COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matters of:

ELECTRONIC APPLICATION OF KENTUCKY UTILITIES COMPANY AND LOUISVILLE GAS AND ELECTRIC COMPANY FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND SITE COMPATIBILITY CERTIFICATES	))))))	CASE NO. 2025-00045

SOUTHERN RENEWABLE ENERGY ASSOCIATION'S RESPONSE POST HEARING MEMORANDUM BRIEF

Comes now the Southern Renewable Energy Association (also "SREA"), by and through counsel, and, in accordance with the Public Service Commission's Order dated August 11, 2025, respectfully files this Response Post Hearing Memorandum pertaining to arguments raised by other parties in their initial briefs. SREA continues to support the Stipulation and Recommendation and respectfully requests its acceptance by the Commission, without modification, in the instant case.

I. RESPONSE TO INITIAL BRIEFS OF SIGNATORIES TO THE STIPULATION AND RECOMMENDATION.

With regard to the initial briefs of the signatories to the Stipulation and Recommendation, consistent with Article VIII, Sections 8.1 and 8.2, among other provisions, the Stipulation is not an admission by SREA that any computation, formula, allegation, assertion, or contention made by any other party in this case is true or valid. Rather, SREA agrees that the Stipulation represents a fair, just, and reasonable resolution of the issues addressed by the Stipulation.

Thus, while SREA does not agree with certain points of advocacy presented by some of the other signatories in their initial briefs, particularly with regard to Battery Energy Storage System ("BESS"), SREA agrees with the result reached through the Stipulation, the withdrawal of the BESS Certificate of Public Convenience and Necessity ("CPCN") request without prejudice,[1] is a fair, just, and reasonable result. The justness and reasonableness of the end result is what is at issue (rather than the exact method employed to reach that result).[2]

In SREA's Initial Post Hearing Memorandum Brief, SREA stated that the Commission's jurisdiction to review Mill Creek 2 and place conditions upon CPCNs is "without question"[3] and, further, that the Commission has plenary authority to attach conditions to a CPCN while implementing KRS Chapter 278.[4] The unidentified basis for this position is, principally, *Kentucky Public Service Commission v. Commonwealth, ex rel. Conway*, 324 S.W.3d 272 (Ky. 2010).

SREA observes that the initial briefs of several of the other signatories to the Stipulation and Recommendation offer a comprehensive discussion of the Commission's plenary authority by reference to the seminal case of *Kentucky Public Service*

[1] Per Article VIII, Section 8.12 of the Stipulation and Recommendation, at pertinent part: "This Stipulation shall not have any precedential value in this or any other jurisdiction."

[2] *See, Kentucky Public Service Commission v. Commonwealth of Kentucky, ex rel. Conway*, 324 S.W.3d 373, 383 (Ky. 2010) (confirming the Supreme Court of Kentucky's use of "The *Hope* Doctrine" [*Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944)] in considering challenges to orders of the Public Service Commission).

[3] Initial Brief page 18.

[4] *Id.*

Commission v. Commonwealth, ex rel. Conway, 324 S.W.3d 373 (Ky. 2010). SREA notes that each such discussion confirms that *Conway* is the controlling precedent regarding the Commission's plenary authority.[5] SREA notes that, per *Conway*, the Commission has "the plenary authority to regulate and investigate utilities and to ensure that rates charged are fair, just, and reasonable under KRS 278.030 and KRS 278.040."[6] No initial post hearing memorandum brief filed into the record contests the Commission's plenary authority recognized and confirmed by the Supreme Court of Kentucky through *Conway*.

SREA, in its initial brief, deferred in many instances to the analysis of record supplied by the Companies and the remaining parties to the Stipulation and Recommendation in support of the arguments that the CPCNs [and related relief] should be issued. SREA states that the initial briefs of the signatories to the Stipulation and Recommendation demonstrate SREA's position that the applications meet the requirements of KRS 278.020 [and KRS 278.216]. SREA further states that the initial briefs of the signatories demonstrate that the relief requested through the Stipulation and Recommendation is fair, just, and reasonable.

II. RESPONSE TO INITIAL BRIEF OF JOINT INTERVENORS KENTUCKIANS FOR THE COMMONWEALTH, KENTUCKY SOLAR ENERGY SOCIETY, METROPOLITAN HOUSING COALITION, AND MOUNTAIN ASSOCIATION ("JOINT INTERVENORS").

A. The Initial Brief of the Joint Intervenors Applies an Incorrect Burden of Proof.

[5] The Initial Brief of the Joint Intervenors and the Sierra Club's Post-Hearing Brief each fail to address *Conway*. Both briefs fail to identify any statute in "KRS Chapter 278 that would forbid the PSC" from allowing the relief requested through the Stipulation and Recommendation.

