COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In The Matter of:

The Electronic Application of Duke Energy Kentucky, Inc., for: 1) An Adjustment of the Electric Rates; 2) Approval of an Environmental Compliance Plan and Surcharge Mechanism; 3) Approval of New Tariffs; 4) Approval of Accounting Practices to Establish Regulatory Assets and Liabilities; and 5) All Other Required Approvals and Relief.	)	Case No. 2017-00321

RESPONSE TO THE ATTORNEY GENERAL'S PETITION FOR REHEARING OF THE COMMISSION'S APRIL 13, 2018 ORDER AND MOTION TO STRIKE

Comes now Duke Energy Kentucky, Inc. (Duke Energy Kentucky or Company), by counsel, and respectfully submits the following response in opposition to the May 3, 2018 Petition for Rehearing filed by the Attorney General (AG) and a motion to strike all testimony filed by the AG, respectfully stating as follows:

The Commission's April 13, 2018 Order (Order) awarded Duke Energy Kentucky an $8.4 million increase in its base electric rates. The Attorney General's petition for rehearing raises three issues: (1) whether the Commission correctly comprehends the function and purpose of testimony offered by the AG; (2) whether the Order appropriately addresses the rate impact of the reduced federal income tax (FIT) between January 1, 2018 and April 13, 2018; and (3) the extent to which

the Order's adjustments to the Company's rate request cannot be reconciled to the $8.4 million increase awarded.[1]

The first issue raised by the AG's petition presents several inimitable problems which heretofore have not been the subject of Commission precedent. The radical nature of the AG's statements disavowing the testimony and evidence presented by the witnesses he has sponsored in this proceeding necessitates not only the filing of an appropriate response by the Company, but also requires Duke Energy Kentucky to concomitantly move to strike the testimony of such witnesses and the Commission's reliance upon such "evidence." Likewise, the AG's argument advocating his calculation of the impact of the recent change in the FIT rate on revenue collected by the Company since January 1, 2018, which lacks any record evidentiary support, reflects a lack of awareness of the fundamental components of the calculation the Commission approved in its order and, therefore, it must be rejected.

A. The AG's Disavowal of the AG's Experts' Testimony

The AG's petition makes several statements which profoundly inform one as to the probative value of the expert opinions he has tendered in this proceeding. A sampling of these statements may be excerpted as follows:

> The Commission's Order is inconsistent and incorrect as to the Attorney General's position on certain issues. For instance, the Commission's Order inconsistently and incorrectly represents that the testimonies of witnesses Lane Kollen and Richard Baudino are the Attorney General's "position", but when referring to the testimony of Glenn Watkins, the Commission properly noted that his testimony was his own recommendation for consideration as evidence. This improper treatment creates unnecessary confusion and ultimately distorts the final and controlling position of the intervenor and advocate: the Attorney General.[2]

[1] The AG's third issue was one of the issues raised by Duke Energy Kentucky in its petition for rehearing. The Company's position on the reconciliation problem is fully stated in its own petition and will not be addressed herein.

[2] AG's Petition, p. 3.

...

> If the Attorney General's brief is ignored, unnecessary confusion occurs between the introduction of evidence and the ultimate presentation and recommendation of a party based on the entirety of the record.[3]
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> ...
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> Mr. Kollen, not the Attorney General, recommended the amortization of excess "unprotected" ADIT over a 5-year period at the hearing in this matter, while the Attorney General made his recommendation in his brief. The Commission's Order acknowledges that, "the Attorney General proposed a five-year amortization period for the unprotected excess ADIT" but in doing so cites to Mr. Kollen's cross-examination. This is further proof of unnecessary confusion.[4]
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> ...
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> It is apparent this mistake was likely caused by the Commission's incorrect determination that the evidence presented by the Attorney General during the pendency of the proceeding was his ultimate position. The sole reliance on testimony and disregard of the Attorney General's brief in the Commission's Order is an error that must be corrected to prevent a manifest injustice.[5]
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> ...
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> The Commission must ensure that the intervenors' briefs are afforded due consideration and referred to as the only "position" of the parties at the conclusion of evidence.[6]

The essence of the AG's argument appears to be that the Commission does not understand the purpose or function of the testimony offered by the expert opinion witnesses that appear regularly on the AG's behalf. According to the AG, the expert opinion testimony which he proffers may or may not accurately reflect his position on the issues of the case. And apparently, neither

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[3] AG's Petition, p. 4.

