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September 11, 2009

VIA HAND DELIVERY

Jeff DeRouen
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, KY 40601

RE: ***Louisville Gas and Electric Company and Kentucky Utilities Company 2009 Application for Approval of Purchased Power Agreements and Recovery of Associated Costs***
Case No. 2009-00353

Dear Mr. DeRouen:

Enclosed please find and accept for filing the original and ten copies of Louisville Gas and Electric Company's and Kentucky Utilities Company's Response to Motion to Dismiss or Hold in Abeyance in the above-referenced matter. Please confirm your receipt of this filing by placing the stamp of your Office with the date received on the enclosed additional copies and return them to me in the enclosed self-addressed stamped envelope.

Should you have any questions, please do not hesitate to contact me.

Yours very truly,

Deborah T. Eversole

Deborah T. Eversole

DTE:ec
Enclosures
cc: Parties of Record

400001.133831/594592.1

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In re the Matter of:

LOUISVILLE GAS AND ELECTRIC COMPANY AND KENTUCKY UTILITIES COMPANY 2009 APPLICATION FOR APPROVAL OF PURCHASED POWER AGREEMENTS AND RECOVERY OF ASSOCIATED COSTS	))))))	**CASE NO. 2009-00353**

RESPONSE OF LOUISVILLE GAS AND ELECTRIC COMPANY AND KENTUCKY UTILITIES COMPANY TO MOTION TO DISMISS OR HOLD IN ABEYANCE

The Applicants in this case, Louisville Gas and Electric Company and Kentucky Utilities Company (collectively, the "Companies"), for their Response to the Motion to Dismiss or, in the Alternative, to Hold in Abeyance (the "Motion") filed by Kentucky Industrial Utility Customers, Inc. ("KIUC") and the Attorney General of Kentucky (collectively, the "Movants"), state as follows:

INTRODUCTION

The Motion is premature. The Commission has not determined whether the Application in this case will be deemed "filed" for purposes of processing pursuant to 807 KAR 5:001; indeed, the Companies have not yet attempted to file the Application, but have merely given notice of their intention to file it. The Motion is a procedural anomaly as well. Rather than filing a response to the Companies' previously filed Motion for a Declaratory Ruling That a Full Rate Case is Not Necessary or, in the Alternative, for Waiver of Certain Filing Requirements as set forth in 807 KAR 5:001, Section 10, the Movants have filed a new motion of their own, and now both await rulings by the Commission.

Of greater importance than the procedural oddities presented by the Motion, though, are the substantive ones. The issues raised in the Application can be properly addressed only by a full Commission investigation. The importance to the public of those issues demands nothing less. A hearing and a full briefing schedule, rather than summary dismissal, are the appropriate means to address the Companies' request for approval of their agreements to purchase energy from wind farms located in LaSalle County, Illinois (the "Wind Power Contracts") and to recover, by surcharge, the costs associated with purchasing that renewable power.

Finally, holding the Application in abeyance is neither a legal requirement nor a practical possibility. As the Companies have explained, the Wind Power Contracts will expire by their own terms, and this case will become moot, if Commission approval, including approval of the proposed rate mechanism to permit the Companies to recover the cost of those contracts, has not been obtained by March 23, 2010.

ARGUMENT

THE MOTION SHOULD BE DENIED

As the Companies have more fully explained in their previous filings in this docket, the Wind Power Contracts will, if approved, constitute a significant step forward in upgrading the Companies' renewable energy portfolio, reducing their carbon footprint, and positioning them to weather new legislation. In addition, the opportunity the Application offers to the Commonwealth is a valuable one that should be carefully reviewed on its merits, and the cost recovery mechanism is entirely reasonable. The Companies seek to recover through the proposed surcharge only the cost of the contract price of generated energy plus the invoice price of transmission service including adjustments. The proposed tracking mechanism does not include any adjustment for finance charges or profit.

Movants discuss the need to "protect the public" when rate mechanisms are at issue [Motion at 2]; but they do not appear at all interested in the environmental concerns that are spurring new legislation and that have resulted in the Companies' search for a reasonable plan to add renewable energy to their portfolio. Moreover, it simply is not true that the proposed tracking mechanism is automatically prohibited by the Kentucky Court of Appeals' decision in *Kentucky Public Service Commission and Duke Energy Kentucky Inc., f/k/a The Union Light, Heat and Power Company, v. Commonwealth of Kentucky, ex rel. Greg Stumbo*, Case No. 2007-CA-001635-MR (Ky. App., November 7, 2008)[1] [Motion at 1-2]. The Court of Appeals did not create in *Stumbo* a bright line prohibition against a surcharge if there is no "specific statutory authorization" for it [Motion at 2]; rather, the Court of Appeals ruled that "specific statutory authorization" is required for a surcharge that includes a rate of return for a "pending long-term capital improvement" such as Duke's gas main replacement program. *Id.*, Slip Op. at 12. Moreover, on the *very same page* of its Opinion, the Court of Appeals accepted, and contrasted, the fuel adjustment clause, a tracking mechanism "that permits the utility to pass the fluctuating fuel prices to its customers but from which it makes no additional profit." *Id.* Substitute the words "wind energy" for "fuel" in that sentence, and it describes the tracking mechanism the Companies propose here. There is no "specific" statutory authorization for it, but there is no "specific" statutory authority for the fuel adjustment clause either. Both surcharges include no rate of return and recover costs that are "fluctuating." *Id.*, Slip Op. at 19. Nothing in *Stumbo* prohibits the tracking mechanism requested in this case. In fact, the language in *Stumbo* overrode the sweeping statement of the Franklin Circuit Court that purported to prohibit all

