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**

JOINT RESPONSE OF KENTUCKY UTILITIES COMPANY AND LOUISVILLE GAS AND ELECTRIC COMPANY TO WALLACE MCMULLEN AND SIERRA CLUB'S REQUEST FOR AN EVIDENTIARY HEARING, WALLACE MCMULLEN AND SIERRA CLUB'S OPPOSITION TO LOUISVILLE GAS AND ELECTRIC COMPANY AND KENTUCKY UTILITIES COMPANY'S MOTION TO SUBMIT THE CASE FOR DECISION ON THE RECORD, AND METROPOLITAN HOUSING COALITION'S RESPONSE IN OPPOSITION TO MOTION OF LOUISVILLE GAS AND ELECTRIC COMPANY AND KENTUCKY UTILITIES COMPANY'S MOTION TO SUBMIT THE CASE FOR DECISION ON THE RECORD AND MOTION TO SET EVIDENTIARY HEARING

Kentucky Utilities Company ("KU") and Louisville Gas and Electric Company ("LG&E") (collectively, "Companies") respectfully submit this Response to Wallace McMullen and Sierra Club's (collectively, "Sierra Club") Request for an Evidentiary Hearing ("Sierra Club's Motion"), Wallace McMullen and Sierra Club's Opposition to Louisville Gas and Electric Company and Kentucky Utilities Company's Motion to Submit the Case for Decision on the Record ("Sierra Club's Opposition"), and Metropolitan Housing Coalition's ("MHC") Response in Opposition to Motion of Louisville Gas and Electric Company and Kentucky Utilities Company's Motion to Submit the Case for Decision on the Record, and Motion to Set Evidentiary Hearing ("MHC Motion"), all filed with the Commission on July 7, 2014.

Of the nine parties to this proceeding, only Sierra Club and MHC have requested a hearing. The Association of Community Ministries, the Attorney General, Community Action

Council, Kentucky Industrial Utility Customers, and Wal-Mart Stores East, LP and Sam's East, Inc. have not requested a hearing. On July 3, 2014, the Companies filed their Motion to Submit Case for Decision on the Record. Only Sierra Club and MHC object to the Companies' motion.

I. 807 KAR 5:001 Section 9(1) Does Not Require the Commission to Hold a Hearing in this Proceeding Because KRS 278.285 Does Not Require a Hearing.

Both Sierra Club and MHC point the Commission to 807 KAR 5:001 Section 9(1) as supporting their requests for a hearing in this proceeding.[1] But the regulation's plain language makes it clear that a hearing is not required in this case:

> *Unless 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) an order to satisfy or answer a complaint has been made and the person complained of has not satisfied the complaint to the commission's satisfaction; or (b) a request for hearing has been made.[2]

In other words, if "a hearing is not required by statute, is waived by the parties to the case, or is found by the commission to be unnecessary for protection of substantial rights or not in the public interest," the rest of 807 KAR 5:001 Section 9(1) does not require the Commission to hold a hearing. Here, KRS 278.285 does not require a hearing for the Commission to issue a final order on a utility's application; therefore, 807 KAR 5:001 Section 9(1) does not apply to the Commission's decision whether to hold a hearing in this proceeding. The regulation's inapplicability to this case does not preclude the Commission from holding a hearing, but neither does the regulation require or even "favor" a hearing in this case.[3] The Companies therefore

[1] Sierra Club Motion at 2-4; Sierra Club Opposition at 1-3; MHC Motion at 1-2.
[2] 807 KAR 5:001 Section 9(1) (emphasis added).
[3] Contrary to MHC's assertion that the regulation reflects a liberal policy toward evidentiary hearings, recent revisions to 807 KAR 5:001 actually reflect an expansion of the Commission's discretion to decide questions without such hearings. Prior to its revision in 2012, the regulation required a hearing when an application had been made in a formal proceeding "[e]xcept as otherwise determined in specific cases." After the 2012 revision, the regulation requires a hearing only when a statute expressly requires or the commission determines that a hearing is necessary for the protection of substantial rights or in the public interest.

reiterate their position that the Commission should decline to hold an evidentiary hearing in this case because, as further shown below, there are no genuine issues of material fact in dispute in this case.

II. Sierra Club's and MHC's Claimed Factual Issues to Address in an Evidentiary Hearing Are Actually Matters of Policy and Law, Which Would More Efficiently Be Addressed through Briefs or Oral Argument.

Sierra Club's and MHC's Motions and Opposition demonstrate there are no issues of material fact to address in a hearing, only questions of policy and law that would be better addressed through briefs or oral argument.

For example, MHC asserts that the equity with which DSM funds are spent on low-income households is a factual issue to address at hearing.[4] But that is not a factual issue; where the DSM funds have been spent is a factual issue, which has already been fully addressed through discovery and not contested.[5] But equity is a policy question, not a genuine issue of material fact.

