

Goss • Samford PLLC



Attorneys at Law

David S. Samford
david@gosssamfordlaw.com

November 27, 2013

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**PUBLIC SERVICE
COMMISSION**

VIA HAND DELIVERY

Mr. Jeff Derouen
Executive Director
Kentucky Public Service Commission
P.O. Box 615
Frankfort, Kentucky 40602

Re: *In the Matter of the Application of East Kentucky Power Cooperative, Inc. for a Certificate of Public Convenience and Necessity for Alteration of Certain Equipment at the Cooper Station and Approval of a Compliance Plan Amendment for Environmental Surcharge Cost Recovery, Case No. 2013-00259*

Dear Mr. Derouen:

Enclosed for filing, please find one original and ten (10) copies of East Kentucky Power Cooperative, Inc.'s Response to Motion to Compel Responses to Intervenors' Supplemental Requests for Information and for a Continuance of Case Schedule. Please return a file-stamped copy of this filing to me.

If you have any questions or require additional information, please contact me.

Very truly yours,

David S. Samford

Enclosures

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COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

**PUBLIC SERVICE
COMMISSION**

IN THE MATTER OF:

**AN APPLICATION OF EAST KENTUCKY)
POWER COOPERATIVE, INC. FOR A)
CERTIFICATE OF PUBLIC CONVENIENCE)
AND NECESSITY FOR ALTERATION OF)
CERTAIN EQUIPMENT AT THE COOPER)
STATION AND APPROVAL OF A COMPLIANCE)
PLAN AMENDMENT FOR ENVIRONMENTAL)
SURCHARGE COST RECOVERY)**

CASE NO. 2013-00259

**EAST KENTUCKY POWER COOPERATIVE, INC.’S RESPONSE TO MOTION TO
COMPEL RESPONSES TO INTERVENORS’ SUPPLEMENTAL REQUESTS FOR
INFORMATION AND FOR A CONTINUANCE OF CASE SCHEDULE**

Comes now East Kentucky Power Cooperative, Inc. (“EKPC”), by and through counsel, pursuant to 807 KAR 5:001, Section 5 and other applicable law, and for its Response in opposition to the Motion to Compel filed by Sonia McElroy and the Sierra Club (collectively, the “Sierra Club”), respectfully states as follows:

I. BACKGROUND

On August 21, 2013, EKPC filed its Application requesting the Commission to issue a Certificate of Public Convenience and Necessity (“CPCN”), pursuant to KRS 278.020(1), for an environmental compliance project that involves re-routing the existing duct work for EKPC’s Cooper Station Unit #1 (“Cooper #1”) such that its emissions are able to flow to the Cooper Station Unit #2 Air Quality Control System (“Cooper #2 AQCS”) (the “Project”). For a capital investment of approximately \$15 million, EKPC determined that it would be able to retain 116 MW of existing capacity, thereby reducing its need to procure new capacity from other sources. The Application also requested the Commission to authorize EKPC to amend its Environmental

Compliance Plan, pursuant to KRS 278.183, so that EKPC could recover the costs associated with the Project through its existing environmental surcharge mechanism.

The Sierra Club filed its motion for leave to intervene on September 26, a full month after EKPC filed its Application. The Commission granted the Sierra Club's motion on October 18, 2013. The Sierra Club's motion for leave to intervene was not granted until the day that responses to the first round of data requests were due and at that time the Sierra Club had not yet entered into any confidentiality agreement respecting the highly confidential, commercially sensitive and propriety nature of the information being tendered by EKPC. Accordingly, a brief seven day extension of time was required to secure the necessary confidentiality agreement from the Sierra Club and to respond to the Sierra Club's initial data requests. The Sierra Club objected to several of EKPC's responses in an informal email to counsel dated October 31, 2013. EKPC quickly tendered supplemental responses to the Sierra Club on November 4, 2013. The Sierra Club then tendered supplemental data requests on November 4, 2013, which EKPC responded to on November 15, 2013. In all, the Sierra Club has propounded nearly five hundred questions to EKPC about the Project and other matters taking into account all of the numerous subparts of each question. Despite this, the Sierra Club remains unsatisfied with EKPC's responses to the original Sierra Club data request, EKPC's supplemental response to that data request and EKPC's response to the Sierra Club's supplemental data request and now seeks to unnecessarily extend and delay this case.

