

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In The Matter Of:

The Application Of Kentucky Power Company For:)	
(1) The Approval Of The Terms And Conditions)	
Of The Sixth Amendment To The Renewable)	
Energy Purchase Agreement For Biomass Energy)	
Resources Between The Company And)	Case No. 2015-00190
ecoPower Generation-Hazard, LLC;)	
(2) Authorization To Enter Into The Sixth)	
Amendment to The Agreement; (3) The Grant Of)	
Certain Declaratory Relief; And (4) The Grant Of)	
All Other Required Approvals And Relief)	

REPLY OF KENTUCKY POWER COMPANY

Kentucky Power Company (“Kentucky Power” or the “Company”) submits this Reply to the Response of Kentucky Industrial Utility Customers, Inc. (“KIUC”) filed in this case on July 8, 2015. As part of its application filed on June 18, 2015, Kentucky Power sought a Declaratory Order pursuant to 807 KAR 5:001, Section 19 declaring that the Second through Seventh Amendments to the ecoPower REPA did not alter or change the Commission’s October 10, 2013 Order in Case No. 2013-00144 (“REPA Approval Order”), including the Commission’s finding in the REPA Approval Order that concurrent recovery of costs associated with the REPA through Kentucky retail rates via a monthly rider is appropriate. Despite KIUC’s protestations in its Response, the requested Declaratory Order is appropriate and should be granted.

As discussed below, nothing in the Second through Seventh Amendments to the REPA altered the Commission’s conclusions that (1) the ecoPower REPA is a necessary and appropriate way for the Company to diversify its generation portfolio; (2) that the ecoPower REPA advances the policy mandates laid out in KRS 154.27-020(2); (3) that the full costs over

the full term of the ecoPower REPA are fair, just and reasonable pursuant to KRS 278.271; and (4) that the recovery of the Company's costs associated with the ecoPower REPA through Tariff B.E.R. is appropriate. The declaratory order sought by Kentucky Power should be granted without further proceedings.

To the extent the Commission requires additional information with respect to the requested declaratory relief, the Company requests that the Commission defer review of these issues until such time as discovery is complete, all testimony, including rebuttal testimony, relating to the remaining issues in the Company's application has been filed, and a hearing has taken place before the Commission.

A. **The Amended Commercial Operating Milestone Date Does Not Materially Alter the REPA Approval Order.**

KIUC complains that by changing the definition of Commercial Operation Milestone the Company has fundamentally altered material terms of the REPA approved by the Commission in the REPA Approval Order. KIUC does so by ignoring the plain language of the REPA and by failing to acknowledge the fact that its actions are the root cause of the delays necessitating the change in the Commercial Operation Milestone definition. Nothing in the Second through Seventh Amendments change the conclusions in the REPA Approval Order.

1. **The Term of the REPA and Contract Rate are not Tied to a Specific Commercial Operation Date.**

KIUC's Response asserts that because the change to the Commercial Operation Milestone date, a change necessitated, as described below, in part by KIUC's appeals of the Commission's REPA Approval Order, the cost of the REPA has increased in a manner inconsistent with the terms of the REPA approved by the Commission. KIUC's argument ignores that the REPA Approval Order approved the language of the REPA as filed, including Article 2 which provides for a 20-year term irrespective of the Commercial Operation Milestone

date. Article 2 of the REPA provides that the agreement “shall remain in full force and effect until the date that is twenty (20) years after the day before the first day of the Delivery Period...” The Delivery Period begins on the Commercial Operation Date which is defined as the date when Seller notifies Purchaser that all of the Conditions to Commercial Operation have been met. As described below, the Commercial Operation Milestone date merely defines when the Company can exercise certain rights relating to delays by Seller. It is not referenced in Article 2 of the agreement and, accordingly, does not set the date the term of the REPA begins. The term of the REPA is simply twenty years, starting with the date the ecoPower facility is fully operational.

Similarly, the date in the definition of Commercial Operation Milestone does not establish the Contract Rate to be paid under the REPA. Exhibit C to the REPA identifies the Contract Rate to be paid. It does so by identifying an initial price if any portion of the Delivery Period occurs in 2016 and an annual escalation for all subsequent years:

The Contract Rate for any portion of the Delivery Period, if any, prior to January 1, 2017 shall be an “around the clock” price of \$110.11/MWh. Beginning January 1, 2017 the Contract Rate for calendar year 2017 shall be an “around the clock” price of \$112.58, and on each January 1 thereafter for the remainder of the Term, the Contract Rate will be increased by 2.25% over the rate for the previous calendar year. All 2.25% adjustments will be rounded down to the nearest cent.

