COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

ATTORNEY GENERAL'S POST-HEARING BRIEF

Comes now the intervenor, the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention, and states as follows for his post-hearing brief in the above-styled matter.

I. STATEMENT OF THE CASE AND BACKGROUND

South Kentucky Rural Electric Cooperative Corporation ("SKRECC"), organized under KRS chapter 279, is one of sixteen member-owner rural electric cooperative corporations ("Member-Owners") that own East Kentucky Power Cooperative, Inc. ("EKPC"), the generation and transmission cooperative that supplies each member-owner with the power they require to distribute electric service to their retail customers.[1] Each member-owner has entered into a Wholesale Power Contract ("WPC") with EKPC approved by the U.S. Rural Utilities Service ("RUS") which until 2003, required each member-owner to obtain all of their energy requirements solely from EKPC.[2] In that year, the member-owners and EKPC created a third amendment ("Amendment Three") to their WPCs, which allowed

[1] SKRECC Application, pp. 2-3.
[2] SKRECC Application, p. 3.

member-owners to obtain a portion of the energy and capacity necessary to serve their "load or loads"[3] from non-EKPC sources ("Alternate Sources"), in amounts up to 15% of each member-owner's coincident peak demand.[4] Prior to the application in this case, EKPC's member-owners submitted six (6) separate Alternate Source elections totaling 11.2 MW, ranging in size from 1.6 MW – 3.6 MW, each of which were derived from behind-the-meter owned, purchased or leased sources,[5] but nine (9) member-owners had not made any Alternate Source election at all.

In 2010, another EKPC member-owner, Jackson Energy Cooperative Corporation ("Jackson Energy"), made an Alternate Source election for 15% of its peak demand (40 MW)[6] at a 100% load factor.[7] According to Jackson Energy CEO Carol Wright:

> South Kentucky was the first cooperative to utilize Amendment Number Three with the Monticello Electric Plant Board purchase. After that, Jackson Energy in 2009-2010 was going to utilize the 15% for a 40 MW purchase. At that time, Amendment Three was fairly new . . . . No one had exercised the right to the 15%, **and at that time no one realized the cost-shifting component that could occur if a cooperative took 15%.** [8]

EKPC then advised Jackson Energy that the only option that would be fair to all the member-owners would be to limit the election to 5% of Jackson Energy's peak demand, at a load factor of significantly less than 100%. Jackson Energy then agreed to place its election in

[3] Amendment Three, p. 2, attached as an exhibit to SKRECC's Application.
[4] *Id.* Since each member-owner's power consumption varies significantly, the 15% Alternate Source acquisition would translate into significantly different quantities of power, from 64 MW for Owen RECC, to a low of 10.8 MW for Grayson RECC. *See* Nucor Hearing Exhibit 3.
[5] *See* Nucor Hearing Exhibit 3; *see also* Direct Testimony of EKPC CEO Anthony S. Campbell, pp. 4-8.
[6] Cross-examination of Jackson Energy CEO Carol Wright, Video Transcript Evidence ("VTE") May 16, 2018, beginning at 3:56:53.
[7] Direct Testimony of Anthony S. Campbell, p. 6.
[8] Cross-Examination of Carol Wright, VTE May 16, 2018, 3:56:40 – 3:57:42 [emphasis added].

abeyance because it would have shifted costs to the other member-owners, and would not be consistent with cooperative principles.[9]

In 2012, another one of EKPC's rural electric cooperatives, Grayson Rural Electric Cooperative Corporation, filed a complaint, Case No. 2012-000503,[10] in which it sought Commission approval to obtain a portion of its energy requirements from an Alternate Source. As a result of that case, the Commission initiated an investigation to determine, "whether Amendment 3 requires or a need exists for a methodology for sharing among all members the allocation of alternative sourced power authorized under Amendment 3."[11] As a result of the settlement reached in Case No. 2012-00503, EKPC and its sixteen member-owners executed an agreement interpreting Amendment Three, known as the "Memorandum of Understanding and Agreement Regarding Alternate Power Sources" ("MOU").[12] As SKRECC's application in the instant case states, the MOU:

> provides a framework by which EKPC's Owner-Members may pursue and contract with parties other than EKPC (i.e., "Alternate Sources") to satisfy a defined portion of their future power needs, and it includes provisions relating to . . . limits on the quantities of alternate-source power that can be acquired by each Owner-Member, the length of term for which the alternate source power can be acquired, and the advance notice that must be provided by an Owner-Member before acquiring alternate-source power.[13]

The MOU also provides that when a member-owner makes an Amendment Three election to procure Alternate Source power to serve their "load or loads," the electing

[9] Cross-examination of Carol Wright, VTE May 16, 2018, at 4:05:42 – 4:07:04. Ms. Wright also testified under cross-examination that Jackson Energy has never officially withdrawn its notice of election to procure 40 MW of an Alternate Source of power. *See also* Direct Testimony of Anthony S. Campbell, p. 6.
[10] Case No. 2012-00503, *In Re Complaint and Petition of Grayson Rural Electric Cooperative Corp.*, Complaint pp. 1-6. *See also,* Case No. 2018-00050, Direct Testimony of Anthony S. Campbell, pp. 6-7, for additional history regarding Amendment 3.
[11] Case No. 2012-00503, Order dated July 17, 2013, p. 20.
[12] *Id.,* Final Order dated Dec. 18, 2015.
[13] SKRECC Application, pp. 2-3.

member-owner must provide EKPC with written notice setting forth, *inter alia*, "the approximate, expected pattern of use or dispatching of the Alternate Source and the corresponding pattern of hourly reductions in energy to be purchased by the Owner Member from EKPC."[14]

On January 31, 2018, SKRECC filed its application in this matter, in which it seeks Commission approval of a master purchase power agreement ("PPA") according to KRS 278.300, whereby SKRECC would purchase 58 MW of firm energy from Morgan Stanley Capital Group, Inc. ("MSCG").[15] The PPA would be in effect for each and every day of a twenty-year period beginning June 1, 2019, at a 100% capacity factor.[16] In addition, SKRECC would obtain from MSCG a financial capacity hedge of 68 MW for an eighteen-year period, beginning June 1, 2021.[17] In support of its application, SKRECC states the PPA would save its ratepayers between $89.7 million to $122.8 million over the lifespan of the PPA. [18]

On February 21, 2018 through February 23, 2018, the Attorney General, Nucor Steel, EKPC and the remaining fifteen member-owners all moved to intervene, all of whose motions were granted between February 22, 2018 and March 1, 2018. After completing two rounds of discovery, EKPC and the fifteen remaining member-owners filed their respective testimony, and additional discovery was completed. SKRECC then filed its rebuttal testimony. On May 15-17, 2018, an evidentiary hearing was held in this matter. SKRECC filed its initial post-hearing brief on June 15, 2018. Intervenor briefs are to be filed by July 2,

[14] MOU (attached as an exhibit to SKRECC's Application), p. 6, 4 (iv).
[15] Case No. 2018-00050, SKRECC Application, pp. 1, 5-8.
[16] *Id.,* pp. 1-2.
[17] *Id.*
[18] SKRECC Application, p.2. SKRECC witness Babbit, during cross-examination on the public record stated that for SKRECC's savings would range from $78 M to $111 M, but when coupled with FAC and ECR savings could total as much as $240 M. VTE May 16, 2018, 10:11:16 – 10:12:31.

