

**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’ REPLY IN SUPPORT OF 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 reply in support of Joint Intervenors’ Motion to Compel East Kentucky Power Cooperative (“EKPC”) to produce the Reaction Engineering report (“REI report”) requested in Joint Intervenors’ Information Request 2-47(c) (“the Motion”).

After originally withholding the report on bare claim of “attorney work product privilege,” EKPC’s Response casts Joint Intervenors’ request as untimely, made in bad faith, and offensive to due process, while also claiming attorney client privilege and the work product doctrine shield EKPC from disclosing an engineering report purporting to show the feasibility of a novel co-firing project. These arguments are misplaced.

Joint Intervenors continue to respectfully request that the Commission compel EKPC to fully respond to Joint Intervenors’ Information Request 2-47(c) and produce the REI report as soon as practicable. It is perfectly fair for EKPC to produce this record in response to Joint Intervenors’ timely and legitimate request.

I. The legitimacy, timeliness, and relevance of Joint Intervenor’s Information Request 2-47(c) remains undisputed.

Joint Intervenor’s data request was legitimate, timely, and made in order to consider the reasonableness of EKPC attempting a “first of its kind” conversion of Spurlock Units 3 and 4 that less than two years ago EKPC told the U.S. EPA was not feasible. Even in EKPC’s Response, these points remain beyond dispute.

On that basis, and as set forth in the Motion, the Commission should compel the swift production of the REI Report responsive to Joint Intervenor’s Information Request 2-47(c).

II. Accusations of “bad faith” are entirely without basis.

Turning to arguments raised in the Response, EKPC’s first point boils down to an assertion that, because Joint Intervenor did not take different steps at different times, EKPC must not be compelled to meet legitimate discovery obligations.¹ Respectfully, EKPC must be mistaken.

As addressed in the Motion and Sections IV and V below, there is no legitimate basis to withhold the REI Report from the record of this proceeding. The Motion seeks the production of a specific record that presumably supports the feasibility of the requested Spurlock 3 and 4 CPCNs but has yet to be produced in response to a timely data request. The Motion seeks basic fairness, a more complete record, and accountability in a regulatory proceeding.

Regrettably, the Response casts the Motion asking EKPC to produce its own evidence in support of project feasibility as “bad faith”, leaving out at least two critical facts. First, the Response does not acknowledge that when this issue was discussed at the hearing, the Commission specifically stated “[d]o a Motion to Compel, and obviously if it’s something that

¹ East Kentucky Power Cooperative, Inc.’s Response to Joint Intervenor’s Motion to Compel East Kentucky Power Cooperative to Fully Respond to Joint Intervenor Information Request 2-47(C), Sec. I, at 1-3 (May 01, 2025) (“EKPC Response”).

should be produced, we'll settle it.”² While Joint Intervenor respectfully acknowledge the Commission's urging that parties should try to settle discovery disputes in advance of hearing, the Motion was filed consistent with the Commission's suggestion at hearing.

Second, EKPC's February 11 supplemental response to JI 2.47 did not tee this issue up as clearly as the Company contends. In particular, when Joint Intervenor requested any report of other documentation of the purported findings of the Reaction Engineering modeling, the Company's initial response was “See attachment *Confidential-JI2.47c.pdf* for documentation supporting that statement filed under seal.”³ EKPC's accompanying Motion for Confidential Treatment, dated January 31, 2025, further explained that “In the response to Joint Intervenor's Second Request, Item 47(c), EKPC provided confidential information pertaining to the fluid dynamics modeling results which is proprietary information to a third-party that is not a party to this proceeding.” It was EKPC's failure to produce that confidential information - i.e. the referenced “attachment *Confidential-JI2.47c.pdf*” - with its initial response to JI 2.47 that led Joint Intervenor to informally request supplementation of EKPC's response. While EKPC's February 11 supplemental response noted that it was producing a summary report dated February 10, it did not remove the prior reference to “attachment *Confidential-JI2.47c.pdf*” or otherwise state that the Company was no longer producing that document. While Joint Intervenor's counsel ideally would have noticed at the time that that document had not been produced, EKPC's claim that it was bad faith that counsel did not do so until preparing for hearing weeks later is baseless.

