COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:	
Application of Mountain Water District	**) Case No 2020-00394**
For a Declaratory Order	**)**

RESPONSE TO PIKEVILLE'S MOTION FOR EXTENSION OF TIME AND PROCEDURAL SCHEDULE

Mountain Water District (Mountain) has no objection to Pikeville's motion to extend the time for a response to the Application. However, Mountain objects to the attempt by Pikeville to relitigate the issues in the rate case establishing the rate in question. On pages 1 and 2 of its motion Pikeville asserts its response will address "how the Commission's prior order did not abrogate the minimum-purchase requirement in the Contract, but also contractual interpretation and the legal limitations of the Commission to eliminate the contractual provision."

Mountain's application does not seek to relitigate, modify or amend the final order in Case 2019-0080. It simply seeks clarification of the final order and whether that order provides for a flat rate of $1.97 per 1000 gallons of water purchased or whether the order includes a 28 million gallon monthly minimum purchase requirement. That issue was fully addressed in the rate case, which is now on appeal to Franklin Circuit Court. The issue cannot be re-litigated while that appeal is pending. The arguments Pikeville

seeks to address go to the merits of the final order. The Commission denied a similar request to review issues pending appeal. In "Application of Kentucky Power Company For: (1) The Approval Of The Terms And Conditions of The Sixth Amendment To The Renewable Energy Purchase Agreement For Biomass Energy Resources Between The Company And Ecopower Generation-Hazard, LLC; (2) Authorization To Enter Into The Sixth Amendment To The Agreement; (3) The Grant Certain Declaratory Relief; And (4) The Grant of All Other Required Approvals And Relief", Case No. 2015-00190, order dated August 27, 2015, pp. 6 and 7, the Commission denied an application to review a substantive issue on appeal:

> After considering the parties' arguments, the Commission finds that it lacks jurisdiction to modify or amend the REPA that is currently pending judicial review. Generally, the filing of a notice of appeal divests a tribunal of jurisdiction to rule on matters involved in the appeal while the appeal is pending, and transfers the named parties to the jurisdiction of the appellate court. The Commission has previously held that an administrative appeal of its decision transfers jurisdiction of the case to the appellate court.

The Commission found that the rehearing request by Kentucky Power would require amending the final order. It rejected jurisdiction over that issue:

> Such a determination would extend beyond that of executing a ministerial act, which we would retain jurisdiction to perform, such as entering nunc pro tunc an Order to correct a clerical error. KPCO, supra, p. 7.

This is consistent with the Commission's decision in "Union Light Heat & Power Motion for Extension of Filing Data and Continuation of Current AMPR Rates", Case No. 2004-00403, Order dated January 27, 2005, in

which it referenced Garnet v. Oliver, 252 Ky. 25, 45 S.W.2d 815,816 (1931):

> [A]n appeal does not necessarily deprive a lower court of all jurisdiction, so as to prevent absolutely any action . . . on the contrary, the case is often regarded as pending in the court of original jurisdiction for the purposes of proceedings . . . concerning collateral or incidental matters necessary for the preservation of the fruits of the ultimate judgment, or affecting the status in quo of the parties. Matters of the character indicated are not placed by an appeal from its judgment beyond the jurisdiction, protection, and control of the lower court.
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> Yet the lower court may not, while the case is pending in the Court of Appeals, permit the filing of amended pleadings affecting the order appealed from, or allow the taking of depositions to be read thereon. Proceedings of that character are proper only after the mandate has been issued and filed and the case has been restored to the docket of the lower court in accordance with the particular provisions of the Civil Code of Practice.

The only issue to be resolved in this matter is the intent of the Commission to impose a flat rate or to retain the minimum purchase requirement. The order is not being modified or amended. Only clarification of the Commission's intended interpretation of the order is needed. No additional facts are needed, no evidence can be introduced to affect that clarification and no legal arguments can be made to change the final order. The question to be answered is simple – which bills from Pikeville are correctly calculated – the ones using a flat $1.97 per 1000 gallons or the ones using a 28-million-gallon minimum purchase?

Mountain asserts that no procedural order is needed and that substantive arguments related to the merits of the order are improper. The decision to be rendered is solely within the control of the Commission based on its intended interpretation of the final order.

SUBMITTED BY:

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