COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

JOINT APPLICATION OF LOUISVILLE GAS AND ELECTRIC COMPANY AND KENTUCKY UTILITIES COMPANY FOR REVIEW, MODIFICATION, AND CONTINUATION OF EXISTING, AND ADDITION OF NEW, DEMAND-SIDE MANAGEMENT AND ENERGY EFFICIENCY PROGRAMS	**)**	**CASE NO. 2014-00003**

WALLACE MCMULLEN AND SIERRA CLUB'S REPLY TO COMPANIES' JOINT RESPONSE TO HEARING REQUESTS AND OPPOSITION TO MOTION TO SUBMIT THE CASE FOR DECISION ON THE RECORD

Wallace McMullen and the Sierra Club (collectively, the "Sierra Club") respectfully submit this reply to Louisville Gas and Electric Company and Kentucky Utilities Company's (collectively, the "Companies") joint response to Sierra Club and Metropolitan Housing Coalition's ("MHC") hearing requests and opposition to the Companies' motion to submit the case for decision on the record ("Joint Response"). In an attempt to avoid a full exploration of the critical issues presented in this proceeding, the Companies incorrectly argue that the Commission's standard governing hearing requests does not apply; that no factual issues are in dispute; that written testimony and discovery obviate the need for a hearing; and that the Commission cannot approve the Companies' proposed 2015-2018 Demand-Side Management ("DSM") and Energy Efficiency ("EE") Program Plan subject to modifications to ensure its reasonableness. None of these arguments passes muster and they collectively reveal the Companies' desire to prematurely close the evidentiary record in this case.

Sierra Club has requested a hearing to "present issues and develop facts that will assist the Commission in fully considering the matter." Order of March 12, 2014 at 3; Sierra Club Request at 4-5. MHC has done the same. *See* MHC Motion at 2 (explaining that the public interest is best served by "allowing the robust interchange among expert witnesses, the parties, and the Commissioners and Commission staff that is not available either when a case is submitted on the record with or without oral argument"). In light of the critical issues that remain contested in this case, conducting a hearing is the most productive way to enable the Commission to decide the case on a complete evidentiary record and is necessary to serve the public interest. Accordingly, Sierra Club respectfully requests that the Commission grant its hearing request.

I. A HEARING IN THIS PROCEEDING IS NECESSARY TO SERVE THE PUBLIC INTEREST AND PROTECT THE SUBSTANTIAL RIGHTS OF THE PARTIES AND SHOULD BE GRANTED UNDER 807 KAR 5:001 SECTION 9(1).

In their Joint Motion to Submit the Case for Decision on the Record ("Joint Motion"), the Companies failed to cite any statutory or regulatory standard by which the Commission should decide when to conduct a hearing. In their Joint Response, the Companies challenge Sierra Club and MHC's reliance on the Commission's governing standard in a further attempt to avoid a hearing. Specifically, the Companies now argue that the Commission's rules of procedure with respect to hearings do not govern whether a hearing should be held in this case. Companies' Joint Response at 2. This flawed argument directly conflicts with the Commission's interpretation of its own rules and should be rejected.

The Commission's rules of procedure state that "[u]nless a hearing is not required by statute, is waived by the parties in the case, or is found by the commission to be unnecessary for

protection of substantial rights or not in the public interest, the commission shall conduct a hearing if ... a request for hearing has been made." 807 KAR 5:00l § 9(1). As the Commission explained in a recent order, "807 KAR 5:001, Section 9(1) provides that the Commission may waive a hearing that is not required by law *if a hearing is found unnecessary for the protection of substantial rights or is not in the public interest*." Order at 2, *Ozark Slone and Kim Slone v. S. Water & Sewer Dist.*, Case No. 2013-00383 (June 13, 2014) (emphasis added). The statute that governs this case, KRS 278.285, does not contain a hearing requirement. However, as the Commission's recent order makes clear, the statute's silence on hearings does not prevent the Commission from granting a hearing pursuant to 807 KAR 5:00l § 9(1) in this or any other DSM proceeding. Rather, the relevant inquiry is whether a hearing is necessary for the protection of substantial rights or in the public interest. *See* Companies' Joint Response at 2, n. 3. As detailed in Sierra Club's hearing request and opposition to the Companies' Joint Motion, the answer is "yes."

Although the Companies argue that the Commission's hearing rule does not apply, no party contests the fact that the Commission has the authority to order a hearing in this proceeding. Companies' Joint Response at 2. Indeed, the Companies do not have to look beyond cases concerning their own DSM applications to find an example of the Commission granting a hearing request in a DSM proceeding. At the request of intervenors, the Commission ordered a hearing on the Companies' 2007 DSM proposal, filed pursuant to KRS 278.285, "[i]n order to ensure that all the issues in the case are fully before the Commission." *In re Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company Demand-Side Management for the Review, Modification, and Continuation of Energy Efficiency Programs and*

DSM Cost Recovery Mechanisms, Case No. 2007-00319 (Dec. 19, 2007).[1] Sierra Club respectfully requests that the Commission do the same here.

