

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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 ) CASE NO.  
OF NEW TARIFFS; 4) APPROVAL OF ACCOUNTING ) 2017-00321  
PRACTICES TO ESTABLISH REGULATORY ASSETS )  
AND LIABILITIES; AND 5) ALL OTHER REQUIRED )  
APPROVALS AND RELIEF )

**ATTORNEY GENERAL’S PETITION FOR REHEARING**

Comes now the Attorney General of the Commonwealth of Kentucky (“Attorney General”), by and through his Office of Rate Intervention, and submits this Petition for Rehearing on the Kentucky Public Service Commission’s (“Commission”) April 13, 2018 Order (“Order”) in this matter. In support of his Petition, the Attorney General states as follows:

KRS 278.400 provides for rehearing on a determination made by the Commission in any hearing. Application for rehearing must be made within twenty (20) days after service of the order, with service being complete three (3) days after the date the order is mailed or sent by electronic submission.<sup>1</sup> KRS 278.400 “is intended to provide closure to Commission

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<sup>1</sup> KRS 278.400; KRS 278.380; *See* Case No. 2012-00578, In the Matter of: Application of Kentucky Power Company for (1) a Certificate of Public Convenience and Necessity Authorizing the Transfer to the Company of an Undivided Fifty Percent Interest in the Mitchell Generating Station and Associated Assets; (2) Approval of the Assumption by Kentucky Power Company of Certain Liabilities in Connection with the Transfer of the Mitchell Generating Station; (3) Declaratory Rulings; (4) Deferral of Costs Incurred in Connection with the Company’s efforts to Meet Federal Clean Air Act and Related Requirements; and (5) All Other Required Approvals and Relief, (Ky. PSC Nov. 22, 2013) at 2.

proceedings,” and provides “an opportunity for the Commission to address any errors or omissions” in its orders.<sup>2</sup> 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. The Commission’s Order also omitted reference or consideration of the significant issue of the treatment of tax “savings” for the three months of 2018 not in the test year. This issue was first raised by Duke Energy Kentucky (“Duke” or “Company”) in rebuttal testimony, was later discussed at the hearing, and finally was addressed by the Attorney General and Duke in their respective briefs. Finally, the Commission’s revenue requirement adjustments do not reconcile to its calculation of Duke’s overall revenue requirement.

#### A. The Attorney General’s Brief

##### 1. The Attorney General Must Represent Consumers as Counsel, Not a Witness

The Attorney General is a Constitutional officer of the Commonwealth of Kentucky.<sup>3</sup>

The Attorney General is the chief law officer of the Commonwealth of Kentucky, and the

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<sup>2</sup>Case No. 2012-00096, Application of Kentucky-American Water Company for a Certificate of Public Convenience and Necessity Authorizing Construction of the Northern Division Connection (Ky. PSC Jan. 23, 2014) at 4-5, citing Case No. 96-524, An Examination by the Public Service Commission of the Application of the Fuel Adjustment Clause of Louisville Gas and Electric Company from November 1, 1994 to October 31, 1996 (Ky. PSC Mar. 11, 1999) at 2; Case No. 2009-00127, DPI Teleconnect, LLC v. Bellsouth Telecommunications, Inc. d/b/a AT&T Kentucky (Ky. PSC Mar. 2, 2012) at 3.

<sup>3</sup> Ky. Const. Section 91.

legislature has seen fit to provide him the authority and obligation to represent consumers before this honorable body.<sup>4</sup> As the chief law officer, the Attorney General and his assistants are licensed attorneys, admitted to practice in the Commonwealth of Kentucky by the Supreme Court.<sup>5</sup> Those assistant Attorneys General that work in the Office of Rate Intervention act as consumer advocates on behalf of Kentucky ratepayers, particularly as to their practice before this Commission.<sup>6</sup> As undersigned counsel, the attorneys in the Office of Rate Intervention are unable to act as witnesses in this or any other matter before the Commission. The Kentucky Supreme Court has previously noted the difference between counsel and witness, stating, “[a] witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others.”<sup>7</sup> The Attorney General, by and through his Office of Rate Intervention, is authorized only to “represent” consumers’ interests and be made a “real party in interest” on behalf of consumers.<sup>8</sup> Thus, the Attorney General and his assistants are legally and ethically required to only advocate on behalf of rate payers and their interests, and cannot act as a witness.<sup>9</sup> Since the Attorney General’s office does not employ non-attorney utility experts, it depends on outside consultants to provide evidence to the Commission for its consideration. Although these experts may provide evidence on the Attorney General’s behalf, they do not, and cannot, speak for the Attorney General himself. Though experts have passed on to the Commission the Attorney General’s position on certain subjects, such as whether he generally agrees or disagrees with a proposal, the Attorney General, as the statutorily designated

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<sup>4</sup> KRS 367.150(8); KRS 15.020.