The Contract Rate to be paid under the REPA in any year is established through the formula set forth in Appendix C to the Agreement. There is no specific end date for the calculation of the Contract Rate set forth in the REPA. By amending the Commercial Operation Milestone date, the parties have deferred costs under the REPA for 23 months. KIUC’s continuing appeal forced a change in the date that that Contract Rate formula begins; however, the terms of the REPA relating to the Contract Rate approved by the Commission have not changed as a result of the Sixth Amendment.

2. The Amendment to the Commercial Operation Milestone is Required by the Actions of KIUC.

KIUC omits any discussion of the reason for the amendment of the Commercial Operation Milestone date. The Company and ecoPower updated the Commercial Operation Milestone date in response to circumstances outside of their control affecting the timeline for meeting the conditions precedent in Section 6.1 of the REPA. KIUC's appeals first to the Franklin Circuit Court and now to the Kentucky Court of Appeals of the Commission's REPA Approval Order have made it impossible for the Company to obtain a Commission Approval Order, as defined in the REPA, prior to the original Commercial Operation Milestone date.

While as Judge Wingate found without difficulty that KIUC's appeal lacks merit, until such time as the order is final and non-appealable, the Commission Approval Order condition precedent in the REPA cannot be met.¹ As described in the Company's semi-annual status reports filed with the Commission, the uncertainty created by KIUC's appeal has forced ecoPower to suspend construction until such time as the appeals have run their course.² Because Kentucky Power is committed to this important project, it worked with ecoPower to extend the Commercial Operation Milestone date in a commercially reasonable manner to account for the delay caused by KIUC's appeals. The delay in commercial operation for the project, and the

¹ The definition of Commission Approval Order in the REPA also requires a final and non-appealable order approving the transfer to Kentucky Power of an undivided 50% interest in the Mitchell generating station. The Commission approved the transfer in its October 7, 2013 Order in Case No. 2012-00578 ("Mitchell Transfer Order"). The Attorney General appealed the Mitchell Transfer Order to Franklin Circuit Court where the order was upheld. As KIUC did with the REPA Approval Order, the Attorney General has continued its appeal of the Mitchell Transfer Order to the Kentucky Court of Appeals.

² See e.g., *In the Matter of: The Application of Kentucky Power Company for (1) the Approval of the Terms and Conditions of the Renewable Energy Purchase Agreement for Biomass Energy Resources Between the Company and ecoPower Generation-Hazard, LLC; (2) Authority to Enter into the Agreement; (3) the Grant of Certain Declaratory Relief; and (4) the Grant of All Other Required Approvals and Relief*, Case No. 2013-00144; January 3, 2014 Status Report at ¶¶ 2-3; July 2, 2014 Status Report at ¶¶ 1-2; January 7, 2015 Status Report at ¶¶ 1-2; and June 29, 2015 Status Report at ¶¶ 1-2. All semi-annual status reports are filed in the Post-Case Referenced Correspondence files for Case No. 2013-00144.

associated contractual impacts, are the direct result of KIUC's actions and not any delays caused by the Company or ecoPower.

The Commission's REPA Approval Order, as confirmed by the Franklin Circuit Court, is well-supported and reasoned decision that properly interpreted KRS 278.271. Although KIUC is fully within its rights to appeal any Commission ruling, it would be a perverse result at best³ if KIUC were permitted to obtain through its unsuccessful appeal the relief unavailable to it on the merits. By statute, the Commission's orders "shall continue in force until ... revoked or modified by the commission, unless the order is suspended, or vacated, in whole or in part, by order or decree of a court of competent jurisdiction."⁴ KIUC should not be permitted to upend the statutory scheme, and manufacture its own extrajudicial relief from the Commission's decision approving the REPA, by the simple expedient of an unsuccessful appeal of that decision.

B. The Amended Commercial Operating Milestone Date Does Not Eliminate the Company's Ability to Terminate the REPA or Recover Liquidated Damages for Delay.

