COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

RESPONSE OF JOINT MOVANTS ATTORNEY GENERAL OF COMMONWEALTH OF KENTUCKY AND KIUC TO E.ON COMPANIES' MOTION TO RECONSIDER

Come now the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention, and Kentucky Industrial Utility Customers, Inc. [hereinafter jointly referred to as "Joint Respondents"], and state as follows for their Joint Response to the EON Companies' Motion to Reconsider the Commission's Order dated October 21, 2009 in the above-styled matter.

A. Background

On September 4, 2009 Joint Respondents herein tendered their Joint Motion to Dismiss or Alternative Motion to Hold in Abeyance [hereinafter: "Motion to Dismiss"] with regard to the original filing of Louisville Gas & Electric Co. and Kentucky Utilities Co. [hereinafter jointly referred to as the "Companies"]. On October 1, 2009 the Joint Respondents filed their Reply to the Companies' Response to the Joint Movants' Motion to Dismiss. On October 21, the Commission issued its Order denying the Joint Movants' Motion to Dismiss.

On November 6, the Companies filed their motion to reconsider. Joint Respondents have in a separate pleading filed their own Motion to Reconsider the Order dated October 21, 2009 in the above-styled matter.

B. Response to E.ON Companies' Motion to Reconsider

The Companies contend that the Kentucky Court of Appeals in its ruling in *Kentucky Public Service Commission and Duke Energy Kentucky, Inc., f/k/a The Union Light, Heat & Power Company v. Commonwealth Of Kentucky, Ex Rel. Greg Stumbo,* 2007-CA-001635-MR, "held" that the PSC has authority to approve separate rate mechanisms for costs that are fluctuating and which contain no profit component, or which are not amenable to review via a general rate case, and that the PSC may approve a non-traditional rate mechanism due to unique facts. Yet no such holding was ever made in that case.

Rather, the Court of Appeals in that case held, as a matter of law, that the PSC cannot authorize the imposition of a surcharge without specific statutory authorization.[1] The Court of Appeals ruled that "the PSC cannot authorize the imposition of a surcharge...without specific statutory authorization." Slip Op. at p.13. In his Opinion and Order that led to the Court of Appeals ruling, Judge Sheppard was more forceful:"...[T]here is no inherent authority to perform interim single-issue rate adjustments because such a mechanism would undermine the statutory scheme...[F]inding the PSC to have authority to review

[1] Court of Appeals Opinion at p. 12, 18. The exact and specific holding of that case is discussed on pp. 18-19.

any single expenditure outside the context of a rate case would create a means to circumvent the general rate case mechanism created by KRS 278.190...Outside a general rate case there is no context in which to consider any expense." Franklin Circuit Court Slip Op. at pp.6-7

The Companies also allege that the PSC in its Order of October 21, 2009 misapplied the holding of *Stumbo, supra.* In that Order, the PSC concluded that based on its interpretation of the holding in *Stumbo, supra,* such surcharges are valid only if approved during the course of a general rate case. [2]

The Companies state that the PSC has implied authority to approve surcharges in all situations, not just in the context of a base rate case. The Companies fail to cite any specific authority for this sweeping proposition which would radically alter the precedents that have guided this Commission for decades. If the position of the Companies is upheld, then the number and type of surcharges that could be authorized would be unlimited.

The Companies further state that the nature of the costs they will incur under the contemplated contracts are volatile, thus justifying the imposition of a surcharge. But the volatility is self imposed. The Companies are not required to buy wind power. Nor are they required to buy wind power on an as delivered basis. The Companies could have negotiated a contract where they paid a fixed capacity cost for the wind turbines and eliminated most of the cost volatility. There would still be transmission cost volatility for congestion, but that is

[2] Order dated October 21, 2009, pp. 6-7.

primarily because they choose to contract with an entity that is geographically distant. Again, this volatility is self imposed. In contrast, the volatility associated with fuel costs recovered in the FAC is inherent. Fuel cost volatility cannot be avoided.

Moreover, the Companies neglected to state in their pleadings that they will experience an increase in off-system sales profits due to the additional 109.5 Mw and 295,000 mwh of power they will obtain from the wind farms. Therefore, contrary to the assertions of the Companies, the proposed contracts do include an implicit profit component.

Additionally, the Companies take exception to the PSC determination that a utility requesting a surcharge must demonstrate that existing rates are insufficient to recover their reasonable costs, including those proposed to be recovered by surcharge.[3] The Joint Respondents take strong exception. If the Companies would be earning a reasonable rate of return after the inclusion of the wind power costs and the additional profits from off-system sales that the wind power would cause, then it would be against the public interest to raise rates on consumers by surcharge or otherwise. This is precisely why the Legislature established the base rate making process. Before an annual rate increase on the average residential consumer of between $8.52 and $11.04 can be approved, all of the Companies' revenues and expenses must be examined.

[3] Order dated Oct. 21, 2009, pp. 6-7.

Finally, in asking the Commission to authorize imposition of a surcharge outside of a general rate case, the Companies would have the PSC engage in single-issue ratemaking. However, the PSC has a well-established precedent against single issue ratemaking:

> Simply stated, the pending applications appear to be requests for the Commission to engage in single-issue rate-making by focusing exclusively on one or more closely related items of revenue and expense, to the exclusion of all other items of revenue and expense. **Although the Commission has, in limited instances, previously engaged in single-issue rate-making, those instances were either specifically authorized by statute or the result of a unanimous agreement by all parties with approval by the Commission.** While the General Assembly has authorized single-issue rate-making for recovery of the Commission's annual assessment and the costs of its consultants (KRS 278.130), environmental costs (KRS 278.183), and demand side management costs (KRS 278.285), there is no provision of law authorizing a rate case focused exclusively on MISO-related revenues and expenses. . . . [4] (emphasis added).

In the instant case, none of the limited exceptions to the prohibition against single issue ratemaking apply. The Companies would have the Commission radically alter the process by which consumers are charged for electric power service in order to "fix" a problem that is self-imposed.

The Joint Respondents argue that the Companies have failed to establish a legitimate need for such an extra-statutory cost tracker, and as such they believe the portion of the Commission's Order Dated October 21, 2009 denying the requested surcharge should be upheld. Further, all other allegations made by the

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[4] *In Re Louisville Gas & Elec. Co.*, Ky. PSC Case No. 2004-00459, and *In Re Kentucky Utilities*, Case No. 2004-00460 (2005 WL 1163147) Joint Order of April 15, 2005 at p. 3.

Companies in their Motion to reconsider should be denied as having no foundation in law.

Respectfully submitted,

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Certificate of Service and Filing

Counsel certifies that an original and ten photocopies of the foregoing were served and filed by hand delivery to Jeff Derouen, Executive Director, Public Service Commission, 211 Sower Boulevard, Frankfort, Kentucky 40601; counsel further states that true and accurate copies of the foregoing were mailed via First Class U.S. Mail, postage pre-paid, to:

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this 18th day of November, 2009.

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