

**COMMONWEALTH OF KENTUCKY**  
**BEFORE THE PUBLIC SERVICE COMMISSION**

**IN THE MATTER OF:**

<b>APPLICATION OF SOUTH KENTUCKY RURAL</b>	)	
<b>ELECTRIC COOPERATIVE CORPORATION</b>	)	<b>CASE NO.</b>
<b>FOR APPROVAL OF MASTER POWER PURCHASE</b>	)	<b>2018-00050</b>
<b>AND SALE AGREEMENT AND TRANSACTIONS</b>	)	
<b>THEREUNDER</b>	)	

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**EAST KENTUCKY POWER COOPERATIVE INC.’S**  
**MOTION TO STRIKE RESPONSE OF**  
**SALT RIVER ELECTRIC COOPERATIVE, RESPONSE TO MOTION TO**  
**STRIKE, AND REPLY**

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Comes East Kentucky Power Cooperative, Inc. (“EKPC”), by counsel, and states as follows:

**MOTION TO STRIKE**

At approximately 3:00 p.m. on Friday, July 20, 2018, counsel for Salt River Electric Cooperative (“Salt River”) inexplicably filed a “Response” brief despite the Commission having specifically ordered that “Post hearing briefs by those intervenors desiring to submit a brief shall be filed by **July 2, 2018.**” 5/18/18 Order at 2. The Response filed by Salt River must be stricken as a matter of law. *See* 807 KAR 5:001, Section 10: “Each brief **shall be filed** within the time fixed. A request for extension of time to file a brief shall be made to the commission by written motion.” Salt River sought no leave to file its Response nearly three weeks after the deadline set by the Commission. In setting the briefing schedule on this matter, the Commission elicited input from the parties’ counsel and specifically noted that it was setting a staggered briefing schedule because it was unclear what the positions of certain individual cooperatives were, and once those positions were articulated in briefing, individual replies might be necessary. All other

parties to this proceeding have complied with the Commission's Order and it would be unfair and prejudicial to EKPC and the other parties to permit such a belated filing. Moreover, the "Response" filed by Salt River is, in fact, an unsworn, first-person narrative by Salt River's counsel that is devoid of *any* citation to the record or the proceedings herein. ("If **I** may repeat **myself**...."; "**I** would be the first to admit...."; "**I**'m an old country lawyer"; "all **I** can say...."; "**I** wonder what they were thinking....."; "**I** also wonder....", Response at 7-8).

EKPC respectfully moves the Commission to strike Salt River's pleading from the record of this proceeding.

### **RESPONSE TO SALT RIVER'S MOTION TO STRIKE**

In its pleading, Salt River has also moved to strike a portion of EKPC's brief describing EKPC Board action at an EKPC Board meeting on June 8, 2018. In perhaps the best illustration of the very sort of thinking that led to this proceeding, Salt River asserts that the meeting was "secret" and "improper" because EKPC did not invite the counsel for each of the cooperatives to be present and advocate for the *individual cooperative's interest* – at an *EKPC Board Meeting*. Salt River Brief at 8.

Salt River praises its counsel for having sent a lengthy, substantive communication regarding the subject-matter of this proceeding to the CEO's of each of the other cooperatives on May 31, 2018. Not unlike the disregard Salt River has shown for the Commission's scheduling Order of May 8, 2018, Salt River's counsel sent his letter directly to parties who are individually represented by counsel in this matter, notwithstanding the clear provisions of SCR 3.130(4.2): "In representing a client, a lawyer **shall not communicate with a person the lawyer knows to**

**be represented by another lawyer in the matter . . .”** The letter was not sent by Tim Sharp, CEO of Salt River, nor the Board of Salt River, but rather, by Salt River’s lawyer.<sup>1</sup>

Contrary to the factual assertion by Salt River that EKPC’s Board Meeting was secret or improper, Salt River’s representative on the EKPC Board of Directors, Jimmy Longmire, was present at the June 8, 2018 special meeting and the June 4, 2018 regularly-scheduled EKPC Board Meeting where the special meeting was discussed and scheduled, and voted *in favor* of the referenced resolution. Incredibly, Salt River’s Motion to Strike states, “[W]e believe that what’s wrong is how EKPC handled this issue with a Board Members only meeting. **Without us present** one of EKPC’s attorneys apparently convinced these Board Members that they had no choice but to adopt some type of resolution that EKPC wanted.” Salt River Brief at 8. Assuming the “us” referenced in Salt River’s pleading is CEO Sharp and counsel for Salt River, they clearly still fail to understand the purpose or duties of the East Kentucky Power Board of Directors. Their “Motion to Strike” is wholly without merit and should be denied.

### **REPLY TO SALT RIVER’S UNTIMELY RESPONSE**

Salt River filed its “Response” more than three weeks late and at 3 p.m. on the business day before Reply briefs were due. Without waiving its motion to strike the Salt River pleading, practicality requires that EKPC at least tender this brief Reply to Salt River’s pleading in the event the Commission elects not to strike the pleading from the record. Otherwise, the time will have expired to file such a Reply.