Additionally, EKPC cites no legal basis in this portion of its argument for denying Joint Intervenor's motion. Instead, EKPC reiterates a partial timeline of the discovery dispute, and

² April 21 Hearing Video Transcript (“HVT”) at 13:46:47 to 13:46:54.

³ EKPC Response to Joint Intervenor Supplemental Request for Information.47(c) (“JI 2.47(c)").

then uses the supposed delay to accuse counsel of “bad faith” - a term without relevant legal significance, so far as can be discerned from the Response. Instead, it essentially amounts to name-calling.

Far from bad faith, Joint Intervenor’s persistence in seeking this report could serve to strengthen EKPC’s requested CPCNs for co-firing projects at Spurlock Units 3 and 4. Without it, the strongest statements of feasibility in the existing evidentiary record are, at best, threadbare and insufficient to justify risking money and reliability on an “unproven” technology experiment.⁴

III. EKPC’s suggestion that due process could be at stake if it cannot continue to withhold information is entirely without basis.

The Response invokes due process, particularly complaining that EKPC would be without an opportunity for cross-examination. Joint Intervenor’s agree that opportunities to confront adverse evidence are important in regulatory proceedings, but EKPC’s concerns are otherwise senseless. If required to produce the REI Report, EKPC will not be injured, unfairly surprised, or deprived of fair process.

First, it makes very little sense for EKPC to be concerned about its cross-examination rights here: Joint Intervenor’s are simply asking EKPC to put forward its own record and no adverse witnesses have been offered. Only EKPC’s witnesses may have seen the REI Report, and there would be no one for EKPC to cross-examine but EKPC’s own witnesses.

⁴ Compare, e.g., Rebuttal Testimony of Julia Tucker at 19 (“EKPC needs to stay with proven technologies...”) and 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 1-7, 1-10, 7-8, and Appx. P, line 039 (Oct. 2024) (“Attach. BY-3”) (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”).

Second, the REI Report allegedly supports EKPC’s requested relief, making imagined harms to EKPC raised in the Response confusing at best. If the report indeed supports project feasibility, EKPC will be helped by its introduction to the record of this proceeding.

Third, the record has not closed,⁵ and if required to produce the REI Report via a supplemental response, the report can speak for itself. While the Response focuses on attacking Joint Intervenors’ interests, it loses sight of the importance of disclosing material engineering reports to the Commission. To the extent that the REI Report might assure the Commission and Commission Staff of the feasibility of converting Spurlock units 3 & 4, one would expect EKPC to eagerly produce it at any phase of the proceedings.

Finally, to the extent that there is a fairness issue at stake here, consider that no party has been afforded an opportunity to independently review a critical engineering report. The REI Report is the only analysis at issue that purportedly shows—contrary to EKPC’s 2023 statement to U.S. EPA—that it “appears technically feasible” to co-fire natural gas at Spurlock Units 3 and 4.⁶ Should the Commission decline to compel production of the REI Report, fairness arguably dictates that EKPC should be prohibited from relying on that report, or on the conclusory reference to it in Attachment BY-3 and Burns & McDonnell’s conclusory one-page summary of it, to show project feasibility.

IV. EKPC’s reliance on Attorney-Client privilege is without basis.

EKPC begins its argument on the merits by claiming “Joint Intervenors confuse the attorney client privilege doctrine ... and the work product doctrine ...,”⁷ and goes on to claim that the REI Report is subject to attorney-client privilege.⁸ This is a novel statement of the facts

⁵ Order at 2 (April 24, 2025) (“This case shall stand submitted for a decision by the Commission effective 12:01 a.m. Eastern Daylight Time, May 17, 2025.”). Given that the record is not closed in this proceeding, the prior Commission orders that EKPC cites in footnotes 7, 8, and 9 of its Response are inapposite.

