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August 11, 2011

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PUBLIC SERVICE  
COMMISSION

**VIA HAND DELIVERY**

Jeff DeRouen  
Executive Director  
Kentucky Public Service Commission  
211 Sower Boulevard  
Frankfort, KY 40601

**RE: Application of Kentucky Utilities Company for Certificates of Public Convenience and Necessity and Approval of its 2011 Compliance Plan for Recovery by Environmental Surcharge**  
**Case No. 2011-00161**

**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**  
**Case No. 2011-00162**

Dear Mr. DeRouen:

Enclosed please find and accept for filing two originals and fifteen copies each of the Joint Sur-reply of Kentucky Utilities Company and Louisville Gas and Electric Company to the Reply of the Kentucky Industrial Utility Customers, Inc. in Support of Motion to Compel Discovery in the above-referenced matters.

Please confirm your receipt of these filings by placing the stamp of your Office with the date received on the enclosed additional copies and return them to me via our office courier.

Should you have any questions please contact me at your convenience.

Yours very truly,

  
Kendrick R. Riggs

KRR:ec  
Enclosures  
cc: Parties of Record  
400001.139563/749351.1

**COMMONWEALTH OF KENTUCKY**  
**BEFORE THE PUBLIC SERVICE COMMISSION**

**In the Matter of:**

<b>APPLICATION OF KENTUCKY UTILITIES</b>	)	
<b>COMPANY FOR CERTIFICATES OF</b>	)	
<b>PUBLIC CONVENIENCE AND NECESSITY</b>	)	<b>CASE NO. 2011-00161</b>
<b>AND APPROVAL OF ITS 2011 COMPLIANCE</b>	)	
<b>PLAN FOR RECOVERY BY</b>	)	
<b>ENVIRONMENTAL SURCHARGE</b>	)	

**In the Matter of:**

<b>APPLICATION OF LOUISVILLE GAS AND</b>	)	
<b>ELECTRIC COMPANY FOR CERTIFICATES</b>	)	
<b>OF PUBLIC CONVENIENCE AND NECESSITY</b>	)	<b>CASE NO. 2011-00162</b>
<b>AND APPROVAL OF ITS 2011 COMPLIANCE</b>	)	
<b>PLAN FOR RECOVERY BY</b>	)	
<b>ENVIRONMENTAL SURCHARGE</b>	)	

**JOINT SUR-REPLY OF KENTUCKY UTILITIES COMPANY  
AND LOUISVILLE GAS AND ELECTRIC COMPANY  
TO THE REPLY OF THE KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC.  
IN SUPPORT OF MOTION TO COMPEL DISCOVERY**

Kentucky Utilities Company (“KU”) and Louisville Gas and Electric Company (“LG&E”) (collectively, the “Companies”), for their Sur-Reply to the Kentucky Industrial Utility Customers, Inc.’s (“KIUC”) Reply to the Companies’ Joint Response (the “Joint Response”) to KIUC’s Motion to Compel (“KIUC Reply”), state as follows:

\* \* \* \* \*

The Companies explained in their Joint Response to KIUC’s motion the reasons that the motion should be denied. Speculative internal budget projections relating to the total operations of the Companies and the debt available to their parent company have no place here. Neither KRS 278.183 nor consistent Commission precedent that eschews the substitution of speculation for fact supports KIUC’s motion. KIUC’s Reply in support of its motion offers little, if any,

substance, relying almost exclusively on the Civil Rules.<sup>1</sup> But the Civil Rules do not operate in a vacuum. This Sur-Reply is to call the Commission's attention to the dispositive issues upon which KIUC offered no reply to the Companies' Joint Response at all.

First and foremost, KIUC does not even mention *KIUC v. Kentucky Utilities Co.*, 983 S.W.2d 493 (Ky. 1998), in which the Kentucky Supreme Court defined the scope of an environmental surcharge case specifically to *exclude from consideration* the sort of information KIUC seeks here. The omission is telling. Thirteen years ago the Supreme Court soundly rejected KIUC's argument that the "Utility's overall financial condition" must be considered in an environmental surcharge case, and found no merit in the claim that there is some flaw in a statutory prescription to provide for "separate proceedings to evaluate separate costs." *Id.* at 497-98. Instead, the Court upheld the Commission's interpretation of KRS 278.183, pursuant to which environmental compliance recovery is considered separately from base rates and the "overall financial condition" of the utility. *Id.* at 497.

KIUC ignores *KIUC* and demands information "used to develop financial projections of the Companies' *regulated rate base growth* and *future capital expenditures*."<sup>2</sup> But the information is clearly irrelevant, and no rote recitation of Civil Rules' provision for "broad" discovery establishes a right to obtain irrelevant information. Instead, "discovery must be kept within reasonable bounds and restricted to questions having substantial and material relevancy."

