

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)	

LEGAL MEMORANDUM OF KENTUCKY POWER COMPANY

In accordance with the Commission’s July 22, 2015 Order¹ in this proceeding, Kentucky Power Company (“Kentucky Power” or the “Company”) submits this memorandum on the issue of whether the pending appeal by Kentucky Industrial Utility Customers, Inc. (“KIUC”) of the Commission’s October 10, 2013 Order in Case No. 2013-00144 (“REPA Approval Order”) divests the Commission of jurisdiction over this separate and independent proceeding. Because Kentucky Power does not seek to modify or alter the REPA Approval Order, KIUC’s appeal does not affect the Commission’s jurisdiction over the Company’s pending application. Adoption of a rule requiring the suspension of this case during the pendency of KIUC’s appeal is contrary to clear Kentucky Supreme Court precedent, would effectively stay the REPA Approval Order in contravention to KRS 278.390.

¹ *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 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, Case No. 2015-00190 (July 22, 2015) (“July 22 Order”).*

ARGUMENT

A. Kentucky Power is Not Seeking to Modify or Amend the REPA Approval Order.

In this case, Kentucky Power seeks Commission approval of the Sixth Amendment to the REPA and a declaratory order that the Second through Seventh Amendments to the REPA have not changed nor altered the REPA Approval Order. The Company is not seeking to modify or alter the REPA Approval Order. Instead, it seeks the Commission's confirmation that the identified amendments to the REPA are consistent with relevant legal authority and the REPA Approval Order.

Kentucky Power and ecoPower entered into the Sixth Amendment to the REPA to address the risk placed on the Company by Ordering Paragraph 7 of the REPA Approval Order. As made clear in Mr. Wohnhas' testimony accompanying the application, Kentucky Power is not challenging the validity of the Ordering Paragraph 7 of the REPA Approval Order or otherwise seeking to amend the Order:

Q. IS KENTUCKY POWER CHALLENGING ORDERING PARAGRAPH 7?

A. No. The Commission acted within its authority in including Ordering Paragraph 7 in the REPA Approval Order. However, Ordering Paragraph 7 placed a financial risk on the Company in connection with the REPA which is unacceptable to Kentucky Power. The Sixth Amendment addresses that risk by properly shifting it to ecoPower.²

Nothing in the Company's application in this case requires the Commission to reevaluate, modify, or amend its fully-supported findings of fact and conclusions of law in the REPA Approval Order. To the contrary, Kentucky Power seeks Commission approval of the subsequent amendments to the REPA, along with related declaratory relief, to permit the Company to exercise the authority granted it in the REPA Approval Order.

² Wohnhas Direct Testimony at 8.

The REPA Approval Order – unaltered by anything in this proceeding – thus serves as the standard against which the identified amendments will be measured and the declaratory relief considered. In sum, nothing in this case requires the Commission to reopen, modify, or amend the REPA Approval Order.

B. Because Kentucky Power is Not Seeking To Modify Or Alter The REPA Approval Order, The Commission Enjoys Jurisdiction To Grant The Company's Application In This Case.

1. Kentucky Law is Clear that KIUC's Appeal Did Not Divest The Commission Of Jurisdiction Over The Company's Subsequently Filed Application.

The Commission's July 22, 2015 Order requiring the filing of legal memoranda explains that “[g]enerally, the filing of a notice of appeal *divests a tribunal of jurisdiction to rule on matters involved in the appeal* while the appeal is pending, and transfers the named parties to the jurisdiction of the appellate court.”³ Explicit in the Commission's general statement of the rule, as well as the controlling appellate authority discussed below, is that KIUC's appeal limits only the Commission's ability to amend or modify its October 10, 2013 Order in Case No. 2013-00144. That Order is the only “matter[] involved in the appeal,” and the Commission retains continuing jurisdiction⁴ to consider “Kentucky Power's proposed amendments to the REPA and ... [to issue] a declaratory order that those amendments have not changed the approvals set forth in that October 10, 2013 Order.”⁵

The effect of the filing of a notice of appeal on the lower tribunal's ability to act has been addressed by the Kentucky Supreme Court on least three occasions in recent years. In

³ July 22 Order at 3 (emphasis supplied).

