

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE  
COMMISSION

In the Matter of: )  
The Application for Approval of Renewable )  
Energy Purchase Agreement for Wind Energy ) Case No. 2009-00545  
Resources Between Kentucky Power Company )  
and FPL Illinois Wind, LLC. )

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**KENTUCKY POWER COMPANY’S MOTION TO STRIKE,  
OR IN THE ALTERNATIVE, MOTION TO FOR LEAVE TO FILE A  
RESPONSE TO EXTRA-RECORD INFORMATION INCLUDED IN THE JOINT  
BRIEF OF THE ATTORNEY GENERAL OF KENTUCKY AND KENTUCKY  
INDUSTRIAL CUSTOMERS, INC.**

Kentucky Power Company moves the Kentucky Public Service Commission pursuant to 807 KAR 5:001, Section 5(4) and KRS 278.310 to strike the extra-record attachment (Exhibit A) to the Kentucky Industrial Utility Customers and Attorney General’s Joint Post-Hearing Brief, along with those portions of page 8 of the brief utilizing the extra-record information.<sup>1</sup>

In the alternative, Kentucky Power respectfully moves the Commission to accept for filing the brief Response tendered with this motion.

In support of its motion and alternative motion Kentucky Power states:

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<sup>1</sup> The improper argument using the extra-record evidence is set forth in the two complete paragraphs that appear on page 8 of the Intervenor’s brief.

## Argument

### 1. Motion to Strike.

#### **BACKGROUND.**

On December 29, 2009, Kentucky Power Company (“Kentucky Power”) filed a Verified Application seeking approval of the assumption of a renewable energy purchase agreement (“Lee-Dekalb REPA”) under KRS 278.300. The Kentucky Industrial Utility Customers Inc. (“KIUC”) and the Attorney General, Commonwealth of Kentucky, (collectively “Intervenors”) intervened in this proceeding. KIUC prefiled expert testimony in the case. The Commission held a hearing on May 25, 2010. The Intervenors participated at the hearing by questioning Kentucky Power’s witnesses. KIUC also entered a number of exhibits into the record during cross-examination of Kentucky Power’s witnesses. Post-Hearing briefs were filed on June 8, 2010. In violation of 807 KAR 5:001, Section 5(4) KIUC, and the Attorney general included information in their Joint Brief not part of the Commission record.

#### **EXTRA-RECORD INFORMATION.**

The Intervenors attached as Exhibit A to their joint brief data from the U.S. Department of Energy’s National Renewable Energy Laboratory (NREL). The unadmitted exhibit includes an article entitled “Illinois Wind Map and Resource Potential” and links embedded within the internet article that connect the source to *Estimates of Windy Land Area and Wind Energy Potential* by State for areas at different capacity factors from 30% to 40% or greater. A review of the record and the Intervenor’s testimony shows that these articles are not part of the evidentiary record and appear for the first time in the Intervenors Brief.

Based on Exhibit A the Intervenor's argue that 0.62 percent of the land in the state of Illinois is suitable to produce a 40 percent or greater capacity factor. Intervenor's conclude that to reach the 39.3 percent capacity factor in the Lee-Dekalb REPA "it would have to be in the very best location in Illinois" and that "[b]ased on its actual performance to date, that does not appear to be the case."<sup>2</sup>

**PROHIBITION AGAINST EXTRA-RECORD INFORMATION.**

Any attempt to add evidence to the record after the close of testimony is prohibited by 807 KAR 5:001 Section 5(4). Specifically, the Commission's rule states,

(4) Except as may be expressly permitted in particular instances, the commission will not receive in evidence or consider as a part of the record any book, paper or other document for consideration in connection with the proceeding after the close of the testimony.

Exhibit A to the Intervenor's' joint brief is in stark contravention of the Commission's rule. The Intervenor's nowhere sought leave to supplement the record, nor was Kentucky Power ever afforded the opportunity to address the propriety of their efforts to do so. Nor may the Intervenor's argue they were unable to obtain the information in time for the May 25, 2010 hearing in this matter. The tables included in Exhibit A are dated February 8, 2010, almost four months prior to the hearing.

