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June 2, 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: The 2011 Joint Integrated Resource Plan of Louisville Gas and Electric Company
and Kentucky Utilities Company**
Case No. 2011-00140

Dear Mr. DeRouen:

Enclosed please find and accept for filing the original and ten copies of Louisville Gas and Electric Company's and Kentucky Utilities Company's Response to the Petition of Rick Clewett, Drew Foley, Janet Overman, Gregg Wagner, The Natural Resources Defense Council, and The Sierra Club for Full Intervention in the above-referenced matter.

Please confirm your receipt of this filing by placing the stamp of your Office with the date received on the enclosed additional copies and return them to me in the enclosed self-addressed stamped envelope. Should you have any questions please contact me at your convenience. in the above-referenced matter.

Yours very truly,


Kendrick R. Riggs

KRR:ec
Enclosures
cc: Parties of Record
Edward George Zuger III

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COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

**THE 2011 JOINT INTEGRATED)
RESOURCE PLAN OF LOUISVILLE GAS) CASE NO. 2011-00140
AND ELECTRIC COMPANY AND)
KENTUCKY UTILITIES COMPANY)**

RESPONSE OF LOUISVILLE GAS AND ELECTRIC COMPANY AND KENTUCKY UTILITIES COMPANY TO THE PETITION OF RICK CLEWETT, DREW FOLEY, JANET OVERMAN, GREGG WAGNER, THE NATURAL RESOURCES DEFENSE COUNCIL, AND THE SIERRA CLUB FOR FULL INTERVENTION

Louisville Gas and Electric Company (“LG&E”) and Kentucky Utilities Company (“KU”) (collectively, the “Companies”) respectfully request that the Commission deny the Petition of Rick Clewett, Drew Foley, Janet Overman, Gregg Wagner (collectively, the “Individuals”) and The Natural Resources Defense Council and The Sierra Club (collectively, the “Environmental Groups”) for full intervention. Neither the Individuals’ nor the Environmental Groups’ Petition should be granted for three principal reasons: (1) the Petition does not demonstrate a special interest in the proceeding because the stated interests are either not within the Commission’s jurisdiction or are adequately represented by other parties; (2) the Petition fails to identify any relevant issues or development of relevant facts that will assist the Commission in the resolution of this matter; and (3) the Individuals’ and Environmental Groups’ intervention would unduly complicate and disrupt the proceeding. Because neither the Individuals nor the Environmental Groups have satisfied any of the requirements for intervention under 807 KAR 5:001 § 3(8), LG&E and KU respectfully request that the Commission deny the Petition of Rick Clewett, Drew Foley, Janet Overman, Gregg Wagner, the Natural Resources Defense Council and the Sierra Club for Full Intervention.

I. THE INDIVIDUALS

A. *The Commission Should Deny the Individuals' Petition to Intervene Because They Do Not Have a Special Interest in the Proceeding.*

The Commission will grant requests for permissive intervention “only upon a determination that the criteria set forth in 807 KAR 5:001, Section 3(8), have been satisfied.”¹ Under the regulation, permissive intervention will only be granted if the person “has a special interest in the proceeding which is not otherwise adequately represented” or that granting full intervention “is likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceeding.”²

Beginning with the first requirement, the Individuals have not demonstrated, nor can they demonstrate, a special interest in this proceeding. The Petition alleges that each of the four Individuals are “customers of one of the two Companies that have submitted this joint IRP, are long time Sierra Club members, and have a deep interest in seeing the Companies transform to meet the new reality in a way that will be low cost and cleaner.”³ As to their special interest in this proceeding, the Petition alleges that as ratepayers, “they help fund the Companies’ operations, and their bills will be directly impacted by the decisions the Companies make about how to provide service to their customers.”⁴ The Petition further alleges that “unlike the individual Movants, none of the existing parties to the proceeding are individual ratepayers and customers of the Companies and, therefore, their interests will not be fully represented unless full intervention is provided to Movants herein.”⁵

¹ *In the Matter: The 2008 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company* (Case No. 2008-00148) Order, July 18, 2008.

² 807 KAR 5:001, § 3(8).

³ Petition at 2.

⁴ *Id.* at 7.