2018, while reply briefs to the intervenors' briefs are due on or before July 23, 2018, and the case will stand submitted for a decision on July 24, 2018.

The Commission must deny SKRECC's Application. SKRECC has failed to prove that it has a "need" for the PPA and that the agreement will not result in wasteful duplication according to both KRS 278.020 and Commission precedent. Further, the Commission must deny the Application because approving it would result in the Commission violating other specific statutory provisions, namely KRS 278.030 and 278.170. As the evidence in the record overwhelmingly proves, approving the PPA results in significant cost shifts that are not fair, just, and reasonable, nor would the prejudice or disparity in rates be reasonable according to the law. Additionally, the Application before the Commission presents the opportunity for unreasonable risks to SKRECC's members, and is likely, in the long-term, not in the best interest of SKRECC's members. Finally, SKRECC's argument that the Commission is estopped from amending or rescinding either the MOU or Amendment Three under the filed-rate doctrine is without merit. As the Attorney General will note below, the law is clear that the Commission has the opportunity and authority to modify or revoke its orders as long as they are subject to its continuing jurisdiction and legal precedent mandates the Commission do so in order to "enforce the provisions" of KRS chapter 278.

II. ARGUMENT

a. SKRECC's PPA Would Unacceptably Shift Costs to Other Member-Owners, Creating Discriminatory, Unfair, Unjust and Unreasonable Rates

One of the determining factors in this matter is whether the proposed PPA represents a legitimate opportunity for SKRECC to in essence, "beat the market," or whether the potential savings it hopes to achieve would instead come at the expense of other member-owners in the form of cost avoidance by not purchasing power directly from EKPC. If the

latter scenario, those avoided costs will be allocated to EKPC's other member-owners, who in turn must pass those costs on to their retail ratepayers. The lengthy record in this matter has conclusively established the latter to be the case.

The vast majority of the remaining fifteen member-owners,[19] together with EKPC, have all stated their belief that if approved, the PPA would result in SKRECC paying less of both the fixed and variable costs currently allocated to SKRECC under its WPC, which, in the case of avoided fixed costs, would require EKPC to re-allocate costs among the other member-owners. In fact, given that EKPC's wholesale Rate E recovers a significant portion of its fixed costs through the energy charge,[20] SKRECC's election of a 100% load factor Alternate Source *enhances* the shift of fixed costs to the other member-owners.[21] Contrary to SKRECC's statement in its initial post-hearing brief, the member-owners clearly did not understand the potential for cost-shifting and the ramifications thereof;[22] it would simply have been illogical for the member-owners to have signed it had they understood those ramifications. As explained by EKPC CEO Anthony S. Campbell:

> Paragraph 6 of the MOU also provides that EKPC is entitled to continue to set its rates for all owner-members to produce revenues that are sufficient to cover all of its costs. To the extent that EKPC cannot mitigate all the costs associated with the South Kentucky transaction (and others like it), it will have to seek adjustments in its rates for all owner-members to recover those costs.[23]

[19] *See, e.g.,* cross-examination of Carol Wright, VTE May 16, 2018 beginning at 3:47:52.
[20] *See* Nucor Hearing Exhibits 4 and 7.
[21] *See, e.g.,* Direct Testimony of Michael McNalley, pp. 12-13; Direct Testimony of John Wolfram on Behalf of the Joint Distribution Cooperatives, pp. 20-21; Direct Testimony of William T. Prather, pp. 9-11; Direct Testimony of Anthony S. Campbell, pp. 10-11, 16-17, 19-20; and EKPC Response to AG 1-8 (e).
[22] Cross-examination of Carol Wright, *supra*, note 8; cross-examination of Anthony S. Campbell, VTE May 16, 2018 10:48:46 p.m. – 10:49:15 p.m.; and cross-examination of David Crews, VTE May 17, 2018 10:25:11 – 10:26:11.
[23] Campbell Direct Testimony, p. 11.

Moreover, SKRECC has acknowledged that it has not performed any studies or analyses of the potential impacts of the proposed transaction on the rates of the other member-owners,[24] nor of the potential impact on EKPC's wholesale and environmental surcharge rates.[25] As EKPC stated in the record, "a significant portion of the perceived benefit by SKRECC is the cost shifting to other owner-members as opposed to an inherent advantageous financial position *vis-à-vis* Morgan Stanley under the contract."[26]

In defense of its proposed PPA, SKRECC makes multiple references to verbal conversations between SKRECC representatives and EKPC's CEO, Anthony S. Campbell, in which the latter allegedly stated that EKPC would have no difficulty in mitigating the loss of 58 MW of load resulting from the PPA.[27] Although EKPC acknowledges having several preliminary verbal conversations with SKRECC, it states that at no time during these conversations was EKPC made aware that SKRECC was contemplating a transaction in which it would obtain 58 MW of firm power at a 100% load factor.[28] In fact, CEO Campbell testified that in the absence of any firm details of the contemplated alternative source election, he assumed that SKRECC had in mind a load-following transaction, which would have been approximately 19 MW (5% of SKRECC's coincident peak at that time), falling in the range of a 50% load factor.[29] Both Amendment Three and the MOU limit member-owners making an Alternate Source election to serving their own "load or loads." The obvious conclusion must be that all parties understood that any Alternate Source would displace a similarly-sized