[6] *Conway*, 324 S.W.3d at 383.

SREA agrees with the observation that the Companies have the burden of proof. SREA disagrees with the standard the Joint Intervenors seek to impose upon the Companies. Specifically, Joint Intervenors argue their position through a "clear and satisfactory evidence" framework.[7] That is an incorrect burden of proof for KRS 278.020.

KRS 278.020 does not, itself, state a burden of proof for an application filed for a certificate of public convenience and necessity; however, precedent demonstrates that a preponderance of evidence standard is the correct standard.[8] It is wholly consistent with the body of law for Kentucky administrative law proceedings as confirmed by its use for administrative hearings pursuant to KRS Chapter 13B.[9] The Commission Order relied upon by Joint Intervenors for their position does not state that the Companies bear the burden of proof by clear and satisfactory evidence nor is such a premise fairly implied.[10]

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[7] Initial Brief of Joint Intervenors, pages 3 and 4.

[8] *See* Case No. 2005-00207, *The Application of East Kentucky Power Cooperative, Inc. for a Certificate of Public Convenience and Necessity to Construct a 161 KV Transmission Line in Barren, Warren, Butler, and Ohio Counties, Kentucky*, (Ky. P.S.C. Oct. 31. 2005), page 10 ("The Commission finds that East Kentucky has established by a preponderance of the evidence a need for the subject line.").

[9] *See* KRS 13B.090(7); *see also Commonwealth of Kentucky, Energy and Environment Cabinet v. Eric Shrader and Kentucky Claims Commission*, 658 S.W.3d 475, 478 (Ky. App. 2022) ("The ultimate burden of persuasion in all administrative hearings is met by a preponderance of evidence in the record, expect when a higher standard of proof is required by law.").

[10] Joint Intervenors' Initial Brief, page 4, footnote 7 citing Case No. 2022-00066, *Electronic Application of Kentucky Utilities Company for a Certificate of Public Convenience and Necessity for the Construction of Transmission Facilities in Hardin County, Kentucky* (Ky. P.S.C. July 28, 2022). The foregoing Order simply confirms a matter not at issue, specifically that the Companies have the burden of proof. The Order does not identify a "clear and satisfactory evidence" standard for that burden.

Comparatively, the "clear and satisfactory evidence" burden of proof standard is for use in judicial actions challenging an "determination, requirement, direction or order of the Commission."[11] It is not a higher standard of proof required by law upon an applicant in an administrative proceeding under KRS 278.020; instead, it is the higher standard of proof for use in judicial review. They are entirely separate matters and should not be confused.[12] The preponderance of evidence standard is the correct standard for purposes of this administrative case.[13]

B. Joint Applicants Improperly "Leverage" the Cost of a Facility That They Do Not Contest While Criticizing the Stipulation and Recommendation.

The question of potential load growth consequent to data centers is one, if not the, dominant force in the instant case. SREA agrees that there is risk associated with the forecasts of load growth. SREA further agrees that the risk requires protection. Thus, in response to the Joint Intervenors, it is first important to place the risk into proper context.

While the Joint Intervenors assail the request to construct approximately 1,290 MW of new gas generation at a cost of roughly $2.8 billion,[14] they neglect to fully address

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[11] KRS 278.430.

[12] *See, for example, South Central Bell Telephone Company v. Kentucky Public Service Commission et al.*, Civil Action No. 80171, slip op. at 1, (Franklin Circuit Court, June 11, 1971); 90 P.U.R.3d 143 (The scope of review in judicial review is confined to considering the record by reference to a "clear and satisfactory evidence" standard while the Commission's administrative review is by reference to a ponderance standard.).

[13] Based upon the record, it certainly can be argued that the Stipulation and Recommendation satisfies the ***higher*** burden of proof - that the evidence supporting the Stipulation ***is*** clear and satisfactory. Pointing out the legal error, therefore, is not in any sense a concession that the evidence is not sufficient under either standard. Instead, it is the identification and application of the correct standard.

[14] Joint Intervenors' Initial Brief, pages 2 and 5.

something very important. For this analysis in Response, the composition of the foregoing number is necessary. In terms of the 1,290 MW amount, it comprises two (2) 645 MW net summer rating natural gas combined cycle combustion turbines ("NGCC"). Per the Joint Intervenors: "[T]he Companies have fallen far short of establishing that there is a demand and need for ***both*** of the gas plant CPCNs that it has requested in this proceeding (emphasis added)."[15]

In terms of their challenge, Joint Intervenors have effectively conceded their opposition to (or at least do not affirmatively contest) one (1) of the NGCCs through only maintaining a challenge to the CPCN application for Mill Creek 6.[16] The Joint Intervenors do not contest the need for at least one (1) of the NGCCs. While this does not shift the burden of proof away from the Companies or compel any finding in their favor on any point,[17] it does serve to dissipate the force behind the Joint Intervenors' arguments.

