

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF KENTUCKY POWER)	
COMPANY FOR: (1) THE APPROVAL OF)	
THE TERMS AND CONDITIONS OF THE)	
SIXTH AMENDMENT TO THE RENEWABLE)	
ENERGY PURCHASE AGREEMENT FOR)	
BIOMASS ENERGY RESOURCES BETWEEN)	
THE COMPANY AND ECOPOWER)	CASE NO. 2015-00190
GENERATION-HAZARD, LLC; (2))	
AUTHORIZATION TO ENTER INTO THE)	
SIXTH AMENDMENT TO THE AGREEMENT;)	
(3) THE GRANT OF CERTAIN)	
DECLARATORY RELIEF; AND (4) THE)	
GRANT OF ALL OTHER REQUIRED)	
APPROVALS AND RELIEF)	

ORDER

This matter is before the Commission on Kentucky Power Company’s (“Kentucky Power”) June 22, 2015 application requesting, among other things, authorization to enter into, and Commission approval of, a Sixth Amendment to the Renewable Energy Purchase Agreement (“REPA”) for biomass energy resources between Kentucky Power and ecoPower Generation-Hazard, LLC (“ecoPower”). By Order entered October 10, 2013, in Case No. 2013-00144 (“REPA Approval Order”), the Commission approved the REPA between Kentucky Power and ecoPower.¹ In that case, the Commission granted

¹ Case No. 2013-00144, *Application of Kentucky Power Company for Approval of the Terms and Conditions of the Renewable Energy Purchase Agreement for Biomass Energy Resources Between the Company and Ecopower Generation-Hazard LLC* (Ky. PSC Oct. 10, 2013).

full intervention to the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention (“AG”), and Kentucky Industrial Utility Customers, Inc. (“KIUC”). The Commission ultimately found, based on the substantial evidence in the record, that Kentucky Power had sufficiently established that there was a need for the REPA; that the cost of the REPA was fair, just and reasonable; and that the REPA was for lawful objects within the corporate purposes of Kentucky Power, was necessary and appropriate for and consistent with the proper performance by Kentucky Power of its service to the public, would not impair its ability to perform that service, and was reasonable, necessary, and appropriate for such purposes.

KIUC appealed the Commission’s REPA Approval Order to the Franklin Circuit Court and named as defendants the Commission, the AG, and Kentucky Power. The Commission defended its Order, and on February 18, 2015, the Franklin Circuit Court entered an Opinion and Order affirming the Commission’s approval of the REPA. On March 13, 2015, KIUC filed a Notice of Appeal to the Kentucky Court of Appeals seeking reversal of the Franklin Circuit Court’s Opinion and Order. The Commission is a named Appellee in that appeal, which has been assigned Case No. 2015-CA-00398, and the Commission is currently engaged in vigorously defending its REPA Approval Order before the Court of Appeals.

Kentucky Power now applies to the Commission seeking: (1) approval of the terms and conditions of the Sixth Amendment to the REPA; (2) authorization to enter into the Sixth Amendment; and (3) the grant of all other required approvals and relief. Kentucky Power also seeks a declaratory Order, pursuant to 807 KAR 5:001, Section 19, that none of the Second through Seventh Amendments to the REPA have altered or

changed the Commission's REPA Approval Order, including the finding therein that Kentucky Power is entitled to recover the costs of the REPA by a monthly rate surcharge. Kentucky Power attached exhibits and testimony as part of its application.

On June 29, 2015, KIUC filed a motion to intervene, which the Commission granted, as well as a motion to establish a procedural schedule. In its motion to establish a procedural schedule, KIUC requested a schedule to allow for one round of discovery, the filing of intervenor testimony, an evidentiary hearing on Kentucky Power's application, and the submission of post-hearing briefs. Shortly thereafter, KIUC filed a response to Kentucky Power's request for a declaratory Order, objecting to the proposed Sixth Amendment and arguing that the Sixth Amendment, if approved, would significantly change the terms of the REPA to the detriment of Kentucky Power's customers. KIUC attached exhibits and testimony as part of its response.