Contrary to KIUC's assertions, the Sixth Amendment does not take away the Company's ability to terminate the REPA or recover liquidated damages in the event ecoPower fails to meet the Commercial Operation Milestone date or any of Seller's other obligations under the REPA. Commercial Operation Milestone is a defined term in the REPA. Those rights exists both before and after the Sixth Amendment. The Sixth Amendment modifies only the date on which those rights can be exercised. As a result of the delays caused by KIUC's appeal of the REPA Approval Order, it was necessary to amend the Commercial Operation Milestone date from

³ See *Inter-Tel Technologies, Inc. v. Linn Station Properties, LLC*, 360 S.W.3d 152, (Ky. 2012) ("This is indeed a bit like the defendant who, having killed his parents, throws himself on the court's mercy because he is an orphan.")

⁴ KRS 278.390.

January 31, 2017 to December 31, 2018. However, because the language of the REPA ties the Company's rights to terminate or seek liquidated damages to the defined term Commercial Operation Milestone and not a specific date, the change in the date included in the definition of Commercial Operation Milestone does nothing to eliminate the Company's rights.

Section 4.10 of the REPA requires Seller to pay liquidated damages to Kentucky Power in the amount of \$15,000 per day in the event Seller fails to meet the Commercial Operation Milestone. The Company's right to recovery of liquidated damages in Section 4.10 of the REPA is tied to the defined term Commercial Operation Milestone and not to a specific date and, therefore, is unaffected by the amended definition of Commercial Operation Milestone. Similarly, the change has no bearing on whether ecoPower will be in default under Section 12.1(E) of the REPA (allowing the Company to terminate the REPA) if it has not cured its failure to meet the Commercial Operation Milestone within 180 days. Kentucky Power's termination rights thus are unaffected by the change in the definition of Commercial Operation Milestone. The only impact of the Sixth Amendment on the Company's rights relating to the Commercial Operation Milestone is the date on which the Company can begin to exercise those rights.

C. Kentucky Power's Decision to Extend the Commercial Operation Milestone Date was Prudent.

KIUC asserts that Kentucky Power's decision to amend the Commercial Operation Milestone date, necessary to address delays resulting from KIUC's appeals of the Commission's REPA Approval Order, was imprudent because it is possible that EPA might not include biomass generation as a compliance option when it issues the final Clean Power Plan. This claim is made despite the fact that EPA included biomass generation in its discussion of compliance options in

the draft Clean Power Plan.⁵ KIUC's speculative claims about what EPA might include in the final Clean Power Plan do not mean that Kentucky Power acted imprudently in extending the Commercial Operation Milestone date.

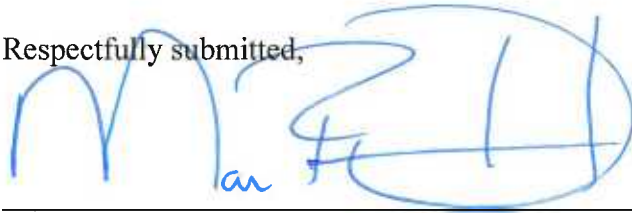
Kentucky Power's costs under the ecoPower REPA, which costs will be recovered via Tariff B.E.R., are established by terms of the agreement. Any additional plant-related costs arising from future regulatory action are borne solely by the Seller and not by Kentucky Power or its customers. Speculative changes to the Clean Power Plan, compounded by guesses about how the Commonwealth of Kentucky would implement the Plan, do not change the fact that the Second through Seventh Amendments to the ecoPower REPA do nothing to change the Commission's REPA Approval Order.

CONCLUSION

For the reasons set forth above, Kentucky Power respectfully requests that the Commission issue a Declaratory Order pursuant to 807 KAR 5:001, Section 19 that nothing in the Second through Seventh Amendments to the ecoPower REPA have altered or changed the Commission's REPA Approval Order, including the conclusion that concurrent recovery of costs associated with REPA through Kentucky retail rates via a monthly rider is appropriate. To the extent the Commission needs additional information to confirm that a Declaratory Order is appropriate, Kentucky Power requests that the Commission defer review of these issues until such time as discovery is complete, all testimony, including rebuttal testimony, relating to the remaining issues in the Company's application has been filed, and a hearing has taken place before the Commission.

⁵ 79 Fed. Reg. at 34,924.

Respectfully submitted,



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Certificate of Service

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this the 22nd day of July, 2015.

A handwritten signature in blue ink, appearing to read "Mark R. Overstreet", is written over a horizontal line. The signature is stylized and somewhat cursive.

Mark R. Overstreet