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<sup>1</sup> Emphasizing procedure, KIUC also cites *In the Matter of the Application of Kentucky-American Water Co. for a Certificate of Public Convenience and Necessity Authorizing the Construction of Kentucky River Station II, Associated Facilities and Transmission Main*, Case No. 2007-00134 (Nov. 15, 2007) at 5 for the proposition that "[w]here a party objects to [a discovery] request, the burden is upon the objecting party to demonstrate that the request is improper" [KIUC Reply at 2]. KIUC does not explain that, in the sentence immediately preceding the one quoted by KIUC, the Commission stated "*If* the requested material appears reasonably calculated to lead to discovery of admissible evidence, then the request is relevant." *Id.* (emphasis added). That threshold issue, relevance, is the issue here. In contrast, undue burden and confidentiality were the objections at issue in *Kentucky-American Water*. A party objecting to discovery on the latter grounds bears the burden; but courts have held that "once an objection has been raised on relevancy grounds, the party seeking discovery must demonstrate that the request is within the scope" of the rule. *Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.*, 174 F.R.D. 609, 631 (M.D. Pa. 1997). KIUC cannot make such a demonstration.

<sup>2</sup> KIUC Reply, p. 3.

*Humana, Inc. v. Fairchild*, 603 S.W.2d 918, 922 (Ky. App. 1980). Those bounds are set by KRS 278.183. Within those reasonable bounds, the Companies have now produced an enormous amount of evidence, including every input and output relevant to or which could lead to relevant evidence concerning the projects and their estimated cost in the 2011 Environmental Compliance Plans.<sup>3</sup> Contrary to KIUC's assertion that the projections it demands would "assist the Commission in determining" the issues in this case, the Commission already has the evidence to decide the issues in this case.<sup>4</sup> The budgets of unrelated expenditures and costs KIUC seek have no relevancy to the projects in the 2011 Environmental Compliance Plans.<sup>5</sup>

Next, KIUC does not reply to the Companies' citations to cases stating that the Commission does not rely on "speculative" information such as budget projections. KIUC does not even use the word, much less attempt to show that the projected budgets it seeks to obtain are anything other than speculative. This omission is as telling as KIUC's failure to address its own resounding defeat in *KIUC*. Once again, KIUC fails to confront the issues: whether the information it seeks is relevant and reliable. Instead, it simply asserts that PSC Case No. 90-158,<sup>6</sup> cited by the Companies for the proposition that the Commission will not compel production of

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<sup>3</sup> LG&E/KU Application Exhibit JNV-2 (Air Compliance Summary; appendices include Engineering reports detailing projects and costs); KU Application Exhibit JNV-4 (Evaluation of conversion of wet storage to dry storage at Brown Station); LG&E/KU Application Exhibit CRS-1 (Needs assessment evaluating installing controls or retiring/ replacing capacity; 30-year study period); KU Application Exhibit CRS-2 (Needs assessment evaluating the conversion of wet storage to dry storage at Brown Station; 21-year study period); LG&E/KU, KPSC data request #46 (All inputs and outputs used in Strategist and PROSYM modeling for the 2011 Plans; 30-year analysis (thru 2040)); KU, KPSC data request #48 (Electronic version of bill impact; includes all capital, O&M, and projected annual revenues through 2020); LG&E, KPSC data request #49 (Electronic version of bill impact; includes all capital, O&M, and projected annual revenues through 2020); LG&E/KU, SC/NRDC data request/production of document #3 (Machine-readable input and output files for Strategist modeling); LG&E/KU, SC/NRDC data request/production of document #4 (Machine-readable input and output files for PROSYM modeling); LG&E/KU, SC/NRDC data request/production of document #16 (Sensitivity analysis of the economics of installing additional pollution controls); LG&E/KU, SC/NRDC data request/production of document #26 (Electronic versions of workpapers, source documents, input and output files used in the development of the 2011 Plans)

<sup>4</sup> *Id.*

<sup>5</sup> In approving the Environmental Compliance Plan under KRS 278.183, the Commission approves the projects in the Plan, but not their associated costs, for purposes of the surcharge assessment. KRS 278.183(2).

<sup>6</sup> *In the Matter of: Adjustment of Gas and Electric Rates of Louisville Gas and Electric Company*, Case No. 90-158 (Ky. PSC September 21, 1990).

budget projections that are irrelevant and of questionable validity, was a rate case based on an historical test year while this is an environmental surcharge case. KIUC cannot, and does not, provide any meaningful response to the two clear principles enunciated in the Commission's order: (1) financial projections are irrelevant to proceedings in which the utility is not seeking recovery of estimated, future costs and (2) financial projections are too speculative to constitute useful evidence. Both apply with equal force to proceedings such as this one, in which the Companies' surcharge will be statutorily subject to review to ensure that they do not recover any costs other than *actual* expenses already incurred.<sup>7</sup> There is no justification to warrant departure from the Commission's well-reasoned Order.

