

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF EAST)	
KENTUCKY POWER COOPERATIVE, INC. FOR)	
1) CERTIFICATES OF PUBLIC CONVENIENCE)	
AND NECESSITY TO CONSTRUCT A NEW)	CASE NO.
GENERATION RESOURCES; 2) FOR A SITE)	2024-00370
COMPATIBILITY CERTIFICATE RELATING TO)	
THE SAME; 3) APPROVAL OF DEMAND SIDE)	
MANAGEMENT TARIFFS; AND 4) OTHER)	
GENERAL RELIEF)	

ORDER

On April 24, 2025, Appalachian Citizens Law Center, Kentuckians for the Commonwealth, and Mountain Association (collectively, Joint Intervenors) filed a motion to compel East Kentucky Power Cooperative, Inc. (EKPC) to produce the Reaction Engineering International's report (REI report) that was requested in Joint Intervenors' Second Request for Information (Joint Intervenors' Second Request).¹ On May 1, 2025, EKPC filed its response to the motion to compel, and Joint Intervenors' filed its reply to EKPC's response the same day. The motion to compel stands ready for a decision on the record.

¹ Joint Intervenors' Second Request, Item 47(c) (filed Jan. 17, 2025).

Joint Intervenor's Motion to Compel

In its motion to compel, Joint Intervenor provided a detailed factual background of the information it had previously requested, where the information originated, and why that information was relevant to the current case.²

Joint Intervenor provided that, in 2023, EKPC submitted comments on the proposed greenhouse gas (GHG) rule to the U.S. Environmental Protection Agency (EPA) noting that Spurlock Units 3 and 4 are circulating fluidized bed (CFB) units and that they “cannot co-fire natural gas because they depend upon coal ash contacting the steam generating tubes inside the furnace. Much research would need to be conducted to see if a viable alternative would be possible and economic.”³ Joint Intervenor argued that no witness testified to the need for “much research” in their written testimony, but EKPC provided a project scoping report prepared by Burns & McDonnell Engineering Company, Inc. (Burns & McDonnell) as an attachment to its application.⁴ Within the scoping report, Burns & McDonnell stated, “to increase confidence in the feasibility of the conceptual design, [Burns & McDonnell] subcontracted with Reaction Engineering, Inc. (REI) to create a CFB model of the Unit 3 furnace.”⁵

Joint Intervenor argued that the report raises concerns about the feasibility of gas co-firing at Spurlock Units 3 and 4.⁶ On January 17, 2025, Joint Intervenor requested

² Joint Intervenor's Motion to Compel (Motion to Compel) (filed Apr. 24, 2025) at 3-6.

³ Motion to Compel at 3, *citing* Joint Intervenor's Hearing Exhibit 1.

⁴ See Application, Exhibit BY3_Spurlock_Unit 1-4_Co-Fire_Project_Scoping_Report (filed Nov. 20, 2024).

⁵ See Application, Exhibit BY3_Spurlock_Unit 1-4_Co-Fire_Project_Scoping_Report at 7-2 and Motion to Compel at 4.

⁶ Motion to Compel at 4.

EKPC to “identify or produce any report or other documentation of the REI model results.”⁷

EKPC responded to the request on January 31, 2025, to “[s]ee attachment Confidential-JI2.47c for documentation supporting the statement filed under seal.”⁸

On February 7, 2025, counsel for Joint Intervenors contacted EKPC regarding deficiencies in its responses, including the fact that attachment JI 2.47c had not been provided.⁹ EKPC supplemented its response to Joint Intervenors’ Second Request on February 11, 2025.¹⁰ With its supplemental response, EKPC provided a one-page summary of the REI report and stated that the actual report was “protected under attorney work product privilege.”¹¹

This issue was brought up again at the hearing held in this matter on April 21, 2025, where the Commission, when considering the issue, noted that no motion to compel had been filed. Thereafter, Joint Intervenors filed a motion to compel on April 24, 2025, which argued that “EKPC failed to fulfill its burden of proving applicability of attorney work product privilege, and that privilege does not apply because the REI report was prepared to support a business decision, rather than in advance of litigation.”¹² Furthermore, Joint Intervenors asserted that any justification to claim the REI report would be protected under attorney work product privilege would fail because “(1) the REI report was not

⁷ Joint Intervenors’ Second Request, Item 47(c).