On July 22, 2015, Kentucky Power filed a reply to KIUC's response. In its reply, Kentucky Power argued that the declaratory Order it seeks should be granted without further proceedings, but to the extent the Commission requires additional information, Kentucky Power requested that the Commission defer review until such time as discovery is complete, all testimony including rebuttal testimony relating to the remaining issues in its application has been filed, and a hearing has taken place before the Commission. Also on July 22, 2015, the Commission entered an Order directing Kentucky Power and KIUC to submit, within ten days, legal memoranda addressing whether the Commission has jurisdiction to consider Kentucky Power's application, given the pending appeal of its REPA Approval Order. The parties timely submitted their memoranda and the matter is now before the Commission for a decision.

DISCUSSION

Kentucky Power's memorandum argues that it is not asking the Commission to re-evaluate, modify, or amend its findings of fact and conclusions of law contained in the REPA Approval Order. To the contrary, it states that it is requesting approval of subsequent amendments to the REPA to permit it to exercise the authority granted it in the REPA Approval Order. As a result, Kentucky Power asserts that the Commission has jurisdiction to review its application in this case. It states that the requested relief can be granted without altering the REPA Approval Order that is the subject of KIUC's appeal and that its current application involves contract amendments that are not at issue in KIUC's appeal. Kentucky Power insists that it is not attempting to re-open or alter a Commission Order which is on appeal and that it should not have to await the outcome of KIUC's appeal before the Commission adjudicates this case. Kentucky Power asserts that suspending Commission review and approval of the Sixth Amendment pending resolution of KIUC's appeal in the case effectively stays implementation of the REPA Approval Order during the appeal contrary to KRS 278.390.

On the other hand, KIUC's memorandum argues that the Commission lacks jurisdiction to amend or modify a prior Order that is pending judicial review. KIUC asserts that though Kentucky Power has filed a separate application/proceeding for approval of the REPA amendments, the issue of whether the underlying REPA contract satisfies the statutory requirements in KRS 278.271 is before the appellate court. KIUC states that sound public policy requires the Commission to recognize the uncertainties

present during the appellate process and wait until all appeals are exhausted before implementing its REPA Approval Order.

KIUC discusses the legal distinction between the Commission's retaining jurisdiction to perform a ministerial act and its amending of a prior Order. KIUC states that courts have held that a lower tribunal can perform a ministerial act to correct a clerical error in an Order subject to appeal, such as signing an unsigned Order. Ministerial acts are defined as those that involve obedience to instructions or law instead of acts involving discretion and judgment. However, KIUC asserts that addressing Kentucky Power's application for review and approval of the Sixth Amendment and for a declaration that the Second through Seventh Amendments have not altered or changed the Commission's REPA Approval Order would not be a ministerial act. KIUC claims that the Commission's determination would involve the exercise of discretion and judgment on the part of the Commission that goes well beyond correcting a clerical error. KIUC further asserts that Kentucky Power's proposed amendments are not collateral or incidental matters necessary for preserving the fruits of the REPA Approval Order or for maintaining the status quo of the parties, but rather are matters that would fundamentally alter material terms approved in the Commission's REPA Approval Order.

After considering the parties' arguments, the Commission finds that it lacks jurisdiction to modify or amend the REPA that is currently pending judicial review. Generally, the filing of a notice of appeal divests a tribunal of jurisdiction to rule on matters involved in the appeal while the appeal is pending, and transfers the named

parties to the jurisdiction of the appellate court.² The Commission has previously held that an administrative appeal of its decision transfers jurisdiction of the case to the appellate court.³

Jurisdiction over the REPA Approval Order cannot exist in the Commission and in the Courts at the same time.⁴ Since the Sixth Amendment's existence is contingent upon the underlying REPA Approval Order's being affirmed on appeal, we must wait until the appellate courts have ruled on the REPA Approval Order before we can address the merits of Kentucky Power's application to amend the REPA. Once the original REPA Approval Order is no longer pending appellate review, Kentucky Power is free to refile its application.