It is noteworthy that Salt River (or, at least its counsel) has now seen fit to weigh in on the merits of this proceeding. As the Commission will recall, it issued an Order requiring each individual cooperative to be present at the hearing and to testify as to the individual

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<sup>1</sup> The letter begins: “My name is Doug Hubbard. I have worked on legal matters for Salt River Electric for a little over 51 years and have been the general counsel for many of those years....”

cooperative's position on the issues presented. A representative of every cooperative attended and took the stand, or affirmatively adopted the testimony of a testifying witness, except one -- Tim Sharp, CEO of Salt River. CEO Sharp declined to testify and, instead, had Mr. Hubbard speak to the Commission on his behalf.<sup>2</sup> Now, Salt River's counsel has filed an unsworn, first-person statement in which he purports to make factual assertions and contradict testimony of the various witnesses who did take the stand. (*See* "WHAT FACTS GOT US HERE," Salt River Brief at 6-8.) Even if the Commission for some reason does not strike the pleading filed by Salt River, it should disregard the unsworn narrative 'testimony' of counsel for Salt River in light of Salt River's election not to take the stand at the public hearing in this matter.

CEO Sharp and Salt River's counsel have lodged a full-frontal attack on EKPC as the enemy and have suggested that a "solution" is for all cooperatives to reduce their power purchases from their G&T, perhaps by as much as 15%. Salt River Brief at 9. Aside from being in direct contravention of Amendment 3's maximum limitation of 5% of EKPC load, a requirement by RUS, the suggestion demonstrates that Salt River views itself as an adversary to the G&T that it co-owns and from whom it buys energy. Previously silent, Salt River now vocally advocates for individual cooperatives to shed load from EKPC in favor of alternate sources. Salt River fails to acknowledge that in the last several years since the substantial changes following the management audit, and guidance and direction from the Commission through the Liberty Report, EKPC has become incredibly competitive with LG&E/KU in cost of service, despite having a significantly more dispersed and physically challenging service territory (which, or course, was the very purpose for which rural electric cooperatives were created nearly a century ago). Instead of being proud of these improvements and rowing in the same direction as the other cooperatives who have clearly stated their positions in this proceeding, Salt River's

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<sup>2</sup> May 17, 2018 H.V.T. at 5:13:47 PM.

pleading unfortunately demonstrates a desire to go back to “the way things used to be.” If the Commission is persuaded that is a good idea, then Salt River has laid out the path. EKPC vehemently disagrees<sup>3</sup> and encourages the Commission not to become disillusioned by a very small minority of interests that apparently resent the substantial progress EKPC has made in the last several years since the management audit – in the Boardroom, in management, in corporate governance, and in the competitive business of energy generation and transmission.

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<sup>3</sup> For purposes of illustration, the following are excerpts from various Orders of the Commission from the perilous 2007-2008 timeframe:

As a general matter, prudently managed utilities will not willingly place themselves in a position where interim rate relief during the suspension period is necessary to avoid a material impairment of the utility’s credit or operations. This is especially true of rural electric cooperative corporations. KRS 279.095 provides that a cooperative “shall be operated on a nonprofit basis for the mutual benefit of its members and patrons.” While low rates are desirable, this must be balanced against the necessity that a cooperative remain financially and operationally viable.

Case No. 2006-00472, 4/1/07 Order at 2-3.

Unlike an investor-owned utility where the equity owners of the utility may or may not also be customers of the utility, an RECC is governed and owned by its members, who are also its customers. While members of the 16 member systems have an interest in keeping their distribution cooperative’s rates as low as possible, they also have an interest in keeping their distribution cooperative’s equity position in EKPC viable. The directors of EKPC – who generally are also officers and directors of the 16 member systems – have an obligation to either seek an increase or decrease in EKPC’s base rates when the balance between low rates for end users and sufficiently high rates to EKPC viable falls out of equilibrium. Though there is a constant friction between these interests, it is one EKPC’s board members voluntarily undertake.

Case No. 2006-00472, 12/5/07 Order at 26-27.

It is altogether unclear that East Kentucky has, as of yet, arrested the deterioration of its financial condition. That question will be thoroughly addressed in the context of East Kentucky’s pending general rate case. The larger question is whether East Kentucky is fully committed to reversing its weakening financial condition. Ultimately, the responsibility for East Kentucky’s viability lies firmly within the province of its board of directors, who have a fiduciary duty to safeguard the financial and operational viability of the cooperative. The Commission cannot and should not usurp the directors’ duty to make business judgments, but as the statutorily created regulatory authority, it also cannot and should not turn a blind eye to a situation which does not appear to be getting better.

Case No. 2008-436, 12/23/08 Order at 8.

EKPC hopes the Commission will give due consideration to the testimony of the many cooperatives' representatives at the hearing, their briefs, and the post-hearing corporate governance materials submitted by EKPC, because the story here is a positive one. With only a very few limited exceptions, it is a story embraced by the EKPC family of cooperatives. To the extent one or two or three individual cooperatives or their CEO's or their counsel desire a different approach, the Commission should recognize that is not a fair depiction of the EKPC cooperative family as a whole. To the extent the Commission has concerns about those positions, EKPC would encourage the Commission to direct its inquiries or concerns in that regard to those cooperatives rather than concluding that those positions are emblematic of the EKPC system as a whole or its owner-member Board of Directors, to whom much of the credit goes for the successes EKPC and its cooperatives now enjoy.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

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