⁸ EKPC’s Response to Joint Intervenors’ Second Request, Item 47(c) (filed Jan. 31, 2025) and Motion to Compel at 4-5.

⁹ Motion to Compel at 5.

¹⁰ EKPC’s Supplemental Responses to Joint Intervenors’ Second Request (filed Feb. 11, 2025).

¹¹ EKPC’s Supplemental Responses to Joint Intervenors’ Second Request, Item 47, and Motion to Compel at 5.

¹² Motion to Compel at 6.

prepared in anticipation of litigation, and (2) Joint Intervenors have a substantial need to review the full REI report and cannot obtain a substantial equivalent of it.”¹³ Lastly, Joint Intervenors argued that the claim of attorney-client privilege would fail for the same reasons; “the REI report was prepared to support a business determination, not a legal one.”¹⁴

EKPC’s Response to Joint Intervenors’ Motion

On May 1, 2025, EKPC responded to the Joint Intervenors’ motion to compel (EKPC’s Response), stating that the motion to compel should be denied for four reasons.¹⁵ EKPC argued that the Joint Intervenors’ motion to compel was untimely since the Joint Intervenors did not take any action from February 11, 2025, the date of the supplemental filing, until the hearing on April 21, 2025.¹⁶ EKPC stated that Joint Intervenors acted in bad faith by not attempting to resolve the dispute prior to the hearing.¹⁷

Furthermore, EKPC argued that the motion to compel should be denied because it violates due process, as Joint Intervenors will attempt to introduce the document and EKPC will not have an opportunity to cross-examine any propositions.¹⁸ EKPC relied on 807 KAR 5:001, Section 11(4), which states:

Unless so ordered by the commission, the commission shall not receive in evidence or consider as part of the record a

¹³ Motion to Compel at 6.

¹⁴ Motion to Compel at 9.

¹⁵ EKPC’s Response (filed May 1, 2025) at 1.

¹⁶ EKPC’s Response at 2.

¹⁷ EKPC’s Response at 2.

¹⁸ EKPC’s Response at 2.

book, paper, or other document for consideration in connection with the proceeding after the close of the testimony.¹⁹

Lastly, EKPC argued that the motion to compel should be denied because it seeks information that is privileged and/or proprietary.²⁰ EKPC asserted that the full REI report is protected under attorney client privilege doctrine under the Rules of Evidence and the work product doctrine under the Rules of Civil Procedure.²¹ EKPC relied upon KRE 503(a)(5), which states “communication is ‘confidential’ if not intended to be disclosed to third persons other than those whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.”²² EKPC argued that since “the REI report was prepared at counsel’s request in the furtherance of legal services and is not intended to be disclosed to any third persons” it is protected under the attorney client privilege doctrine under the rules of evidence.²³

Furthermore, EKPC argued that REI Report is also protected under the work-product doctrine under the Rule of Civil Procedure 26.02(3), which provides a two-prong test:

First, the court must determine whether the document is work product because it was prepared ‘in anticipation of litigation.’...Second, if the document is work product, the court must determine whether the requesting party has a

¹⁹ EKPC’s Response at 4.

²⁰ EKPC’s Response at 4.

²¹ EKPC’s Response at 4.

²² KRE 503(a)(3); *See also* EKPC’s Response at 5.

²³ EKPC’s Response at 5.

‘substantial need’ of the document and is unable to obtain the “substantial equivalent without undue hardship.”²⁴

EKPC asserted that the REI report was prepared in anticipation of litigation and was used for counsel to make legal impressions on which strategy to pursue during litigation.²⁵

Joint Intervenor’s Reply

On May 1, 2025, Joint Intervenor’s replied to EKPC’s response to the motion to compel (Joint Intervenor’s Reply).²⁶ Joint Intervenor’s argued that their request was legitimate, timely, and in good faith.²⁷ Joint Intervenor’s also asserted that “if required to produce the report, EKPC will not be injured, unfairly surprised, or deprived of due process.”²⁸ Joint Intervenor’s argued that providing the REI report would benefit EKPC, as it purportedly shows the feasibility of converting Spurlock Units 3 and 4.²⁹

