

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)
COMPATIBILITY CERTIFICATE RELATING TO)
THE SAME; 3) APPROVAL OF DEMAND SIDE)
MANAGEMENT TARIFFS; AND 4) OTHER)
GENERAL RELIEF)

Case No. 2024-00370

**EAST KENTUCKY POWER COOPERATIVE, INC.’S RESPONSE TO JOINT
INTERVENORS’ MOTION TO COMPEL EAST KENTUCKY POWER
COOPERATIVE TO FULLY RESPOND TO JOINT INTERVENOR INFORMATION
REQUEST 2-47(C)**

Comes now East Kentucky Power Cooperative, Inc., (“EKPC”) pursuant to 807 KAR 5:001 Section 5 and other relevant law, by counsel, and for its response to Joint Intervenor’s Motion to Compel East Kentucky Power Cooperative to Fully Respond to Joint Intervenor Information Request 2-47(c) (“Motion to Compel”) hereby states as follows:

ARGUMENT

The Joint Intervenor’s motion is 1) untimely and in bad faith, 2) deprives EKPC of due process of law, and 3) the REI report is privileged both under the attorney client privilege doctrine under the Rules of Evidence and the work product doctrine under the Rules of Civil Procedure. The Joint Intervenor’s Motion to Compel should therefore be denied.

I. Joint Intervenor’s Motion should be denied because it is untimely and is in bad faith.

EKPC filed its Application on November 20, 2024. The Joint Intervenor moved to intervene on December 13, 2024, and tendered initial requests for information on December 20,

2024. EKPC responded to the Joint Intervenors' initial requests on January 10, 2025. The Joint Intervenors filed supplemental requests for information on January 17, 2025. The supplemental request for information contained Item 47(c) that requested, "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.'"¹ EKPC responded to the supplemental requests on January 31, 2025 and after an informal request by Joint Intervenors' counsel to supplement responses, EKPC filed supplemental responses on February 11, 2025 specifically providing a confidential summary of the Reaction Engineering, Inc. ("REI") Report at issue. The Motion for Confidential treatment filed on February 11, 2025, with the summary of the REI Report indicated that the REI Report is privileged information protected under attorney work product privilege.²

An evidentiary hearing was held in this matter on April 21, 2025, and concluded on April 22, 2025. During the April 21, 2025 hearing, the Joint Intervenors cross-examined EKPC's witness, Brad Young³, regarding the response to this data request and why EKPC did not provide the entire report. This was the first time since EKPC filed its February 11, 2025 response that the Joint Intervenors had inquired about the report. Joint Intervenors have not set forth any grounds as to why they did not exercise reasonable diligence to file their Motion to Compel prior to the hearing, within a reasonable time after EKPC filed its response, or why such information should now be entered into the record. At the hearing in this matter, counsel for EKPC objected to the line of questions on this discovery dispute and the Commission discussed with the Joint Intervenors

¹ Supplemental Requests for Information of Joint Intervenors to East Kentucky Power Cooperative, Inc., Item 47(c) (filed January 17, 2024).

² EKPC's Motion for Confidential Treatment (filed February 11, 2025).

³ HVT Day 1 13:43:00-13:45:00.

that a motion to compel the information had not been filed prior to the hearing.⁴ In response to the Commission regarding not filing a motion to compel prior to the hearing, counsel for the Joint Intervenors said “we did not have time to do one”.⁵ Later in the hearing, the Commission stated that discovery issues should be resolved prior to the hearing.⁶

EKPC provided the summary of the REI Report on February 11, 2025. The Joint Intervenors had sixty-nine days to address this issue prior to the hearing. The Joint Intervenors claim sixty-nine days was not enough time to address a discovery issue before a hearing, but they can incredibly draft and file a motion to compel in just three days after being admonished at the hearing for not addressing or attempting to resolve discovery disputes prior to the hearing. The Joint Intervenors are acting in bad faith by not attempting to resolve the discovery dispute with EKPC prior to the hearing, telling the Commission that it had not had time to file the motion prior to the hearing, and then drafting and filing a motion three days after being reprimanded on the record. In addition, pursuant to 807 KAR 5:001 Section 12(e), the party filing the motion to compel must include the information regarding how they sought to resolve the discovery dispute. The Joint Intervenors did not contact counsel after the February 11, 2025 response was filed. The Joint Intervenors waited until the hearing in this matter to reveal that they believed the information was not privileged. Accordingly, the Commission should deny the Joint Intervenor’s Motion to Compel.⁷⁸

⁴ HVT Day 1 13:45:26-11:46:00

⁵ HVT Day 1 13:46:46-13:46:50.

⁶ HVT Day 1 15:51:00-15:52:00.

⁷ See *In the Matter of Harold Barker; Ann Barker; and Brooks Barker v. East Kentucky Power Cooperative*, Order p. 10, Case No. 2013-00291 (Ky. P.S.C., July 6, 2015) (denying complainants’ motion to compel where complainants did not set forth any grounds as to why their request was not made prior to the close of the record or why such information should now be entered into the record.).