The real contention offered by Joint Intervenors, therefore, is not upon 1,290 MW of gas generation but rather upon 645 MW of gas generation, its corresponding cost estimate, and the related load growth projections. The question, therefore, is how best to balance interests associated with the "second" NGCC. SREA submits that the interests are best balanced through the Stipulation while the Joint Intervenors believe it is best balanced through denying the NGCC and rejecting the Stipulation.[18]

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[15] Joint Intervenors' Initial Brief, page 6.

[16] Joint Intervenors' Initial Brief, page 79.

[17] *See, for comparison, Energy Regulatory Commission v. Kentucky Power*, 605 S.W.2d 46, 50 (Ky. App. 1980).

[18] Joint Intervenors' Initial Brief at page 79.

Hence, the Joint Intervenors rely upon the logic that there can never be stranded costs for a project that is not built; however, they do so to the exclusion of the protections offered through the Stipulation if the CPCN for the second NGCC is granted. The Joint Intervenors' position is also to the exclusion of the portions of the Stipulation that serve to facilitate the expansion of renewable energy resources.[19]

C. Joint Intervenors Fail to Properly Value Parts of The Stipulation.

The Joint Intervenors suggest that if the Stipulation contains something that could be accomplished outside of the context of a settlement, there is no value in their inclusion in the settlement.[20] Lawful provisions in the public interest, per the Joint Intervenors, "certainly could be accomplished outside of settlement."[21] It is not that simple as attested to by the Joint Intervenors' extensive discussion of their frustrations in engaging the Companies in matters pertaining to DSM.

The Joint Intervenors' proposed competitive procurement process works only in a scenario in which competitive procurement can be compelled in each instance in the manner suggested by Joint Intervenors,[22] or the Companies voluntarily decide to adopt best procurement practices. If only it were that simple. The Joint Intervenors chide the

[19] While the Joint Intervenors' Initial Brief heralds SREA's evidence concerning a gas-heavy portfolio (at pages 40 and 41), the Joint Intervenors' opposition to the information that the renewable sector needs to move away from that gas-heavy portfolio only serves to frustrate the cause of renewables.

[20] Joint Intervenors' Initial Brief at page 56.

[21] *Id.*

[22] Joint Intervenors' Initial Brief at page 60.

parties regarding the reporting commitments[23] under the premise that they should already be performed by the Companies.[24] Hence, by their logic, gaining something that is not being done has no value for the Stipulation because it should be done by the Companies in the absence of the Stipulation (even though the non-company parties to the Stipulation cannot compel its performance).

While it is true that the Commission has the power to require reporting, the legislature has yet to extend such a grant of power to the intervening parties, and the Commission has not yet deputized parties to exercise such power. The fact that the Commission can itself cause something does not render commitments gained by parties lacking the Commission's power meaningless. The Joint Intervenors' own arguments concerning DSM are more than adequate to demonstrate that the Joint Intervenors' dismissive comments concerning access to information and engagement with the Companies via the Stipulation are off-the-mark.

The Joint Intervenors' description of the renewable RFP terms[25] as "hollow" is likewise troubling.[26] If the Joint Intervenors seek a transition to renewable energy, then

[23] *Id*. at page 63 (semi-annual in-person construction, economic development, and load forecast updates to the Commission and other parties). The Stipulation also has requirements concerning SEEM which stand to provide remarkably valuable information that is not otherwise readily available on demand.

[24] *Id.*

[25] I.e., the Companies' commitment to issue an RFP for renewable energy and energy storage by mid-2026 and seek Commission approval for any cost-effective resources or those needed to serve customer requests by the end of 2028.

[26] Joint Intervenors' Initial Brief at pages 76-79.

the best option for doing so is through the RFP process and having the Companies go into the marketplace.