[24] SKRECC Responses to AG 1-12, and to Nucor Steel 1-1; *see also* VTE May 15, 2018, beginning at 10:20:06.
[25] SKRECC Responses to Joint Cooperatives' 1-6, and to AG 1-13.
[26] EKPC Response to AG 1-1 (b), referencing the Direct Testimony of Michael McNalley, pp. 12-13.
[27] SKRECC Response to AG 1-1, 1-2, 1-12, 1-13, 1-14; SKRECC Response to Joint Distribution Cooperatives 1-6, 1-35; SKRECC response to Nucor 1-1; SKRECC response to EKPC 1-29, 1-35; SKRECC response to Joint Distribution Cooperatives 2-1; SKRECC response to EKPC 2-9; 2-30.
[28] Direct Testimony of Anthony S. Campbell, pp. 12-14.
[29] Direct Testimony of Anthony S. Campbell, pp. 13-14.

portion of the load EKPC had been serving on a load-following basis, especially given that no "load or loads" in SKRECC's service territory operates at a 100% load factor.[30] Without any further clarifying information, CEO Campbell at that time was therefore fully justified in assuming that SKRECC had intended to follow the letter and spirit of both Amendment Three and the MOU by procuring a load-following Alternate Source, not the 100% load factor Alternate Source at the center of this case.

EKPC contends that although it can mitigate the loss of 58 MW of load over time, nonetheless the loss represents a lost economic opportunity which cannot be mitigated:

> Mitigation of rate increase pressures are the efforts we undertake to achieve acceptable financial performance, operate reliably and safely, and forestall the need for base rate increases. These efforts are achieved through two broad categories: growth of our sales through economic development and other efforts, and keeping our costs down to essential levels given the strategic direction set by EKPC's Board. *Lost opportunity cannot be mitigated.* This represents the opportunities for revenue growth and cost savings that would have been available to all owner members. However, the South Kentucky transaction diverts these opportunities to mitigate rate increase pressure, rendering them unavailable for the benefit of the other owner-members. . . . South Kentucky's election . . . results in *a **permanent shift of costs**, which our mitigation efforts cannot change*. . . . In other words, the mitigation efforts are devoted to simply offsetting the South Kentucky election, resulting in a "wash," whereas in the absence of that transaction the benefits of EKPC's mitigation efforts would inure to all of its owner-members as a net gain.[31]

As indicated in both direct testimony and during the evidentiary hearing held in this matter, such permanent cost shifts will force at least several member-owners to seek increased base rates.[32] In addition, EKPC may need to increase its wholesale rates sooner than

[30] In 2017, SKRECC's load factor was 41.17%. SKRECC's response to PSC 1-23.
[31] Direct Testimony of Michael McNalley, pp. 3, 5 [emphasis added].
[32] *See, e.g.*, Direct Testimony of William T. Prather, pp. 9-11; *see also* Direct Testimony of John Wolfram, pp. 21-22; and VTE May 15, 2018 at 6:06:48 (wherein Mr. Jim Adkins noted that if Mr. Wolfram's analysis is correct, "a lot of them [the 15 other member-owners] would need a rate increase.")

anticipated.[33] Despite the fact that cost shifting resulting from the PPA would likely lead to higher system base rates, SKRECC's astonishingly tone-deaf position is that cost shifting is somehow irrelevant to the instant case.[34] Even one of SKRECC's consultants, Steve Seelye, who has repeatedly testified before this Commission that cost-causers should be required to pay for the costs they generate, in the instant case opines that his client should indeed be allowed to transfer the costs for which it to date has been contractually responsible, to its sister cooperatives.[35] SKRECC's incessant, tunnel-vision focus on its alleged ability to avoid 40% of its fixed energy costs under the proposed transaction, is a feint designed to obscure the palpable harm that will occur if SKRECC's costs are placed squarely onto the backs of the other member-owners. SKRECC's position stands in stark contrast to those of sister member-owners. When Ted Hampton, CEO of Cumberland Valley was asked whether his company had considered making an Alternate Source election, Mr. Hampton responded: "East Kentucky Power and the 16 distributors are a big family; *why would I want to do something that would hurt the family*?"[36]

While EKPC likely could partially mitigate the impact of base rate increases given enough time, it is readily apparent that it simply cannot mitigate the cost shift impact. "Ultimately, there is no way to split this deal up in a way that benefits the member systems;

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[33] Direct Testimony of Michael McNalley, p. 9.

[34] Cross-examination of Dennis Holt, VTE May 15, 2018 beginning at 10:51:00. However, as brought out in cross-examination of SKRECC CEO Mr. Dennis Holt (VTE May 15, 2018 beginning at 10:58:12), this position stands in stark contrast with the position SKRECC took with regard to opting-out of smart meter systems, where Mr. Holt stated: "if the Commission allows opt-outs the member [retail customer] must be responsible for the additional cost. **It is not fair for other members to absorb the additional cost of providing service to those that opt-out**" [emphasis added](*quoting* SKRECC's Response to PSC 2-9 in, *In Re: Consideration of the Implementation of Smart Grid and Smart Meter Technologies,* Administrative Case No. 2012-00428); *see also* cross-examination of Steve Seelye, VTE May 16, 2018 starting at 1:30:40, wherein he states that any stranded cost that may result from the proposed transaction is irrelevant, because effectively, the utilities knew what they were doing, "as harsh as that may sound."

[35] VTE May 16, 2018, 1:38:01 – 1:50:59, cross-examination of Steve Seelye.

[36] VTE May 16, 2018 9:03:23 p.m. - 9:03:48 p.m.

it always results in higher costs to [them]."[37] The Commission should deny SKRECC's Application because if approved the PPA would unreasonably harm the retail ratepayers taking service from EKPC.

As provided in KRS 278.170 (1):

> No utility shall, as to rates or service, give any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage, or establish or maintain any unreasonable difference between localities or between classes of service for doing a like and contemporaneous service under the same or substantially the same conditions.

The Commission is prohibited from allowing EKPC to give an *unreasonable preference or advantage* to SKRECC, and the Commission is further prohibited from allowing EKPC to subject the remaining 15 member-owners to any *unreasonable prejudice or disadvantage*. In this case, the inescapable conclusion is that Amendment Three, the MOU (which both constitute parts of EKPC's Commission-approved tariff), and SKRECC's Application to procure a PPA under them, results in rates that if approved will result in transfer of costs of a significant size — for which SKRECC would otherwise have been responsible — to one or more of the remaining member-owners. The Commission must keep in consideration that EKPC incurred these costs over the decades in order to serve all sixteen owner-members, including SKRECC.