[4] *Id.*, p. 5, n. 29; *compare* AG's Brief, p. 31 ("As to 'unprotected' excess ADIT, or those 'that did not result from depreciation differences,' the Attorney General agrees with Mr. Kollen's proposal to amortize them over a five (5) year period.").

[5] AG's Petition, p. 6.

[6] *Id.*, p. 7.

the Commission nor any other party to a proceeding will know the AG's position until *after* the filing of testimony, *after* the hearing and *after* the filing of simultaneous post-hearing briefs. As set forth above, the AG is putting the Commission on notice that the only authoritative source for understanding the AG's "position" on the issues of this or any other case is the AG's post-hearing brief.

However, the AG's reliance upon *McDonald v. Knotts*, 52 S.W.3d 555 (Ky. 2001), is misplaced. *McDonald* does nothing more than state the obvious – an attorney cannot appear as his client's own witness in a civil trial. That rather obvious point of law has no bearing on the question of whether a party may properly sponsor expert opinion testimony which it may or may not subsequently disavow. It bears emphasis that the AG is almost never in the position of offering witnesses who testify as to the facts of a case before the Commission. The AG's proffered witnesses are all retained experts who merely provide an opinion which characterizes the facts otherwise developed through the utility's application and subsequent discovery. However, the courts have held that when an agency presents an expert witness testifying on matters within the scope of the agency's jurisdiction, the expert's testimony is automatically afforded a degree of deference.[7] Accordingly, the AG's filing of expert opinion testimony carries with it an appearance of legitimacy which, now according to the AG, apparently may not be justified.

Furthermore, the decision to tender any particular expert opinion testimony always lies squarely and exclusively within the unfettered discretion of the party sponsoring the expert witness. There is no provision of Kentucky law that compels a party in an administrative proceeding to produce expert opinion testimony. Once the decision to tender such evidence is made, however, certain duties necessarily apply, for in the their absence a proceeding will quickly

[7] *See United States v. Larkins*, 657 F.Supp. 76, 83 (W.D. Ky. Jan. 16, 1987).

devolve into a spectacle of confusion and inefficiency. For instance, it is not unreasonable to assume that when any party voluntarily proffers expert opinion testimony,[8] the proffering party adopts, or at least acquiesces in, the substance of the opinion rendered. A contrary presumption is patently absurd. What independent standing does an expert witness have to opine a personally held opinion in a regulatory proceeding? What administrative efficiencies are to be gained from the manufacturing of evidence that no party supports? Why must the Commission's role of arbitrator be unnecessarily complicated by considering evidence which is disavowed by the very party who caused the opinion – not fact – evidence to be introduced in the first place? Why should other parties and the Commission be forced to expend valuable time and resources responding to issues raised by a witness in whose opinion his own sponsor places no credence?

When the logic of the AG's argument is taken to its final and ultimate conclusion, one beholds an administrative process that is inefficient, unwieldy and altogether unappealing. The AG's interest in a proceding is simply assumed in KRS 367.150(8)(a). Unlike every other intervenor that comes before the Commission, the AG has no obligation to demonstrate how his intervention will "present issues or develop facts that will assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings."[9] Thus, there is no initial showing necessary from the AG to identify what issues he intends to explore or raise. While some inferential assumptions may be gained from the information requests propounded by the AG, it is the filing of intervenor testimony which most directly identifies the issues upon which the AG focuses. Indeed, the hearing is devoted exclusively to the cross-examination of witnesses based upon the testimony and responses to information requests they have provided. The post-

[8] For sake of simplicity and clarity, Duke Energy Kentucky refers herein only to "testimony." However, the same arguments will of course apply to any opinionated responses to information requests provided by an expert as well.