The same Joint Intervenors who criticize the lack of an inclusion of the BESS in the 2024 RFP,[27] now dismiss RFPs for renewable energy as meaningless. While SREA agrees that the Joint Intervenors make several valid points in terms of improvements that could be made to the RFP commitments that the Companies made in Article V, paragraph 5.1,[28] this does not demonstrate that the commitments are hollow simply because there are some details that are left to the Companies' discretion or may be "contingent on need materializing to justify additional generation."[29]

SREA submits that the RFP commitments are a step in the right direction, and the Joint Intervenors should not let the struggle for perfection stand in the way of appreciating something that is meritable, simply because there may still be room for improvements in terms of details or discretion that is left to the Companies. For instance, although SREA agrees that an RFP could potentially be "fruitless" given that the Stipulation "makes no commitment to procure a fixed amount of energy or capacity," [30] SREA also notes that the RFP does not arbitrarily limit the capacity or energy that the Companies may procure. Likewise, although the Stipulation allows the Companies the option to wait until December

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[27] Joint Intervenors' Initial Brief at page 43.

[28] Namely to commit to issue an RFP for renewable energy and energy storage by mid-2026 and seek Commission approval for any cost-effective resources or those needed to serve customer requests by the end of 2028.

[29] Joint Intervenors' Initial Brief at page 77.

[30] *Id*. at 76 ("The Stipulation makes no commitment to procure a fixed amount of energy or capacity, thus an RFP could be a fruitless exercise.")

31, 2028, to seek Commission approval for renewable energy resources following the 2026 RFP, it also does not preclude the Companies from seeking Commission approval sooner, including "to provide operational flexibility to support incoming data center load in the near term."[31] The Stipulation allows the Companies some discretion to act in good faith based on constantly changing circumstances, but it is not unreasonable for the Companies to want to retain some discretion in this regard.

If the Joint Intervenors are wrong concerning the potential for load growth (and the Companies are correct), the Companies will likely need significantly more resources (and sooner rather than later). Indeed, considering the corporate objectives of some of the potential data center customers, the Companies will need to get much better at renewable energy if they want to serve some of that load.

The Joint Intervenors note that the growth may not materialize.[32] Thus, per their logic, the fact that it may not materialize renders the provision "hollow." Further, the Joint Intervenors' advocacy is predicated upon their certainty of what will take place.[33] The Joint Intervenor's presumption that "if data center load does not come to fruition…renewable generation would be the first on the chopping block" is likewise pessimistic.[34] SREA notes that while data centers often have ambitious clean energy

[31] *Id*. at 78. ("By waiting until the end of 2028 to seek Commission approval, it is a certainty that any cost-effective renewable energy resources cannot be online in time to provide operational flexibility to support incoming data center load in the near term.")

[32] Joint Intervenors' Initial Brief at page 77.

[33] Joint Intervenors' Initial Brief at pages 77 - 78.

[34] *Id.* at 77.

goals, these are not the only customers that value access to clean and renewable energy, which is cost competitive and can provide benefits to all customers. SREA also notes that if the Companies adopt the recommendations set forth in the Commission Staff's Report on the Companies' 2024 Integrates Resource Plan in Case No. 2024-00326, this will allow renewable energy resources to compete on a more level playing field with thermal resources in the Companies' resource planning.[35] SREA likewise expects that the Companies and the Commission will prudently consider all reasonable resources for meeting the energy needs of all customers moving forward.

The vision of the role of renewables suggested by the Joint Intervenors is far from certain. SREA is equally as free to point out, suggest, and predict that the Companies' ability to continue to meet load growth in a timely and cost-effective manner only through additional NGCCs may be far from likely.

The reporting commitments, the renewable RFP commitment, the stakeholder feedback commitment, the contracting resources commitment, and the SEEM reporting commitments each have remarkable value to the effort of deploying renewable energy resources. If any of the foregoing was as simple to obtain as suggested by the Joint Intervenors, each would have been obtained a long time ago. In large part, the Joint Intervenors' arguments concerning these commitments are value assessments offered by a party that, for whatever reason or reasons, does not itself appear to have any use

[35] As noted in SREA's Comments on the Commission Staff Report, SREA particularly appreciates Staff's recommendation #4 ("LG&E/KU should assign non-zero capacity values to solar resources in winter") and #6 ("LG&E/KU should appropriately lower the capacity factor of its thermal units to align with historical data instead of assigning a 100 percent capacity contribution to each unit."). https://psc.ky.gov/pscecf/2024-00326/rstrobo%40strobobarkley.com/08222025120301/2025.08.22_SREA_Comments_on_KPSC_Staffs_Report_on_LGEKU_IRP_FINAL.pdf.

for the benefits that they provide. That position does not confirm the view that the commitments have no value (or that negotiating for them was unnecessary).