For at least the following reasons, any approval of the proposed PPA would provide an unreasonable preference or advantage to SKRECC, and would thus fly in the face of this statute: (a) entering into the PPA would abrogate SKRECC's prior commitments to pay its full share of EKPC system costs as set forth in the Commission-approved rate structures of both EKPC and SKRECC, and in SKRECC's WPC; (b) SKRECC would achieve a rate

[37] Cross-examination of Michael McNally, May 16, 2018 VTE 8:52:44 – 8:52:54.

reduction primarily as a result of shifting costs for which it is responsible to the remaining member-owners without the latter's express consent;[38] and (c) the resulting rate reduction achieved primarily through cost-shifting would make SKRECC's retail rates appear more attractive as opposed to the remaining member-owners' retail rates, to potential new commercial and industrial customers contemplating whether to expand or move new operations within the EKPC system.

Further, for at least the following reasons, any approval of the proposed PPA would subject the remaining 15 member-owners, and potentially EKPC itself to an unreasonable prejudice or disadvantage: (a) the remaining member-owners — in particular the nine who have never made an Alternate Source election[39] — have relied to their detriment upon SKRECC's prior commitment to pay its share of both fixed and variable costs under the EKPC system, as the remaining member-owners will have the costs that SKRECC would have paid under its WPC shifted to them — including environmental surcharge costs — which will force some member-owners to seek increased base rates from their retail customers; (b) retail ratepayers of the member-owners who are forced to raise base rates will experience increased bills, for costs that neither they nor their distribution cooperative are responsible, with no corresponding benefit;[40] (c) EKPC itself may have to seek an increase in its wholesale

[38] Although the MOU states that any member-owner electing to obtain an Alternate Source will not be responsible for "stranded costs," (MOU p. 9, item no. 6) that term is not defined and nowhere does that agreement, nor Amendment Three state that the non-electing member-owners agree to pay for costs that are *shifted* to them as a specific result of one member-owner making such an election. Moreover, neither document contains any provision whereby non-electing member-owners agree to become responsible for all shifted costs resulting when the Alternate Source election is for the full 15% of the electing member-owner's share of Alternate Source power at a 100% load factor; clearly, the 100% load factor was never contemplated by any member-owner at the time Amendment Three and the MOU were executed. Furthermore, the MOU's requirement (at p. 6, § 4 (A)(iii)) that the Alternate Source's primary generating sources be identified evinces an intent that the Alternate Source should be a behind-the-meter resource which the electing member-owner either owns or leases, as has been the case with all six Alternate Source completed elections prior to the instant case.

[39] *See, e.g.,* cross-examination of Anthony S. Campbell, VTE May 16, 2018 at 10:18:45 p.m.

[40] Direct Testimony of John Wolfram, p. 23.

rates sooner than anticipated; (d) the increased base rates many of the remaining member-owners will experience could harm EKPC's credit metrics, which could result in higher interest rates on its loans; (e) remaining member-owners would be forced to pay costs they did not incur, particularly costs SKRECC had agreed to pay prior to seeking the current Alternate Source transaction, or even before the initiation of Amendment Three; (f) the resulting rate increases the remaining member-owners will face will result in their rates appearing less attractive to potential new commercial and industrial customers contemplating whether to expand or move new operations within the EKPC system; (g) Jackson Energy Cooperative Corporation, which appears to have made an Alternate Source election prior to the date that SKRECC submitted its notice, would be extremely prejudiced if SKRECC's application is approved because an Alternate Source election as large as Jackson's would not be allowed under the terms of Amendment Three and the MOU;[41] and (h) the unreasonable prejudice and disadvantage that will result if the PPA is approved threatens to weaken the EKPC system, which would create unprecedented prejudice and harm not only to the 530,000 customers in the EKPC system, but indeed to the entire Commonwealth.

Finally, by no means would SKRECC's proposed PPA yield rates that are fair, just and reasonable to the 15 remaining member-owners, or to EKPC itself, as required under KRS 278.030 (1). Despite the fact that the Application in this matter was filed pursuant to KRS 278.300 (although it must also comply with the "need" provision of KRS 278.020(1)), every Commission order must also comply with the additional statutory mandates the legislature has placed on the Commission. Although SKRECC contends that any resulting cost shift under its desired PPA is irrelevant, SKRECC has nevertheless chosen to ignore the

[41] As noted on pp. 2-3, *supra*, Jackson has never withdrawn its election for the Alternate Source discussed therein.

fact that Commission orders must comply with the entirety of KRS Chapter 278. KRS 278.040 (1) mandates that, "The Public Service Commission shall regulate utilities and enforce the provisions of this chapter." One such provision is KRS 278.030 (1), which notes that utilities may only charge rates that are fair, just, and reasonable. The record provides ample evidence that the rates resulting from the transaction, and from the inevitable cost shift, would be anything but "fair, just and reasonable." Mr. Wolfram's testimony noted that by 2020 under the PPA, SKRECC would be saving $5.9 million, but at the expense of shifting $15.9 to $18.3 million to the other member-owners.[42] The member-owners' service territories are located in some of the poorest counties in the nation, serving retail customers who can ill-afford even the *slightest* increase, much less one brought about simply by unjust cost-shifting. The unfair, unjust, and unreasonable rates resulting from the inevitable cost shift could hardly be said to be "irrelevant." The Attorney General will address this issue more thoroughly in section (d) of this brief.

b. <u>The PPA Would Constitute Wasteful Duplication Under KRS 278.020 (1)</u>

In Case No. 2013-00144,[43] the Commission set forth a standard governing the review of PPAs as evidence of indebtedness under KRS 278.300, such as the one at the center of this case:

> Pursuant to KRS 278.300, a utility must establish that the proposed assumption of obligation or liability is for some lawful object within the corporate purposes of the utility, is necessary or appropriate for or consistent with the proper performance by the utility of its service to the public and will not impair its ability to perform that service, and is reasonably necessary and appropriate for such purpose. In addition to the standards set forth in KRS 278.300, the Commission must also analyze the need for the purchase power agreement under the Commission's existing statutory authority where, as here, the purchase power agreement

[42] Direct Testimony of John Wolfram, pp. 21-23, Exhibit JW-2.
[43] In Re: *Application of Kentucky Power Co. for Approval of the Terms and Conditions of the Renewable Energy Purchase Agreement*, etc., Final Order dated Oct. 10, 2013, pp. 12-13.