⁸ See *In the Matter of the Application of Kentucky Power Company for (1) a Certificate of Public Convenience and Necessity Authorizing the transfer to the Company of an Undivided Fifty Percent Interest in the Mitchell Generating Station and Associated Assets; (2) Approval of the Assumption by Kentucky Power Company of Certain Liabilities in Connection with the Transfer of the Mitchell Generating Station; (3) Declaratory Rulings; (4) Deferral of Costs*

II. Joint Intervenor’s Motion should be denied because it violates due process.

If the Joint Intervenors’ motion is granted, the Joint Intervenors will attempt to introduce the new information as evidence into the record. This will deprive EKPC of the opportunity to cross-examine any proposition that the Joint Intervenors may espouse regarding the new information. Asking the Commission to consider such information for the first time at this point in the proceeding is inappropriate and a violation of due process. 807 KAR 5:001, Section 11(4) states:

Unless so ordered by the commission, the commission shall not receive in evidence or consider as part of the record a book, paper, or other document for consideration in connection with the proceeding after the close of the testimony.

The testimony was closed in this case on April 22, 2025 when the last full day of the public hearing concluded. Any new evidence sought to be introduced at this date should not be received into evidence or considered as part of the record.^{9, 10}

III. Joint Intervenor’s Motion should be denied because it seeks information that is privileged and/or proprietary.

The Joint Intervenors confuse the attorney client privilege doctrine under the Rules of Evidence and the work product doctrine under the Rules of Civil Procedure. The attorney client privilege is codified in Kentucky Rules of Evidence (KRE) 503 and attaches to a confidential

Incurred in Connection with the Company’s Efforts to Meet Federal Clean Air Act and Related Requirements; and (5) All Other Required Approvals and Relief. Order, Case No. 2012-00578, (Ky. P.S.C., Nov. 26, 2013) (holding that information submitted after the evidentiary record has closed and which could have been, with reasonable diligence, filed prior to the hearing, was not admissible under 807 KAR 5:001, Section 11(4).)

⁹ See also *In the Matter of the Application of Jessamine-South Elkhorn Water District for a Certificate of Public Convenience and Necessity to Construct and Finance a Waterworks Improvements Project Pursuant to KRS 278.020 and 278.300.* Order, Case No. 2012-00470, pp. 4-5 (Ky. P.S.C., Apr. 30, 2013) (holding that a water district’s attempt to introduce evidence after the close of testimony “deprived the intervenors of notice” of an issue, as well as “any opportunity to address this evidence or confront the water district’s claim of conflicting propositions ... such notice and opportunity are the essence of due process.”).

¹⁰ See also *In the Matter of Kentucky Utilities Company v. Henderson-Union Rural Electric Cooperative Corporation,* Order, Case No. 1989-00349 (Ky. P.S.C., May 21, 1990) (“[t]he Commission must ensure that all parties to its proceedings are afforded due process. Despite the relaxed nature of Commission proceedings, each party must still have the opportunity to confront and cross examine adverse witnesses...”).

communication made to facilitate the client in their legal dilemma.¹¹ The rule explains, “[a] communication is ‘confidential’ if not intended to be disclosed to third persons other than those whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.”¹² The attorney client privilege affords absolute protection and information is “not discoverable even when the information is essential to the underlying case and cannot be obtained from another source.”¹³

The protection of the work-product privilege stems from CR 26.02(3) and its applicability is determined under a two-part test:

First, the court must determine whether the document is work product because it was prepared “in anticipation of litigation.” ... Second, if the document is work product, the court must determine whether the requesting party has a “substantial need” of the document and is unable to obtain the “substantial equivalent without undue hardship.”¹⁴

The REI Report is protected both under the attorney client privilege doctrine under the Rules of Evidence and the work product doctrine under the Rules of Civil Procedure.

a. The REI Report is protected under the attorney client privilege doctrine under the Rules of Evidence.

Here, the REI report was prepared at counsel’s request in the furtherance of legal services and is not intended to be disclosed to any third persons and is therefore privileged regardless of any “substantial need” or inability to obtain the information from an alternate source. The REI Report supports EKPC’s development of strategy for regulatory compliance for a contentious regulation known as the *New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission*

¹¹ *St. Luke Hospitals, Inc. v. Kopowski*, 160 S.W.3d 771, 777 (Ky. 2005).

¹² KRE 503(a)(5).

¹³ *Kopowski*, 160 S.W.3d at 777.

¹⁴ *Duffy v. Wilson*, 289 S.W.3d 555, 559 (Ky. 2009).

Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule, 89 Fed. Reg. 39798 (May 9, 2024) (“GHG Rule”). EKPC’s existing coal-fired units are subject to the GHG Rule. For existing units, the EPA devised best systems for emissions reduction (BSER) for two subcategories. For each category, the EPA identified the technology to be utilized to meet the CO₂ emission limits. For long-term units, BSER is carbon capture and storage; for medium units, BSER is co-firing natural gas at 40% of the heat input. States must submit a Section 111 plan to the EPA to address all of the applicable sources in the state on or before May 11, 2026.¹⁵ States are currently developing plans with owner/operator input, such as subcategory preferences for the affected units and whether to account for remaining useful life and other factors (RULOF), which may result in less stringent CO₂ emission limitations. EKPC must provide unit-specific information to Kentucky prior to the 2026 deadline to be included in the state plan. The state plan process often involves negotiation with the state and other utilities, each of which may have different interests.