II. THE COMPANIES CONTINUE TO MISCHARACTERIZE THE DISPUTED ISSUES IN THIS CASE.

As detailed in Sierra Club's hearing request and opposition to the Companies' Joint Motion, several factual issues and mixed questions of law, policy and fact remain in dispute. *See, e.g.*, Sierra Club Opposition at 3-4. For example, a core issue is whether the Companies accurately calculated the benefits and costs of their energy efficiency programs. To resolve this issue, the Commission must consider several complex questions involving the record and the application of KRS § 278.285. An evidentiary hearing would serve the public interest by developing and clarifying this and other contested issues to ensure that they are "fully before the Commission" as it determines the reasonableness of the Companies' proposal.

Ironically, the Companies' attempt to prevent a hearing only serves to highlight the need to further clarify and develop the record through a hearing. In their Joint Response, the Companies argue that there is no outstanding issue regarding whether the Companies calculated the benefit of avoiding the cost to comply with carbon regulations because the Companies have "explicitly stated they did not include carbon-regulation costs." Joint Response at 3. However, in rebuttal testimony, the Companies argue that Sierra Club witness Tim Woolf's assertion that the Companies' DSM/EE cost-benefit analyses are flawed for "'not includ[ing] any cost associated with greenhouse has ("GHG") emissions in their avoided costs'. ... is incorrect" because the Companies' DSM/EE analysis has "been affected by the potential for GHG emissions costs." Hornung Rebuttal, p. 2, lines 8-18. The issue of whether the Companies underestimated the

[1] In the 2007 case, the hearing ultimately was cancelled at the request of the intervenors that sought the hearing because the parties entered into a settlement agreement, which the Commission accepted. Order, p. 2, Case No. 2007-00319 (Jan. 31. 2008).

avoided costs of environmental compliance, along with other disputed issues concerning the Companies' cost effectiveness test calculations, potential study methodology and resultant Proposed DSM/EE Plan, should be further developed at a hearing.

In support of their flawed assertion that a hearing is not warranted, the Companies note that Sierra Club has identified a legal issue in the case. Specifically, the Companies cite to Sierra Club's agreement that the Companies raised a legal issue in rebuttal testimony regarding whether the Commission lacks authority to consider participant non-energy benefits. Companies' Joint Response at 5. But the fact that Sierra Club recognizes that a single issue is appropriate for briefing does not eliminate the existence of several other, factual issues for which a hearing, in addition to briefing, is necessary.[2] Rather, such recognition demonstrates that the Sierra Club properly considered which issues require an evidentiary hearing.

Finally, the Companies argue that written testimony and two rounds of discovery obviate the need for a hearing. Companies' Joint Response at 5. However, opportunities for pre-filed testimony and discovery are provided in most, if not all, Commission proceedings in which a hearing is held. Written testimony generally is a prerequisite to live witness testimony at a Commission hearing and discovery is essential to hearing preparation. The Companies' contention that pre-filed testimony and discovery eliminate the need for a hearing is without merit and should be rejected.

III. THE COMMISSION MAY CONSIDER POTENTIAL MODIFICATIONS TO THE COMPANIES' PROPOSAL TO ENSURE REASONABLENESS.

The Commission has "exclusive jurisdiction over the regulation of rates and service of utilities." KRS § 278.040(2). In this case, the Companies have asked the Commission to issue an

[2] As Sierra Club explained in their Opposition to the Joint Motion, this case does not involve a dispute that can be fully resolved through a Commission ruling on a single legal issue. Sierra Club Opposition at 2 (distinguishing *In re Barnett v. S. Anderson Water Dist.*, Case No. 95-397 (Mar. 28, 1996)).

order approving their Proposed DSM/EE Program Plan and associated cost recovery tariffs pursuant to KRS 278.285. Companies' Joint Application at 1. The Commission has the authority to review the reasonableness of DSM plans proposed by any utility under its jurisdiction. KRS 278.285(1). The DSM statute obligates the Commission to consider certain factors in determining the reasonableness of a DSM proposal, but allows the Commission to consider additional factors not enumerated in the statute. *Id.*

As explained in the expert testimony of Mr. Woolf, the Companies' Proposed DSM/EE Plan and underlying analyses suffer from several significant deficiencies that call into question the reasonableness of the proposal as filed. The Companies significantly understate the benefits of energy efficiency and the potential for efficiency savings. Woolf Testimony at 14-20, 37-47. The result of these flaws is a proposed plan that consists of virtually no growth in annual energy savings relative to sales during the four-year planning period. *Id.* at 7, 11. This lack of growth is unreasonable, particularly in light of the U.S. Environmental Protection Agency's recent proposal that would require Kentucky to limit carbon pollution under Section 111(d) of the Clean Air Act and identifies energy efficiency as a reasonable and cost-effective compliance option. 79 Fed. Reg. 34,830, 34,874 (June 18, 2014). Mr. Woolf recommended that the Commission approve the Companies' Proposed DSM/EE Plan subject to certain modifications and recommended certain methodologies and assumptions for use in developing future plans. Woolf Testimony at 4-5.