We do not find persuasive Kentucky Power's assertion that the Sixth Amendment does not seek to modify the REPA, especially given that Kentucky Power and KIUC disagree as to whether the proposed terms constitute a material change to the REPA. The existence of a dispute over the extent to which the proposed amendment may

² See *Johnson v. Commonwealth*, 17 S.W.3d 109, 113 (Ky. 2000); *City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990); and *Young v. Richardson*, 267 S.W.3d 690, 695-697 (Ky. App. 2008).

³ See Case No. 2004-00403, *The Union Light, Heat and Power Company's Motion for an Extension of Filing Date and Continuation of Its Current Rider AMRP Rates* (Ky. PSC Jan. 27, 2005) (Commission declined to rule on motion to modify a previously entered Commission Order on grounds that the Commission lacked jurisdiction to modify an Order that had been entered over two years earlier and was still pending on appeal at the Franklin Circuit Court.); Case No. 1995-00445, *An Examination by the Public Service Commission of the Environmental Surcharge Mechanism of Kentucky Utilities Company as Billed from February 1, 1995 to July 31, 1995* (Ky. PSC Mar. 6, 1996) (Commission denied KIUC's request to require refunds on the basis that the case was pending appellate review.); and Case No. 2007-00134, *Application of Kentucky-American Water Company for a Certificate of Convenience and Necessity Authorizing the Construction of Kentucky River Station II, Associated Facilities and Transmission Main* (Ky. PSC June 5, 2008) (Commission lacked jurisdiction to reopen case or otherwise modify its Order while case was pending review by the Franklin Circuit Court.).

⁴ "It is axiomatic that two courts cannot exercise jurisdiction over the same issue at the same time." *Young v. Richardson*, 267 S.W.3d 690, 697 (Ky. App. 2008).

impact Kentucky Power's customers, coupled with the fact that the opportunity to conduct discovery and an evidentiary hearing have been requested, demonstrate that a substantial issue of material fact exists as to the effect of the Sixth Amendment. Clearly, a factual determination on the part of this Commission would be necessary to resolve the issue. Such a determination would extend beyond that of executing a ministerial act, which we would retain jurisdiction to perform, such as entering *nunc pro tunc* an Order to correct a clerical error.⁵

The Commission finds no merit in Kentucky Power's argument that a finding of no jurisdiction to entertain its application effectively stays the REPA Approval Order contrary to KRS 278.390. The REPA Approval Order has not been stayed by the Commission or by any court. The REPA Approval Order is in full force and effect, and the parties to the REPA are free to exercise all of their rights and responsibilities under that contract. However, the fact that the REPA is in full force and effect does not mean that the Commission has jurisdiction to review what may be substantive amendments to the REPA while the REPA Approval Order is pending judicial review.

Kentucky Power also asks that the Commission issue an Order granting the requested relief as soon as practicable, but no later than August 28, 2015. Kentucky Power states that the issuance of an Order by August 28, 2015, is a necessary predicate to a final and non-appealable Order issued on or before October 1, 2015, as required by the amended paragraph 6.1(A) of the REPA as set forth in the Sixth Amendment. The Sixth Amendment supplements the definition of "Commission

⁵ *Frankfort Kentucky Natural Gas Co. v. City of Frankfort*, 123 S.W.2d 270, 272 (Ky. App. 1938).

Approval Order” as defined in the REPA by adding the following language to the end of the definition: “With respect to the foregoing, the final, non-appealable Order from the Commission reference means that the Commission Order in Docket 2013-00144 [REPA Approval Order] shall be affirmed, without modification, by the Franklin Circuit Court in Case No. 13-CI-1272, *and all subsequent appellate courts*, and the Commission Order in Docket 2012-00578 [“Mitchell Approval Order”] shall be affirmed, without modification, by the Franklin Circuit Court in Case No. 13-CI-1398, *and all subsequent appellate courts.*” (Emphasis added).

The Sixth Amendment, Section 6.1(A), addresses “Purchaser’s Conditions Precedent” and provides, in relevant part, “If the Commission fails to issue the Commission Approval Order by September 1, 2015, or the FERC fails to issue the FERC Approval Order by December 31, 2014, Purchaser, by notice to Seller delivered on or before October 1, 2015, may terminate this REPA, without any further financial or other obligation to Seller as a result of such termination except that Purchaser shall return the Security Fund to Seller; provided that, if Purchaser has not on or prior to October 1, 2015, provided notice of termination of this REPA as a result of the failure to obtain either the Commission Approval Order or the FERC Approval Order, Purchaser shall be deemed to have waived the right to terminate this REPA for failure to achieve such condition precedent.”

