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

In the Matter of:

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| ELECTRONIC INVESTIGATION OF KENTUCKY POWER COMPANY ROCKPORT DEFERRAL MECHANISM | ) ) ) | CASE NO. 2022-00283 |

**Kentucky Power Company's Motion To Recuse**

Kentucky Power Company respectfully moves Chairman Chandler to recuse himself from deciding or otherwise participating in this proceeding. Kentucky Power does not file this motion lightly. Nor does it attribute bad faith or intentional wrongdoing to Chairman Chandler. Nevertheless, given Chairman Chandler's direct opposition on behalf of his former client to the non-unanimous settlement agreement and its Rockport Deferral provisions, approved in the 2017 rate case, his prior involvement as counsel to one of the parties to this proceeding, and the need to protect the appearance of impartiality of the Public Service Commission of Kentucky, the Company moves Chairman Chandler to recuse himself from this case.

Kentucky Power states as follows in support of its motion:

FACTUAL BACKGROUND

This matter is currently before the Public Service Commission of Kentucky for investigation of the appropriate amortization period and recovery mechanism of Kentucky Power's Rockport Unit Power Agreement (UPA) deferral regulatory asset ("Rockport Deferral Regulatory Asset"), as well as a credit for Rockport Fixed Costs Savings and Rockport Offset. Under the Rockport UPA, Kentucky Power purchases capacity and energy produced at the Rockport Plant in Spencer, Indiana. The Rockport UPA expires on December 8, 2022; Kentucky Power will not renew or extend the Rockport UPA.

This proceeding grows directly out of Kentucky Power's 2017 base rate case (Case No. 2017-00179). The Attorney General of Kentucky was a party to Case No. 2017-00179. Counsel for the Attorney General, including Chairman Chandler in his former position as an Assistant Attorney General, propounded discovery, presented witnesses, and conducted extensive and effective cross-examination of the Company's witnesses in opposition to the Company's application. Representatives of the Attorney General, including Chairman Chandler, appeared for and observed at least one of the non-public informal conferences that resulted in a non-unanimous settlement agreement that subsequently was approved with modification. Several of the modifications were expressly advocated by the Attorney General.[1]

A key part of the non-unanimous settlement agreement in Case No. 2017-00179 was Kentucky Power's agreement to defer $50 million in non-fuel, non-environmental Rockport UPA expenses during the nearly five-year period between the effective date of the Company's new base rates (January 18, 2018) and December 8, 2022, when the Rockport UPA expires. The deferral, which provided immediate rate relief to the Company's customers, was available only through the agreement of Kentucky Power. In return for the Company's agreement to defer for the benefit of customers the recovery of $50 million in otherwise recoverable expenses, the Commission approved for accounting purposes the establishment of a regulatory asset in the amount of the deferred Rockport UPA expense and a WACC carrying charge. The non-unanimous settlement agreement also provides for the amortization of the Rockport Deferral Regulatory Asset over a five-year period (mirroring the deferral period).

[1] Order, *In the Matter of: Electronic Application Of Kentucky Power Company For (1) A General Adjustment Of Its Rates For Electric Service; (2) An Order Approving Its 2017 Environmental Compliance Plan; (3) An Order Approving Its Tariffs And Riders; (4) An Order Approving Accounting Practices To Establish Regulatory Assets Or Liabilities; And (5) An Order Granting All Other Required Approvals And Relief*, Case No. 2017-00179 at 28 (Ky. P.S.C. January 18, 2018) ("The Commission agrees with the Attorney General that, although interest rates are increasing, they are doing so slowly and are still historically low…. The Commission also agrees with the Attorney General that flotation costs should be excluded from the analysis.")

