Burchett*, 190 S.W.2d 697, 700 (Ky. App. 1945).
[7] *Hilltop Basic Resources, Inc. v. County of Boone*, 180 S.W.3d 464, 468 (Ky. 2005).

Andy Beshear
Governor

Rebecca W. Goodman
Secretary
Energy and Environment Cabinet

Commonwealth of Kentucky
Public Service Commission
211 Sower Blvd.
P.O. Box 615
Frankfort, Kentucky 40602-0615
Telephone: (502) 564-3940
Fax: (502) 564-3460
psc.ky.gov

Kent A. Chandler
Chairman

Mary Pat Regan
Commissioner

> In the administrative or legislative context, however, the concept of impartiality is, by necessity and by function, more relaxed and informal. For example, although such an arrangement would create an unacceptable appearance of bias in the judicial arena, this Court has held that the merging of the investigative and adjudicative roles in an administrative setting does not likewise create an unacceptable appearance of bias.
>
> The fundamental requirement of procedural due process is simply that all affected parties be given "the opportunity to be heard at a meaningful time and in a meaningful manner." Procedural due process in the administrative or legislative setting has widely been understood to encompass "a hearing, the taking and weighing of evidence if such is offered, a finding of fact based upon a consideration of the evidence, the making of an order supported by substantial evidence, and, where the party's constitutional rights are involved, a judicial review of the administrative action." The "right to an impartial tribunal" is nowhere to be found within this list, and rightfully so, since the right, as it is commonly conceived within the judicial context, cannot be guaranteed (nor need it be) in the administrative or legislative setting.
>
> However, decision makers are not free to be biased or prejudicial when performing nonjudicial functions. To the contrary, any bias or prejudicial conduct which demonstrates "malice, fraud, or corruption" is expressly prohibited as arbitrary. Furthermore, decisions tainted by conflicts of interest or blatant favoritism are also prohibited as arbitrary.[8]

Kentucky Power's second argument in support of my recusal is that although a Commissioners' conduct is not subject to Supreme Court rules and no statute or regulation addresses the disqualification of a Commissioner, the rules applicable to judges should inform "the need" for me to recuse, as they are "analogous authority." In putting forth this second proposition for my recusal, Kentucky Power does attempt to apply law it believes to be informative to the current situation. However, in doing so, the utility mischaracterizes the issue at hand. Kentucky Power argues that the current case is about adjudicating a "non-unanimous settlement agreement."[9] This case is one of ratemaking, not some adjudication of a contested proceeding, such as a civil matter in a judicial context. Rate cases, such as Case No. 2017-00179, are not adversary

[8] *Id*. at 468-489 (citations omitted).
[9] Motion at 7.

proceedings of the type nearly all cases and controversies are in the judicial branch of government. Rather, rate cases are applications to a regulatory agency to determine the appropriate rates and practices to be employed by a utility under the scheme created by KRS Chapter 278. There is no complainant and respondent in rate cases, but instead, there is an applicant and there exists the opportunity for interested parties to intervene in the proceeding and advance their interests. However, those intervenors need not, and ordinarily do not, have rights and obligations that are being adjudicated in the matter. The same can be said of Commission investigations initiated under KRS 278.260. These distinctions between PSC ratemaking cases and judicial or even quasi-judicial adjudications are important to understand here because of Kentucky Power's insistence that this matter is about adjudicating some non-unanimous settlement. A settlement with regard to ratemaking, unanimous or otherwise, brings with it no effect under law. If all parties in a rate case set to determine the appropriate residential customer charge, for instance, and formally enter a settlement agreement to that effect, the rate cannot go into effect until ordered by the Commission, exactly the same way the Commission would have set that rate in the absence of the agreement.

