

**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 ecoPower Generation-Hazard, : **Case No. 2015-00190**
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. :

**MOTION TO ESTABLISH PROCEDURAL SCHEDULE OF
KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC.**

On June 18, 2015, Kentucky Power Company (“Kentucky Power” or “Company”) filed an Application at the Public Service Commission of Kentucky (“Commission”) requesting approval of a Sixth Amendment to the Renewable Energy Purchase Agreement for Biomass Energy Resources (“REPA”) between Kentucky Power and ecoPower Generation-Hazard LLC (“ecoPower”). Kentucky Power seeks an Order: 1) approving the terms and conditions of the Sixth Amendment to the REPA; 2) approving and authorizing Kentucky Power to enter into the Sixth Amendment to the REPA; and 3) granting all other required relief and approvals. The Company also asks for a Declaratory Order that none of the Second through Seventh Amendments to the REPA have altered or changed the Commission’s October 10, 2013 Order in Case No. 2013-00144 (“REPA Order”).

For the reasons set forth below, KIUC respectfully requests that the Commission establish a procedural schedule in this case allowing for one round of intervenor discovery, the filing of intervenor testimony, an evidentiary hearing on Kentucky Power’s Application, and the submission of post-hearing briefs. 807 KAR 5:001, Section 19 provides that any response to an application for declaratory order is due 21 days after the date on which the application was filed. Therefore, KIUC intends to file its response on or before July 9, 2015, unless that requirement is modified by the Commission.

The proposed Sixth Amendment to the REPA, if approved, would make at least two significant changes to the terms of the REPA that would adversely impact Kentucky Power’s customers. The first significant change,

which the Company discusses at length in its Application, concerns the Security Fund required under Section 11.1 of the REPA. Currently, the Security Fund is intended solely to cover damages resulting from any breach by ecoPower of its obligations under the REPA, protecting both Kentucky Power and its customers in the event of breach.¹ In the proposed Sixth Amendment, however, the Company expands the purpose of the Security Fund and increases its level in order to protect Kentucky Power's shareholders in the event of any negative impact of the REPA on the Company's credit ratings.² Kentucky Power's customers do not benefit from this proposed change since the Commission has already directed that ratepayers be held harmless if the Company's credit ratings are negatively impacted by the REPA.³ Because the Sixth Amendment would expand the use of the Security Fund in a manner that protects only Kentucky Power's shareholders, the original protection of the Security Fund afforded to customers in the event of a breach may be unreasonably weakened. Accordingly, KIUC respectfully requests an opportunity to address this proposed change.

The second significant change, which is barely touched upon in the Application and testimony, but which fundamentally alters material terms of the contract, concerns the Commercial Operations Milestone set forth in the REPA. In the proposed Sixth Amendment, Kentucky Power extends the deadline for Commercial Operations of the ecoPower facility from January 31, 2017 to December 31, 2018, delaying the required operations start date by 23 months.⁴ While Kentucky Power generically states that the Sixth Amendment "*extends key facility developmental milestones,*"⁵ the Company fails to explain or address that those milestones include the critical Commercial Operations Milestone. Kentucky Power also fails to explain how extension of the Commercial Operations Milestone would impact the REPA and the Company's customers. But a comprehensive analysis regarding the impacts of extending the Commercial Operations Milestone as proposed in the Sixth Amendment is fundamental to the Commission's ultimate determination in this case. From a customer perspective, the proposed 23-month extension of the Commercial Operations Milestone is far more important than the changes to the Security Fund.

¹ Direct Testimony of Jay F. Godfrey on Behalf of Kentucky Power Company, Case No. 2013-00144 (April 10, 2013) at Ex. JFG-1 ("Initial REPA") at 46.

² Application at 7-8; Direct Testimony of Jay F. Godfrey on Behalf of Kentucky Power Company (June 18, 2015) at 9:3-11:10; Direct Testimony of Ranie K. Wohnhas on Behalf of Kentucky Power Company (June 18, 2015)("Wohnhas Testimony") at 6-7 and 8-9.