> is intended to add supplemental generating capacity to the utility. In examining the statutory criteria for approving financing under KRS 278.300(3), the "purposes and uses of the proposed issue" are for the acquisition of new generation; and for the debt to be "for some lawful object within the corporate purposes of the utility." **A utility must also establish a need for additional generation and the absence of wasteful duplication, both as required under KRS 278.020(1).**

"Need" requires:

> [A] showing of a substantial inadequacy of existing service, involving a consumer market sufficiently large to make it economically feasible for the new system or facility to be constructed or operated. [T]he inadequacy must be due either to a substantial deficiency of service facilities, beyond what could be supplied by normal improvements in the ordinary course of business; or to indifference, poor management or disregard of the rights of consumers, persisting over such a period of time as to establish an inability or unwillingness to render adequate service.[44]

Furthermore:

> "Wasteful duplication" is defined as "an excess of capacity over need" and "an excessive investment in relation to productivity or efficiency, and an unnecessary multiplicity of physical properties."[45] For an applicant to demonstrate that a proposed facility does not result in wasteful duplication, we have held that the applicant must demonstrate that a thorough review of all reasonable alternatives has been performed. [46] . . . All relevant factors must be balanced.[47]

It is understood that EKPC and its system is both planned and operated as a whole. The Commission's IRP regulation, 807 KAR 5:058 § 1 specifically exempts "distribution cooperatives organized under KRS Chapter 279," which includes SKRECC, because of the role that a G&T plays in system planning for the "families" of cooperatives. As the Staff

[44] *Citing* Kentucky Utilities Co. v. Public Service Commission, 252 S.W.2d 885, 890 (Ky. 1952).
[45] *Id.*
[46] *Citing* Case No. 2005-00142, *Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company for a Certificate of Public Convenience and Necessity for the Construction of Transmission Facilities in Jefferson, Bullitt, Meade, and Hardin Counties, Kentucky* (Ky. PSC Sept. 8, 2005)).
[47] Case no. 2013-00144, *supra* at pp. 13-14 (c*iting* Case No. 2005-00089, *Application of East Kentucky Power Cooperative, Inc. for a Certificate of Public Convenience and Necessity for the Construction of a 138 kV Electric Transmission Line in Rowan County, Kentucky* (Ky. PSC Aug. 19, 2005)).

Report to EKPC's last IRP indicates:[48] (a) EKPC has no plan to add any new generation to serve projected load until 2026;[49] and (b) PJM requires EKPC to maintain a 72 MW reserve, but as of 2019 its summer reserve will be 672 MW. As will be discussed in the next section, the resulting short-term cost shift to the other fifteen member-owners may not necessarily result in actual savings for SKRECC customers over the term of the proposed PPA. Any argument that the replacement of power with cheaper power somehow "saves" SKRECC on the issue of wasteful duplication is thus misplaced. Clearly, the addition of SKRECC's proposed 58 MW would constitute sheer waste.

c. The PPA Poses Unreasonable Risk to SKRECC and its Ratepayers

As set forth in the Direct Testimony of EKPC Executive Vice President and Chief Operating Officer Don Moser, EKPC's concerns about the risks SKRECC could face should the PPA be approved, fall into three categories: the long-term nature of the agreement; contractual provisions allowing MSCG to change certain crucial terms; and that, what SKRECC characterizes as a purchase of capacity from SKRECC is actually only a derivative financial swap transaction, which would not qualify as an "Alternate Source."[50]

Mr. Moser states that most energy PPAs having a 100% load factor are for very short periods.[51] Agreements with a twenty-year period are usually associated with all-requirements and specific asset-based tolling agreements.[52] Moreover, the fact that SKRECC's proposed "Alternate Source" is not specifically identified "creates a high degree of regulatory, market

[48] Case No. 2015-00134, Staff Report on the Integrated Resource Plan of East Kentucky Power Cooperative, Inc., April, 2016; submitted as Nucor Hearing Exhibit 2.
[49] *Id.* at p. 4.
[50] Direct Testimony of Don Moser, pp. 2-3.
[51] *Id.* at p. 4.
[52] *Id.*

and economic risk for South Kentucky that has not been accounted for in its due diligence."[53] For example, the PPA does not require MSCG to own its own generation, or to source its power from any particular third party; indeed, MSCG could obtain the power from any number of generators located within PJM's 13-state footprint.[54] Significantly, however, this risk is multiplied given the PPA's twenty-year term, which could include the risk of being compelled to transact business with a financially strapped generator, who could impose modifications that MSCG in turn would pass on to SKRECC through elastic contractual repricing mechanisms set forth in broadly-worded terms such as "Change in Law," "Environmental Change in Law," or "Additional Environmental Costs."[55]

Given the volatility in today's energy markets, such risks are indeed significant enough to warrant abundant and thorough due diligence, particularly as market constructs are also in flux. Yet as Mr. Moser points out, SKRECC's application, testimony and data responses are *devoid* of any indication that the utility undertook any "empirical analysis of varying market conditions, the range of outcomes, how it would affect the propriety of the transaction, or identified what the degree of risk tolerance was for South Kentucky and its customers."[56] In fact, SKRECC dismisses analysis of potential risk scenarios as mere "truisms,"[57] while

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[53] *Id.*
[54] *Id*. at p. 6.
[55] *Id.* at pp. 4-7. *See also* cross-examination of Don Moser, describing the terms of the "Environmental Change in Law," and "Additional Environmental Costs" as utilized in both Confirms as being so vague that "you could drive a truck through it . . . .there is a good opportunity for this price to change meaningfully over a twenty-year time." (VTE May 16, 2018 4:23:27 – 4:29:30); and cross-examination of John Wolfram, VTE May 17, 2018 12:03:39 – 12:04:57.
[56] Direct Testimony of Don Moser, at pp. 4-5. *See also* VTE May 15, 2018, cross-examination of Dennis Holt beginning at 10:32:09 (confirming that the NPV analysis was the only study SKRECC conducted); and cross-examination of John Wolfram, VTE May 17, 2018 12:01:56 – 12:03:48 ("I don't think we've seen sufficient evidence to demonstrate whether this transaction would be in the best interest of [SKRECC] ratepayers over the full twenty years.").
[57] "Intervenors' ability to design a hypothetical scenario that erodes the projected savings of the agreement is a truism." SKRECC Initial Post-Hearing Brief, p. 33.

claiming its due diligence was "comprehensive and reasonable."[58] However, the extent and sufficiency of SKRECC's due diligence is only part of the problem. The Commission should expect that MSCG, as a sophisticated party well-experienced in such transactions, is likely at some point during the twenty-year term of the contract to seek re-definition of one or more of the key repricing terms set forth in the preceding paragraph to its advantage in order to limit its risk exposure, and to meet its investors' expectations.[59] SKRECC, on the other hand, being merely a distribution utility, a novice in such transactions, and lacking the resources necessary to protect its interests, is unlikely to avoid price escalations unfavorable to its retail member-owners, to whom it owes a fiduciary duty. SKRECC's repeated statements in the record equating the degree of risk it would face under the proposed PPA with the same risk it faces in purchasing power under its WPC with EKPC [60] *strikingly* illustrates that SKRECC simply does not comprehend the risk its members face under the PPA, and the long-term damage to the company that may result under it.