⁴ See e.g., *Commonwealth v. Bailey*, 71 S.W.3d 73 (Ky. 2002) (“Generally, an appeal divests the trial court of jurisdiction *to proceed further in the underlying case.*”) (emphasis supplied). Here, the underlying case is Case No. 2013-00144 and not this case, which is an independent action, filed almost two years after the Commission's decision in Case No. 2013-00144, that seeks relief different from that adjudicated by the Commission in its October 10, 2013 decision.

⁵ July 22 Order at 3.

Commonwealth v. Steadman,⁶ for example, the defendant challenged on multiple grounds the trial court's order requiring him to make restitution. Among the arguments was his claim that by filing a notice of appeal of his conviction he divested the trial court of jurisdiction in the case, and thus the court lacked the ability to enter the subsequent restitution order in the case.⁷ Agreeing that the appeal divested the trial court of authority to enter the subsequent restitution order in the case on appeal, the Court first explained what it intended by its statement in *Devondale v. Stallings* and similar decisions concerning the effect of the filing of a notice of appeal:

Admittedly, ... [w]e have also stated that the filing of a notice of appeal divests the trial court of jurisdiction and "transfers jurisdiction of the case from the circuit court to the appellate court.... But these decisions repeatedly refer to jurisdiction of or over "the case." They do not say the court loses jurisdiction over the subject matter of the case, or a category or class of cases. In fact, that claim does not make sense.⁸

The Court then continued by distinguishing between subject matter jurisdiction and jurisdiction over a particular case.⁹ The filing of a notice of appeal divests the lower tribunal of jurisdiction over the judgment appealed – that is jurisdiction of a particular case – and not the general subject matter of the case:

A court's power to affect its own judgment ... after the filing of a notice of appeal is this latter category: jurisdiction over a particular case. Such questions go more accurately to the propriety of the exercise of jurisdiction rather than the *existence* of jurisdiction. As noted above, the decisions describing a lack of jurisdiction under such circumstances limit it to "this case." That alone shows that we are not

⁶ *Commonwealth v. Steadman*, 411 S.W.3d 717 (2013).

⁷ *Id.* at 721 ("he also argues that his notice of appeal stripped the court of subject matter jurisdiction and transferred it to the Court of Appeals.")

⁸ *Id.*

⁹ *Id.* at 722 ("jurisdiction over a particular case ... refers to a court's authority to decide a specific case (as opposed to a class of cases of which the court has subject matter jurisdiction).")

talking about limits on the court's power over an entire category of cases, but whether the court has exceeded its power with respect to *this* case.¹⁰

The Court then concluded that the trial lacked jurisdiction over the particular case, and as a result, it lacked authority to modify its judgment of conviction to include the restitution obligation.¹¹

Commonwealth v. Wingate,¹² arose in connection with an action filed in Franklin Circuit Court against the Finance and Administration Cabinet by Kentucky Spirit Health Plan, Inc. Judge Wingate entered partial summary judgment in favor of the Commonwealth on some but not all of the claims in the action. The partial summary judgment was made final and appealable pursuant to CR 54.02 and all parties appealed.¹³ While the appeals were pending, the court entered a subsequent order staying discovery on the claims remaining before it. Kentucky Spirit then sought a writ of prohibition to set aside the stay.¹⁴ The court of appeals granted the writ and the Cabinet appealed to the Kentucky Supreme Court.¹⁵ The Cabinet argued in the alternative before the Supreme Court that the earlier appeals on the merits of the partial summary judgment divested the Franklin Circuit Court of subject matter jurisdiction, and that as a result the case, including discovery, could not proceed before the trial court on the remaining claims until the

¹⁰ *Id.* at 722-723 (emphasis in original).

¹¹ *Id.* at 724. The Court premised its conclusion that the trial court lacked jurisdiction over that particular case on the fact that ten days had elapsed since the final judgment of conviction was entered in the case and not on the subsequent filing of the notice of appeal. *Id.* Nevertheless, the Court treated the loss of jurisdiction of the particular case as a result of the filing of a notice of appeal, and as the result of the lapse of more than ten days after the judgment of conviction was entered, as equivalent throughout the opinion. *See, id.* at 721, 722-723. The Court also concluded that jurisdiction over the particular case, unlike subject matter jurisdiction may be waived, and that Steadman had done so by raising his intervening notice of appeal for the first time on appeal. *Id.* at 724-725.