<sup>5</sup> KRS 15.100; Ky. Const. Section 92.

<sup>6</sup> KRS 15.010; KRS 367.150(8).

<sup>7</sup> Zurich Ins. Co. v. Knotts, 52 S.W.3d 555, 559 (Ky. 2001).

<sup>8</sup> KRS 367.150(8).

<sup>9</sup> SCR 3.130, Rule 3.7.

consumer advocate, is personally limited in participation to simply “explain[ing] and comment[ing] on evidence given by others.”<sup>10</sup>

2. The Commission’s Order Is Inconsistent or Incorrect as to the Attorney General’s Positions

In granting an increase in electric base rates of \$8,428,645,<sup>11</sup> the Commission noted that, “[t]he Attorney General is the only intervenor who presented evidence addressing Duke Kentucky’s proposed revenue increase.”<sup>12</sup> The Commission later stated that it “must consider the evidentiary record on these issues as presented by Duke Kentucky and the Attorney General.”<sup>13</sup> Insofar as the Commission relied almost exclusively on testimony evidence in making its determination, it did so while ignoring the positions that intervenors, including the Attorney General, made in their briefs. Although it is true that the Attorney General is the only intervenor who supported testimony regarding revenue requirements, the Commission is not, and as a matter of law cannot be limited to “testimony” in determining proper adjustments to a utility’s revenue requirements. The Commission is allowed to use the entirety of the record in order to make a determination as to what rates are fair, just, and reasonable, but it must ensure that any outcome is based on substantial evidence.<sup>14</sup> Just as the Commission’s determinations are limited to the evidence, the Attorney General’s brief and positions on issues must be allowed to be based on the entire record. 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.

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<sup>10</sup> Zurich Ins. Co. v. Knotts.

<sup>11</sup> Order at 41.

<sup>12</sup> *Id.* at 6.

<sup>13</sup> *Id.* at 6 (Emphasis added).

<sup>14</sup> National-Southwire Aluminum Co. v. Big Rivers Elec. Corp., 785 S.W.2d 503, 510 (Ky. App. 1990).

To evidence the problems that occur when his expert witness testimony is treated as the Attorney General's "position," consider Mr. Kollen's testimony regarding Duke's test-year vegetation management expense. Mr. Kollen stated, "I recommend that the Commission use a more realistic forecast expense based on the actual average expense for the year 2012 through 2016," recommending a reduction to the revenue requirement of \$2.407 million.<sup>15</sup> This was evidence provided for the Commission's consideration. After Mr. Kollen's testimony was filed in this matter, additional evidence was presented regarding vegetation management, including in rebuttal testimony and at the hearing.<sup>16</sup> Although Mr. Kollen recommended a reduction in vegetation management, the Attorney General stated in his brief that he accepted Duke's expense amount since the forecast expenses were now based on actual costs.<sup>17</sup> Nevertheless, the Commission stated in its Order that the Attorney General's position on the subject was merely the evidence found in Mr. Kollen's testimony.<sup>18</sup> The Commission subsequently reduced the test-year vegetation management expense, based on evidence provided in a post-hearing data request, not based on any party's testimony.<sup>19</sup> The Attorney General is not disputing the reasonableness of the Commission's reduction to vegetation management, but he merely brings to the Commission's attention that the

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<sup>15</sup> Direct Testimony of Lane Kollen (Ky. PSC Dec. 28, 2017) at 15 (Emphasis added).

<sup>16</sup> Rebuttal Testimony of April N. Edwards, Attachment ANE-Rebuttal-1 (Confidential); March 7, 2018 VTE at 10:50:40-11:04:20; Duke's Response to Attorney General's Post-Hearing Request for Information, Question 4 (Confidential).

<sup>17</sup> Attorney General's post-hearing brief ("AG's brief") (Ky. PSC Apr. 2, 2018) at 12.

<sup>18</sup> Order at 18.

<sup>19</sup> *Id.*; Additionally, although Mr. Kollen provided the Commission evidence of what the amortization of excess ADITs would be assuming a 20-year period, he did so one day after the Commission itself assumed the same treatment for deferral accounting purposes in the tax investigation order. A 20-year amortization of excess ADIT was not the Attorney General's initial proposal as the Commission's Order indicates. 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.

representation of his position on the issue was stated incorrectly in the Order. 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.<sup>20</sup>