Additionally, while SKRECC has indeed procured a financial swap hedge product, it does not appear that this represents physical firm capacity for PJM's purposes.[61] SKRECC apparently intends to utilize that product only as a financial hedge to its 68 MW capacity plus reserves obligation, but it would rely upon EKPC to purchase firm capacity, as part of the yet-to-be-negotiated service agency contract between SKRECC and EKPC. Mr. Moser believes the capacity confirmation to be "an unnecessary and risky derivative instruction to effect a "hedge" to South Kentucky's yet-to-be-sourced capacity obligation."[62] SKRECC thus will

[58] *Id.* at p. 39.
[59] Direct Testimony of Don Moser, at pp. 4-5.
[60] *See, e.g.,* SKRECC response to AG 1-5.
[61] *Id*. at p. 9.
[62] *Id.* at p. 10.

have to pay EKPC an additional sum to procure physical capacity, a cost that has not been included in the instant application. Furthermore, SKRECC argues that the hedge benefits the utility if the capacity price exceeds the hedge.[63] What SKRECC does not seem to acknowledge though is that higher capacity prices are actually a boon to SKRECC whether the PPA is approved or not. As a generation-owning member of PJM, and having the unique disposition of being long capacity in the summer, EKPC, and ultimately its members, are beneficiaries of higher capacity prices under the status quo. In fact, in executing the hedge under the proposed transaction, SKRECC actually takes the risk that prices will be lower than the hedge, thus subjecting the utility to pay for the capacity and the hedge price.[64] Furthermore, by going it alone with 68 MW, the entire downside risk of lower capacity prices is on SKRECC, rather than spread across the remaining EKPC member-owners. The risk to SKRECC's members does not end there.

SKRECC's analysis in this matter did not assume that EKPC would move toward or to cost based rates for Rate E, even though the record provides evidence that EKPC has attempted to do so in the not-so-recent past.[65] Importantly, SKRECC's expert Mr. Steve Seelye, who the utility has held out to be an important witness in support of its Application based on no small part to his impressive CV of cases in which he testified before this Commission, agreed that the MOU "absolutely" does not preclude EKPC from requesting cost-based rates in its next rate case.[66] Further, it was Mr. Seelye's expert opinion that nothing in the MOU precludes the Commission from setting cost-based rates in subsequent rate

[63] Rebuttal Testimony of Cater Babbit at 10.
[64] Rebuttal Testimony of Cater Babbit at 10.
[65] VTE May 16, 2018 at 11:40:01; *see also* OAG Hearing Exhibit 3.
[66] VTE May 16, 2018 at 1:33:47.

cases.[67] As Mr. Seelye explains, "a cost based rate would have the demand components and the energy components reflective of costs."[68] Mr. Seelye went on to admit that cost based rates "may change the dynamic of the analysis" that SKRECC performed, and that a rate design would alter the economics of the proposal.[69] Because SKRECC's proposed PPA includes a provision for energy at a 100% load factor, although SKRECC is replacing 15% of its peak demand, it would be purchasing nearly 40% of its energy under the agreement.[70] Further, as discussed at length, EKPC's rates are currently by no means cost-based, and looking back to its rate case history, EKPC's rate E likely includes a significant amount of fixed costs in its energy charge.[71] In the 2008 rate case, EKPC's cost-based energy charge, both on and off-peak, would have been in the lower $30's per mWh.[72]

Remarkably, another PJM-member, Kentucky-based and heavily coal-burning utility, Kentucky Power, currently has an IGS rate, a transmission level class similar to those parties served under EKPC rate E, with a $27.30 mWh energy rate.[73] Given that rate E's current energy charge is approximately $45[74] and the amount under the proposed PPA is $33.95,[75] it is almost guaranteed that if EKPC requests and receives cost-based rates, EKPC's rate E energy rate will be lower than it is today, thus reducing any economic benefit on the energy side of the equation. Although SKRECC's witnesses wanted the Commission to understand that as the energy charge decreases, the demand charge will increase, due to the PPA's

[67] *Id.*
[68] VTE May 16, 2018 at 1:35:08.
[69] *Id.*
[70] VTE May 16, 2018 at 1:53:00 & 2:54:00.
[71] VTE May 16, 2018 at 2:51:01.
[72] Nucor Hearing Exhibit 7; VTE May 16, 2018 at 2:52:10.
[73] VTE May 16, 2018 2:57:00
[74] An approximate blend of on and off-peak costs, considering an average load factor.
[75] Application at 1.

proposed 100% load factor, the effect on the energy side is disproportionate to the demand.[76] Furthermore, considering the positive impact PJM membership has had on EKPC's income and credit metrics, reviewing EKPC's past rate cases and cost of service studies, and looking at Kentucky Power as a similar yardstick, there is a likelihood that EKPC's energy rates could dip below the amount provided for in the PPA. In that event, SKRECC would be paying more for 40% of its energy than it otherwise would in the absence of the agreement. This would obviously be detrimental to SKRECC's customers, and is a significant risk that SKRECC not only failed to analyze, but failed to consider. Lastly, as neither Mr. Babbit nor Mr. Seelye could guarantee that SKRECC's customers would see savings under the proposed transaction, the inherent risks that the PPA brings about to SKRECC's members clearly outweigh the benefits.

d. The Commission Must Rescind its Prior Approval of the MOU

As a condition to obtaining loan funds from the federal government for construction of generation assets, the RUS requires borrowers through their WPC to commit users to obtain their power needs from the generating sources paid through the proceeds of such loans, thus insuring loan repayment.[77] In addition to extending the term of the WPC, Amendment Three for the first time allowed member-owners who so elected to obtain from an Alternate Source up to 15% of the rolling average of the electing member-owner's highest coincident peak demand occurring during each of the three 12-month periods immediately preceding their election, while also limiting the aggregate of the member-owners to no more than 5% of the rolling average of EKPC's highest coincident peak demand occurring during each of

