

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

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

Kentucky Industrial Utility Customers, Inc. (“KIUC”) submits this Response to the Motion For Rehearing (“Motion”) Of The Commission’s August 27, 2015 Order Denying Jurisdiction (“Order”) filed by Kentucky Power Company (“Kentucky Power” or “Company”) . In its August 27, 2015 Order, the Commission found that it lacked jurisdiction to consider the Company’s proposed Sixth Amendment to the Renewable Energy Purchase Agreement (“REPA”) between the Company and ecoPower Generation-Hazard, LLC (“ecoPower”) while the Commission’s order approving the REPA was on appeal at the Kentucky Court of Appeals. In response, Kentucky Power now claims that: 1) the Commission’s Order is premised upon a manifest error of law;¹ 2) the Order is a repudiation of the jurisdiction the Commission has previously exercised and will be required to exercise in the future;² and 3) the Order results in a manifest injustice.³ For the reasons discussed below, Kentucky Power’s claims are without merit and its Motion should be denied.

¹ Motion at 2-3.

² Id. at 3-6.

³ Id. at 6-7.

RESPONSE

I. The Commission's Interpretation Of The Law Is Correct.

Kentucky Power's Motion relies heavily upon arguments already raised in its Legal Memorandum filed August 3, 2015 ("Memorandum"), which the Commission already rejected through its Order. For instance, Kentucky Power cites three Kentucky Supreme Court cases previously mentioned in its Memorandum,⁴ alleging that those cases allow the Commission to consider the Company's proposed Sixth Amendment to the REPA while the legality of the underlying REPA itself is still being challenged at the Kentucky Court of Appeals.⁵

The Commission correctly decided not to rely upon those cases. A review of those cases quickly reveals that they do not support Kentucky Power's legal proposition. The facts of those cases (two of which are criminal law cases and one of which involved a party's discovery rights while a summary judgment order is on appeal) are markedly different from the facts in this proceeding. Moreover, in two of the cases cited by the Company, the Kentucky Supreme Court was merely clarifying the distinction between general "subject matter jurisdiction" over a broad category of cases and a court's jurisdiction over a particular set of facts at issue.⁶ To read those decisions as permitting the Commission to approve an amendment to a power purchase contract currently under appellate review would broadly misconstrue the Supreme Court's rulings.

⁴ Memorandum at 3-7 (citing Commonwealth v. Bailey, 71 S.W.3d 73, 84 (Ky. 2002); Commonwealth v. Steadman, 411 S.W.3d 717 (Ky. 2013); Commonwealth v. Wingate, 460 S.W.3d 843 (Ky. 2015)).

⁵ Motion at 2-3.

⁶ Commonwealth v. Steadman, 411 S.W.3d 717, 722-23 (Ky. 2013) ("...There is a significant difference between general subject matter jurisdiction and jurisdiction over a particular case. General subject-matter jurisdiction 'refers to a court's authority to determine 'this kind of case' (as opposed to 'this case')... This differs from 'another type of jurisdiction, jurisdiction over a particular case... [which] refers to a court's authority to determine a specific case (as opposed to the class of cases of which the court has subject matter jurisdiction)...A court's power to affect its own judgment within ten days of entry or 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 to 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 talking not 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.); Commonwealth v. Wingate, 460 S.W.3d 843, 848 (Ky. 2015) ("The Cabinet, however, misperceives the concept of 'subject matter jurisdiction' as that terminology has been defined in our relevant precedents. 'In Kentucky, circuit courts are courts of 'general jurisdiction,' which means that circuit courts 'shall have original jurisdiction of all justiciable causes not vested in some other court.'...Thus "subject-matter jurisdiction' refers to a circuit court's authority not simply to hear this case, but rather, to hear 'this kind of case.'...Here, the underlying claims relate to Kentucky Spirit's action for ascertaining its right to an early termination of the Medicaid contract and associated issues concerning the measure of damages. Circuit Courts, as courts of general jurisdiction...have subject matter jurisdiction over declaratory-judgments and contract disputes of the type at issue...Thus the Cabinet's argument that the circuit court lacks "subject matter jurisdiction" because of the order granting partial summary judgment and subsequent appeal is inaccurate. The award of partial summary judgment and the associated appeal does not implicate the relevant inquiry: whether the Franklin Circuit Court has the authority to hear "this kind of case."").