¹² 460 S.W.3d 843 (Ky. 2015).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

appeals were resolved.¹⁶ The Supreme Court had little difficulty rejecting the Cabinet's argument, explaining "we are unpersuaded by the Cabinet's argument that the circuit's court's holding [staying the case] may be upheld upon the basis that it had lost 'subject matter jurisdiction,' and so may not further preside over the case in any manner."¹⁷ Accordingly, it concluded the trial court retained jurisdiction to enter orders in the case.

Finally, the Supreme Court less than two months ago again emphasized that filing a notice of appeal limits the lower tribunal's continuing jurisdiction with respect to judgment or order appealed only. In *Wright v. Ecolab, Inc.*¹⁸ the Kenton Circuit Court entered what was in effect a partial summary judgment in favor of all but one defendant. The plaintiff filed a notice of appeal despite the fact the order did not contain the finality language required by CR 54.02.¹⁹ Subsequent to the filing of the notice of appeal the trial court entered an order *nunc pro tunc* amending the partial summary judgment to include certification pursuant to CR 54.02. The court of appeals dismissed the appeal as premature.²⁰ On discretionary review, the Supreme Court affirmed. Noting that a notice of appeal did not affect the lower tribunal's "authority to act in matters unrelated to the appeal,"²¹ the Court concluded that the order *nunc pro tunc* nevertheless was a nullity because it sought to modify "an integral part of the summary judgment from which the notice of appeal was taken."²²

¹⁶ *Id.*

¹⁷ *Id.* at 848.

¹⁸ 2015 Ky. LEXIS 1633 (Ky. June 11, 2015). The decision was denoted as "To Be Published" and became final on Jul 2, 2015. The opinion has yet to be assigned a S.W.3d citation. A copy of the slip opinion is attached as Exhibit 1.

¹⁹ *Id.* at * 5.

²⁰ *Id.* at ** 7-8.

²¹ *Id.* at ** 13-14 quoting *Commonwealth v. Bailey*, 71 S.W.3d 73, 84 (Ky. 2002).

²² *Id.* at *14.

Because KIUC's notice of appeal of the Commission's October 10, 2013 Order only divested the Commission of jurisdiction with respect to that case – jurisdiction of the particular case – the Commission's may continue to exercise jurisdiction with the Company's subsequent application. As was the case with the remaining claims in *Wingate*, and unlike the subsequent orders in *Steadman* and *Ecolab*, the exercise by the Commission of its jurisdiction with respect to the Company's application in this case does not require the Commission to amend or modify its October 10, 2013 Order in Case No. 2013-00144. Indeed, the relief requested can be granted in full without any alteration of the Order that is the subject of KIUC's appeal.

The Commission's jurisdiction with respect to the Company's pending application is unaffected by KIUC's appeal.

2. The Three Appellate Decisions Cited By The Commission In Its July 22, 2015 Order Requesting Legal Authority Are Limited To The Issue Of The Lower Tribunal's Jurisdiction To Amend Or Otherwise Modify The Judgment Being Appealed During The Pendency Of The Appeal.

The Commission cites *Johnson v. Commonwealth*,²³ *City of Devondale v. Stallings*,²⁴ and *Young v. Richardson*²⁵ in support of its statement concerning the effect of filing of a notice of appeal.²⁶ As the Commission's own statement of the rule notes, the filing of a notice of appeal divests the lower tribunal of jurisdiction only with respect to the matters involved in the pending appeal.²⁷ None of the decisions cited by the Commission support the much broader proposition that KIUC's appeal of the October 10, 2013 Order divests this Court of jurisdiction to consider

²³ 17 S.W.3d 109, 113 (Ky. 2000).

²⁴ 795 S.W.2d 954, 957 (Ky. 1990).

²⁵ 267 S.W.3d 690, 695-696 (Ky. App. 2008).

²⁶ July 22 Order at 3.

²⁷ *Id.* (“the filing of a notice of appeal divests a tribunal of jurisdiction to rule on matters involved in the appeal while the appeal is pending....”)

the Company's subsequently filed application involving contract amendments that are not at issue in KIUC's appeal, and that did not even exist at the time the notice of appeal was filed.