[76] VTE May 16, 2018 at 1:53:00.
[77] Campbell Direct Testimony, p. 3. The WPCs remain in effect until Jan. 1, 2051. *See also* Seelye Exhibit 2, accessible at: https://psc.ky.gov/pscecf/2018-00050/mmalone%40hdmfirm.com/05072018025426/Seelye_Exhibit_2.pdf

the three 12-month periods immediately preceding the election of the Amendment Three option.[78]

However, one of the key weakness of Amendment Three was how to allocate the right to purchase Alternate Source power when one member-owner sought to obtain more than 5% of its coincident peak load. This remaining weakness led to the filing of the 2012-00503 complaint case, which was ultimately resolved by adopting the MOU as a settlement in that matter. The MOU caps the amount of Alternate Source power at thresholds of either 5% or 15% of the rolling average of the electing member-owner's peak demand. If the aggregate amount of all member-owner loads being served with Alternate Sources (including the load included within the notice of the electing member-owner) is *less* than 2.5% of EKPC's rolling average, then the election cannot be more than 15% of the electing member-owner's peak demand. But, if the aggregate amount reflects 2.5% or *more* of EKPC's peak demand, then the election is limited to no more than 5% of the electing member-owner's peak demand.[79]

Once SKRECC made its election in the instant case, this meant that only 5.3 MW of additional load among one of the remaining member-owners could be served via an Alternate Source before EKPC's 2.5% threshold would be triggered.[80] This would mean that: (a) no other member-owner would be able to elect the full 15% from an Alternate Source; and (b) only some of the other member-owners would be able to elect even a 5% share from an Alternate Source, because the MOU's 5% threshold for EKPC's load would be exceeded before all member-owners had the opportunity to exercise that option.[81] Clearly, the framework for allocating the right to obtain Alternate Source power is fragile, at best. But if

[78] Campbell Direct Testimony, p. 4.
[79] Direct Testimony of Anthony S. Campbell, pp. 7-8.
[80] *Id*. at p. 8.
[81] *Id*. at 9. See also cross-examination of Carol Wright, VTE May 16, 2018, at 4:04:32 through 4:05:40.

the Commission should approve the PPA, the resulting reallocation of SKRECC's avoided costs among the remaining member-owners [82] would create *palpable* conflict.

From the outset, SKRECC appears to have been focused primarily, if not exclusively, on obtaining Commission approval of the proposed PPA in order to reduce its costs. However, as EKPC points out, cooperatives are guided by several key principles, one of which provides:

> Cooperation Among Cooperatives. Cooperatives serve their members most effectively and strengthen the cooperative movement by working together through local, national, regional and international structures.[83]

While a perceived violation of that principle alone may not be actionable on the part of the Commission, nonetheless this key principle is at least partially embodied in KRS 279.095, which provides in pertinent part: "A rural electric cooperative shall be operated on a nonprofit basis for the mutual benefit of its members and patrons." Clearly, this statute carries equal application to SKRECC, EKPC and all of its member-owners.

More importantly, it is now readily apparent that the subject of procuring Alternate Source power is one which will give rise to significant conflicts of interests that could easily impede and stifle the effective governance of the entire EKPC cooperative family. As the Commission is well aware, in 2009 EKPC was the subject of a focused management audit conducted by the Liberty Consulting Group, which concentrated particular attention upon certain conflicts of interest which EKPC at that time was experiencing. As provided in the final audit report:

> Liberty has concluded that a de facto conflict does indeed exist and it is real, continuing and dangerous. The conflict forces *a philosophy of low rates at the expense of all else* and hence influences all of the board's actions in key areas, including financial health, rate strategies, and strategic

[82] *See* Argument, subsection (a), *supra*.
[83] Direct Testimony of Anthony S. Campbell, p. 18.

> planning. It manifests itself most directly in the balancing of financial health, as expressed in targets for TIER and equity, against the goal of lower rates. Since this recommendation calls for a change in underlying philosophy, there is a tendency to see the required fixes as intangible, but that is not true. A fundamental change in thinking is necessary, but that must be accomplished along with numerous tangible actions. The board must articulate a new, EKPC-centric way of thinking and acknowledge that, while the consumer's voice must be heard, a role of consumer advocate is not acceptable for directors. Further the board needs to commit to enforcing this notion on a continuing basis, with specific measures for the removal of directors who sacrifice EKPC's interests for others, including the interests of the distribution cooperatives.[84]

It appears that the MOU incentivizes ". . . *a philosophy of low rates at the expense of all else* . . ." — that places an individual cooperative's interests above the overall financial health of the entire family of EKPC cooperatives, including that of its G & T cooperative. Rather than provide a workable solution to Amendment Three's conundrum, the MOU has only provided a new pitfall, one which SKRECC has in essence found a way to manipulate to its advantage, at the expense of its sister cooperatives. For that reason, mere denial of SKRECC's application is not enough; indeed, the Commission must strike the entire MOU in order to prevent a recurrence of the type of harm the instant case poses. "This issue has . . . created a rift among the members. I've been here for seven and a half years, and it's troubled me from the beginning because anytime you have a cost shift of the magnitude that the 15% creates, it's harmful."[85]

Beyond this issue, SKRECC has consistently argued that the filed-rate doctrine precludes the Commission from denying the proposed transaction by retroactively altering or

[84] Focused Management and Operations Audit of East Kentucky Power Cooperative, Inc., Final Report, The Liberty Consulting Group, dated April 20, 2010, p. 63 [emphasis added].
[85] Cross-examination of David Crews, VTE May 17, 2018 at 11:22:24 - 11:23:30.

revoking the MOU to nullify South Kentucky's election under it.[86] In this, SKRECC is incorrect. The former Kentucky Court of Appeals has noted that

> [i]t may. . . be said that the commission, like a court, acts and speaks only though its written orders. Furthermore, we know of no rule of law that denies to a court the right to revoke an order and substitute in lieu thereof a new and different one, provided that court has not lost jurisdiction over the case involved. An administrative agency unquestionably has the authority, just as has a court, to reconsider and change its orders during the time it retains control over any question under submission to it. It has been held that an administrative agency has the power to amend or correct its records by nunc pro tunc entries.[87]

Additionally, KRS 278.390 provides that "Every order entered by the commission shall continue in force until the expiration of the time, if any, named by the commission in the order, or until revoked or modified by the commission, unless the order is suspended, or vacated in whole or in part, by order or decree of a court of competent jurisdiction." As the Supreme Court of Kentucky has held, "It is as obvious as the acropolis of Athens that an order of the commission continues in force until revoked or modified by the commission or unless suspended or vacated in whole or in part by the Franklin Circuit Court."[88] Here, SKRECC's claims have the effect of arguing that the filed-rate doctrine precludes the Commission from denying the proposed transaction via a modification or revocation of the orders approving Amendment Three and the MOU. The law does not support that contention.