³ REPA Order at 23, Ordering Paragraph 7.

⁴ Wohnhas Testimony, Ex. RKW-1 (proposed Sixth Amendment to the REPA) at 2, 15, and 17. Both the approved and the proposed versions of Exhibit A to the REPA are attached to this pleading.

⁵ Application at 7.

The Commercial Operations Milestone significantly impacts the operation of several portions of the REPA. For instance, as approved by the Commission in Case No. 2013-00144, the REPA required that Commercial Operations at the ecoPower facility begin no later than January 31, 2017.⁶ If Commercial Operations did not begin by that date, and if ecoPower failed to cure that issue within the time allotted by the REPA, then ecoPower would be in default and Kentucky Power would have the right to terminate the REPA. Failure to meet the Commercial Operations Milestone would also require ecoPower to pay liquidated damages to Kentucky Power up to a large (but confidential) liquidated damages cap set forth in the REPA.⁷ Additionally, the REPA Contract Rate was based upon the Commercial Operations Milestone, establishing a rate of \$112.58/MW effective January 2017, which would increase each year thereafter by 2.25%.⁸

If the Commercial Operations Milestone is extended as proposed in the Sixth Amendment, then the Commission would effectively be taking away Kentucky Power's right to terminate the REPA and excusing ecoPower from paying the liquidated damages required by the REPA. Liquidated damages would have flowed through the customers. Moreover, the Commission would be altering the term of the REPA by extending the end date by 23 months from January 31, 2037 to December 31, 2038. And the Commission would be altering the price of the REPA since the 2.25% escalation would increase the contract price for the additional 23 months of the REPA.

Kentucky Power's request to extend the Commercial Operations Milestone would alter the price and the term of the REPA as approved by the Commission and would waive liquidated damages that customers otherwise would receive. Because the Company failed to explain any of these repercussions in detail, KIUC respectfully requests an opportunity for discovery, testimony, an evidentiary hearing and the submission of post-hearing briefs. KIUC recognizes that 807 KAR 5:001, Section 19 requires that any response to an application for declaratory order is due 21 days after the date on which the application was filed, and intends to file a response on or before July 9, 2015 unless that requirement is modified by the Commission. KIUC also acknowledges Kentucky Power's request for a Commission order by August 28, 2015 and would not oppose an expedited schedule.

⁶ Initial REPA at 12 (defining "Commercial Operation Milestone") and 73 (Exhibit A).

⁷ Initial REPA at 28-29 (Section 4.10).

⁸ Initial REPA at 77 (Exhibit C).

Respectfully submitted,



Michael L. Kurtz, Esq.

Kurt J. Boehm, Esq.

Jody Kyler Cohn, Esq.

BOEHM, KURTZ & LOWRY

36 East Seventh Street, Suite 1510

Cincinnati, Ohio 45202

Ph: 513.421.2255 Fax: 513.421.2764

mkurtz@BKLawfirm.com

kboehm@BKLawfirm.com

jkylercohn@BKLawfirm.com

**COUNSEL FOR KENTUCKY INDUSTRIAL UTILITY
CUSTOMERS, INC.**

June 29, 2015

EXHIBIT A
FACILITY MILESTONES

Project Activity	Completion Date
Revised Air Permit	APRIL 30, 2013
Construction Start Date (LNTP)	MAY 23, 2013
PJM Interconnection Services Agreement	JANUARY 15, 2014
Financial Close	APRIL 15, 2014
Final Equipment Procurement (FNTF)	APRIL 15, 2014
Commercial Operation Milestone	JANUARY 31, 2017

**EXHIBIT A
FACILITY MILESTONES**

Project Activity	Completion Date
Revised Air Permit V-10-013-R1	APRIL 24, 2013
Construction Start Date	April 22, 2013
PJM Interconnection Services Agreement	June 1, 2016
Financial Closing	July 1, 2016
Final Equipment Procurement (FNTP)	July 1, 2016
Commercial Operation Milestone	December 31, 2018