[1] Discretionary Review is pending. *See* 2009-SC-000134; 2009-SC-000150.

"single-issue rate adjustments" – a broad, now discredited, statement which the Movants, curiously, continue to quote [Motion at 4].

Next, holding this case in abeyance until the Kentucky Supreme Court completes its discretionary review of *Stumbo*, as the Movants alternatively suggest, would simply waste time. The pending Kentucky Supreme Court review of *Stumbo* is highly unlikely to restore the blanket ban on "single-issue rate adjustments" proclaimed in the Franklin Circuit Court's short-lived opinion. In order to restore that ban, the Kentucky Supreme Court would, among other things, have to overrule its own approval of fuel adjustment clauses in *Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Co.*, 983 S.W.2d 493 (Ky. 1998). The sheer common sense approach of providing for adjustable surcharges for volatile, fluctuating costs (and of permitting unique rate mechanisms in unique situations, *see National-Southwire Aluminum Co. v. Big Rivers Electric Corp.*, 785 S.W.2d 503 (Ky. App. 1990)), will almost certainly survive the Kentucky Supreme Court's review of *Stumbo;* and even if it did not, holding this case in abeyance is unwarranted. The Commission should not be, and has not been, in the practice of avoiding decisions in utility cases based on a mere possibility that the law will change.

Under the Court of Appeals' current decision in *Stumbo,* consideration of the requested rate mechanism is lawful, and the Commission has a duty to go forward. The Commission previously refused to abdicate its responsibility to process cases during the pendency of *Stumbo,* despite the Attorney General's insistence that it was not, under the Franklin Circuit Court's opinion, permitted to consider *any* "non-statutory surcharges." *See Purchased Gas Cost Adjustment Filing of Duke Energy Kentucky,* PSC Case No. 2007-00362 (Order of Aug. 28, 2007), at 3. The Commission concluded, however, that it "must continue to receive, consider,

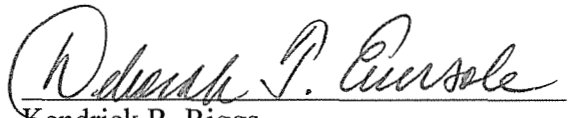
and adjudicate cases involving rate adjustments outside of a general rate proceeding." *Id.* The Commission should consider the Application here as well.

The Application cannot be summarily dismissed as Movants wish; in fact, the Application cannot be dismissed at all because it is not yet on file with the Commission. Nor should it be held in abeyance. Indeed, because the Wind Energy Contracts will expire on their own in March 2010 absent Commission approval, holding the case in abeyance would be tantamount to dismissing it. Instead, the issues raised in the case deserve the Commission's careful consideration. Some of the issues are novel, to be sure; but the law is flexible enough to accommodate them, and only a full review of the policies implicated will do justice to those policies and to the citizens of the Commonwealth.

WHEREFORE, Louisville Gas and Electric Company and Kentucky Utilities Company respectfully request that the Commission deny the Motion of the Attorney General and KIUC, and respectfully renew their request that the Commission declare that the application for approval of a cost recovery tracking mechanism for the Wind Power Contracts need not be filed as part of a general rate case pursuant to 807 KAR 5:001, Section 10; or, in the alternative, that the Commission waive the filing requirements of that regulation pursuant to 807 KAR 5:001, Section 10(11) and Section 14.

Dated: September 11, 2009

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Response of Louisville Gas and Electric Company and Kentucky Utilities Company to Motion to Dismiss or Hold in Abeyance was served on the following persons on the 11th day of September, 2009, United States mail, postage prepaid:

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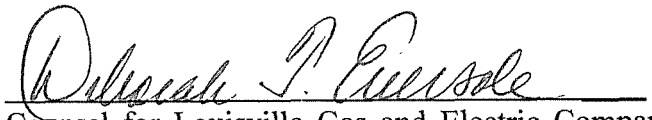

Counsel for Louisville Gas and Electric Company
and Kentucky Utilities Company

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