⁵ *Id.*

These allegations do not meet the regulatory standards. By their own statements in the Petition, the Individuals admit that the only true interest they have in this proceeding is as customers of the utility. This interest is insufficient to warrant intervention. The Commission has held that a customer's "interest as a ratepayer is not a special interest...[It] is already represented by the AG."⁶ The Attorney General, who has a statutory right, pursuant to KRS 367.150(8)(b), to represent customers' interests in IRP proceedings, filed a motion to intervene on May 20, 2011. The Commission has foreclosed any argument that additional customer intervention is necessary when the Attorney General is participating in the case on behalf of the customers:

...the AG, as the statutorily authorized representative of Kentucky's utility customers, has a continuing interest in articulating and advocating support for renewable energy and energy conservation issues – the same issues that [a customer] seeks to advocate in this proceeding. The Commission further finds that the AG has consistently exercised his statutory duty to investigate these energy policy issues and to advocate their consideration by the Commission in its examination of the IRPs filed by Kentucky's jurisdictional electric utilities over the past several years.⁷

Moreover, in denying a customer's motion to intervene in Duke Energy's last IRP proceeding, the Commission noted that the Attorney General will represent customers' interests with regard to the portions of the IRP action that are related to environmental issues within the Commission's jurisdiction, including "demand-side management, non-coal electric generation,

⁶ *In the Matter of: Application of Kentucky Utilities Company to File Depreciation Study* (Case No. 2007-00565) and *In the Matter of Application of Kentucky Utilities Company for an Adjustment of Electric Base Rates* (Case No. 2008-00251) Order, December 5, 2008. Other orders in which the Commission has denied intervention because an individual customer's interest as a ratepayer is not a "special interest" include: *In the Matter of: Application of Kentucky Utilities Company to Amortize, by Means of Temporary Decreases in Rates, Net Fuel Cost Savings Recovered in Coal Contract Litigation* (Case No. 93-113) Order, December 7, 1993; *In the Matter of: Application of Water Service Corporation of Kentucky for an Adjustment of Rates* (Case No. 2008-563) Order, May 6, 2009; *In the Matter of: An Examination by the Kentucky Public Service Commission of the Environmental Surcharge Mechanism of Louisville Gas and Electric Company for the Two-Year Billing Period Ending April 30, 2003* (Case No. 2003-00236) Order, October 8, 2003.

⁷ *In the Matter of: The 2008 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company* (Case No. 2008-148) Order, July 18, 2008 at 8.

and energy efficiency.”⁸ The Individuals have failed to allege a special interest in this proceeding because their interest as ratepayers is already represented by the Attorney General.

B. The Commission Should Deny the Individuals’ Petition to Intervene Because the Individuals Have Not Demonstrated that They Will Present Issues or Develop Facts that Would Assist the Commission.

The Individuals’ Petition to intervene fails to demonstrate that they will present issues or develop facts that would assist the Commission in fully considering this matter without unduly complicating or disrupting the proceeding.⁹ The Petition does not attempt to explain how the Individuals will present issues or develop facts, instead relying solely on the experience of the other movants in the Petition, the Environmental Groups, as evidence of their abilities. The Petition states that “Movants NRDC and Sierra Club, on behalf of their members including the individual Movants herein...”¹⁰ The Petition later states that “[t]hrough full intervention, NRDC and Sierra Club, on behalf of their members including the individuals Movants...”¹¹ These two references are the *only* references to the Individuals’ ability to present issues or develop facts that would assist the Commission in this proceeding. While the movants allege that the Individuals should be granted full intervention on their own merit, a careful examination of the Petition demonstrates that the Individuals have not even alleged that they can present issues or develop facts, but instead seek to rely on the purported abilities of the Environmental Groups in order to satisfy the statutory standard for intervention. This is entirely insufficient.

⁸ *In the Matter of: The 2008 Integrated Resource Plan of Duke Energy Kentucky, Inc.* (Case No. 2008-00248) Order, November 5, 2008 at 4.

⁹ 807 KAR 5:001 § 3(8)(b).

¹⁰ Petition at 5.

¹¹ *Id.* at 6.