II. ARGUMENT

The Sierra Club's Motion to Compel essentially makes two arguments. First, the Sierra Club alleges that EKPC should have provided certain information which EKPC objected to on the basis that it is irrelevant to this proceeding. Second, the Sierra Club alleges that certain of

EKPC's responses are insufficient. The Sierra Club's arguments are demonstrably false and should be rejected. Moreover, the Sierra Club's motion to extend the procedural schedule is without merit and should be denied.

A. The Sierra Club's Motion to Compel Relates to Information Which is Wholly Irrelevant to the Application

The Sierra Club alleges that EKPC's objections that certain of the Supplemental Requests were either irrelevant or overly broad are unfounded. However, a review of each of these Supplemental Requests reveals that the Sierra Club's requests relate to information which is not used in the evaluation of the net present value ("NPV") of the Project, highly speculative, over-reaching, or some combination of all three. The Sierra Club's Motion to Compel fails to demonstrate how the requested information is relevant to the issues of this case and, as the Commission has said, a "bare assertion of relevance, without any further explanation, is not sufficient."¹ Accordingly, the Motion to Compel should be denied.

1. Historical Unit-By-Unit Data

In Supplemental Request 2.5, the Sierra Club requested a "breakdown of EKPC's historical annual costs from 2003 through 2013 associated with each plant." Similarly, in Supplemental Request 2.6, the Sierra Club requested "EKPC's projected annual cost for each year of the NPV analysis associated with each plant." In support of both requests, the Sierra Club argues that the information is necessary to assess whether EKPC will be able to comply with the Mercury Air Toxics Standard ("MATS") and whether the assumptions underlying EKPC's economic model are reasonable. The Sierra Club is not satisfied that the fleet-wide data provided by EKPC will be sufficient to perform its own analysis of EKPC's Application.

¹ *In the Matter of Application of Kentucky-American Water Company for an Adjustment of Rates Supported by a Fully Forecasted Test Year*, Order, Case No. 2010-00036 (Ky. P.S.C., Aug. 9, 2010).

Moreover, the Sierra Club's argument misses the fundamental point that historical data is not the standard by which the Application for a CPCN will be evaluated. The Project must be evaluated on a forward-looking basis that is based upon the bids received by EKPC through the Request for Proposal ("RFP") process. It is the marketplace that will determine whether the Project is economically feasible and ultimately approved by the Commission as a reasonable option for complying with MATS. In other words, the costs of complying with future environmental regulations will, by definition, not be reflected in historic unit cost data. This information is not subject to disclosure:

The Commission also finds that the information used to develop financial projections that are not limited to environmental compliance, such as LG&E's regulated rate base growth and future overall capital expenditures, is outside the scope of issues to be considered in an Environmental Compliance Plan and rate surcharge under KRS 278.183. In addition, such information is also outside the scope of issues to be considered in determining the need for, and the absence of wasteful duplication from, constructing new environmental facilities under KRS 278.020(1). Therefore, such information is not relevant to any issues in this case, does not appear to be reasonably calculated to lead to the discovery of relevant information, and is not subject to discovery in this case.²

The Sierra Club acknowledges that information for the entire EKPC fleet has been provided, but does not explain how a failure to break that information down on a unit-by-unit basis in any way hinders their ability to evaluate the model results for each scenario. In addition, the Sierra Club acknowledges that, for the base case, the costs for Cooper Unit 1 have been omitted. A subtraction of the base case information from the entire EKPC fleet information previously provided yields the Cooper Unit 1 information.

² *In the Matter of Application of Louisville Gas and Electric Company for Certificates of Public Convenience and Necessity and Approval of its 2011 Compliance Plan for Recovery by Environmental Surcharge*, Order, Case No. 2011-00162 (Ky. P.S.C., Sept. 1, 2011).

The Sierra Club's broad claim that it cannot meaningfully evaluate the reasonableness of EKPC's efforts to comply with new environmental regulations without more data is a never-ending argument. EKPC has provided historic fleet cost data even though such data is only tangentially relevant to EKPC's Application. But, that is apparently not enough. If EKPC provides unit-by-unit historical cost data, the Sierra Club will likely then claim the need to see the detail underlying each element of each unit's historical cost. If that were to be provided, then it is easy to imagine how the Sierra Club would request the assumptions and data underlying each detail of each element of each unit's historical cost. If that were not enough, the "more data" argument would suggest that EKPC should provide the methods for arriving at such assumptions and gathering and calculating such data for each detail of each element of each unit's historical cost. At some point, the request for "more data" ceases to be credible. The Sierra Club's Motion to Compel has passed that point. If the Sierra Club cannot evaluate the Project based upon the abundance of information already provided, there is likely no amount of detail that would satisfy it.

