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 MOTION TO STRIKE OR, IN THE ALTERNATIVE, REPLY TO ATTORNEY GENERAL'S NOTICE OF CONTEST

Wallace McMullen and Sierra Club (collectively, "Sierra Club") seek to intervene in the above-captioned case to protect their special interests that are not otherwise adequately represented and to assist the Commission in fully considering the joint application at issue without unduly complicating or disrupting the proceeding. On February 5, 2014, Sierra Club filed a timely motion for leave to intervene pursuant to KRS § 278.310 and 807 KAR 5:00l § 4(11)(a). Thirteen days later—well outside of the regulatory time period for filing an opposition—the Office of the Attorney General ("Attorney General" or "AG") filed a "Notice of Contest," opposing Sierra Club's request for intervention and seeking administrative notice of the AG's erroneous allegation that Sierra Club has a history of unduly complicating and disrupting conduct in matters directly associated with demand-side management ("DSM") programs filed under KRS § 278.285. Because the AG's opposition to Sierra Club's intervention is untimely (and wholly improper), Sierra Club moves to strike the "Notice of Contest" from the record in this case.

Should the Commission decide to reach the substance of the filing, the Notice should be rejected as meritless. The Attorney General mischaracterizes the legal standard governing intervention and misrepresents Sierra Club's role in DSM collaborative efforts in Kentucky. Ironically, in an attempt to block Sierra Club's participation in this important docket, the AG's misrepresentations of the law and unsupported allegations make clear that the AG could not adequately represent Sierra Club's interests, thereby bolstering the case for Sierra Club's intervention.

I. THE COMMISSION SHOULD STRIKE THE AG'S "NOTICE OF CONTEST" AS UNTIMELY.

On February 5, 2014, Sierra Club filed a timely motion requesting leave to intervene in this proceeding. Pursuant to Commission Rule 807 KAR 5:001, § 5(2), responses to this motion were due no later than seven days from the date of the motion's filing, or February 12, 2014. The Attorney General filed its opposition to the intervention motion, styled as a "Notice of Contest," on February 18, 2014, thirteen days after Sierra Club filed its motion. The AG cannot evade the seven-day filing deadline for responding to a motion by calling its response a "Notice of Contest." Therefore, Sierra Club respectfully requests that the Commission strike the AG's "Notice of Contest" as untimely.

II. ALTERNATIVELY, THE COMMISSION SHOULD REJECT THE AG'S NOTICE BECAUSE IT PROVIDES NO BASIS FOR DENYING SIERRA CLUB'S MOTION FOR LEAVE TO INTERVENE.

As discussed above, the AG's attempt to oppose Sierra Club's intervention should be rejected as untimely, and the Notice should be stricken. However, if the Commission decides to address the merits of the filing, the Notice should be rejected as erroneous and unsupported for three reasons. First, the AG incorrectly argues that its right to participate in Commission proceedings and stakeholder processes forecloses intervention by other parties. Second, the AG

relies on a condition precedent for intervention that is not based in Kentucky law. Finally, the AG grossly misrepresents Sierra Club's history of stakeholder participation in an attempt to characterize honest, diligent public participation efforts as unduly complicating and disruptive.

The Commission's regulations regarding intervention provide that the Commission shall grant leave to intervene upon a timely motion if the Commission finds that the movant "has a special interest in the case that is not otherwise adequately represented or that intervention is likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings." 807 KAR 5:001 § 4(11)(b). Because the AG fails to show that Sierra Club does not meet either of the regulatory grounds for intervention, the Commission should reject the AG's Notice and grant Sierra Club's request to intervene on the basis of Sierra Club's timely filed intervention motion.

A. The AG Has Not Demonstrated That It Would Adequately Represent Sierra Club's Interests in This Proceeding.

In its intervention motion, Sierra Club showed that it has a special interest in this proceeding that is not adequately represented by any other party. The Attorney General does not dispute this in its Notice. Instead, the Attorney General appears to base its opposition to Sierra Club's intervention on the fact that the AG is the only party with a statutory right to appear before the Commission and the only DSM collaborative stakeholder specified by statute. AG's Notice at 1-2. However, the role of the AG as an intervenor or stakeholder on behalf of consumers' interests does not foreclose permissive intervention by other parties. Indeed, if the Attorney General's participation in proceedings precluded others from intervening, the Commission's rules regarding intervention would effectively be rendered superfluous.[1]

[1] *See Lexington-Fayette Urban Cnty. Gov't v. Johnson*, 280 S.W.3d 31, 34 (Ky. 2009); *Univ. of Cumberlands v. Pennybacker*, 308 S.W.3d 668, 683-84 (Ky. 2010).