[9] *See* 807 KAR 5:001, Section 4(11).

hearing brief, which is merely a summation of the evidence and legal arguments received by the Commission, is a very poor time for the AG to first make known the issues he intends for the Commission to address. In most cases, post-hearing briefs are filed simultaneously (if at all), thereby preventing any opportunity for a response to issues raised for the first time in an intervenor's post-hearing brief.

If a party causes an expert opinion to be tendered in a proceeding, he is equitably estopped from later denying the substance of the opinion, as other agencies regulating public utilities around the country have not hesitated to enforce the doctrine of equitable estoppel on evidentiary issues coming before them.[10] Likewise, the AG's claimed right to selectively adopt discreet portions of the various iterations of evidence he has introduced into the record fundamentally offends all sensible notions of fair play and due process. The elements of due process that attach to a Commission proceeding are well-established and beyond dispute: a party has a constitutional and statutory right to know "what evidence is being considered...."[11] Duke Energy Kentucky does not doubt the sincerity behind the AG's petition for rehearing, but it requires no leap in imagination to contemplate the future pettifoggery that could result from allowing an intervenor to introduce evidence, test its effectiveness and then adopt or disavow it as expediency suggests is most appropriate. The Kentucky Supreme Court's admonition in *Kentucky Power Co. v. Energy Regulatory Comm'n* seems especially apropros in this context: "Even a public utility has some

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[10] *See e.g. In the Matter of BellSouth Telecommunications, Inc. v. US LEC of North Carolina, Inc.*, Docket No. P-561, Sub 10, 201 P.U.R.4th 58 (N.C.U.C. Mar. 31, 2000); *In the Matter of the Complaint of Paul L. Frederick Against Consumers Power Company*, Docket No. U-9311 (Mich. P.S.C. Aug. 29, 1989); *In The Matter of Washington Utilities and Transportation Commission v. Whidbey Telephone Company*, Order, Docket Nos. U-85-50, U-85-51 and U-86-30 (Wash. U.T.C. June 30, 1986).

[11] *Kentucky American Water Co. v. Com. ex rel. Cowan*, 847 S.W.2d 737, 741 (Ky. 1993) citing *Utility Regulatory Commission v. Kentucky Water Service, Inc.*, 642 S.W.2d 591 (Ky. App. 1982); *Ohio Bell Telephone Company v. Public Utility Commission of Ohio*, 301 U.S. 292 (1937).

rights, one of which is the right to a final determination of its claim within a reasonable time and in accordance with due process. This Company had been wooled around long enough."[12] At a minimum, due process requires the AG (and all intervenors) to immediately, plainly and unequivocally disavow any expert opinion testimony he causes to be filed in a Commission proceeding that is inconsistent with the AG's "position" on issues.

Duke Energy Kentucky has been harmed and prejudiced in this proceeding. It has been required to review and respond to expert opinion testimony that evidently had no probative value from the point of view of the party sponsoring the testimony. Duke Energy Kentucky was forced to cross-examine the AG's witnesses to the point that the Chairman suggested the horse might be dead,[13] when in fact most of that portion of the hearing was apparently a waste of everyone's time. Among other remedies, the Commission has the authority to strike all superflous and irrelevant evidence from the record. In light of the foregoing, the Company respectfully moves the Commission to stike all of the testimony of the AG's witnesses that was not expressly adopted by the AG in his post-hearing brief.

B. The Impact of the FIT from January 1, 2018 Through April 13, 2018

The Attorney General also claims that the Commission omitted an adjustment to the Company's revenue requirement to account for the impact of the lower FIT from January 1, 2018 through April 13, 2018, the date when the Company's new rates took effect. The AG further argues that the amount of the adjustment should decrease the Company's revenue requirement by $795,759.[14] Again, there are several problems with the AG's arguments.