Ultimately, treating intervenor testimony as the "recommendation" of an intervening party leads to unnecessary and unreasonable conclusions. The purpose of intervenor testimony is to provide the Commission with evidence on which it can base its decision. The brief, however, is not for providing evidence. As previously noted, the Attorney General and his assistants are unable to provide testimony before the Commission. In rate cases, the Attorney General sponsors expert testimony to provide the Commission evidence to consider in reviewing the utilities' Application and in ensuring rates are fair, just, and reasonable.<sup>21</sup> In most matters, like this one, the Attorney General does not bear the burden of proof, and instead supports testimony in order to provide evidence to the contrary of that presented in the utility's application.<sup>22</sup> Although the Attorney General supports testimony for filing, that testimony is not "his." The Attorney General attempts to contract with educated, experienced and knowledgeable expert witnesses in applicable fields to provide the Commission probative evidence for its consideration. The Attorney General's brief, however, is provided to the Commission in an attempt to properly characterize and contextualize the entirety of the

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<sup>20</sup> Further, the Commission stated that the Attorney General presented evidence that Duke Kentucky "Should be required to decrease its electric revenues by \$11,901,000. That is true, Mr. Lane Kollen provided evidence of a reduction of that amount, but the Commission later erred by stating that, "In the Post-Hearing Brief, the Attorney General revised his recommended decrease to \$14.839 million." The Attorney General did not "revise" his recommendation. His recommendation was stated in his post-hearing brief.

<sup>21</sup> KRS 278.030.

<sup>22</sup> KRS 278.190.

evidence in the record. 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. If the Commission ignores the parties' positions on the entirety of the evidence, the parties' procedural due process rights are affected.

3. The Commission Must Address the Attorney General's Recommendation as to the Treatment of Income Tax Savings for the First three Months of 2018.

In rebuttal testimony, Duke provided an adjustment to its test-year revenue requirement to reflect "any tax benefits [Duke] will accrue from January 1, 2018, through the effective date of new base rates," to the tune of \$110,762.<sup>23</sup> Although this adjustment was presented in rebuttal testimony, discussed at the hearing, and extensively addressed in post-hearing briefs, the Commission's Order nonetheless failed to mention the issue.<sup>24</sup> The Commission must address 1) whether or not Duke should adjust its revenue requirement for this issue, and 2) if Duke must adjust the revenue requirement to reflect the savings, by what amount should they do so. Although Duke provided testimony as to the amount it recommends reducing the revenue requirement, the Attorney General's recommendation, based exclusively on evidence in the record, differs by nearly \$700,000.<sup>25</sup> This is a substantial amount of money that the Commission must address, not only because customers, not Duke, deserve to receive the benefit from a reduced federal corporate tax rate, but also because the methodology that Duke presented flies in the face of Commission precedent on this issue.<sup>26</sup>

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<sup>23</sup> Rebuttal Testimony of William "Don" Wathen, Jr. ("Wathen rebuttal") (Ky. PSC Feb. 14, 2018) at 29-31.

<sup>24</sup> March 7, 2017 VTE at 3:15:00; AG's brief at 33-34; Wathen rebuttal at 29-31.

<sup>25</sup> AG's brief at 34.

<sup>26</sup> See *Id.*

Although the Attorney General understands the tight time constraints that the procedural schedule presented, the Commission must consider parties' post-hearing briefs as their ultimate position and recommendation. To leave the Order in this matter regarding the Attorney General's positions as is, in error, would result in a manifest injustice to the consumers the Attorney General represents and sets an unfortunate precedent for intervenor parties in future proceedings.

#### B. The Commission's Revenue Requirements Determination

The Commission's Order granted an increase in electric base rates of \$8,428,645.<sup>27</sup> Although the Attorney General believes the record supports a reduction, rather than an increase to current rates, he nonetheless does not believe the Commission's ultimate revenue determination is unreasonable. The Attorney General does though request rehearing for the purpose of ascertaining the specific adjustments the Commission made, both to rate base and operating expenses, in order to conclude that an \$8,428,645 increase is reasonable. The Attorney General has thoroughly reviewed the Order and is unable to reconcile the adjustments discussed therein and the overall revenue requirement approved. In fact, the Attorney General is not alone in his confusion. On April 25, 2018, the parties to this matter participated in an informal conference where Duke raised a similar concern about the Order, and even provided a handout with its attempted reconciliation.<sup>28</sup> Although the Attorney General believes that Duke left out certain adjustments, such as a gross-up for the PSC assessment and uncollectible amounts, as well as not addressing Cash Working Capital, the handout provides a glimpse inside the concern regarding revenue requirements. The Attorney

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<sup>27</sup> Order at 41.

<sup>28</sup> PSC IC Memo (Ky. PSC Apr. 12, 2018) at PDF pagination 6.



General believes that rehearing is necessary to ensure there are no errors or omissions as to the overall revenue requirement.

Respectfully submitted,

ANDY BESHEAR  
ATTORNEY GENERAL



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