For example, in *Johnson* the Court held that an order entered three months after the defendant filed his notice of appeal, and that overruled the defendants' post-trial motions seeking to set aside the judgment being appealed, "was entered without jurisdiction and is a nullity."²⁸ Similarly, in *Young*, the Court held that the trial court was without jurisdiction to enter an agreed order vacating a prior judgment in the case while the appeal of that same judgment was pending.²⁹ Finally, in *Steadman* the Supreme Court explained that *City of Devondale* and the other decisions reviewed by the Court "repeatedly refer to jurisdiction of or over 'the case.' They do not say the court loses jurisdiction over the subject matter of the case, or a category or class of cases"³⁰

Under clearly-established Kentucky law, including the three cases cited in the Commission's July 22 Order, KIUC's pending appeal of the Commission's October 10, 2013 Order in Case No. 2013-00144 does not affect the Commission's jurisdiction with respect to this case filed nearly two years later.

²⁸ 17 S.W.3d at 113.

²⁹ 267 S.W.3d at 696.

³⁰ *Steadman*, 411 S.W.3d at 721.

C. None of the Commission Decisions Referenced in Its July 22, 2015 Order Require The Commission To Await The Outcome Of KIUC's Appeal Of The Commission's October 10, 2013 Order Before Adjudicating This Case.

In the July 22 Order, the Commission pointed to three prior rulings where it held that an appeal of its decision transferred jurisdiction of the case to the appellate court.³¹ Each of those cases involved attempts to re-open or alter Commission orders under appeal, and, therefore, each is distinguishable from the present case:

- In its January 27, 2005 order in Case No. 2004-00403, the Commission denied Union Light, Heat & Power's request to extend the date for filing a rate case, because to do so would require the Commission to *modify its earlier order in Case No. 2001-00092* (which established the filing date) and that order was under appeal at the Franklin Circuit Court.³²
- In its March 6, 1996 order in Case No. 95-445, the Commission refused a request by KIUC to require Kentucky Utilities to refund certain environmental costs that originally had been approved for recovery in Case No. 93-465 (but were reversed by the Franklin Circuit Court) because to order a refund would require the Commission to *amend its order in Case No. 93-465* and that order was under appeal at the Kentucky Court of Appeal.³³
- In its November 24, 2009 order in Case No. 2009-00096, the Commission dismissed formal complaints in part because the complainants sought to *re-open the Commission's earlier decision in Case No. 2007-00134* that was being appealed at the time.³⁴

³¹ July 22 Order at 3. The Commission referenced, in footnote 3 of the July 22 Order, the June 5, 2008 order in Case No. 2007-00134. The referenced order, however, was the Commission's denial of an application for rehearing. The Commission's November 24, 2009 order in Case No. 2009-00096 dismissed formal complaints against Kentucky American Water Company in part because the Complaint sought to re-open the Commission's order in Case No. 2007-00134.

³² Order, *In the Matter of: The Union Light, Heat And Power Company's Motion For Extension Of Filing Date And Continuation Of Its Current AMRP Rates*, Case No. 20013-00403 at 7 (Ky. P.S.C. January 27, 2005) ("Unlike ULH&P's present request, which would modify our previous order by extending the rider beyond the previously authorized period, our decision in Case No. 2002-000107 did not modify a decision on appeal...").

³³ Order, *In the Matter of: An Examination By The Public Service Commission Of The Environmental Surcharge Mechanism Of Kentucky Utilities Company As Billed From February 1, 1995 To July 31, 1995*, Case No. 95-445, 1996 Ky. PUC LEXIS 2108 at *- 3-4 (Ky. P.S.C. March 6, 2006)

³⁴ *Schimmoeller v. Kentucky-American Water Company*, Case No. 2009-00096 at 4 (Ky. P.S.C. November 24, 2009) ("As to Kentucky-American's first argument we have previously held that the Commission lacks jurisdiction to amend or modify any Order that is currently pending judicial review").

Unlike the cases cited by the Commission in its July 22, 2015 Order, the Company's application in this case does not seek to modify or amend the REPA Approval Order. Kentucky Power instead seeks approval of the Sixth Amendment to the REPA, an amendment that responds to but does not effect any change to the REPA Approval Order. Kentucky Power also seeks a declaration that the Second through Seventh Amendments have not changed or altered the Commission's REPA Approval Order. Neither request for relief runs afoul the Commission's own decisions in the cases cited by it.