Nowhere in the Kentucky statutes does it state that the AG shall be the *exclusive* party representing consumer interests. The Commission routinely permits representatives of segments of ratepayers, such as industrial customers or low-income customers, to intervene. And this is for good reason. The Attorney General cannot adequately represent certain classes of ratepayers that have interests that are distinct from, and may diverge from, the interests of other classes of ratepayers. Tellingly, the AG's Notice does not contest the requests for intervention made by the four other potential intervenors in this case, including the industrial and low-income representatives.

Sierra Club does not question that the AG serves an important function in PSC proceedings and stakeholder collaborative processes, or that the AG has experience working on DSM-related matters. But these facts are not sufficient to bar a party that has satisfied the criteria for intervention from participating in a Commission proceeding. Critically, the AG does not argue that it would adequately represent the interests of Sierra Club in this proceeding, and the tone and substance of the Notice suggest that it would not.

Finally, the AG cannot credibly argue that it has adequately represented Sierra Club's interest in enhanced investment in DSM in recent proceedings before the Commission. For example, in the Kentucky Power Mitchell transfer proceeding, Case No. 2012-00578, Sierra Club entered a stipulated settlement with Kentucky Power Company ("KPC") and Kentucky Industrial Utility Customers Inc. ("KIUC") that provided for significant increases in DSM investment, which this Commission approved with modifications. *See* Commission Order in Case No. 2012-00578, attached as Exhibit A. In its order, the Commission found that the Stipulation's provisions were not only reasonable but also "provide additional, substantial benefits to ratepayers that could not otherwise be obtained." *Id*. at 35. These substantial benefits

to the ratepayers were secured without the participation of—and indeed, in spite of opposition from—the AG.

This divergence in positions underscores that while the AG must represent all consumers with all of their varied interests, even where those interests are diametrically opposed to each other, Sierra Club is uniquely able to bring focused support for DSM. As such, the AG cannot adequately represent Sierra Club's interest in this case.

B. The AG's Attempt to Block Parties Who Were Not Invited to Join the Collaborative from Intervention Should be Rejected.

Citing KRS § 278.285(1)(f), the AG also contends that Sierra Club's intervention should be denied because it did not participate in Louisville Gas and Electric and Kentucky Utilities Company's (collectively, the "Companies") DSM collaborative process. AG's Notice at 1-2. But Sierra Club was not invited to join the collaborative process. In addition, KRS § 278.285(1)(f) provides that in evaluating the reasonableness of a DSM plan, the Commission should consider factors including "the extent to which customer representatives and [the AG] have been involved in developing the plan." Nothing in that provision limits participation to only the AG, nor does the provision have any bearing on the right to intervene, which is instead governed by 807 KAR 5:001 § 4(11)(b). A party must be granted full intervention if it has filed a timely intervention motion and either has interests in this proceeding that are not adequately represented or if it would assist in evaluation of the pending application without unduly complicating or disrupting the proceedings. As explained in its motion, Sierra Club meets these criteria. While Sierra Club appreciates the value of and participates in collaborative processes, the AG is simply wrong to suggest that intervention of non-collaborative members is barred.

Indeed, adopting the AG's position would result in a situation in which the AG has access to two forums through which it can comment on the Companies' DSM Plan—both through a

collaborative process and through DSM proceedings before the Commission—while stakeholders, like Sierra Club, who have not been invited into the collaborative process would have none at all. Not surprisingly, the AG cites no case in which the Commission has denied a motion to intervene in a DSM proceeding because the movant was not a member of the relevant DSM collaborative.

C. The AG Fails to Show That Sierra Club's Participation Would be Unduly Complicating or Disruptive to the Proceeding.

The AG attempts to undermine Sierra Club's long track record of hard work in collaborative processes in Kentucky and across the country by distorting Sierra Club's role in two Kentucky collaboratives. The AG's "examples"—which consist of a single unintentional misstatement that was quickly corrected with the approval of the utility, and routine follow-up after Commission approval of a settlement agreement—show neither complicating nor disruptive behavior. Rather, they illustrate swift action to correct mistakes and dedicated follow through.

First, the AG is correct that a March 7, 2011 letter from the Chair of Sierra Club Cumberland Chapter, Alice Howell, to its members mistakenly stated that East Kentucky Power Cooperative ("EKPC") had promised to invest $5 million in renewable energy and energy efficiency projects. AG's Notice, Attachment A. What the AG neglects to mention, however, is that as soon as EKPC brought the misstatement to the Chapter's attention, the Chapter quickly and in good faith sought to remedy the error. *See* Affidavit of Alice Howell, para. 5, attached as Exhibit B. With EKPC's approval, the Chapter determined that the fastest way to fix the error was to issue a correction in its forthcoming April 2011 issue of *The Cumberland,* Sierra Club Cumberland Chapter's newsletter. *Id*. In that newsletter, the Chapter published the following statement:

> We wish to correct a reference in our March Appeal letter that we have found was in error. EKPC did not promise to invest $5 million in renewable energy and energy efficiency projects. EKPC did set up an advisory group of industry representatives, environmental representatives, and co-op members to look for ways to increase the use of renewable energy and improve demand-side management. Our apologies to EKPC for this inaccuracy.