KRS 278.310 provides the Intervenor's no relief. Although exempting Commission proceedings from formal rules of evidence, it requires that the Commission conduct its hearings in accordance with "rules adopted by the commission:"

All hearings and investigations before the commission or any commissioner shall be governed by rules adopted by the commission, and in the conduct thereof neither the

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<sup>2</sup> Joint Brief of The Attorney General of Kentucky and Kentucky Industrial Customers, Inc. at 8.

commission nor the commissioner shall be bound by the technical rules of legal evidence.

One such rule is 807 KRS 5:001 Section 5(4), which prohibits exactly what the Intervenors attempt here.

Underlying 807 KRS 5:001 Section 5(4) is the fundamental principle of fairness and protection of the Commission's record. A system that allows a party to hold back information until the post-hearing brief and then rely on unsworn third party information as evidence undermines the very purpose of an evidentiary hearing. The opposing party is not only denied notice, but has no opportunity to cross-examine a witness regarding the documents or to rebut the evidence and arguments with evidence of its own. The give and take of an evidentiary hearing also protects the Commission by ensuring it has the full context of anything it may rely upon to base its decision. Finally, it provides opposing parties with some modicum of due process.<sup>3</sup>

Accordingly, Kentucky Power respectfully requests that Exhibit A to the Intervenors' Post-Hearing Brief and the two complete paragraphs of page 8 the brief utilizing information from Exhibit A be stricken from the record.

2. Alternative Motion To File Brief In Response To Extra-Record Information And Arguments.

If the Commission denies Kentucky Power's Motion to Strike, the Company respectfully requests that it be granted leave to file the attached brief response. At a minimum, due process requires that Kentucky Power be afforded a "meaningful

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<sup>3</sup> *Hougham v. Lexington-Fayette County Government*, 29 S.W.3d 370, 373 (Ky. App. 1999) (appellant afforded due process where appellant was provided notice, a hearing, sufficient opportunity to present their case, cross-examine the opponents, and opportunity to rebut the opponents' arguments and findings of fact.")

opportunity to be heard.”<sup>4</sup> Permitting the Intervenors to file and rely upon information outside the record, without giving Kentucky Power an opportunity to rebut the arguments premised upon the extra-record information denies the Company any opportunity to be heard, much less the meaningful hearing guaranteed by the Constitution. Indeed, the Court of Appeals in *Kentucky Water Service* held that the failure to afford a utility the opportunity to rebut evidence introduced for the first time after a hearing was a denial of due process.<sup>5</sup>

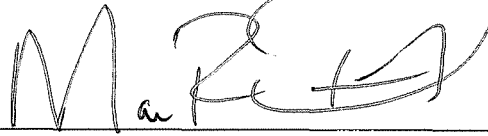
Accordingly, Kentucky Power respectfully requests that in the event the Commission denies its motion to strike that it be granted leave to file the attached tendered response to extra-record Exhibit A and argument.

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<sup>4</sup> *Utility Regulatory Commission v. Kentucky Water Service Company*, 642 S.W.2d 591, 593 (Ky. App. 1983).

<sup>5</sup> *Id.*

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mark R. Overstreet", written over a horizontal line.

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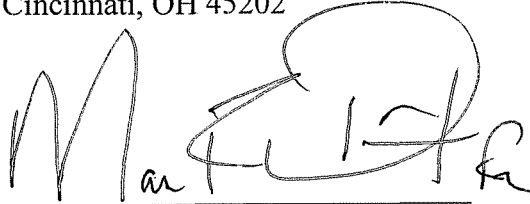
COUNSEL FOR KENTUCKY POWER  
COMPANY

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served upon the following by first class mail, postage prepaid and e-mail transmission on the 9<sup>th</sup> day of June, 2010:

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A handwritten signature in black ink, appearing to read "Bruce F. Clarke", written over a horizontal line.

Bruce F. Clarke