COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF KENTUCKY POWER COMPANY FOR A GENERAL ADJUSTMENT OF ELECTRIC RATES	)))	Case No. 2009-00459

ATTORNEY GENERAL'S SUR-REPLY REGARDING HIS MOTION FOR AN EVIDENTIARY HEARING

PUBLIC REDACTED VERSION

Comes now the intervenor, the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention, and states as follows for his sur-reply regarding his previously-tendered motion for an evidentiary hearing for the limited purpose of cross-examining Kentucky Power Company's witness Ms. Renee V. Hawkins. The Attorney General reiterates and incorporates by reference his prior pleadings in this matter, as if set forth fully herein.

Ms. Hawkins, an employee of a corporation affiliated with Kentucky Power ["KP"] previously filed an affidavit on behalf of her employer in which she expressed her unsupported opinion that disclosure of certain information for which Kentucky Power ["KP"] seeks confidential treatment would give an advantage to "competitors" of KP. It is well-established that KP, a monopoly utility, has a certified service territory and in fact has *no competitors*.

Since Witness Hawkins has proffered testimony, the Attorney General is entitled to cross-examine her as a matter of simple procedural due process. The subject affidavit

signed by Witness Hawkins cites her opinion that disclosure of the information which the Attorney General seeks to be kept in the public domain would cause harm. Witness Hawkins fails to cite any facts to support her allegation. The Attorney General, on behalf of KP's ratepayers, should be allowed to inquire of Witness Hawkins what – if any – factual basis she can cite to support her mere opinion. Such facts are indispensable to reaching a decision on this issue. Any decision reached solely upon Witness Hawkins' opinion would otherwise be based solely on conjecture and speculation.[1]

During an informal conference held on March 29, 2010 to discuss this matter, counsel for KP contended that a "full-blown" evidentiary hearing should be denied because it would be too burdensome. However, the Attorney General's motion for an evidentiary hearing was limited in scope to merely cross-examining KP's sole affiant. The ability to test another party's evidence has always been recognized as a procedural due process right. Further, 807 KAR 5:001 § 7 places the burden of proof on the party seeking confidential treatment. In promulgating this regulation, the Commission did not establish a proceeding susceptible of being interpreted as being solely *ex parte*.

Clearly, parties have the right to respond to and contest such petitions as recognized in the regulation. Indeed, the Attorney General has already shown that in prior cases, this Commission has recognized that Due Process concerns dictated that evidentiary hearings are, at times, necessary to resolve disputes related to discovery

[1] *See, e.g., Mondie v. Com.*, 158 S.W.3d 203, 213 (Ky. 2005)(". . . expert opinion based on speculation rather than reasoned analysis and judgment is of no assistance . . .").

issues and accordingly, amended the procedural schedules to include such hearings.[2] "Procedural due process is not a static concept, but calls for such procedural protections as the particular situation may demand." *Kentucky Central Life Ins. Co. v. Stephens*, 879 S.W.2d 583, 590 (Ky. 1995). [3]

Moreover, the Attorney General would be ill-advised to fail cross-examine KP's witness at this stage of the proceeding in light of the Kentucky Supreme Court's ruling in *Southeastern United Medigroup, Inc. v. Hughes*, 952 S.W.2d 195, 200 (Ky. 1997). In that case, the Supreme Court noted that a hearing officer acted appropriately in affording confidential treatment when the Attorney General failed to present a witness who could be subjected to cross-examination. In the case at bar, KP's failure to subject its sole affiant to limited cross-examination, whose affidavit is limited to mere opinion and conjecture, shows that it has failed to meet its burden of proving that the information at issue should be given confidential treatment.