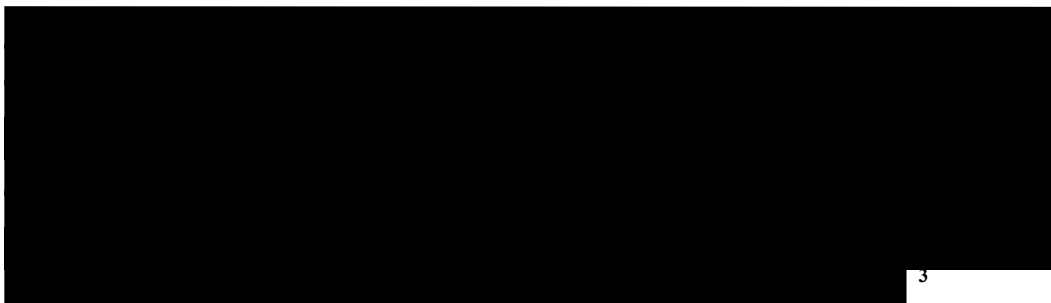
⁶ Motion at 3-4 (citing JI Hearing Ex. 1 at 29).

⁷ EKPC Response at 4.

⁸ EKPC Response at 5-7.

here, given that EKPC's supplement to the Joint Intervenor's request claimed only that "[t]he actual REI Report is protected under attorney *work product privilege*";⁹ and the Company's February 11 Motion for Confidential Treatment similarly contended only that "[t]he REI Study itself is privileged information protected under the attorney *work product privilege*."¹⁰ The Commission, therefore, should pay little heed to EKPC's post hoc rationalization of attorney-client privilege in deciding this Motion.¹¹

Regardless, EKPC's claim of attorney-client privilege fails for the same reasons that its claim of work-product privilege does. First, EKPC's claim that the report was created at the behest of counsel for EKPC is in direct contradiction of evidence of record, and testimony of EKPC's witnesses. The report is first referenced in attachment BY-3 to the Direct Testimony of Brad Young. That document - the Spurlock Units 1-4 Gas Co-firing Project Scoping Report, which was authored by Burns & McDonnell - states specifically that "[t]herefore, to increase confidence in the feasibility of the conceptual design, *BMcD subcontracted with Reaction Engineering, Inc. (REI)*...."¹² Second, the "confidential summary of the REI Report" produced as a supplement to EKPC's original response requesting the report, and also authored by Burns & McDonnell, states:



⁹ EKPC Supplemental Response to JI 2.47(c) (Feb. 11, 2025) (emphasis added).

¹⁰ EKPC, Motion for Confidential Treatment, Feb. 11, 2025 at p. 3 para. 4 (emphasis added).

¹¹ The Commission's Rules obligated EKPC to "provide a written explanation of the specific grounds for" not "completely and precisely" responding to Joint Intervenor's request for the REI Report. 807 KAR 5:001 Section 4(12)(d)(5).

¹² Attach. BY-3 at 7-2 (emphasis added)

¹³ Supplemental Response to JI 2-47(c), attachment.

Finally, at hearing, prior to objection from counsel for EKPC, Mr. Young stated in response to questions about the report that he had seen “analysis” of the modeling, and that he, with Burns & McDonnell, and Spurlock staff had gone through the evaluation.¹⁴

V. EKPC’s claim of work-product privilege continues to be without basis.

EKPC also now provides some pretextual explanation for how the REI Report could be privileged, but has failed to provide any evidence to support the claim, or rebut the clear record of evidence that the report was requested by EKPC’s Owner’s-Engineer, not its attorneys. As stated in JI’s initial Motion to Compel, Parties asserting a privilege bear the burden of proving its applicability.¹⁵ EKPC continues to fail here to provide any evidence for asserting that the REI report is privileged, and the Commission should therefore compel EKPC to produce the report.