Further, Kentucky Power’s statement that “*none of the cases cited by KIUC, or by the Commission in the Jurisdiction Order, hold that an appeal divests the Commission of jurisdiction over the subject matter of the order*” is inaccurate. In Johnson Bonding Co. v. Ashcroft, 483 S.W.2d 118, 119 (Ky. App. 1972), one of the cases that KIUC cited, the Kentucky Court of Appeals 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.”⁷ And in multiple Commission cases cited by KIUC, the Commission recognized that it lacked jurisdiction to consider separate proceedings addressing the same subject matter as cases that were then pending appellate review.⁸ That the docket numbers of those proceedings differed from the docket number of the case on appeal made no difference.

The subject matter at issue here – the contents of 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. Hence, Kentucky law provides that the Commission is divested of jurisdiction to consider Kentucky Power’s proposed Sixth Amendment to the REPA until appellate review of the legality of the REPA itself is complete.

II. The Commission’s Order Is Not A Repudiation Of Its Past Or Future Jurisdiction.

Kentucky Power alleges that the Commission’s Order threatens its “continuing ability to exercise its exclusive jurisdiction over the over the rates and services of utilities during the interim of an appeal.”⁹ The Company cites previous cases in which the Commission exercised authority over a rate while an appeal of the legality of that rate was pending. The Company then manufactures a speculative future scenario in which a previously-granted certificate of public convenience and necessity (“CPCNs”) needed to be modified during an appeal.

⁷ Emphasis added.

⁸ 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 3; Schimmoeller v. Kentucky-American Water Company, Case No. 2009-00096, Order (November 24, 2009) at 4.

⁹ Motion at 6.

Kentucky Power overstates the potential adverse effects of a pending appeal on the Commission's past or future ratemaking jurisdiction. Unless enjoined, a Commission-approved rate is valid when issued and continues to be valid during the pendency of an appeal. Therefore, the Commission retains jurisdiction to implement that rate during the appellate review period. For instance, in the Duke Energy Kentucky's Accelerated Main Replacement Program ("AMRP") Rider cases cited by Kentucky Power, the Commission could lawfully *implement* the AMRP Rider rate while it was on appeal through annual rider adjustments. What the Commission could not do, and what Kentucky Power now asks the Commission to do, was to substantially *modify or amend* the rate while its legality was under appellate review.

The recent fuel adjustment clause ("FAC") proceeding cited by Kentucky Power is also distinguishable from this case because the Commission's governing regulations required it to proceed with its two-year FAC review while an appeal was pending. And in that scenario, the Commission took steps to avoid inefficiency and confusion that could otherwise result, asking the appellate court to stay the appeal while its review proceeded. The Commission should also give no credence to the speculative future scenario manufactured by Kentucky Power. The Commission has issued CPCNs for decades yet the Company failed to provide any case in which the issue that it conjured up actually occurred.

III. The Order Did Not Result in a Manifest Injustice.

Kentucky Power complains that the Order results in a delay that could threaten the financing and construction of the ecoPower facility.¹⁰ But the possibility of delays in securing legal approval of the REPA was a risk that Kentucky Power and ecoPower reasonably could have anticipated when they drafted the REPA. Parties have the freedom to contract as they wish. It is not the Commission's responsibility to undermine the jurisdiction of the Kentucky Court of Appeals in order to protect the contracting parties from the consequences of risks that they knowingly undertook.

Moreover, the fact that equity investors and lenders are unwilling to finance the project until there is certainty that consumers will be required to pay for it demonstrates that the project is not economic and cannot stand on its own. The manifest injustice would be to unlawfully give life support to a grossly over-priced no-bid \$1.26

¹⁰ Motion at 6-7.

billion project that will unnecessarily drain money out of the already impoverished economy of Eastern Kentucky, while adding only a handful of new jobs. In the ecoPower saga, the only potential winners are the developers who stand to personally make millions at the expense of the public and the economy as a whole. This is especially true as there is no evidence that the project even qualifies as renewable under the Clean Power Plan.

IV. Kentucky Power's Claim That It Is Not Seeking to Modify, Alter, or Amend the REPA Order Is False.

Contrary to Kentucky Power's claims, the Company *is* seeking to substantially modify, alter, and amend the Commission's REPA approval order. 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. Consequently, moving forward with consideration of Kentucky Power's proposed Sixth Amendment could result in the Kentucky Court of Appeals 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 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.

CONCLUSION

WHEREFORE, for the reasons discussed above, the Commission should deny Kentucky Power's Motion.

Respectfully submitted,



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