The Attorney General, acting through his counsel, including Chairman Chandler, declined to join the settlement agreement in Case No. 2017-00179. In his cross-examination of the Company's then-President, Mr. Satterwhite, Chairman Chandler addressed the Rockport Deferral provisions of the non-unanimous settlement.[2] In addition, the Attorney General, in his post-hearing brief argued that "the Rockport cost deferral as proposed in the non-unanimous settlement ***would represent a profit center to KPCo*** as in the long run, it will end up extracting an additional $9 million more from ratepayers."[3]

Now, in his current role, Chairman Chandler will be tasked with adjudicating the non-unanimous settlement agreement, and the Rockport Deferral provisions, he previously opposed in his prior position as attorney for the Attorney General. Moreover, Chairman Chandler's former employer/client, the Attorney General's Office of Rate Intervention, is party to this proceeding.

Kentucky Power respectfully requests that Chairman Chandler recuse himself from this proceeding because: (1) due process requires both the appearance and fact of an impartial and unbiased trier of fact; (2) Kentucky law presumes bias when a judge has previously been involved in a case as an attorney; and (3) principles of fairness and impartiality apply with as much force to administrative proceedings as they do to judicial trials.

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[2] *See e.g.* Transcript of December 6, 2017 Hearing, *In the Matter of: Electronic Application Of Kentucky Power Company For (1) A General Adjustment Of Its Rates For Electric Service; (2) An Order Approving Its 2017 Environmental Compliance Plan; (3) An Order Approving Its Tariffs And Riders; (4) An Order Approving Accounting Practices To Establish Regulatory Assets Or Liabilities; And (5) An Order Granting All Other Required Approvals And Relief*, Case No. 2017-00179 at 334-336 (Ky. P.S.C. Filed December 21, 2017).

[3] Post-Hearing Brief of the Kentucky Attorney General, *In the Matter of: Electronic Application Of Kentucky Power Company For (1) A General Adjustment Of Its Rates For Electric Service; (2) An Order Approving Its 2017 Environmental Compliance Plan; (3) An Order Approving Its Tariffs And Riders; (4) An Order Approving Accounting Practices To Establish Regulatory Assets Or Liabilities; And (5) An Order Granting All Other Required Approvals And Relief*, Case No. 2017-00179 at 31 (Ky. P.S.C. Filed January 5, 2018) (emphasis supplied).

## ARGUMENT

### A. Both The Federal And State Constitutions Guarantee All Parties To This Proceeding The Right To A Fair And Impartial Decision Maker In Reality And Appearance.

The right to an impartial decision maker is fundamental to due process.[4] A fair and unbiased decision-maker (in fact and appearance) is the minimum requirement for a due process hearing :

> [M]ost questionings concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard. Instead, these questions are, in most cases, answered by common law, statute, or the professional standards of the bench and bar. But the floor established by the Due Process Clause clearly requires a fair trial in a fair tribunal, before a judge with no actual bias against the defendant or interest in the outcome of his particular case.[5]

These same protections are inherent in Section 2 of the Kentucky Constitution's prohibition against arbitrary state action: "[w]ith respect to adjudications, ***whether judicial or administrative***, this guarantee [under Section 2 of the Kentucky Constitution] is generally understood as a due process provision whereby Kentucky citizens may be assured of fundamentally fair and unbiased procedures."[6]

Further, even in the absence of actual bias, "it is a universally recognized tradition of the law that the appearance of impartiality is next in importance only to the fact itself." *Wells v. Walter*, 501 S.W.2d 259, 260 (Ky. App. 1973). The need to avoid even the appearance of bias requires that tribunals act to preserve both the reality and appearance of an impartial and disinterested decision maker:

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[4] *See Johnson v. Mississippi*, 403 U.S. 212, 215-216 (1971) ("Trial before 'an unbiased judge' is essential to due process.")

[5] *Bracy v. Gramley*, 520 U.S. 899, 904-905 (1997) (internal citations and quotation marks omitted).

[6] *Smith v. O'Dea*, 939 S.W.2d 353, 357 (Ky. App. 1997) (emphasis supplied).

> …[E]very litigant is entitled to nothing less than the cold neutrality of an impartial judge and should be able to feel that his cause has been tried by a judge who is wholly free, disinterested, impartial and independent. Any doubt of qualification, therefore, should be resolved in favor of the party questioning it, bona fide, and upon grounds having substance and significance.