Evidence of record clearly demonstrates that the REI Report was the result of EKPC’s Owner’s-Engineer subcontracting work to determine the feasibility of the conceptual design of the project proposed here for approval by the Commission.¹⁶ Now, in response to Joint Intervenors’ Motion to Compel, counsel asserts that “the REI report was prepared at counsel’s request in the furtherance of legal services,”¹⁷ and that the report was created in anticipation of litigation over EPA or state rulemaking,¹⁸ *not* at the behest of Burns & McDonnell, as stated in the report included as support for this application.¹⁹ EKPC, however, points to no evidence of record, or even out of record, that this is the case, or to explain the discrepancy with the several assertions of its witness and its Owner’s-Engineer about the provenance of this study and report.

¹⁴ April 21 Hearing Video Transcript (“HVT”) at 13:44:30 to 13:45:00.

¹⁵ *Haney*, 40 S.W.3d at 355.

¹⁶ Attach. BY-3 at 7-2.

¹⁷ EKPC Response at 4.

¹⁸ EKPC Response at 4-7. EKPC also states that “[t]he REI Report helps EKPC formulate a compliance strategy,” a claim which Joint Intervenors do not doubt - and is in fact supportive of the need for review of the Report, precisely to determine the feasibility of the proposed project as a compliance method with the EPA rulemaking.

¹⁹ Att. BY-3 at 7-2.

EKPC further states that there is not a substantial need for the report to be included in the record because of JI’s supposed delay (addressed above, regarding accusations of “bad faith”), but fails to explain how this shows that there is not a substantial need for the document to be produced prior to the close of acceptance of evidence in this case. If anything, EKPC’s response bolsters the case that there is a substantial need for the report to be in the record. In particular, EKPC contends that the REI Report “helps EKPC formulate a compliance strategy” for the GHG Rule,²⁰ “including whether the medium subcategory [i.e. 40% gas co-firing] is feasible for certain of EKPC’s generating units.”²¹ Concerns about the ability of Spurlock 3 and 4 to comply with a gas co-firing requirement were raised by EKPC itself in 2023 comments to EPA.²² If the REI Report alleviates those concerns, then as noted previously, there is no harm to EKPC of including it in the record. If, however, the REI Report raises serious questions about the feasibility of gas co-firing at Spurlock 3 and 4, that is a very relevant and important fact that needs to be in the record given that a primary purpose of the proposed Spurlock 3 and 4 gas co-firing project is to achieve GHG Rule compliance. EKPC’s attempt to withhold the REI Report ignores that not only JIs are prejudiced by the failure to produce the document, but the Commission itself is prejudiced at not being able to fully assess the feasibility of a nearly \$90 million GHG Rule compliance plan²³ that they are asked to approve.

Finally, EKPC’s expressed concerns about “reveal[ing] proprietary details” and “provid[ing] a competitive advantage to other utilities”²⁴ are irrelevant. EKPC is of course free to make a separate motion for confidential treatment, and Joint Intervenors are subject to a

²⁰ EKPC Response at 7.

²¹ EKPC Response at 6.

²² Motion at 3-4 (citing JI Hearing Ex. 1 at 29).

²³ Direct Testimony of Don Mosier at 15; Direct Testimony of Julia J. Tucker at 32-33.

²⁴ EKPC Response at 8.

confidentiality agreement which would prevent disclosure to anyone other than signatories to the agreement.²⁵

VI. EKPC's response mischaracterizes the Commission's past rulings and other relevant authority.

The Response later misconstrues arguments and authorities cited in the Motion, then complains that those misunderstandings take previous Commission rulings and Kentucky case law out of context.²⁶ In fact, Joint Intervenor's cited authorities support rejection of EKPC's privilege claim.

First, the Response claims that Joint Intervenor's Motion cited to the Commission's September 7, 2012 Order in Case No. 2012-00149, *In re 2012 Integrated Resource Plan of East Kentucky Power Cooperative, Inc.*, for the claim that "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'";²⁷ claims that Case No. 2012-00149 only concerned the production of public information; and asserts that the case is therefore irrelevant.²⁸ EKPC is wrong on both points.