Courts in Kentucky, and elsewhere, have long held that ratemaking is a legislative function.[10] In the context of utility ratemaking, the Court of Appeals of Kentucky has "held that courts need not inquire into the wisdom of legislative procedures, unless they are tainted by malice, fraud or corruption."[11] Ratemaking is not akin to the job of a judge, whose task in most respects is to merely call "balls and strikes."[12] Rather, as explained by Learned Hand, the issue of appropriate rates under the law "is an issue which courts may not determine unaided, because the questions involved require a specialized acquaintance with the nexus of conflicting interests involved in [that subject matter] that courts do not have and cannot acquire."[13] Simply stated, rules applying exclusively to judges and judicial proceedings are inapposite to Commissioners of the Kentucky PSC and the Commission's ratemaking functions. Indeed, the Kentucky General Assembly recognizes the need to have individuals with specified skills and experience tasked with ratemaking in the Commonwealth, rather than delegate the determination of appropriate rates to judges or administrative law judges that merely "adjudicate."

KRS 278.060 sets forth the qualifications of Kentucky PSC Commissioners, which includes items like age and residency requirements. The statute also dictates the following:

> In making appointments to the commission, the Governor shall consider the various kinds of expertise relevant to utility regulation and the varied interests to be protected by the

[10] *Southern Bell Telephone & Telegraph Co. v. City of Louisville*, 96 S.W.2d 695, 697 (Ky. App. 1936).
[11] *National-Southwire v. Big Rivers Elec.*, 785 S.W.2d 503, 515 (Ky. App. 1990) (*citing Commonwealth ex rel Stephens v. South Central Bell Tel. Co.*, 545 S.W.2d 927 (1976)).
[12] *See* Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., nominee to be Chief Justice of the United States).
[13] *Feinstein v. New York Central Railroad Co.*, 159 F.Supp. 460, 464 (S.D.N.Y. 1958).

> commission, including those of consumers as well as utility investors, and no more than two (2) members shall be of the same occupation or profession.

Instead of a regulatory scheme that results in judges or administrative law judges calling balls and strikes on utility rate issues, the General Assembly determined it best to have dedicated individuals with "various kinds of expertise relevant to utility regulation" tasked with the regulation of utilities and their rates and service.[14] These individuals not only are expected to be appointed to the Commission with this expertise, but certainly gain experience, expertise and relevant knowledge given they exclusively regulate the Commonwealth's utilities. However, the General Assembly purposefully called out two types of interests that should be given consideration as well, those of consumers and utility investors. My experience as a consumer advocate that practiced in front of the Commission is the type the General Assembly advocates for, not one that should bar my participation on issues for eternity.

Case No. 2017-00179 was Kentucky Power's general rate case submission. In it, Kentucky Power requested rate increases to various rate schedules, changes in terms of service, certain accounting practices, new tariff provisions, and a number of other items. I participated in that case while employed by the Kentucky Office of the Attorney General and am disqualified now from participating in issues arising in that matter.[15] I am not, however, disqualified from participating on issues addressed in that case that subsequently come before the Commission. The most obvious example of this comes in the dozens of issues that were present in Kentucky Power's 2020 rate case that were also addressed in its 2017 rate case. In fact, the 2020 rate case sought to change or reset many issues decided in the 2017 rate case, some of which were included in the aforementioned "non-unanimous settlement agreement." For example, one of the provisions of the "non-unanimous settlement agreement" was that Kentucky Power would be permitted to track 80% of the over- or under-recovery of PJM OATT LSE expenses as compared to a base amount through Tariff P.P.A. Similar to the Rockport Deferral, the Commission approved that proposal in the 2017 case over the Attorney General's objection. In its 2020 rate case, which I fully participated in as a Commissioner, Kentucky Power proposed a change to that Tariff P.P.A. provision that was approved in the 2017 rate case, seeking to increase the amount of PJM OATT LSE expenses recovered through the tariff to 100%. No recusal was sought on that issue. No argument was made by any party that I could not participate in deciding the proposed change in Tariff P.P.A. because of my advocacy against the existence of the tariff just a few years earlier. No recusal was sought for any of the other items also present in the 2017 rate case which I, as counsel for the Attorney General advocated on, such as the residential customer charge, economic development costs, rate case expenses, a number of test-year

[14] KRS 278.060.