2. Speculative Future Environmental Compliance Cost Data

In Supplemental Requests 2.31(a)-(b), 2.32(a)-(b), and 2.33(a)-(b), the Sierra Club sought documents EKPC reviewed relating to potential compliance costs at Cooper Unit 1 and/or Cooper Unit 2 regarding the Clean Water Act Section 316(b) rule, the forthcoming coal combustion residuals rule under RCRA, and forthcoming Clean Water Act effluent limitations guidelines, respectively. On its face, these requests are overly broad and would require the production of documents which are clearly beyond the scope of this proceeding. For instance, must EKPC produce an article in the *Wall Street Journal* which discusses the future compliance costs of future environmental regulations? Is commentary by public officials describing the

over-reach of environmental regulators and their vow to overturn such efforts what the Sierra Club is seeking? There are numerous examples of documents that EKPC has viewed which speculate as to the parameters of various future regulations, the potential costs associated with such and the possible planning horizons for compliance. Yet the sum and total of these documents would be largely a hodge-podge of what various third parties think. The fact that future environmental rules are not yet certain highlights the speculative nature of any future cost assumptions. Suggesting that EKPC should factor in unknown future costs that may or may not materialize opens the door for the Sierra Club to manipulate its evaluation of the Project's NPV analysis, in order to reach some pre-ordained position.

To the extent that the Sierra Club believes that EKPC has somehow failed to take into account whatever future environmental costs that regulations may one day impose, its own motion to intervene demonstrates that the Sierra Club is already prepared to support and advocate that very point. In its motion to intervene, the Sierra Club proudly proclaimed it:

[H]as developed expertise that encompasses a broad range of environmental and energy concerns that fully complement the myriad of technical and policy issues parties will face in this proceeding. In particular, Sierra Club's staff and consultants have extensive experience in resource planning, analyzing the potential for cost effective energy efficiency, *and in the laws and regulations regulating energy production.*³

Consequently, the Sierra Club should clearly have all the information it needs to develop its own positions concerning the costs for Cooper Unit 1 to comply with pending environmental rules without perusing through the research of EKPC. If the Sierra Club is looking for something specific, EKPC has stated that it would respond to such a request.

³ Sierra Club Motion to Intervene, p. 6.

3. Coal Combustion Residuals and Liquid Waste Streams

In Supplemental Requests 2.32(d)-(h) and 2.33(d), the Sierra Club sought information regarding the current and future handling of coal combustion residuals (“CCR”) and liquid waste streams, respectively. The Sierra Club’s Motion to Compel argues that the request is narrowly drawn because it applies only to Cooper Unit 1, however, both requests seek information about both Cooper Units 1 and 2 and 2.32(f)-(h) posed questions applicable to the Dale Station as well. EKPC has clearly stated, and the Sierra Club has not challenged through data requests, the fact that the future handling of CCR and liquid waste streams will be highly dependent on an evaluation of the requirements contained in future rules and regulations. Until such rules and regulations become final, it is disputable whether Cooper Units 1 and 2 will actually realize costs regarding CCR and liquid wastes compliance. As set forth above, the Sierra Club’s motion to intervene demonstrates that it believes it has the expertise necessary to form an opinion and make speculative judgments about the potential future impact of such categories of environmental compliance costs.

B. EKPC’s Responses to the Supplemental Data Requests Have Been Fully Responsive to the Sierra Club’s Requests

The balance of the Sierra Club’s Motion to Compel essentially argues that EKPC somehow failed to provide answers that were completely responsive to the Supplemental Requests. However, as the following points demonstrate, the problem appears to be more that the Sierra Club is not satisfied that the information provided by EKPC rather than the information not being responsive.