*Dotson v. Burchett*, 190 S.W.2d 697, 700 (Ky. App. 1945) (internal quotations and citations omitted).

The requirements of the Due Process Clause of the Fourteenth Amendment have led at least two federal circuit courts of appeal to require recusal in circumstances very similar to those presented here. For example, in *Amos Treat & Co. v. Securities and Exchange Commission*,[7] the D.C. Circuit Court of Appeals looked to dictates of fundamental fairness and required that a Securities Exchange Commission commissioner recuse himself from revocation proceedings because he was formerly responsible for initiating and conducting the investigation of the company subject to revocation:

> The fundamental requirements of fairness in the performance of [quasi-judicial] functions require at least that one who participates in a case on behalf of any party…take no part in the decision of that case by any tribunal on which he may thereafter sit.[8]

In *American Cyanamid Co. v. FTC*,[9] the United States Court of Appeals for the Sixth Circuit similarly disqualified the Chairman of the Federal Trade Commission from hearing a case because he previously served as counsel for a Senate subcommittee investigating many of the same facts and issues that later came before the commission. The Sixth Circuit held that participation of the Chairman amounted to denial of due process and found that, "[i]t is

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[7] 306 F.2d 260 (D.C. Cir. 1962).

[8] *Id*. at 264 (internal quotations and citations omitted); *see also id.* at 267 ("Enough has been said to demonstrate the basis for our conclusion that an administrative hearing of such importance and vast potential consequences must be attended, not only with every element of fairness but with the very appearance of complete fairness. Only thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirement of due process.")

[9] 363 F.2d 757, 767 (6th Cir. 1966).

fundamental that both unfairness and the appearance of unfairness should be avoided. Wherever there may be reasonable suspicion of unfairness, it is best to disqualify."[10]

The Commission itself similarly recognizes the fundamental need to avoid the appearance of impropriety by decision makers. Thus, in *In the Matter of: Application Of Atmos Energy Corporation For Adjustment Of Rates And Tariffs*, then-Chairman Gardner recused himself from a satellite proceeding established by the Commission to examine the reasonableness of contributions by Atmos to the Gas Technology Institute because then-Chairman Gardner was a member of the Public Advocacy Committee of the Gas Technology Institute. Importantly, the recusal was based on the need to avoid the appearance of impropriety as opposed to actual bias or prejudice.[11] Indeed, avoidance of the appearance of impropriety under Kentucky law is fundamental to protecting "the integrity of the administrative process" and the "fairness of the result."[12]

B. Chapter 26A Of The Kentucky Revised Statutes And The Kentucky Code Of Judicial Conduct Reasonably Inform The Need For Chairman Chandler To Recuse Himself.

Neither Chapter 278 of the Kentucky Revised Statutes nor the Commission's regulations address when a commissioner is required to recuse. In the absence of direct authority, the Commission in the past has looked to analogous authority in exercising its authority.[13] Two

[10] *Id*. (citing PREJUDICE AND THE ADMINISTRATIVE PROCESS, 59 Nw.U.L.Rev. 216, 231; DISQUALIFICATION OF ADMINISTRATIVE OFFICIALS FOR BIAS, 13 Vand. L. Rev. 713, 727 (1960)).

[11] Case No. 2015-00343 at 2 (Ky. P.S.C. February 8, 2016).

[12] *Louisville Gas & Elec. Co. v. Commonwealth ex rel. Cowan*, 862 S.W.2d 897, 901 (Ky. App. 1993).

[13] *See e.g. In the Matter of: Application Of Windstream Communications, Inc. For A Declaratory Order Affirming The Interconnection Regimes Under KRS 278.530 And 47 U.S.C. § 251 Are Technology Neutral*, Case No. 2015-00283 (Ky. P.S.C. August 6, 2018) (treating Rules of Evidence And Rules of Civil Procedure as advisory in nature); *In the Matter of: Application Of Kentucky Utilities Co. For Certificates Of Public Convenience And Necessity And Approval Of Its 2011 Compliance Plan For Recovery By Environmental Surcharge*, Case No. 2011-00161 (Ky. P.S.C. September 1, 2011) (recognizing that although not bound by the Rules of Civil Procedure reference to CR 26.02(1) to resolve a discovery dispute is appropriate).

sources of analogous authority are KRS 26A.015(2)(b) and the Kentucky Code of Judicial Conduct.