The Companies erroneously contend that the Commission lacks the legal authority to approve a DSM program subject to modification. The Companies begin from a true premise—that the Commission is a creature of statute[3]—but reach the wrong conclusion, ignoring the

[3] The Companies cite two cases for the proposition that the Commission is a creature of statute and must follow procedures set by the legislature. Companies' Joint Response at 6, n. 12 (*citing*

Commission's statutory authority to regulate utility rates and services and review and approve reasonable utility plans to invest in DSM resources.

The history of the Companies' current DSM application undermines their argument that the Commission has "no additional power to order utilities to investigate or implement DSM programs other than those utilities propose." Companies' Joint Responses at 6-7. For example, in the Companies' 2011 DSM docket, the Commission ordered the Companies to investigate the potential for DSM in their service territories by conducting a market potential study.[4] Indeed, the Companies' Proposed DSM/EE Plan is based in large part on the DSM potential study that the Companies conducted per the Commission's order.

Likewise, in 2001, the Commission rejected an LG&E efficiency program as proposed and approved a modified version. In that case, LG&E, along with other organizations, proposed a Home Energy Assistance Program ("HEA"). The Commission faced a dilemma analogous to the situation in this case: as proposed, the HEA contained multiple flaws; but with the winter heating season approaching, the Commission recognized the urgency of having an energy assistance program in place. As a result of the flaws in the proposal, the Commission denied the application as filed and approved a modified program. Case No. 2001-323, Order at 28 (Dec. 27, 2001), revised after rehearing by Order (Jan. 29, 2002). The Commission expressly rejected the argument advanced by the Companies in this proceeding, stating that "[w]hile the Commission appreciates Mr. Madison's opinion that the Commission lacks the authority to propose a modified HEA once a proposed HEA is rejected, we do not share his opinion." Case No. 2011-

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Enviro Power, LLC v. Pub. Serv. Comm'n of Ky., 2007 WL 289328 (Ky. App. 2007) and *S. Cent. Bell Tel. Co. v. Utility Regulatory Comm'n*, 637 S.W.2d 649 (Ky. 1982)). But the mere fact that the Commission is a creature of statute says nothing about the scope of the Commission's authority under a statute, KRS 278.285, that expressly grants the Commission the power to review and approve a DSM program and its fundamental charge to regulate utility rates and services under KRS § 278.040.

[4] Commission Order at pp 17-18, *Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company for a Certificate of Public Convenience and Necessity*, Case 2011-00375 (Ky. PSC May 3, 2012).

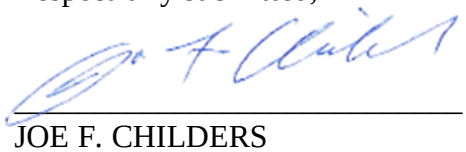
323, Order at 4 (Jan. 29, 2002). The Commission could issue a similar order in this docket approving modified DSM programs.[5]

IV. CONCLUSION

For the foregoing reasons, Sierra Club respectfully requests that the Commission deny the Companies' motion and grant Sierra Club's motion to conduct an evidentiary hearing in this matter.

Dated: July 21, 2014

Respectfully submitted,



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[5] In addition to Case No. 2001-323, there are other examples of the Commission approving a DSM proposal subject to conditions imposed by the Commission. For example, Duke Energy Kentucky included in its DSM plan a provision for automatic approval of small-scale pilot programs. After the AG objected, the Commission granted automatic approval of pilot programs, but required that such programs be less than $75,000 and meet other conditions. Case No. 2012-00085, Order at 22-23 (June 29, 2012). Similarly, after reviewing Kentucky Power Company's 2012 DSM filing, the Commission ordered that "[a] two-year extension, rather than a three-year extension as requested by Kentucky Power, should be approved" for 4 DSM programs. Case no. 2012-00367, Order at 24 (Feb. 22, 2013).

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CERTIFICATE OF SERVICE

I hereby certify that Sierra Club's July 21, 2014 electronic filing is a true and accurate copy of the Wallace McMullen and Sierra Club's Reply to Joint Response to Hearing Requests and Opposition to Motion to Submit the Case for Decision on the Record, to be filed in paper medium; and that on July 21, 2014, the electronic filing has been transmitted to the Commission, and that one copy of the filing will be delivered to the Commission, that no participants have been excused from electronic filing at this time, and electronic mail notification of the electronic filing is provided to the following:

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