Furthermore, Joint Intervenor’s maintained that EKPC’s reliance on attorney-client privilege is without merit.³⁰ Joint Intervenor’s highlighted the fact that EKPC’s argument stating the REI report was “created at the behest of counsel for EKPC is in direct contradiction of evidence of record, and testimony of EKPC’s witnesses.”³¹ Joint Intervenor’s provide that the record clearly demonstrates that the REI report was

²⁴ *Duffy v. Wilson*, 289 S.W.3d 555,559 (Ky. 2009). See also EKPC’s Response at 5.

²⁵ EKPC’s Response at 7.

²⁶ Joint Intervenor’s Reply (filed May 1, 2025).

²⁷ Joint Intervenor’s Reply at 1.

²⁸ Joint Intervenor’s Reply at 4.

²⁹ Joint Intervenor’s Reply at 5.

³⁰ Joint Intervenor’s Reply at 5.

³¹ Joint Intervenor’s Reply at 6.

requested by Burns & McDonnell and was completed to determine the feasibility of the conceptual design.³² Additionally, Joint Intervenor's reiterated its argument that there is a substantial need for the REI report. Specifically, Joint Intervenor's provided that if the REI Report alleviates the feasibility concerns, "there is no harm to EKPC of including it in the record. If, however, the REI Report raises serious questions about the feasibility of gas co-firing at Spurlock 3 and 4, that is a very relevant and important fact...."³³

LEGAL STANDARD

If permitted by order of the commission, a party may request information from another party to the case in accordance with 807 KAR 5:001, Section 4(12).³⁴ Responses to a request for information must be provided under oath or "be accompanied by a signed certification of the preparer or person supervising the preparation of the responses on behalf of the person that the response is true and accurate to the best of that person's knowledge, information, and belief formed after a reasonable inquiry."³⁵ If a party served with a request for information fails or refuses to furnish all or part of the requested information, the party shall provide a written explanation of the specific grounds for the failure to completely and precisely respond.³⁶

A party may seek to compel compliance with the party's request for information by filing a motion to compel. Specifically, 807 KAR 5:001, Section 4(12)(e)(2), states that:

A party shall compel compliance with the party's request of information by motion to the commission, which shall include:

³² Joint Intervenor's Reply at 7.

³³ Joint Intervenor's Reply at 8.

³⁴ 807 KAR 5:001, Section 4(12)(a).

³⁵ 807 KAR 5:001, Section 4(12)(d)(2).

³⁶ 807 KAR 5:001, Section 4(12)(d)(5).

- 1) a description of the information requested;
- 2) the reasons why it is relevant to the issues in the case; and
- 3) the efforts taken to resolve any disagreement over the production of the requested information.

Pursuant to the Kentucky Rules of Civil Procedure, CR 26.02(1),

[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

The attorney work product doctrine “allows for the assertion of protection against discovery of ‘documents and tangible things’ prepared in anticipation of litigation.”³⁷ Kentucky Courts use a “two-step analysis” to determine if a document is protected under the work product doctrine.³⁸ The court “first determine[s] whether the document is work product because it was prepared in anticipation of litigation.”³⁹ The test for whether a document was prepared in anticipation of litigation is whether, “in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because the prospect of litigation.”⁴⁰ If the document was prepared in anticipation of litigation, the court then determine[s] whether the

³⁷ Case No 2020-00349, *Electronic Application of Kentucky Utilities Company and Louisville Gas and Electric Company for an Adjustment of its Electric Rates, a Certificate of Public Convenience and Necessity to Deploy Advanced Metering Infrastructure, Approval of Certain Regulatory and Accounting Treatments, and Establishment of a On-Year Surcredit* (Ky. PSC Dec. 6, 2021), Order at 4.

³⁸ *Duffy v. Wilson*, 289 S.W.3d 555, 558-59 (Ky. 2009).

³⁹ *Duffy v. Wilson*, 289 S.W.3d at 558-59.

