

**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 : **Case No. 2015-00190**
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. :

**MEMORANDUM OF
KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC.**

Kentucky Industrial Utility Customers, Inc. (“KIUC”) submits this Memorandum in accordance with the Kentucky Public Service Commission’s (“Commission”) Order issued July 22, 2015. In that Order, the Commission directed parties to submit a legal memorandum within ten days addressing whether the Commission lacks jurisdiction to consider Kentucky Power Company’s (“Kentucky Power” or “Company”) application in this proceeding given that the Commission’s October 13, 2013 Order in Case No. 2013-00144 (“REPA Order”), approving the Renewable Energy Purchase Agreement (“REPA”) for biomass energy resources between Kentucky Power and ecoPower Generation-Hazard, LLC (“ecoPower”) is currently being challenged in the Kentucky Court of Appeals. (Case No. 2015-CA-000398)

KIUC submits that the Commission does not have jurisdiction to consider Kentucky Power’s application to issue a Declaratory Order and to amend the REPA while matters regarding the REPA are pending before the Kentucky Court of Appeals. Proceeding to consider the proposed contract amendments and request for a Declaratory Order would frustrate the judicial process and disrupt the orderly workings of the court system. That is why there is an unbroken line of Commission and court precedent holding that, except in very limited circumstances, subject matter jurisdiction cannot reside in two places at the same time.

Both the Commission and Kentucky courts have held that a lower tribunal loses jurisdiction over a subject matter once that subject matter is appealed to a higher court. In Case No. 2004-00403, Union Light Heat and Power Company (“ULH&P”) argued that the Commission retains jurisdiction to modify an order after that order is appealed, claiming that the Commission has the “*inherent ability to issue ministerial type Orders modifying its previous Orders even when an appeal has been taken.*”¹ The Commission rejected UHL&P’s arguments, holding that “[g]enerally a lower tribunal loses jurisdiction to amend or modify a decision once that decision is appealed”.²

In making this determination, the Commission cited two Kentucky court cases, which are equally applicable in this proceeding. The first is a Kentucky Court of Appeals case, *Johnson Bonding Co. v. Ashcroft*, 483 S.W.2d 118, 119 (Ky. App. 1972), in which the Court held that “[t]he general rule, with certain exceptions, is that the trial court loses jurisdiction over matters that have been appealed until mandate has issued.” The second is a Supreme Court of Kentucky case, *City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990), which directs that “[a] notice of appeal, when filed, transfers jurisdiction of the case from the circuit court to the appellate court.”³

The Commission has applied this legal principle to prohibit a separate proceeding addressing the same subject matter as a case pending at the Kentucky Court of Appeals. In Case No. 95-445, KIUC sought a refund on the ground that a Franklin Circuit Order overturned the Commission’s decision in Case No. 93-465 allowing the utility to collect certain amounts through its environmental surcharge mechanism.⁴ The Commission refused to grant the requested refund because the subject matter of Case No. 93-465 was still on appeal at the Kentucky Court of Appeals, holding that “[the Commission] cannot implement the Court’s judgment until Case No. 93-465 is actually remanded... sound public policy requires the Commission to recognize the uncertainties present during the appeal and wait until all appeals are exhausted.”⁵

¹ *Union Light, Heat and Power Company’s Motion for Extension of Filing Date and Continuation of Its Current Rider AMRP Rates*, Order (January 27, 2005)(“ULH&P Order”) at 4.

² ULH&P Order at 5.

³ ULH&P Order at 5.

⁴ *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. 1995-00445, Order (Mar. 6, 1996) (“KU Order”) at 2.

⁵ KU Order at 3.

