

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

In the Matter of:

ELECTRONIC APPLICATION OF EAST)	
KENTUCKY POWER COOPERATIVE, INC. FOR)	
1) CERTIFICATES OF PUBLIC CONVENIENCE)	
AND NECESSITY TO CONSTRUCT A NEW)	
GENERATION RESOURCES; 2) FOR A SITE)	CASE NO. 2024-00370
COMPATIBILITY CERTIFICATE RELATING TO)	
THE SAME; 3) APPROVAL OF DEMAND SIDE)	
MANAGEMENT TARIFFS; AND 4) OTHER)	
GENERAL RELIEF)	

**JOINT INTERVENORS' MOTION TO COMPEL EAST KENTUCKY
POWER COOPERATIVE TO FULLY RESPOND TO JOINT
INTERVENOR INFORMATION REQUEST 2-47(C)**

Appalachian Citizens Law Center, Kentuckians for the Commonwealth, and Mountain Association (collectively “Joint Intervenors”) hereby move the Kentucky Public Service Commission (“the Commission”) to compel East Kentucky Power Cooperative (“EKPC”) to produce the Reaction Engineering report (“REI report”) requested in Joint Intervenors’ Information Request 2-47(c). EKPC has withheld the report on a vague claim of “attorney work product privilege,” but that privilege does not apply because the report was prepared to assess project feasibility, rather than in advance of litigation, and Joint Intervenors have a substantial need to review the document.

As such, pursuant to 807 KAR 5:001 Section 4(12)(e), Joint Intervenors respectfully request that the Commission compel EKPC to fully respond to Joint Intervenors’ Information Request 2-47(c) and produce the REI report by May 1, 2025.

I. Legal Standard

In proceedings before the Commission, “[i]f a party served with a request for information fails or refuses to furnish all or part of the requested information, the party shall provide a written

explanation of the specific grounds for the failure to completely and precisely respond.”¹

Responding parties further “shall make timely amendments to its prior response if the [responding] party obtains information that indicates that the response was incorrect when made or, though correct when made, is subsequently incorrect in any material respect.”²

The Commission has specifically held that “a party should be able to expect that information developed and/or maintained by a utility jurisdictional to this Commission will be provided when the party makes a legitimate request for such information,” even if the information may be available by searching various governmental agencies.³

807 KAR 5:001 Section 4(12)(e) (the Commission’s Rules of Procedure) states that a motion to compel compliance with the party’s request for information shall include: (1) a description of the information requested; (2) the reasons why it is relevant to the issues in the case; and (3) the efforts taken to resolve any disagreement over the production of the requested information. Kentucky Rule of Civil Procedure 26.02(1) provides that “[p]arties may obtain discovery regarding any matter not privileged which is relevant to the subject matter involved in the pending action.”⁴ The party asserting a privilege bears the burden of proving its applicability.⁵ Furthermore, “privileges should be strictly construed, because they contravene the fundamental principle that ‘the . . . public has a right to every man’s evidence.’”⁶

¹ 807 KAR 5:001 Section 4(12)(d)(5).

² 807 KAR 5:001 Section 4(12)(d)(4).

³ Case No. 2012-00149, *In re 2012 Integrated Resource Plan of East Kentucky Power Cooperative, Inc.*, Order at 3 (Sept. 7, 2012) (“EKPC 2012 IRP September 7 Order”).

⁴ See Case No. 2005-00455, *In re DPI Teleconnect, L.L.C. v. Bellsouth Telecommunications, Inc. D/B/A AT&T Kentucky*, Order at 2-3 (Apr. 7, 2009).

⁵ *Haney v. Yates*, 40 S.W.3d 352, 355 (Ky. 2001).

⁶ *Sisters of Charity Health Sys., Inc. v. Raikes*, 984 S.W.2d 464, 468 (Ky. 1998), *as amended* (Mar. 3, 1999) (quoting *Trammel v. United States*, 445 U.S. 40, 45 (1980)).

II. Argument

Joint Intervenors seek to compel information relevant to the viability of proposed generation projects, which EKPC has no legal basis for withholding. Joint Intervenors' proposed relief is therefore appropriate.

In Joint Intervenors Request 2-47(c), Joint Intervenors asked EKPC to produce the REI report that was developed to determine the feasibility of EKPC's Spurlock Units 3 and 4 co-firing project design. EKPC produced only a one-page summary of the report, claiming that the full report was protected by attorney work product privilege. But the privilege does not apply, because the REI report was not prepared in anticipation of litigation. Even if the REI report was prepared in anticipation of litigation, the Commission should order EKPC to produce the document because Joint Intervenors have a substantial need to assess the feasibility of EKPC's Spurlock co-firing plan.