⁴⁰ *Duffy v. Wilson*, 289 S.W.3d at 558-59.

requesting party has a ‘substantial need’ of the document and is unable to obtain the ‘substantial equivalent’ without ‘undue hardship.’”⁴¹ Furthermore, the party asserting a privilege bears the burden of proving its applicability.⁴²

Additionally, under KRE 503(a)(5), “a communication is ‘confidential’ if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.”

DISCUSSION AND FINDINGS

After reviewing the motions and being otherwise sufficiently advised, the Commission finds that Joint Intervenors’ motion to compel should be granted. Joint Intervenors made their Second Request for Information in a timely manner, there were clearly communications outside the record that led to the filing of the summary report, and at the hearing, the Joint Intervenors again requested the REI report. The Commission’s administrative regulations do not contain a deadline for filing of a motion to compel, with the lack of a specific time period allowing parties to attempt to resolve evidentiary disputes outside of the Commission’s involvement, though the Commission, in considering such a motion may weigh multiple factors, including any delay in demanding the subject materials. Although evidentiary matters are best handled before the hearing, and in an ideal scenario, Joint Intervenors would have filed a motion to compel before being reminded of the option to do so at the hearing, the timing of the motion does not prevent Joint Intervenors from receiving the report as the record has not closed in this matter.

⁴¹ *Duffy v. Wilson*, 289 S.W.3d at 558-59.

⁴² *Haney v. Yates*, 40 S.W.3d 352, 355 (Ky. 2011).

Furthermore, the Commission finds that EKPC has not met its burden of establishing that the REI report falls under the protection of the attorney work product doctrine or the attorney-client privilege. As the evidence in the record indicates, the report was prepared at the request of Burns & McDonnell, an engineering company and not by counsel, in anticipation of litigation, nor for the provision of professional legal services.⁴³ The record indicates that Burns & McDonnell subcontracted with REI in order to determine the feasibility of co-firing at Spurlock Units 3 & 4.

EKPC can elect to file the document with a request for confidentiality if it maintains that the report contains proprietary information, as was originally argued in the motion for confidentiality filed with the document at issue. Additionally, as discussed above, the report should have been in the record already, as a document with a request for confidential treatment.

The Commission notes that, when filed, Joint Intervenors asked for a decision on the motion to compel by May 1, 2025.⁴⁴ Due to the timing of the motions and responses,⁴⁵ the requested deadline could not be met before initial briefs were due. Therefore, the Commission finds that in order to allow all parties sufficient time to review the REI report and make additional arguments, the procedural schedule should be amended to allow for additional supplemental briefs limited to the issues within the REI report. However, the Commission reiterates that such briefs are not evidentiary and shall be considered only as legal argument. No new evidence may be presented within the supplemental briefs.

⁴³ Application, Exhibit BY3_Spurlock_Unit 1-4_Co-Fire_Project_Scoping_Report at 7-2.

⁴⁴ Joint Intervenors' Motion to Compel at 9.

⁴⁵ Administrative regulation 807 KAR 5:001 Section 5. All parties shall be allowed time for responses and replies to responses.

As a result of the amendment to the post-hearing procedural schedule, the Commission notes that the amended procedural schedule extends past the suspension date originally set by the Commission for EKPC's demand side management requests. Accordingly, the Commission intends to issue an order addressing the demand side management portion of the application prior to the suspension date, then address any remaining matters in a subsequent order.

IT IS THEREFORE ORDERED that:

1. Joint Intervenors' motion to compel is granted.
2. EKPC shall file and serve, pursuant to 807 KAR 5:001, Section 4(12)(d)(6), the full REI report requested in JI 2-47(c) to the parties in this proceeding, as discussed above, on or before May 19, 2025.
3. The Parties may file supplemental initial briefs, limited to arguments regarding the REI report. All supplemental initial briefs shall be filed on or before June 6, 2025.
4. Should a party choose to file a response to the supplemental initial brief, all responses shall be filed on or before June 11, 2025.
5. All provisions of the Commission's December 5, 2024, December 20, 2024, January 8, 2025, and February 17, 2025 procedural Orders not in conflict with the provisions of this Order or previously amended shall remain in effect.

PUBLIC SERVICE COMMISSION


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Vice Chairman


Commissioner

ATTEST:


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