In other words, Section 6.1(A) requires issuance of a Commission Approval Order, as defined in the Sixth Amendment, by September 1, 2015. The Seventh Amendment extends this deadline to October 1, 2015. The Sixth Amendment defines a Commission Approval Order, in part, as a final, non-appealable Order affirmed without

modification by all subsequent appellate courts. However, this Commission has no control over whether appellate resolution of its REPA Approval Order and Mitchell Approval Order will occur by September 1, 2015, or by October 1, 2015. Given that the Kentucky Court of Appeals has only recently established briefing schedules in both cases, obtaining a final, non-appealable Order by either of those dates is unlikely. As a result, even if the Commission had jurisdiction to consider Kentucky Power's application, any Order entered in this case would not control whether a condition precedent of the Sixth Amendment is satisfied. The Sixth Amendment cannot stand on its own without a final and non-appealable Order approving the underlying REPA. On this basis, we find Kentucky Power's request for an Order as defined in the REPA by August 28, 2015, addressing the merits of its application to be unachievable.

Lastly, with respect to Kentucky Power's request for a declaratory Order that none of the Second through Seventh Amendments to the REPA has altered or changed the REPA Approval Order, Kentucky Power is in effect asking us to review the amendments along with our REPA Approval Order and conclude that the amendments do not change the Order, thereby affirming the provision in our original Order that concurrent recovery of costs associated with the REPA through a monthly surcharge is appropriate. The Commission notes that the Second, Third, Fourth, and Fifth Amendments have been acted upon by the parties to the contract without requesting prior Commission approval. These amendments were filed at the Commission in the post-case referenced correspondence file for Case No. 2013-00144. KIUC received notice of the filing of these amendments and did not object. These amendments changed the date of the previously discussed final "Commission Approval Order"

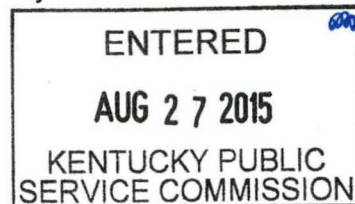
described in Section 6.1(A) and discussed in detail above. As with Kentucky Power's request for review of the Sixth Amendment to the REPA Approval Order, the Commission is likewise without jurisdiction to issue a declaratory Order while jurisdiction is vested at the Court of Appeals. The Commission will leave it to the parties to determine the dates, if any, by which the two parties to the contract may terminate the agreement.

In summary, the Commission finds that while the REPA Approval Order is pending appellate review, we lack jurisdiction to grant approval or authorization to Kentucky Power to enter into the Sixth Amendment to the REPA and we lack jurisdiction to issue the requested declaratory Order.

Based on the foregoing reasons, the Commission HEREBY ORDERS that:

1. Kentucky Power's application is dismissed without prejudice.
2. This case is closed and removed from the Commission's docket.

By the Commission



ATTEST:



Executive Director

*Honorable Kurt J Boehm
Attorney at Law
Boehm, Kurtz & Lowry
36 East Seventh Street
Suite 1510
Cincinnati, OHIO 45202

*Jody Kyler Cohn
Boehm, Kurtz & Lowry
36 East Seventh Street
Suite 1510
Cincinnati, OHIO 45202

*Kenneth J Gish, Jr.
Stites & Harbison
250 West Main Street, Suite 2300
Lexington, KENTUCKY 40507

*Kentucky Power Company
101 A Enterprise Drive
P. O. Box 5190
Frankfort, KY 40602

*Honorable Michael L Kurtz
Attorney at Law
Boehm, Kurtz & Lowry
36 East Seventh Street
Suite 1510
Cincinnati, OHIO 45202

*Honorable Mark R Overstreet
Attorney at Law
Stites & Harbison
421 West Main Street
P. O. Box 634
Frankfort, KENTUCKY 40602-0634