A. Factual Background and Efforts to Resolve the Dispute

The Spurlock units 1-4 gas co-firing projects were proposed in part to bring those units into compliance with the U.S. EPA's Greenhouse Gas rule ("GHG Rule") which requires, among other things, coal-fired generating units that intend to operate past January 1, 2032 but retire before January 1, 2039 to co-fire with natural gas.⁷ In 2023, EKPC submitted to the U.S. EPA comments on the proposed GHG Rule noting that Units 3 and 4 of the Spurlock plant are circulating fluidized bed ("CFB") units, and that:

CFBs cannot co-fire natural gas because they depend upon coal ash contacting the steam generating tubes inside the furnace. Much research would need to be conducted to see if a viable alternative would be possible and economic.⁸

⁷ Application Ex. 4, Direct Testimony of Brad Young on Behalf of East Kentucky Power Cooperative, Inc., Case No. 2024-00370 (Nov. 20, 2024)

⁸ JI Hearing Ex. 1 at 29.

None of EKPC's witnesses noted this concern about the feasibility of gas co-firing Spurlock Units 3 and 4, or the need for "much research," in their written testimony supporting EKPC's request for a CPCN authorizing gas co-firing at those units.

EKPC, however, submitted as attachment BY-3 a Spurlock Units 1-4 Gas Co-firing Project Scoping Report. That report, prepared for EKPC by Burns & McDonnell Engineering Company, Inc. ("BMcD"), raises concerns about the feasibility of gas co-firing at Spurlock Units 3 and 4 in at least four different places, noting that such gas co-firing "requires novel design solutions that are unproven," that "the proposed co-firing modifications have not been executed to BMcD's knowledge," and that the "first of a kind" design is a "major risk."⁹ The Burns & McDonnell report goes on to state that:

The preliminary gas firing system for co-firing the Unit 3 and Unit 4 CFB boilers is a "first-of-its-kind" design. Therefore, to increase confidence in the feasibility of the conceptual design, BMcD subcontracted with Reaction Engineering, Inc. (REI) to create a CFD [circulating fluidized bed] model of the Unit 3 furnace. The model results show that co-firing the units on 50% gas at full load appears technically feasible.¹⁰

On January 17, 2025, Joint Intervenors submitted Request 2-47(c), which reads: "Referring to p. 7-2 of Attachment BY-3, identify and produce any report or other documentation of the Reaction Engineering, Inc. model results that 'show that co-firing the units on 50% gas at full load appears technically feasible.'"¹¹ EKPC responded to this request on January 31, 2025, as follows: "See attachment Confidential-JI2.47c.pdf for documentation supporting that statement filed under

⁹ Attach. BY-3 at 1-7, 1-10, 7-8, and Appendix P line 039.

¹⁰ Application Ex. 4, Direct Testimony of Brad Young on Behalf of East Kentucky Power Cooperative, Inc., Case No. 2024-00370 (Nov. 20, 2024), Attach. BY-3, Spurlock Station Units 1-4 Co-fire Project Scoping Report (Rev. 4), at 7-2 (Oct. 2024) ("Attach. BY-3) (emphasis added).

¹¹ Joint Intervenors' Second Information Request to East Kentucky Power Cooperative, Inc., Case No. 2024-00370, Question 47(c) (Jan. 17, 2024) ("JI Q2-47(c)").

seal.”¹² EKPC also confirmed that “no additional engineering studies or research was performed” besides the modeling referenced in 2.47c.¹³

On February 7, 2025, counsel for JIs contacted EKPC regarding deficiencies in a number of their responses to JIs’ supplemental requests, including asking specifically for the Confidential-JI2.47c.pdf attachment, which had not been produced. On February 11, 2025, EKPC supplemented its response to Joint Intervenor’s request, stating: “All modeling files, assumptions, and resource selection explanations have been provided within this case. In addition, EKPC is filing a confidential summary of the REI Report under seal pursuant to a motion for confidential treatment. The actual REI Report is protected under attorney work product privilege.”¹⁴ The one-page summary document is dated February 10, 2025, and was not prepared by REI. JIs again raised the issue at hearing to clarify the purpose of creation of the report, and whether it had been inadvertently omitted from responses, and were again told EKPC counsel believes the report to be privileged.