As previously noted, in enacting KRS 278.040 the legislature clearly intended for the Commission to enforce the laws and power prescribed to it under Chapter 278. KRS 278.040

[86] Initial Post-Hearing Brief of South Kentucky Rural Electric Cooperative Corporation, (June 15, 2018) pp. 13-14.
[87] Union Light, Heat & Power Co. v. Public Service Comm'n, 271 S.W.2d 361, 365-366 (Ky. 1954) (internal citations omitted).
[88] Commonwealth *ex rel.* Stephens v. South Central Bell Tel. Co, 545 S.W.2d 927 (Ky. 1976).

declares, "The Public Service Commission shall regulate utilities and enforce the provisions of this chapter." "This chapter," or KRS chapter 278, provides for additional standards *beyond* those addressed by SKRECC, namely, and as mentioned previously by the Attorney General, the Commission must constantly ensure that its orders comply with KRS 278.030 in that utilities may only demand, collect and receive rates that are fair, just and reasonable, and that utilities must furnish adequate, efficient, and reasonable service. Under the applicable law, any order from the Commission that violates a section of chapter 278, which the legislature has entrusted the Commission to enforce the provisions of, must be revoked or modified upon the first opportunity to do so. Here is the Commission's opportunity.

In Case No. 2011-00036, the Commission correctly noted, "the General Assembly has very clearly and explicitly authorized the Commission to have continuing jurisdiction over its orders."[89] Furthermore, in the same matter, the Commission stated that "statutes should be construed in such a way that they do not become meaningless or ineffectual."[90] Finally, in that matter, contrary to the Attorney General's argument otherwise, the Commission noted that it must address the pressing issues before it, and that according to KRS 278.040, to do otherwise in order to try and achieve "judicial economy" "would be in violation of its statutory mandate to 'enforce the provisions of this chapter [KRS 278].'"[91] The Commission cannot, with the facts presented in this matter, continue to operate with the orders approving Amendment Three and the MOU still in effect. It is clear from the record in this matter that any order approving or complying with the sections of the MOU or Amendment Three related

[89] *Application of Big Rivers Electric Corp. for a General Adjustment in Rates*, Case No. 2011-00036, Order (Feb. 14, 2012) p. 11.
[90] *Id., citing* Case No. 2009-00096, *Chris Schimmoeller and Connie Lemley v. Kentucky-American Water Company* (Ky. PSC Nov. 24, 2009), p. 8.
[91] Order, Case No. 2011-00036 (Feb. 14, 2012), p. 12.

to Alternate Sources, violates other sections of KRS chapter 278. The Filed Rate Doctrine cannot be allowed to cloak illegality.

Finally, in the event SKRECC attempts to argue equitable estoppel or *res adjudicata* applies, these arguments must also fail. As N.L.R.B. v. Baltimore Transit Co. recites, the U.S. Supreme Court has long held that administrative agencies cannot be precluded from righting their wrongs in regard to previous decisions, particularly when doing so is in compliance with their legal or statutory requirements.[92] If two wrongs (approving Amendment Three and the MOU) do not make a right, then certainly a third wrong (this PPA) must fail.

WHEREFORE, the Attorney General respectfully requests this Commission deny South Kentucky RECC's proposed Application and rescind its orders approving Amendment Three and the MOU. The Commission should further direct EKPC and its sixteen owner-members to execute and file with the Commission a new amendment to its wholesale power contract.

[92] N.L.R.B. v. Baltimore Transit Co., 140 F.2d 51, 54-55 (4th Cir. 1944) (stating: "Whatever may be the effect of quasi-judicial determinations of administrative agencies (*Cf.* Arizona Grocery Co. v. Atchison, etc., R. Co., 284 U.S. 370, 389, 52 S.Ct. 183, 76 L.Ed. 348), it is well settled that the principle of res adjudicata has no application to their exercise of other powers. 30 Am.Jur. p. 930; Pearson v. Williams, 202 U.S. 281, 26 S.Ct. 608, 50 L.Ed. 1029; Tagg Bros. & Moorehead v. United States, 280 U.S. 420, 445, 50 S.Ct. 220, 74 L.Ed. 524; *55 State Corp. Comm. v. Wichita Gas Co., 290 U.S. 561, 569, 54 S.Ct. 321, 78 L.Ed. 500; St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 64, 56 S.Ct. 720, 80 L.Ed. 1033. An administrative agency, charged with the protection of the public interest, is certainly not precluded from taking appropriate action to that end because of mistaken action on its part in the past. *Cf.* Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 145, 60 S.Ct. 437, 84 L.Ed. 656; Houghton v. Payne, 194 U.S. 88, 100, 24 S.Ct. 590, 48 L.Ed. 888. Nor can the principles of equitable estoppel be applied to deprive the public of the protection of a statute because of mistaken action or lack of action on the part of public officials. United States v. San Francisco, 310 U.S. 16, 32, 60 S.Ct. 749, 84 L.Ed. 1050; Utah Power & Light Co. v. United States, 243 U.S. 389, 409, 37 S.Ct. 387, 61 L.Ed. 791; United States v. City of Greenville, 4 Cir., 118 F.2d 963, 966.")

Respectfully submitted,

ANDY BESHEAR
ATTORNEY GENERAL

LAWRENCE W. COOK
KENT A. CHANDLER
JUSTIN M. McNEIL
REBECCA W. GOODMAN
ASSISTANT ATTORNEYS GENERAL
700 CAPITOL AVE., SUITE 20
FRANKFORT KY 40601
(502) 696-5453
FAX: (502) 573-8315
Rebecca.Goodman@ky.gov
Larry.Cook@ky.gov
Kent.Chandler@ky.gov
Justin.McNeil@ky.gov

Certificate of Service and Filing

Counsel certifies that the foregoing is a true and accurate copy of the same document being filed in paper medium with the Commission within two business days; that the electronic filing has been transmitted to the Commission on July 2, 2018; that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding.

This 2nd day of July, 2018.

Assistant Attorney General