The Commission again adhered to the rule that it loses jurisdiction to amend or modify a prior order when an appeal is pending in *Schimmoeller v. Kentucky-American Water Company*.⁶ In Case No. 2007-134, the Commission issued a Certificate of Public Convenience and Necessity to construct certain new facilities.⁷ That decision was appealed to the Franklin Circuit Court.⁸ Subsequently, two individuals filed complaints with the Commission requesting a reexamination of the need to construct the new facilities.⁹ Dismissing both complaints, the Commission stated that it had “*previously held that the Commission lacks jurisdiction to amend or modify any Order that is currently pending judicial review... [t]o the extent that the Complainants seek to reopen Case No. 2007- 00134, we are without jurisdiction to act.*”¹⁰

In sum, the principle is well-established that the Commission lacks jurisdiction over a given subject matter while that subject matter case is on appeal to a higher court. That principle governs in this case since the subject matter at issue here – the REPA between Kentucky Power and ecoPower and whether that REPA satisfies the requirements of KRS 278.271 – is the same subject matter currently before the Kentucky Court of Appeals. As discussed at length in KIUC’s pleadings in this proceeding, Kentucky Power’s application seeks to fundamentally alter the REPA by: 1) increasing its “*full costs*” by \$57 million; 2) extending the end date of its “*full term*” by 23 months; 3) excusing ecoPower from paying up to \$2.7 million in liquidated damages that would otherwise flow through to customers; and 4) expanding the use of the Security Fund required under Section 11.1 of the REPA solely to benefit Kentucky Power. But the contents of the Commission-approved REPA and its compliance with KRS 278.271 are matters currently before the Kentucky Court of Appeals. The Commission would be unlawfully circumventing the jurisdiction of the Kentucky Court of Appeals if it proceeded with consideration of the Company’s application during the pendency of the appeal.

⁶ Case No. 2009-00096.

⁷ *Application of Kentucky-American Water for a Certificate of Public Convenience and Necessity Authorizing the Construction of Kentucky River Station II, Associated Facilities and Transmission Main*, Order (April 25, 2008).

⁸ *Schimmoeller v. Kentucky-American Water Company*, Case No. 2009-00096, Order (November 24, 2009)(“*Schimmoeller Order*”) at 2.

⁹ *Schimmoeller Order* at 2-3.

¹⁰ *Schimmoeller Order* at 4.

While courts have held that a lower tribunal can perform a “*ministerial act*” to correct a clerical error in an order subject to appeal, such as signing an unsigned order,¹¹ that exception is not applicable in this proceeding. The Commission defines “*ministerial acts*” as acts that involve “*obedience to instructions or laws instead of discretion, judgment, or skill.*”¹² The Commission defines a “*ministerial duty*” as “*one in respect to which nothing is left to discretion.*”¹³ Addressing Kentucky Power’s application in this proceeding would not be a “*ministerial*” act/duty. To address Kentucky Power’s application, the Commission would have to determine whether increasing the costs of the REPA by \$57 million, extending the term of the REPA by 23 months, waiving the \$2.7 million in liquidated damages that may result from the REPA, and changing the potential use of the Security Funds required by the REPA solely to benefit Kentucky Power are consistent with the requirements of KRS 278.271. This would go well beyond the bounds of correcting a clerical error.

Kentucky Power has already submitted the direct testimony of two witnesses in this proceeding. KIUC has already submitted affidavits of two witnesses on the portion of the Company’s application requesting a Declaratory Order. KIUC also seeks to conduct discovery and submit direct testimony on the portion of the application that seeks approval of the Sixth Amendment. And in the Reply filed by Kentucky Power on July 22, 2015, the Company requests the ability to submit rebuttal testimony prior to any hearing. These are the hallmarks of a full evidentiary proceeding on the merits, not a mere “*ministerial*” act/duty. Hence, resolving this case would clearly involve “*discretion, judgment, or skill*” on the part of the Commission.