KRS § 26A.015(2)(b) requires that "[a]ny justice or judge of the Court of Justice or master commissioner ***shall*** disqualify himself in any proceeding [w]here in private practice or government service he served as a lawyer or rendered a legal opinion in the matter in controversy[.]"[14] Likewise, the Kentucky Code of Judicial Conduct (SCR 4.300), Rule 2.11(A)(5)(a) requires that "[a] judge ***shall*** disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: the judge serves as a lawyer in the matter in controversy[.]"[15]

Chairman Chandler energetically and ably represented his client in Case No. 2017-00179 in opposition to the non-unanimous settlement agreement he will be required to adjudicate if he elects not to recuse from this proceeding. To the extent followed by this Commission, these two provisions unambiguously require that Chairman Chandler recuse himself.

The mandatory language of KRS § 26A.015(2)(b) and Kentucky Code of Judicial Conduct, Rule 2.11(A)(5)(a) is grounded in broader principles of Kentucky law. In *Ledford v. Hubbart*,[16] the Court explained:

> It may reasonably be presumed that the relationship of client and attorney might influence action of the judge. The principle of disqualification extends to the adjudication not only in matters arising in the identical case in which the judge has acted as attorney, but also to supplemental proceedings taken to enforce a judgment rendered in the case.

Similarly, in *Howerton v. Price*, 449 S.W.2d 746, 748 (Ky. App. 1970), the Kentucky Court of Appeals held that "[a]lthough change in conditions and circumstances may have occurred, it is

[14] (emphasis supplied).

[15] (emphasis supplied).

[16] 33 S.W.2d 345, 346 (Ky. 1930).

difficult to escape the conclusion that the former attorney, now judge, formed and retained some predilection for his then client."

Importantly, these principles of fairness and impartiality apply with equal force to administrative proceedings.[17] Although KRS 26A.015(2)(b) and Kentucky Code of Judicial Conduct (SCR 4.300), Rule 2.11(A)(5)(a) are not expressly applicable to proceedings before this Commission, they provide persuasive authority for addressing questions of the appearance of impropriety.[18] Indeed, there is no principled basis for according parties before this Commission any less of a "wholly free, disinterested, impartial and independent"[19] decision maker than in a court of this Commonwealth.

Whether grounded in the analogous authority of KRS 26A.015(2)(b) and Kentucky Code of Judicial Conduct (SCR 4.300), Rule 2.11(A)(5)(a), or the requirements of the due process provisions of the Fourteenth Amendment and Section 2 of the Kentucky Constitution, the need to avoid the appearance of impropriety requires that Chairman Chandler recuse himself.

[17] *Gibson v.* Berryhill, 411 U.S. 564, 579 (1973) ("It has also come to be the prevailing view that '(m)ost of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators.")

[18] *See* 3 K. Davis, *Administrative Law Treatise* section 196 (2nd ed. 1980).

[19] *Dotson v. Burchett*, 190 S.W.2d 697, 700 (Ky. App. 1945).

## CONCLUSION

WHEREFORE, Kentucky Power respectfully requests that the Commission enter an Order:

1. By which Chairman Chandler recuses himself from this proceeding; and

2. Granting Kentucky Power all other relief to which it may appear entitled.

Respectfully submitted,

Mark R. Overstreet
Katie M. Glass
Vanna R. Milligan
STITES & HARBISON PLLC
421 West Main Street
P.O. Box 634
Frankfort, Kentucky 40602-0634
Telephone: (502) 223-3477
Facsimile: (502) 779-8349
moverstreet@stites.com
kglass@stites.com
vmilligan@stites.com

COUNSEL FOR: KENTUCKY POWER COMPANY