Another telling omission is any explanation in KIUC's assertion that "disclosure of the financing information ... is necessary because it affects the costs that will be incurred by the Companies and recovered through the ECR"<sup>8</sup> of how the demanded information could possibly affect the capital costs of the Companies. KIUC's assertion merely begs the relevancy question. Only the costs incurred by the Companies, including a "reasonable return on compliance-related capital expenditures," are recoverable, if approved, through the environmental surcharge.<sup>9</sup> Another omission is apparent in KIUC's contention that the budgeted information is somehow necessary to "ensure that the Companies' customers will not be subsidizing unregulated affiliate companies."<sup>10</sup> The demanded budgeted information cannot possibly lead to any relevant evidence of subsidization of the unregulated affiliates. The Commission has held consistently over a course of years that LG&E and KU are to be treated as stand-alone entities.<sup>11</sup> Indeed, in a

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<sup>7</sup> See Joint Response at 2-4.

<sup>8</sup> KIUC Reply, page 4

<sup>9</sup> KRS 278.183(2). The issuance or assumption of securities by utilities is subject to a separate proceeding under KRS 278.300

<sup>10</sup> KIUC Reply, page 4

<sup>11</sup> *In the Matter of: Application of Kentucky Utilities Company for an Adjustment of Base Rates*, Case No. 2009-00548, Order at 24 (July 30, 2010) ("The Commission is not persuaded by the AG's arguments in this case on this

2006 Order in KU's 2003 base rate case, the Commission stated that taking into account affiliated entities' financial performance could actually result in cross-subsidization.<sup>12</sup>

Finally, KIUC does not reply – *at all* – to the Companies' detailed explanation that disclosure *to KIUC itself* would harm the Companies.<sup>13</sup> Instead, KIUC demands that the Companies furnish the information under seal and cites a Commission regulation stating that confidentiality is not, in itself, grounds to refuse to “respond to discovery.”<sup>14</sup> But the Companies' grounds for objection are relevance and reliability, together with the very real harm to the Companies and their budgeting processes that could result from even *confidential disclosure* to KIUC. KIUC simply is not entitled to the information it seeks, and it most certainly could not show that the information “is essential to a meaningful participation in the proceeding” in the absence of a protective agreement. 807 KAR 5:001, § 7(5)(b).

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issue any more than we were in Case No. 2003-00434. Acceptance of the adjustment would preclude KU from the opportunity to earn its authorized rate of return; would violate the “stand-alone” rate-making principal that the Commission has long employed; and would result in cross subsidization of KU and its ratepayers by its unregulated affiliates.”). *See also In the Matter of: Application of Louisville Gas and Electric Company for an Adjustment of Electric and Gas Base Rates*, Case No. 2009-00549, Order at 25 (July 30, 2010).

<sup>12</sup> *In the Matter of: An Adjustment of the Gas and Electric Rates, Terms, and Conditions of Louisville Gas and Electric Company*, Case No. 2003-00433, Order at 8-9 (March 31, 2006) (“For LG&E, the majority of the entities other than KU included in the consolidated income tax return of LG&E’s parent corporation, E.ON US Investment Corp., reflect activities which are not regulated by the Commission. By having to recognize tax losses and other tax credits related to these non-regulated activities to derive an effective Kentucky income tax rate could well be viewed as forcing the utility to use these non-regulated activities to subsidize the regulated utility operations.”). *See also In the Matter of: An Adjustment of the Electric Rates, Terms, and Conditions of Kentucky Utilities Company*, Case No. 2003-00434, Order at 8 (March 31, 2006); *Application of Louisville Gas and Electric Company for an Order Approving an Agreement and Plan of Exchange and to Carry Out Certain Transactions in Connection Therewith*, Case No. 89-374, Order (May 25, 1990); *In the Matter of Application of Kentucky Utilities Company for an Order Approving an Agreement and Plan of Exchange and to Carry Out Certain Transactions in Connection Therewith*, Case No. 10296, Order (October 6, 1988).

<sup>13</sup> *See* Joint Response at 7, notes 17 and 18 (discussing potential federal liability due to inadvertent disclosure by any party and the very real possibility that KIUC would seek to use the information as leverage in future, unrelated Commission cases).

<sup>14</sup> KIUC Reply, p. 4-5.

## CONCLUSION

Information concerning broad financial projections and debt available to affiliated companies has absolutely no bearing on a utility's environmental surcharge application pursuant to KRS 278.183. Nor do speculative budget projections have any relevance to a proceeding in which only costs actually incurred will be charged. KIUC's claim that the information it seeks is broad enough to *include* information concerning the Companies' environmental compliance plans and costs establish nothing to the contrary. Thousands and thousands of pages of non-privileged information that *is* relevant to the environmental compliance plans and costs has already been filed in this record without objection by the Companies, demonstrating that the Companies are not at all reluctant to file information that will actually assist the Commission in deciding the case at hand.

KIUC's motion to compel should be denied.

Dated: August 11, 2011

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Joint Sur-Reply was served via U.S. mail, first-class, postage prepaid, this 11th day of August 2011 upon the following persons:

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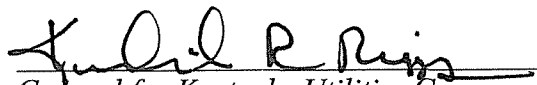
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