In Case No. 2012-00149, the Commission issued two separate Orders compelling EKPC to produce information. The first Order, dated September 7, 2012, concerned, in part, the compelled production of public information. But after EKPC still failed to produce responsive information, "claiming that the Commission's September 7, 2012 Order compelled only disclosure of information already publicly available with various governmental agencies," the

²⁵ EKPC's suggestion that disclosure of the REI Report could somehow put "national security at issue" is entirely unsubstantiated. EKPC Response at 8. To the extent that there are operational or other details the disclosure of which would pose a real security threat, those specific details could be withheld as critical energy infrastructure information, KRS 61.878(1)(m). But a vague and unsubstantiated claim cannot justify withholding an entire report evaluating a project feasibility issue that has nothing to do with national security.

²⁶ EKPC Response at 8-9.

²⁷ *Id.* at 9.

²⁸ *Id.*

Commission issued a separate Order on December 4, 2012 compelling further production.²⁹ In the December 4 Order, the Commission noted that EKPC had produced certain responsive confidential information but had “declined to provide information concerning the environmental capital expenditures” for the Spurlock, Cooper, and Dale generating stations.³⁰ As Joint Intervenor stated in their Motion, the Commission’s December 4 Order rejected EKPC’s claim that “such information was protected by the attorney-client privilege and the attorney-work-product doctrine,” because EKPC “has provided no justification for asserting those privileges.”³¹ In the present case, EKPC similarly failed to provide adequate justification for asserting its claimed privileges, for the reasons set forth above.

In a footnote, EKPC claims that “Joint Intervenor[s]’ citation to *Sisters of Charity Health Sys., Inc. v. Raikes*, 984 S.W.2d 464, 468 (Ky. 1998) is also taken out of context as that case analyzes the peer review privilege applicable [to] medical malpractice cases and not the attorney client privilege asserted in this case.”³² Again, EKPC is incorrect. Joint Intervenor cited to *Raikes* for the “nearly universal rule that privileges should be strictly construed, because they contravene the fundamental principle that ‘the public . . . has a right to every man’s evidence.’”³³ This “fundamental maxim” that has been recognized “[f]or more than three centuries”³⁴ is not limited to medical malpractice cases. Rather, this rule applies also in the context of attorney-client privilege and the work-product doctrine.³⁵ The rule is particularly applicable here

²⁹ Case No. 2012-00149, *In re 2012 Integrated Resource Plan of East Kentucky Power Cooperative, Inc.*, Order at 2-3 (Dec. 4, 2012).

³⁰ *Id.* at 3.

³¹ *Id.*

³² EKPC Response at 9, n.16.

³³ *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)). See Motion at 2.

³⁴ *United States v. Bryan*, 339 U.S. 323, 331 (1950).

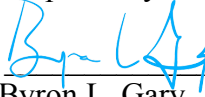
³⁵ See *Meador v. Indiana Ins. Co.*, No. 1:05CV-00206-TBR, 2006 WL 8457433, at *3 (W.D. Ky. May 12, 2006); *United States v. Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO*, 119 F.3d 210, 214 (2d Cir. 1997) (“since the attorney-client privilege ‘stands in derogation of the public’s ‘right to every man’s evidence, ... it ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.’”) (quoting *In re Horowitz*, 482 F.2d 72, 81 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973)); *In re Pac.*

because EKPC seeks to deprive Joint Intervenors and the Commission of the opportunity to review the key piece of evidence that EKPC claims to demonstrate the feasibility of its Spurlock Co-Fire Project, instead asking Joint Intervenors and the Commission to simply trust a conclusory one-page summary and “EKPC’s witnesses [who] already assert[] that it is technically feasible.”³⁶ The Commission should reject EKPC’s attempt to withhold this evidence.

VII. 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 as soon as practicable.

Respectfully submitted,



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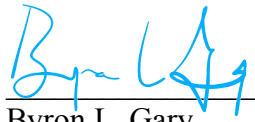
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Pictures Corp., 679 F.3d 1121, 1126 (9th Cir. 2012) (“because, like any other testimonial privilege, this [attorney-client privilege] rule ‘contravene[s] the fundamental principle that the public has a right to every man’s evidence,’ we construe it narrowly to serve its purposes.”).

³⁶ EKPC Response at 7.

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 May 1, 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