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[12] *Kentucky Power Co. v. Energy Regulatory Comm'n*, 623 S.W.2d 904, 908 (Ky. 1981).

[13] *See* Hearing Video Record, 04:44:40 (March 8, 2018).

[14] *See* AG's Petition, p. 7, citing AG's Brief, p. 34.

First, the argument appears to have been raised for the first time in the AG's post-hearing brief, which illustrates the problem set forth above. The references cited by the AG in his petition for rehearing are instances where the Company presented its evidence, but there was no apparent instance where the AG disagreed with or challenged the Company's proposal.

Second, the AG's calculations are incorrect. The AG asserts that the right way to calculate the FIT impact is to take the change in the pre-tax rate of return shown in Attachment WDW-5 of the rebuttal testimony of Mr. William Don Wathen, Jr., and apply that difference to only the rate base from the prior rate case. Because the pre-tax rate of return in the Company's last rate case is 12.12% and the current pre-tax rate of return is 9.26%, applying the difference to a $557 million capitalization figure yields $15.9 million, which when divided by the 60 months proposed by the Company, and multiplied by the three months at issue, leads to a final calculation of $795,759.[15]

The problem with the AG's formula is that it uses: (1) a pre-tax rate of return for the old rate case that is based on (a) a higher tax rate; (b) higher debt rates; and (c) a higher equity ratio; and (2) a new pre-tax rate of return that is based on: (a) a lower tax rate, (b) the 2010 debt rates, and (c) the 2010 capital structure. In calculating the impact of the lower FIT on the Company's annual revenue requirement, the Company and AG agreed that the overall revenue requirement was reduced by between $10.3 million and $10.6 million using current capitalization figures. It is simply not credible to now suggest that the impact of the lower tax rate is almost $6 million higher, on an annual basis, using a much lower capitalization. The electric base rates that customers paid from January 1, 2018, through March 31, 2018, were based on debt rates, capital structure, and income taxes that were approved in the last rate case. The AG's argument in his initial brief and in his rehearing request is that there should be no recognition given to the Company

[15] *See* AG's Petition, p. 7, n. 166.

for the increase in investment since the last rate case, but that customers should be credited not only with the lower federal income tax rates, but also current lower debt rates and current lower equity ratio. The AG's calculation is inequitable, unreasonable and opportunistic. The Company's initial proposal, which was approved by the Commission, is symmetrical in that it updates all aspects of the Company's cost of capital. The only other option that would maintain symmetry is to use the 2010 capitalization but then only adjust the pre-tax return for the change in income taxes. The AG's proposal impetuously conflates the two symmetrical options to inappropriately seek more than could possibly be at issue as a result of the change in federal income taxes.

Third, the AG's reliance in his brief upon a decision in Case No. 2018-00034 is premature.[16] That case is still pending on the Commission's active docket and has no value of precedent as of yet. The AG's petition for rehearing on the tax issue is based upon flawed math, perplexing logic, and precedent that does not yet exist. As such, the Company requests that the petition be overruled.

WHEREFORE, Duke Energy Kentucky respectfully requests that the Commission deny the AG's Petition for Rehearing, strike all expert opinion testimony sponsored by the AG but not expressly adopted in the AG's post-hearing brief, reject the AG's position regarding the relevant FIT impact and grant Duke Energy Kentucky all other relief to which it is is entitled.

[16] *See* AG's Petition, p. 7, citing *In the Matter of Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Company and Louisville Gas and Electric Company*, Case No. 2018-00034.

This 10th day of May, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing electronic filing is a true and accurate copy of the document being filed in paper medium; that the electronic filing was transmitted to the Commission on May 10, 2018; that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding; and that a copy of the filing in paper medium is being hand delivered to the Commission on the 10th day of May, 2018.

David Samford by LAH

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