[15] *See* Commission Order entered on November 9, 2022 in Case No. 2017-00179 related to a petition for confidentiality stating that "Chairman Kent A. Chandler did not participate in the deliberations or decision concerning this case." It should be noted that I have recused myself from many cases since arriving at the Public Service Commission, initially in a staff position, more than three years ago due to disqualification.

expenses, or any residential rate increase at all. The last item is the starkest. In 2017, on behalf of the Attorney General, I advanced the proposition and helped provide evidence to the Commission that residential customers could not afford the rates currently in effect, and thus any rate increase must be denied as not being fair, just or reasonable. Nevertheless, no party called into question my ability to participate in the 2020 rate case without violating a party's due process rights. Indeed, the outcome of the 2020 rate case saw a residential customer rate increase, residential customer charge increase, and the requested increase in the amount of PJM OATT LSE expenses tracked through Tariff P.P.A. from 80% to 100%, all of which I voted for. Nothing in the motion explains why I am disqualified from participating in this case, but was able to fully participate in the 2020 rate case.

Taking Kentucky Power's argument here to its logical conclusion, a consumer advocate that argued against any item a utility proposes in a rate case must recuse from subsequently participating in a case regarding that item when the utility presents it before that person in their role as a Commissioner. The same would go for a person working at a utility. If a person works at a utility and participates in advancing the utility's interest in increasing the residential customer charge, Kentucky Power's argument is that should that person ever come to the Commission, the person's able advancement of the utility's position in the past disqualifies them from even hearing a rate case by that utility forever. Accepting such an argument would clearly frustrate the legislature's expectation regarding the type of interests and experience Commissioners should represent for appointment to the Commission.

In summary, I find no good cause to recuse from this matter. Contrary to Kentucky Power's assertion otherwise, disqualification should not be accepted lightly. I have an obligation to hear cases and initiate matters except in the case of disqualification. I cannot shirk that obligation when there is no objective reason to disqualify. This letter attempts to address the arguments put forth by Kentucky Power, but is certainly not exhaustive in its explanations of the reasons against disqualification. However, as I noted before, it is Kentucky Power that must put forward good cause for my disqualification, and not my task to explain all the reasons my continued participation is acceptable under law.

Kent A. Chandler

*Angela M Goad
Assistant Attorney General
Office of the Attorney General Office of Rate
700 Capitol Avenue
Suite 20
Frankfort, KENTUCKY 40601-8204

*Kentucky Power Company
Kentucky Power Company
1645 Winchester Avenue
Ashland, KY 41101

*Christen M Blend
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Post Office Box 16631
Columbus, OHIO 43216

*Katie M Glass
Stites & Harbison
421 West Main Street
P. O. Box 634
Frankfort, KENTUCKY 40602-0634

*Hector Garcia
Kentucky Power Company
1645 Winchester Avenue
Ashland, KY 41101

*Larry Cook
Assistant Attorney General
Office of the Attorney General Office of Rate
700 Capitol Avenue
Suite 20
Frankfort, KENTUCKY 40601-8204

*Jody Kyler Cohn
Boehm, Kurtz & Lowry
36 East Seventh Street
Suite 1510
Cincinnati, OHIO 45202

*Michael West
Office of the Attorney General Office of Rate
700 Capitol Avenue
Suite 20
Frankfort, KENTUCKY 40601-8204

*John Horne
Office of the Attorney General Office of Rate
700 Capitol Avenue
Suite 20
Frankfort, KENTUCKY 40601-8204

*Honorable Michael L Kurtz
Attorney at Law
Boehm, Kurtz & Lowry
36 East Seventh Street
Suite 1510
Cincinnati, OHIO 45202

*Honorable Kurt J Boehm
Attorney at Law
Boehm, Kurtz & Lowry
36 East Seventh Street
Suite 1510
Cincinnati, OHIO 45202

*Honorable Mark R Overstreet
Attorney at Law
Stites & Harbison
421 West Main Street
P. O. Box 634
Frankfort, KENTUCKY 40602-0634

*Kentucky Power Company
1645 Winchester Avenue
Ashland, KY 41101

*Vanna R. Milligan
Stites & Harbison
421 West Main Street
P. O. Box 634
Frankfort, KENTUCKY 40602-0634