1. Annual Generation from Coal-Fired Units

In Supplemental Request 2.12(c), the Sierra Club asked EKPC to set forth the projected annual generation by each of EKPC’s coal units for each year of the NPV analysis. EKPC’s

response referred to its supplemental response to Sierra Club Request 1.15d which, in turn, incorporated EKPC's response to Staff's Initial Request 5. While the Sierra Club acknowledges that information for the entire EKPC fleet has been provided, it has not explained how failing to break down that information on a unit-by-unit basis somehow hinders its ability to evaluate the model results for each scenario. The Sierra Club also acknowledges that EKPC has omitted the base case information for Cooper Unit 1 from the base case. A subtraction of the base case information from the entire EKPC fleet information provided produces the Cooper Unit 1 information, if that is what the Sierra Club seeks.

2. Self-Build Proposals

In Supplemental Request 2.14(c)-(e), the Sierra Club sought information uniquely relating to various EKPC self-build proposals. The Sierra Club's motion assumes that the data from the self-build options is somehow entitled to greater significance and scrutiny than other bids EKPC received from third parties. However, the Motion to Compel contains no factual or legal basis to support this assumption. The fact is that in the response to Staff's Initial Request 5, EKPC provided information for all the proposals received in response to the RFP process, which would include all of the self-build proposals. This response was incorporated into EKPC's Response to the Sierra Club's Initial Data Request 9. The Sierra Club did not object to the scope or sufficiency of EKPC's response in providing the data for all bids, but now argues that the self-build proposals should be produced again. EKPC's objection, which the Sierra Club mischaracterizes, demonstrated that it would be inappropriate to focus upon one subset of bids received in the RFP. Consistency in the treatment of all proposals is the standard by which EKPC conducted the RFP process and there is nothing in the Sierra Club's request which appropriately suggests that standard should be deviated from after-the-fact.

3. The Andritz Contract

In Supplemental Request 2.46(a), the Sierra Club seeks production of a contract including performance guarantees from Andritz regarding the modified FGD system's ability to meet certain emissions limits and performance levels. The Sierra Club's argument to compel production appears to rest upon the belief that a previously-produced two page letter from Andritz documenting the guarantees is not sufficient to demonstrate that such guarantees exist. The Sierra Club's request has been adequately addressed and its suggestion that further production is required is simply without merit and should be denied by the Commission.

C. The Request to Extend the Procedural Schedule Should be Denied

Finally, the Sierra Club requests that the deadline for filing intervenor testimony should be extended until after such time as this motion may be adjudicated. This request is on top of the concessions which EKPC has already made with regard to scheduling, including the deadline for the Sierra Club to file its testimony on November 27, 2013. As part of its motion to intervene, the Sierra Club specifically affirmed that it would accept the procedural schedule as it then existed and that it would not seek to disrupt the proceeding. Adding what would likely amount to several weeks to the existing procedural schedule – which already includes delays consented to by EKPC – would prejudice EKPC's ability to begin and complete the Project on a timely basis. For all of these reasons, the Sierra Club's request should be denied.

IV. CONCLUSION

The Commission should deny the Sierra Club's Motion to Compel. EKPC has provided all of the information which is responsive to the multiple data requests from the Commission and the Sierra Club. To the extent that the Sierra Club is not satisfied, it has the opportunity to make its arguments in the form of testimony and cross-examination of EKPC's witnesses.

WHEREFORE, on the basis of the foregoing, EKPC respectfully requests the Commission to DENY the Sierra Club's Motion.

This 27th day of November 2013.

Respectfully submitted,



Mark David Goss
David S. Samford
GOSS SAMFORD, PLLC
2365 Harrodsburg Road, Suite B325
Lexington, KY 40504
(859) 368-7740
mdgoss@gosssamfordlaw.com
david@gosssamfordlaw.com

Counsel for East Kentucky Power Cooperative, Inc.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was deposited in the custody and care of the U.S. Mail, postage prepaid, on this the 27th day of November 2013, addressed to the following:

Mr. Mike Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street
Suite 510
Cincinnati, OH 45202

Shannon Fisk
Earthjustice
1617 JFK Boulevard, Suite 1675
Philadelphia, PA 19103

Joe Childers
Joe F. Childers & Associates
300 Lexington Building
201 West Short Street
Lexington, KY 40507

Kristen Henry
Sierra Club
85 Second Street
San Francisco, CA 94105



Counsel for East Kentucky Power Cooperative, Inc.