Similarly, Sierra Club asserts there is a question whether the Companies "calculate[d] the benefit of avoiding the cost to comply with carbon regulations."[6] This falls in the "asked and answered" category: the Companies have explicitly stated they did not include carbon-regulation costs, and provided reasons why they did not do so.[7] Sierra Club may find those reasons unsatisfying, but there is no factual dispute about what the Companies did, and therefore no reason to hold an evidentiary hearing in this proceeding.

[4] MHC Motion at 3.
[5] *See, e.g.*, Companies' Response to the Association of Community Ministries, Inc. First Requests for Information Dated February 17, 2014, Responses to DR Nos. 1, 3, 4, and 5.
[6] Sierra Club Opposition at 3.
[7] *See, e.g.*, Rebuttal Testimony of Michael E. Hornung at 3-5; Companies' Response to Wallace McMullen and Sierra Club's Supplemental Request for Information Dated March 20, 201, Response to DR No. 3a.

The same critique applies to Sierra Club's claimed concerns about the "accuracy" of the Companies' various calculations.[8] Sierra Club's witness did not assert that the Companies erred in their calculations or that the data underlying those calculations are inaccurate; rather, Mr. Wolff testified that the Companies should have included different kinds of inputs in their calculations (e.g., non-energy benefits) and given different priority to certain cost-benefit tests. But Mr. Wolff did not provide any data of his own specific to the Companies, and did not perform any quantitative analyses on data the Companies supplied; he merely critiqued the Companies' methods. In doing so, the Sierra Club's witness did not introduce sufficient evidence to create a material issue of fact with the Companies' various calculations. So Sierra Club's dispute with the Companies is not factual, but purely a matter of policy and law.

The closest thing to a factual issue Sierra Club raises is: "Do the results of the Companies' survey of industrial customers state that a substantial number of industrial customers are likely to participate in EE and/or DR programs that could be offered by the Companies?"[9] But the information the Companies have supplied in the record of this case speaks for itself; the survey results are available for all to review and interpret.[10] Whether the results show "that a substantial number of industrial customers are likely to participate in EE and/or DR programs that could be offered by the Companies" is a subjective judgment the Commission can conclusively make based on an examination of the record; it is not a factual question. So an evidentiary hearing is not necessary in this proceeding.

[8] Sierra Club Opposition at 3-4.
[9] Sierra Club Opposition at 3.
[10] Companies' Response to Wallace McMullen and Sierra Club's Supplemental Request for Information Dated March 20, 201, Response to DR No. 8.

III. Discovery and Testimony in this Case Have Already Provided a Thorough Paper Hearing of the Facts.

The Companies have provided direct and rebuttal testimony in this proceeding (the latter of which did not introduce new facts requiring cross-examination at hearing). The Commission Staff and intervenors have issued, and the Companies have responded to, multiple rounds of discovery. The intervenors who desired to express their own views on the Companies' application and evidence have done so through pre-filed testimony following the Companies' direct testimony and discovery. As demonstrated above, there are no further factual issues to address in this proceeding; all that remains is for the Commission to apply the law to the facts and issue a decision.

Sierra Club's and MHC's Motions represent nothing more than another bite at the policy-and-law apple. As shown above, the issues they assert require a hearing for their disposition are not factual issues; rather, they are questions of legal and policy issues that Sierra Club and MHC wish to argue through cross-examination of the Companies' witnesses and additional testimony from their own witnesses (indeed, Sierra Club concedes its views on non-energy benefits are a legal matter, not a factual matter).[11] Written briefs and oral argument, not a potentially lengthy evidentiary hearing, are a far more effective and efficient use of the Commission's and the parties' limited resources to argue and address these legal and policy questions. If the parties wish to express their legal and policy views, the better means of doing so are briefing and (perhaps) oral argument.

[11] Sierra Club Opposition at 2.

IV. An Evidentiary Hearing Is Unnecessary for the Protection of Substantial Rights or the Public Interest Because the Commission Cannot Grant the Relief Sierra Club Has Requested.

In their July 7, 2014 pleadings, Sierra Club and MHC argue that 807 KAR 5:001 Section 9(1) provides the Commission discretionary authority to hold a hearing where the Commission finds such a hearing is necessary for protection of substantial rights or in the public interest. As the Commission and Kentucky's courts have recognized, the Commission is a creature of statute, and has only those powers granted to it by statute.[12] The Commission has further recognized that its jurisdiction over utilities' rates and service does not empower the Commission to substitute its managerial judgment for the judgment of a utility's management, but rather constrains the Commission to use cost disallowance as the means of correcting a utility's misjudgment.[13] With respect to DSM programs, Commission Staff has correctly stated that KRS 278.285 has been interpreted to permit the Commission only to approve or disapprove utilities' DSM proposals, not to empower the Commission to compel utilities to implement other DSM programs. The Commission appears to have accepted this view, which is entirely consistent with the text of KRS 278.285 that empowers the Commission to "determine the reasonableness of demand-side management plans ***proposed by any utility*** under its jurisdiction," but provides no additional

[12] *Enviro Power, LLC v. Public Service Commission of Kentucky*, 2007 WL 289328 at 3 (Ky. App. 2007) (not to be published) ("'[R]ates' or 'service' … are the only two subjects under the jurisdiction of the PSC.") *South Central Bell Telephone Company v. Utility Regulatory Commission*, 637 S.W.2d 649 at 643 (Ky. 1982) ("The legislative grant of power to regulate rates will be strictly construed and will neither be interpreted by implication nor inference. In fixing rates, the commission must give effect to all factors which are prescribed by the legislative body, but may not act on a matter which the legislature has not established.").