The Cumberland, (Kentucky Sierra Club, Lexington, Ky.), Apr. 2011, at 5, attached as Exhibit C.

Sierra Club has been an active participant in the EKPC Collaborative and voted in support of all programs proposed by the Collaborative. The inadvertent misstatement that the AG highlighted in its Notice was addressed immediately upon its discovery, which is exactly what should happen when a mistake is made. The AG's selective recounting of this incident wholly fails to demonstrate any history of unduly complicating and disrupting DSM matters.

The AG next turns to Sierra Club's work with KPC. Far from "overreaching" or using "heavy-handed" efforts to join the KPC DSM Collaborative, AG's Notice at 4, Sierra Club was granted the ability to participate through a stipulation and settlement with KPC and KIUC in Case No. 2012-00578, in which Kentucky Power committed to increasing its DSM expenditures from $3 million to $6 million in 2016. *See* Commission Order, Appendix A at para.12, attached as Exhibit A (stating that "Sierra Club may participate in the Company's DSM collaborative"). The Commission approved the Stipulation, with modifications, finding that its provisions were not only reasonable but also "provide additional, substantial benefits to ratepayers that could not otherwise be obtained." *Id*. at 35. After approval of the stipulation, Sierra Club has since sought to assume its spot in the Collaborative, *as agreed to under the terms of the stipulation and settlement*, in order "to assist in maximizing the effectiveness of the additional funds" that KPC agreed to invest in DSM. AG's Notice, Attachment B at 2. Specifically, Sierra Club submitted to

the Collaborative its membership petition, which the AG includes as Attachment B to its Notice, *at the direction of EKPC*. Far from demonstrating any desire to disrupt the Collaborative process, the letter to which the AG cites expresses the Sierra Club's commitment to abide by and fulfill its duties under the Collaborative bylaws, and to help develop "robust DSM and energy efficiency programs that best serve the interests of ratepayers." *Id*.

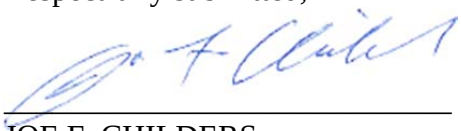
In sum, the two examples to which the AG cites fall far short of "overreaching." Instead, these examples only bolster Sierra Club's commitment to the collaborative development of robust DSM programs that will benefit Kentucky ratepayers. Because the AG fails to offer any credible evidence that Sierra Club will disrupt or complicate the DSM proceeding, the AG's Notice should be rejected as groundless.

III. CONCLUSION

For the foregoing reasons, Sierra Club respectfully request that the Commission strike the AG's Notice as untimely or, in the alternative, reject it as meritless, and grant Sierra Club's motion for leave to intervene.

Dated: February 24, 2014

Respectfully submitted,



JOE F. CHILDERS
JOE F. CHILDERS & ASSOCIATES

300 Lexington Building
201 West Short Street
Lexington, Kentucky 40507
859-253-9824
859-258-9288 (facsimile)
childerslaw81@gmail.com

Of counsel:
(The following attorneys are not licensed to practice law in Kentucky.)

Jill Tauber
Earthjustice
Washington, DC Office
1625 Massachusetts Avenue, NW, Suite 702
Washington, DC 20036-2212
(202) 667-4500
jtauber@earthjustice.org

Susan Laureign Williams
Sierra Club
50 F Street, N.W., 8th Floor
Washington, DC 20001
(202) 548-4597
laurie.williams@sierraclub.org

CERTIFICATE OF SERVICE

I certify that the foregoing WALLACE MCMULLEN AND SIERRA CLUB'S MOTION TO STRIKE OR, IN THE ALTERNATIVE, REPLY TO ATTORNEY GENERAL'S NOTICE OF CONTEST has been filed with the Commission and served via U.S. Mail on February 24, 2014 to the following:

Rick E. Lovekamp
Manager - Regulatory Affairs
LG&E and KU Energy LLC
220 West Main Street
Louisville, KENTUCKY 40202

Ed Staton
LG&E and KU Energy LLC
220 West Main Street
Louisville, KENTUCKY 40202

Allyson K. Sturgeon
Senior Corporate Attorney
LG&E and KU Energy LLC
220 West Main Street
Louisville, KENTUCKY 40202

Kendrick R. Riggs
Stoll Keenon Ogden PLLC
2000 PNC Plaza
500 West Jefferson Street
Louisville, Kentucky 40202

Lawrence W. Cook
Angela M. Goad
Dennis G. Howard, II
Assistant Attorneys General
1024 Capital Center Drive, Suite 200
Frankfort, KY 40601-8204