B. Relevance

EKPC has not contested the relevance of the REI report. Furthermore, the report is relevant because Burns & McDonald’s scoping report identifies it as bearing on the technical feasibility of co-firing the Spurlock Station Unit 3 and 4 CFB boilers on 50% gas at full load.¹⁵ The Commission should not approve a project that is not technically feasible, and the feasibility of EKPC’s co-firing plan is not a certainty. In the commissioned project scoping report Burns and McDonald note the proposed co-firing projects “require[] novel design solutions that are

¹² Responses to Joint Intervenor’s Second Information Request to East Kentucky Power Cooperative, Inc. dated January 17, 2024, Case No. 2024-00370, Question 47(c) (Jan. 31, 2025).

¹³ EKPC Resp. to JI Q2-47(d).

¹⁴ Supplemental Responses to Joint Intervenor’s Second Information Request to East Kentucky Power Cooperative, Inc. dated January 17, 2024, Case No. 2024-00370, Question 47(c) (Feb. 11, 2025).

¹⁵ Attach. BY-3 at 7-2.

unproven,”¹⁶ and hinge on the uncertain viability of a “first-of-its-kind design.”¹⁷ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁸ The one-page summary does not, however, provide Joint Intervenors or the Commission with sufficient context to verify this conclusion. That context is presumably contained in the full REI report.

C. Privilege

EKPC claims that the full REI report is protected under attorney work product privilege. But EKPC has failed to fulfill its burden of proving the applicability of attorney work product privilege, and that privilege does not apply because the REI report was prepared to support a business determination, rather than in advance of litigation.

Parties asserting a privilege bear the burden of proving its applicability.¹⁹ The Commission has previously ordered EKPC to produce documents when it “provided no justification for asserting the attorney-client privilege and the attorney-work-product doctrine.”²⁰ EKPC has similarly failed here to provide any justification for asserting that the REI report is privileged, and the Commission should therefore compel EKPC to produce the report.

Even if EKPC had attempted to justify its claim of attorney work product privilege, the justification would fail for two separate reasons: (1) the REI report was not prepared in anticipation of litigation, and (2) Joint Intervenors have a substantial need to review the full REI report and cannot obtain a substantial equivalent of it.

¹⁶ *Id.* at 1-7.

¹⁷ *Id.* at 7-2.

¹⁸ EKPC Response 47c REI CFD Report Summary (Confidential).

¹⁹ *Haney*, 40 S.W.3d at 355.

²⁰ Case No. 2012-00149, *In re 2012 Integrated Resource Plan of East Kentucky Power Cooperative, Inc.*, Order at 4 (Dec. 4, 2012).

As this Commission has recognized, the attorney work product doctrine “allows for the assertion of a protection against discovery of ‘documents and tangible things’ prepared in anticipation of litigation.”²¹ Kentucky courts use a “two-step analysis” to determine if a document is protected under the work product doctrine.²² The court first “determine[s] whether the document is work product because it was prepared ‘in anticipation of litigation.’”²³ The test for whether a document was prepared in anticipation of litigation is whether, “in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.”²⁴ If the document was prepared in anticipation of litigation, the court then “determine[s] whether the requesting party has a ‘substantial need’ of the document and is unable to obtain the ‘substantial equivalent’ without ‘undue hardship.’”²⁵

EKPC’s own evidence demonstrates that the REI report was not prepared because of the prospect of litigation. Rather, Burns & McDonald acknowledged that it subcontracted with REI for the express reason of “increas[ing] confidence in the feasibility of the conceptual design,” as part of the process of preparing a project scoping report for EKPC.²⁶ This was necessary because the application of co-firing technology in a CFB boiler “is limited in practice and experience,” which EKPC had “identified as a project risk.”²⁷ With respect to EKPC’s relationship to Burns & McDonald, EKPC stated that it had “hired an engineering consultant to conduct co-firing studies

²¹ Case Nos. 2020-00349 & 2020-00350, *In re Electronic Applications of Kentucky Utilities Company and Louisville Gas and Electric Company for an Adjustment of Its Electric Rates, a Certificate of Public Convenience and Necessity to Deploy Advanced Metering Infrastructure, Approval of Certain Regulatory and Accounting Treatments, and Establishment of a One-Year Surcredit*, Order at 4 (Dec. 6, 2021).

²² *Duffy v. Wilson*, 289 S.W.3d 555, 558-59 (Ky. 2009).

²³ *Id.* at 559.