Kentucky Power may argue that its requested Declaratory Order and amendments in this case are “*collateral or incidental matters necessary for the preservation of the fruits of the ultimate judgment, or affecting the status quo of the parties*” and would not affect the issues currently on appeal,¹⁴ but such a claim would be incorrect. In Case No. 2004-00403, ULH&P requested that the Commission modify an order on appeal by extending the deadline for filing the utility’s next rate case and continuing one of its riders until the effective date of new rates.¹⁵ Although the Commission had previously modified that same order on appeal by extending the deadline for the filing of ULH&P’s next rate case, the Commission rejected ULH&P’s request in Case No. 2004-

¹¹ *Frankfort Kentucky Natural Gas Co. v. City of Frankfort*; 123 S.W.2d 270, 272 (Ky.App. 1938).

¹² ULH&P Order at 5 (citing Black’s Law Dictionary 1011 (7th ed. 1999); 2 Am. Jur. 2d Administrative Law § 64 (1994)).

¹³ ULH&P Order at 5 (citing 2 Am. Jur. 2d Administrative Law § 60 (May 2004)).

¹⁴ *Garnet v. Oliver*, 45 SW 2d 815, 816 (Ky. App. 1931).

¹⁵ ULH&P Order at 3.

00403. The Commission explained that the previously granted extension of the filing deadline was a “*collateral or incidental*” matter that “*merely preserved the fruits of the ultimate judgment and maintained the status quo of the parties*” because it did not modify the cost recovery terms approved in the order on appeal.¹⁶ However, ULH&P’s request for an additional extension of the filing deadline and continuation of its rider was different because approval of that request “*would modify [the] previous Order by extending the Rider beyond the previously authorized period.*”¹⁷

Similar to ULH&P’s request, Kentucky Power’s requests in this case would fundamentally alter material terms approved in the Commission’s order currently on appeal, including cost recovery terms. The Company seeks to increase the “*full costs*” of the REPA that customers must pay by \$57 million, to extend the “*full term*” over which customers are forced to pay above-market REPA-related costs by an additional 23 months, to excuse ecoPower from paying up to \$2.7 million in liquidated damages that would otherwise flow through to customers if ecoPower fails to meet the Commercial Operations Milestone currently set forth in the Commission-approved REPA and to hold itself harmless in the event of any negative impact of the REPA on the Company’s credit ratings. These are not merely “*collateral or incidental matters.*” Rather, matters impacting the “*full costs*” and “*full term*” of the REPA are central to a determination of whether the REPA satisfies the requirements of KRS 278.271, which is an issue squarely before the Kentucky Court of Appeals. Thus, any attempt to carve out the issues in this proceeding from the issues currently on appeal would infringe upon the jurisdiction of the Kentucky Court of Appeals.

Proceeding to consider Kentucky Power’s application to issue a Declaratory Order and to amend the REPA during the pending appeal would frustrate the judicial process and disrupt the orderly workings of the court system. If the Commission moved forward with considering Kentucky Power’s requests during the pendency of the appeal, then the Kentucky Court of Appeals could end up addressing the legality of a REPA whose material terms have been fundamentally altered outside of the appellate record. Moreover, Kentucky Power’s proposed amendments to the REPA would be rendered moot if the Kentucky Court of Appeals ultimately found that approval of the original REPA was not lawful in accordance with KRS 278.271. And proceeding to consider

¹⁶ ULH&P Order at 6-7.

¹⁷ ULH&P Order at 6-7.

Kentucky Power's requests during the pending appeal would introduce the possibility that an appeal addressing the original REPA would be taking place in the Kentucky Court of Appeals while an appeal addressing the amended REPA is taking place in the Franklin Circuit Court. Add to this the possibility that KIUC's original appeal may ultimately reach the Supreme Court of Kentucky and the jurisdictional complexity and uncertainty is compounded. Avoiding such a result confirms the wisdom of the unbroken line of cases confirming that with limited exception subject matter jurisdiction cannot reside in two places at the same time.

WHEREFORE, for the foregoing reasons, the Commission should dismiss the application for lack of subject matter jurisdiction.

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

August 3, 2015

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