Finally, the Joint Intervenors do not propose reasonable recommendations for the Commission's consideration. Rather than offering some reasonable suggestions for incremental improvements to the Stipulation that the Companies and other Parties (including SREA) would potentially accept, or the Commission could potentially adopt, the Joint Intervenors simply request that the Commission reject the proposed Stipulation in its entirety.[36] Rejecting the Stipulation in its entirety would be unreasonably harsh and would result in increased risk of litigation. Likewise, if the Commission were to reject the Stipulation it in its entirety, SREA is concerned that (in the words of the Joint Intervenors) "renewable generation would be the first on the chopping block."[37] Thus, the Joint Intervenors' own recommendation would likely bring about the very concern that they raised regarding the possible impact of a hypothetical scenario that could occur during the implementation of the Stipulation's terms. Therefore, to the extent that the Commission finds any of the Joint Intervenors' concerns to be valid, SREA notes that the Commission could suggest that the Joint Intervenors propose and negotiate for reasonable modifications to the Stipulation rather than denial in its entirety.

III. RESPONSE TO INITIAL BRIEF OF THE SIERRA CLUB.

The Sierra Club Brief opposes "both gas plants" and "construction of two gas plants based on speculative data center load growth."[38] The Sierra Club also opposes the SCR

[36] *Id.* at 79.

[37] *Id.* at 77.

[38] Sierra Club Brief at pages 2 and 5.

for Ghent and extending the life of Mill Creek 2.[39] Finally, the Sierra Club opposes the Cane Run BESS (and implicitly all remaining elements of relief associated with the foregoing requests).[40] The Sierra Club, thus, protects against risk through simply not building anything to serve potential low growth consequent to data centers.[41]

The burden of proof is upon the Companies. The Sierra Club is correct in pointing out that "the mere acquiescence of a subset of parties does not by itself constitute the requisite showing necessary to support issuance of CPCNs."[42] Nonetheless, if the notion of "acquiescence" is reluctantly accepting something without protest, such a description is not properly assigned to the Stipulation and Recommendation in that it is the product of negotiations between adverse parties through which the non-company signatories sought and obtained protections against the speculative data center growth which is identified by the Sierra Club as the chief risk.

The Stipulation seeks to address and establish ratepayer protections as part of (alongside) the consideration of new generation resources. The risk that the Sierra Club does not acknowledge is that the intervening parties were faced with the prospect of seeking rate protection after the granting of CPCNs. Given the risk of such a scenario,

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[39] *Id.*

[40] *Id.*, The Sierra Club does offer the position, in the alternative, that if portions of the Stipulation are approved, the Commission should "deny the CPCN for at least one of the two proposed gas plants and the unnecessary Ghent 2 SCR, while approving the CPCN for the Cane Run BESS, which will at least provide multiple grid services beyond adding near-term capacity."

[41] The Sierra Club Brief at page 9.

[42] *Id.*

simultaneous consideration is quite reasonable. The Sierra Club effectively assumes away the risk of gaining rate protections after-the-fact. SREA does not necessarily disagree with the premise that tariff issues are better addressed in front of certificate applications. SREA notes, instead, that option was not readily available to the intervenors in the facts of this case (such that simultaneous consideration is certainly reasonable in terms of rate risk management).

The Stipulation's treatment of the BESS proposal is straight-forward and supported by the record. Compared to the Joint Intervenors' harsh recommendation of complete denial, SREA notes that the Sierra Club's alternative recommendation that "Commission should approve the Stipulation subject to modifications that are necessary to protect the public interest" is a more mitigated position.[43] However, SREA notes that the Sierra Club still did not offer reasonable incremental modifications that the Settling Parties and Commission could consider, thus leaving more work and litigation risk to the Commission by asking for the Commission's unilateral modifications. Finally, SREA reiterates that the Stipulation already includes terms to protect the public interest, and thus modifications are not necessary.

IV. CONCLUSION

Based on SREA's Initial Post Hearing Memorandum Brief and for the foregoing reasons, SREA respectfully urges the acceptance of the Stipulation and Recommendation.[44]

[43] *Id.* at 26.

[44] The absence of a SREA comment upon a position of another party raised in an initial brief should not be construed as a concession or admission of that point.

Respectfully submitted,

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NOTICE AND CERTIFICATION FOR FILING

Undersigned counsel provides notices that the electronic version of the paper has been submitted to the Commission by uploading it using the Commission's E-Filing System on this 17th day of September 2025. Pursuant to the Commission's July 22, 2021 Order in Case No. 2020-00085 (Electronic Emergency Docket Related to the Novel Coronavirus COVID-19), the paper, in paper medium, is not required to be filed.

/s/ David E. Spenard

NOTICE CONCERNING SERVICE

The Commission has not yet excused any party from electronic filing procedures for this case.

/s/ David E. Spenard