The REI Report supports EKPC’s development of a compliance approach for the state plan process. It contains information central to its counsels’ Section 111 implementation legal theories and compliance and negotiation strategies and was prepared at counsel’s request. The REI Report provides information to determine EKPC’s state plan selection, including whether the medium subcategory is feasible for certain of EKPC’s generating units. It also offers information to inform EKPC as to RULOF, which takes into account remaining useful life of the unit and cost. These matters all pertain to the development and formulation of EKPC’s legal understanding of the GHG Rule, its legal strategy for responding to the GHG Rule and, ultimately, the legal considerations

¹⁵ 40 CFR § 60.5785b

underpinning its compliance decisions. These are proprietary and privileged in the most classic textbook example of legal privilege.

b. The REI Report is protected under the work product doctrine under the Rules of Civil Procedure.

EKPC and its legal counsel, anticipated litigation regarding the carbon rules when the REI Report was commissioned and prepared. The REI Report was created in anticipation of this litigation and was used for counsel to make legal impressions on which strategy to pursue during litigation. The REI Report helps EKPC formulate a compliance strategy and informs the legal bases of a future lawsuit against the state or the EPA on the state plan. Revealing the document will prejudice EKPC by revealing elements of its compliance strategy that will place EKPC in a detrimental negotiation position with the state regarding the plan.

The Joint Intervenors have not shown a substantial need for the REI Report. A confidential summary of the REI Report was produced to the Joint Intervenors under seal pursuant to a motion for confidential treatment. The REI Report is not needed to show that co-firing Spurlock 3 and 4 is technically feasible. Sworn testimony from EKPC's witnesses already asserts that it is technically feasible. The summary of the REI Report along with the testimony from EKPC's witnesses at the hearing in this matter is more than sufficient to show that it is technically feasible. The evidentiary value of the information does not outweigh the harm that would be done to EKPC if this information was made available to the Joint Intervenors.

Despite their alleged "substantial need" to review the information, the Joint Intervenors could not find the time during the sixty-nine day window to contact EKPC to raise or discuss the discovery dispute or to file a motion to compel with the Commission. Instead, the Joint Intervenors waited until after the hearing to file this motion to compel – over two months after EKPC responded to their supplemental request and provided a confidential summary of the report and

after the Commission had admonished the Joint Intervenors for not filing a motion to compel prior to the hearing in this matter and trying to discuss a discovery dispute at the hearing.

The REI Report would reveal proprietary details regarding EKPC's equipment and how the specialized CFB technology operates, including its capacity, constraints, lower emissions profile, and material needs. Release of this information would provide a competitive advantage to other utilities, particularly those in the PJM market. In addition, national security is at issue. Essential information concerning generating assets has been used by attackers to coordinate physical and cyber breaches to disrupt the power supply. These events are well-planned efforts intended to affect the United States economy, national defense, and human health and welfare. EKPC's need to keep the information in the REI Report protected is paramount and vastly outweighs the Joint Intervenor's desire to start an untimely fishing expedition.

The Joint Intervenor's motion argues that none of EKPC's witnesses addressed the concern stated in EKPC's public comments on the EPA's proposed GHG Rule. However, there is no such requirement to create or preserve a privilege. The REI Report was performed in direct response to those concerns, whether publicly articulated through comments or not, and identified the engineering work necessary to determine the environmental compliance strategy for the Spurlock CFB units.

Joint Intervenors' Motion cites to Case No. 2012-00149, *In re 2012 Integrated Resource Plan of East Kentucky Power Cooperative, Inc.*'s September 7, 2012 Order denying in part and granting in part an intervenor's motion to compel. Joint Intervenors' Motion cites to this order for the proposition 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" and saying 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.” However, these citations take the Commission’s ruling out of context. In that case, the issue was whether EKPC was required to provide information that was publicly available. The public availability of the requested information is not at issue in this case – quite the opposite. There is currently no publicly available version of the REI Report. Instead, the REI Report is privileged and proprietary.¹⁶

CONCLUSION

The Joint Intervenor’s request is untimely, violates due process, and the REI report is privileged both under the attorney client privilege doctrine under the Rules of Evidence and the work product doctrine under the Rules of Civil Procedure. For the foregoing reasons, EKPC respectfully requests that the Commission deny the Joint Intervenor’s Motion.

Respectfully submitted,



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¹⁶ 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 medical malpractice cases and not the attorney client privilege asserted in this case.

CERTIFICATE OF SERVICE

This is to certify that foregoing electronic filing was transmitted to the Commission on May 1, 2025; that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding; and that pursuant to the Commission's July 22, 2021 Order in Case No. 2020-00085, no paper copies of the filing will be made.



Counsel for East Kentucky Power Cooperative, Inc.