²⁴ *Id.* (quoting 8 Charles Alan Wright, Arthur R. Miller, & Richard L. Marcus, *Federal Practice and Procedure* § 2024 (2d ed.1994)) (emphasis added).

²⁵ *Id.*

²⁶ EKPC Attach. BY-3 at 7-2.

²⁷ Resp. to JI Q2-47(b).

and research on the Spurlock CFB technology” due to concern about “preserving unit capacity and fleet capacity” in light of EPA’s GHG rule.²⁸ Because the report was commissioned to support project development, in service of preserving unit capacity and fleet capacity, rather than in anticipation of litigation, the attorney work product doctrine does not apply.

Even if the REI report was prepared in anticipation of litigation, the Commission should compel production of the report because Joint Intervenors *and the Commission* have a substantial need to review it to assess and verify whether the co-firing plan at Spurlock 3 and 4 is technically feasible. As discussed above, Burns & McDonald’s scoping report refers to the co-firing plan as an “unproven” and “first-of-its-kind design.” EKPC too identified this component of the project as a “project risk” and, as noted previously, in its August 2023 comments regarding EPA’s Greenhouse Gas Rule, EKPC stated that “CFBs *cannot* co-fire natural gas because they depend upon coal ash contacting the steam generating tubes inside the furnace,” and that “much research would need to be conducted to see if a viable alternative would be economic.”²⁹ Less than two years after stating that “CFBs cannot co-fire natural gas,” EKPC bases its CPCN application on the notion that they can, without producing the full report that allegedly proves the feasibility of its project design. Joint Intervenors and the Commission have a substantial need to verify and evaluate the reasonableness of this conclusion.

Burns and McDonnell’s conclusory, one-page summary memorandum does not serve as a “substantial equivalent” because it does not provide any results or explanation that one would

²⁸ Resp. to JI Q1-43(a). Although Resp. to JI Q1-43(a) refers to “Attachment BY-1 to the application,” EKPC later clarified that it meant to refer to EKPC Attach. BY-3. See Resp. to JI Q2-47(a).

²⁹ East Kentucky Power Cooperative, Inc., Comments on New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule; Proposed Rule Docket ID No. EPA-HQ-OAR-2023-0072, at p. 29, available at https://downloads.regulations.gov/EPA-HQ-OAR-2023-0072-0542/attachment_1.pdf (visited Dec. 16, 2024) (emphasis added). See Resp. to JI Q1-43(a).

need to evaluate the validity and reasonableness of the purported findings of the REI report.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]³⁰ Joint Intervenors have no alternate way to verify and assess the validity and reasonableness of this conclusion without access to the full REI report.

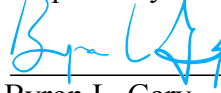
To the extent that EKPC instead seeks to base its privilege claim on attorney-client privilege, that privilege does not apply for the same reason. The Supreme Court of Kentucky has held, and this Commission has recognized, that “[t]he [attorney/client] privilege ‘protects only those disclosures necessary to obtain legal advice which might not have been made absent the privilege,’ and ‘is triggered only by a client’s request for legal, as contrasted with business, advice.’” Case No. 2005-00228, *In re Joint Application of Duke Energy Corporation, Duke Energy Holding Corp., Deer Acquisition Corp., Cougar Acquisition Corp., Cinergy Corp., The Cincinnati Gas & Electric Company and the Union Light, Heat and Power Company for Approval of a Transfer and Acquisition of Control*, Order at 3 (Sept. 27, 2005) (quoting *Lexington Public Library v. Clark*, 90 S.W.3d 53, 60 (Ky. 2002)). As with the attorney work product privilege, a claim of attorney-client privilege would fail here because the REI report was prepared to support a business determination, not a legal one.

III. Conclusion

For the reasons set forth above, Joint Intervenors respectfully request that the Commission compel EKPC to fully respond to Joint Intervenors’ Request 2-47(c) by producing the REI report by May 1, 2025.

³⁰ EKPC Response 47c REI CFD Report Summary (Confidential).

Respectfully submitted,



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CERTIFICATE OF SERVICE

In accordance with the Commission's July 22, 2021 Order in Case No. 2020-00085, *Electronic Emergency Docket Related to the Novel Coronavirus COVID-19*, this is to certify that the electronic filing was submitted to the Commission on April 24, 2025; that the documents in this electronic filing are a true representations of the materials prepared for the filing; and that the Commission has not excused any party from electronic filing procedures for this case at this time.



Byron L. Gary