[13] Case Nos. 89-014, 89-029, and 89-179, Order at 18-20 (Jan. 31, 1990) ("The Commission's powers are purely statutory. … Such action amounts to the Commission's selection of Campbell District's water supplier, which is clearly a management decision. A regulatory commission lacks the power to make such decisions. … Where costs associated with a management decision are found to be unreasonably and imprudently incurred, the only available remedy to protect a utility's ratepayers from that management decision is to disallow the cost in excess of that found reasonable when establishing new rates."). ***See also*** Case No. 2005-00089, Order at 6 and 8-9 (Aug. 19, 2005) and Order at 4-5, 6-7 (Nov. 9, 2005).

power to order utilities to investigate or implement DSM programs other than those utilities propose.[14]

This clear and long-standing restriction on Commission authority creates a significant difficulty for Sierra Club, because Sierra Club recommends that the Commission approve the Companies' proposed DSM/EE Program Plan, but then asks the Commission to require the Companies to do more than they have proposed.[15] The Commission may certainly approve the Companies' application; the Commission may approve or deny parts of the application; the Commission may deny the application entirely. But the Commission may not grant the relief Sierra Club has requested that goes beyond the Companies' application in this proceeding. Given that the Sierra Club has *not* requested that the Commission do less than approve the Companies' application as filed, that the Commission may not provide any relief Sierra Club has requested beyond approving the application as filed, and the extensive record in this case without genuine issue of material facts, an evidentiary hearing is unnecessary for the protection of substantial rights or the public interest.

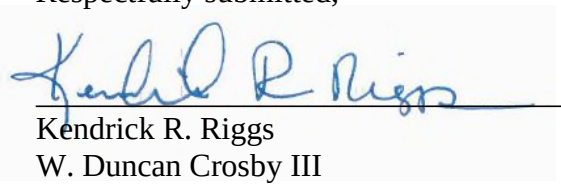
WHEREFORE, Louisville Gas and Electric Company and Kentucky Utilities Company respectfully ask the Commission to issue an order denying the Motions of Sierra Club and MHC.

[14] Emphasis added. In 2009, SB 51 was introduced to expressly permit the Commission to order a utility to file a DSM plan. (*See* http://www.lrc.ky.gov/record/09RS/SB51.htm). The General Assembly's refusal to enact this legislation is evidence of legislative intent to limit the Commission's authority to review DSM plans, not require them.

[15] Direct Testimony of Tim Woolf at 48-49.

Dated: July 14, 2014

Respectfully submitted,



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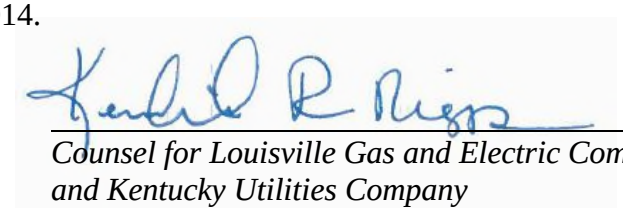
CERTIFICATE OF SERVICE

This is to certify that Louisville Gas and Electric Company and Kentucky Utilities Company's July 14, 2014 electronic filing of the Response to Wallace McMullen and Sierra Club's Request for an Evidentiary Hearing, Wallace McMullen and Sierra Club's Opposition Louisville Gas and Electric Company and Kentucky Utilities Company's Motion to Submit the Case for Decision on the Record, and Metropolitan Housing Coalition's Response in Opposition to Motion of Louisville Gas and Electric Company and Kentucky Utilities Company's Motion to Submit the Case for Decision on the Record, and Motion to Set Evidentiary Hearing is a true and accurate copy of the same document being filed in paper medium; that the electronic filing has been transmitted to the Commission on July 14, 2014; that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding; and that an original and one copy in paper medium of the Response to Wallace McMullen and Sierra Club's Request for an Evidentiary Hearing, Wallace McMullen and Sierra Club's Opposition Louisville Gas and Electric Company and Kentucky Utilities Company's Motion to Submit the Case for Decision on the Record, and Metropolitan Housing Coalition's Response in Opposition to Motion of Louisville Gas and Electric Company and Kentucky Utilities Company's Motion to Submit the Case for Decision on the Record, and Motion to Set Evidentiary Hearing are being mailed to the Commission on July 14, 2014.



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