During the March 29th informal conference, counsel for KP submitted *Abul-Ela v. Kentucky Bd. of Medical Licensure*, 217 S.W.3d 246 (Ky. App. 2006) which he contends supports KP's position that the issues can be addressed without an evidentiary hearing. *Abul-Ela* notes that the Kentucky Supreme Court has adopted[4] the landmark holding in *Matthews v. Eldridge*, 424 U.S. 319, 333-35 (1976), which developed a three-part test to determine the level of process that is due in any given administrative proceeding. This

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[2] PSC Orders in Case No. 2002-00018, dated April 1, 2002 and April 3, 2002.
[3] *Citing Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

[4] The Commonwealth's highest court adopted the holding of *Matthews, supra*, in *Div. of Driver Licensing v. Bergmann*, 740 S.W.2d 948, 951 (Ky. 1987).

three-part test requires analyzing: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[5]

In the case at bar, all three prongs of this test are readily ascertainable and dispositive in favor of the relief the Attorney General seeks. First, KP has already agreed to disclose information contained in some of the documents it produced in response to the Attorney General's discovery requests which indicate KP will be [redacted]. Those documents were [redacted]. Yet the company seeks confidentiality for virtually the same information found in written presentations made to a rating agency. Since the information has already been disclosed, KP simply has no private interest that would preclude the additional process the Attorney General seeks, that of a limited hearing to cross-examine Ms. Hawkins. Moreover, KP has no private interest at stake that should preclude full disclosure of the information at issue. Finally, KP has yet to cite to any actual legal provisions governing its parent corporation, AEP, which could be violated should the information at issue be further disclosed, or to any provisions that would

[5] *Abul-Ela, supra* at 251 (*citing Matthews*, 96 S.Ct. at 903).

establish liability on the part of a subsidiary corporation should that subsidiary be compelled to disclose information under state law.

The second prong of the *Matthews* test is just as easily resolved in favor of the relief the Attorney General seeks. Since disclosure of the information at issue contained in other documents has already been allowed by KP itself, the company cannot now allege that the process the Attorney General seeks will somehow deprive it of its interest. No other process exists whereby the Attorney General, the other parties and this Commission can learn any possible factual basis for KP's position.

The final prong of the *Matthews* analysis is also easily resolved, because a limited, brief evidentiary hearing for the sole purpose of cross-examining the only affiant KP offered in support of its position would clearly be quite useful to this Commission, and would impose only a very slight burden, if any at all.

During the March 29, 2010 informal conference, counsel for KP stated that if the information for which KP seeks confidential treatment should be disclosed, it could pose difficulties for KP's parent corporation, American Electric Power ["AEP"], with federal securities regulators. He did not identify a specific statute or order prohibiting the disclosure during the course of state regulatory proceeding. Staff counsel then inquired whether it would be helpful for the parties to brief whether the Commission is bound by the federal securities statutes and regulations to which counsel for KP made only indirect reference.[6]

[6] In the March 29th informal conference, Staff Counsel also indicated that the ruling in *Kentucky Ind. Utility Customers v Kentucky Utilities*, 983 SW2d 493 (Ky. 1998), could have bearing in this matter. The

KP bears the burden of proof in regard to the issue of whether the information at issue is entitled to confidential treatment. KP has failed to cite this Commission to any rulings, statutes or regulations indicating that disclosure of information in compliance with applicable state laws could place a parent corporation in jeopardy of violating any matters relevant or pertaining to federal securities law, or that such a concern should even be contemplated by this Commission. Moreover, the company filing the above-styled petition in this matter – Kentucky Power Co. – is not the entity subject to any potential jurisdiction or review by federal securities regulators.

KP likewise bears the burden of establishing that this Commission, which is governed by the law of the Commonwealth of Kentucky, is somehow subject to certain federal securities laws and / or regulations, which remain unidentified, and which according to counsel for KP require this Commission to keep the information at issue confidential. Such would truly constitute a case of first impression in this Commonwealth, and doubtlessly would of necessity raise significant Constitutional issues.

KP cannot meet these burdens. The Attorney General should be allowed to cross-examine the witness in order to establish upon what, if any, facts she bases her opinion. The unsupported opinion of a single affiant that disclosure could pose harm to the parent corporate entity of the jurisdictional corporation that appears before this Commission has no factual foundation.

Attorney General believes this case is irrelevant because it deals with substantive due process rights, and has no bearing on the procedural due process issues at the core of the instant matter.

WHEREFORE, the Attorney General moves that: (1) he be allowed to cross-examine the above-identified affiant; and (2) that the information for which KP seeks confidential treatment be fully disclosed in the public record.

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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