D. Suspending Review of Kentucky Power's Application Would Stay the REPA Approval Order Contrary To KRS 278.390.

The conclusion that KIUC's appeal strips this Commission of jurisdiction to consider and approve subsequent amendments to the REPA is contrary to the clear purpose of KRS 278.390.

That statute provides, in relevant part, that:

Every order entered by the commission shall continue in force until the expiration of the time, if any, named by the commission in the order, or 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.³⁵

The REPA Approval Order remains fully effective and in force, including the requirements of Ordering Paragraph 7. To enable the Company to proceed with the project, while complying with the terms of the REPA Approval Order, Kentucky Power and ecoPower entered into the Sixth Amendment. Suspending Commission review and approval of the Sixth Amendment pending the resolution of KIUC's appeal this case in effect stays implementation of the REPA Approval Order during the appeal contrary to the General Assembly's intent in enacting KRS 278.390.

³⁵ KRS 278.390.

Certainly, the Commission has turned to KRS 278.390 to reject more direct, stay efforts in the past. On October 7, 2013, Kentucky Power's application to acquire a fifty percent undivided interest in the Mitchell generating station was approved by the Commission. Soon thereafter, Kentucky Power filed an application for authority to refund the liabilities to be assumed by the Company in connection with the Mitchell transfer.³⁶ The Attorney General, who opposed the transfer, filed a motion to abate the financing application pending the expiration of the time for appeals from the decision, and if an appeal was filed, during the pendency of those proceedings in the Franklin Circuit Court.³⁷ The Commission denied the Attorney General's motion, recognizing that in light of the clear language of KRS 278.390 the filing of an appeal does not necessitate the abeyance. Instead, the Commission explained that the pendency of an appeal alone does not provide sufficient basis for an abeyance:

The AG has ... [not] presented good cause why the instant matter should be held in abeyance. The Commission notes the AG did file on December 4, 2013, an appeal of our decision in Case No. 2012-00578 and, pursuant to KRS 278.390, that decision will remain in effect until it is "suspended, or vacated in whole or part, by order or decree of a court of competent jurisdiction." In light of the fact we have already approved the acquisition of debt in connection with the Mitchell Transfer, and that approval remains in effect, the Commission finds that Kentucky Power's proposal to manage its interest-rate risk in connection with the Mitchell Transfer should not be delayed.³⁸

Notwithstanding KIUC's appeal, the Commission retains jurisdiction to consider and grant the relief sought by the Company in this proceeding.

³⁶ See Order, *In the Matter of Application of Kentucky Power Company for Authority Pursuant to KRS 278.300 to Issue and Sell Promissory Notes of One or More Series, to Enter Into Loan Agreements, and For Other Authorizations in Connection with the Refunding of Liabilities Assumed by the Company in Connection with the Mitchell Transfer*, Case No. 2013-00410 (December 6, 2013).

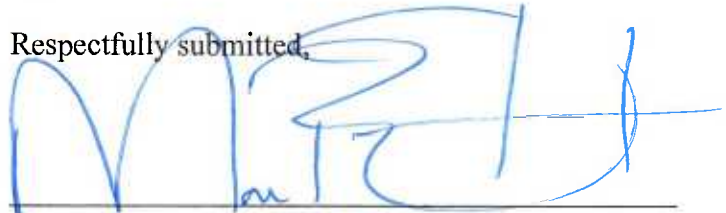
³⁷ *Id.* at 2.

³⁸ *Id.* at 4.

CONCLUSION

Because the Company's application does not seek to amend or modify the Commission's prior decision, KIUC's appeal of the REPA Approval Order does not divest the Commission of jurisdiction over the application. The Commission's review of the Company's application can and should proceed notwithstanding KIUC's appeal.

Respectfully submitted,



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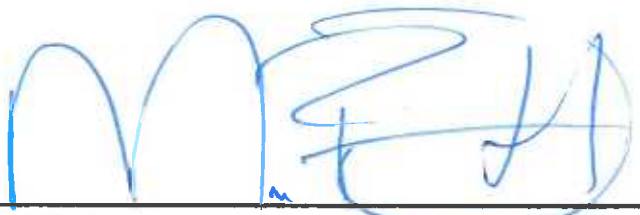
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Certificate of Service

A copy of the foregoing was filed using the Public Service Commission of Kentucky's electronic filing service, which will send an e-mail message to:

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this the 3rd day of August, 2015.



Mark R. Overstreet