The Commission, in evaluating petitions to intervene, has closely examined whether the petition discloses any expertise in the issue involved in the proceeding.¹² The Individuals' Petition fails to allege any expertise with regard to Commission proceedings, utility costs, resource planning, or any other of the highly complex and technical components of this action. Instead, the Petition simply acknowledges that the Individuals are customers that are also members of the Sierra Club. Membership in the Sierra Club does not consequentially confer upon each of its members the expertise necessary to develop facts or present issues that will assist the Commission in IRP proceedings. As the Petition fails to allege how the Individuals are inimitably qualified to satisfy this prerequisite for intervention, their Petition should be denied.

C. The Commission Should Deny the Individuals' Motion to Intervene Because Their Intervention Will Unduly Complicate and Disrupt the Proceeding.

Even if the Individuals could demonstrate a special interest in this proceeding or that their involvement would assist in developing facts or issues, their intervention would unduly complicate and disrupt the proceeding. As set forth above, the only true interest the Individuals have with regard to this proceeding is based upon their status as ratepayers. Moreover the Petition repeatedly asserts that the Movants, including the Individuals, have sought intervention to ensure that the Companies develop plans for a "cleaner energy future" due to "growing awareness of the public health, environmental, and economic impacts of energy production."¹³

¹² *In the Matter of: Application of Louisville Gas and Electric Company for Approval of a Revised Collection Cycle for Payment of Bills* (Case No. 2007-00410) Order, November 29, 2007 at 3; *In the Matter of: Joint Application of Louisville Gas and Electric Company, Metro Human Needs Alliance, Inc., People Organized and Working for Energy Reform, and Kentucky Association for Community Action, Inc. for the Establishment of a Home Energy Assistance Program* (Case No. 2004-00304) Order, August 25, 2004 at 2; *In the Matter of: Application of Kentucky Utilities Company to File Depreciation Study* (Case No. 2007-00565) and *In the Matter of Application of Kentucky Utilities Company for an Adjustment of Electric Base Rates* (Case No. 2008-00251) Order, December 5, 2008 at 5-6; *In the Matter of: Application of Water Service Corporation of Kentucky for an Adjustment of Rates* (Case No. 2008-563) Order, May 5, 2009 at 2.

¹³ Petition at 2.

Further, the Petition states that the Individuals have a “deep interest” in cleaner energy.¹⁴ As discussed in more detail with regard to the Environmental Groups, the Commission’s jurisdiction is limited to the rates and service of utilities and motions to intervene must consequently demonstrate an interest or expertise in either rates or service. While the Petition mentions the Individuals’ interest in low-cost energy, the thrust of the Petition makes evident that the Individuals, along with the Environmental Groups that have attempted to act on their behalf, are predominantly motivated to intervene in this proceeding to advance environmental issues that have repeatedly been held to be beyond the scope of Commission proceedings, including IRP actions such as this one.¹⁵

Permitting the Individuals to expand the scope of the proceeding to encompass environmental concerns that are not within the Commission’s jurisdiction would inevitably unduly complicate and disrupt the Companies’ IRP proceeding. The Commission has repeatedly held that allowing an intervenor to raise issues that are beyond the scope of the Commission’s jurisdiction would unduly complicate and disrupt the proceeding.¹⁶ The proper means for the Individuals to participate in this proceeding is through filing public comments and communicating with the Attorney General, who will represent the Individuals’ interests as ratepayers. These mechanisms ensure that the Individuals are given the opportunity to present their positions on jurisdictional issues without unduly complicating the pending action. The

¹⁴ *Id.*

¹⁵ *In the Matter of: The 2008 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company* (Case No. 2008-148) Order, July 18, 2008 at 5-6; *EnviroPower, LLC v. Public Service Commission of Kentucky*, 2007 WL 289328 at *4 (Ky. App. 2007) (not to be published; pursuant to C.R. 76.28(4), a copy is attached to the Response).

¹⁶ *In the Matter of: Application of Louisville Gas and Electric Company to File Depreciation Study*, Case No. 2007-00564 and *In the Matter of: Application of Louisville Gas and Electric Company for an Adjustment of Its Electric and Gas Base Rates* (Case No. 2008-00252), Order, October 10, 2008; *In the Matter of: The Joint Application Pursuant to 1994 House Bill No. 501 for the Approval of Kentucky Power Company Collaborative Demand-Side Management Programs and Authority to Implement a Tariff to Recover Costs, Net Lost Revenues and Receive Incentives Associated with the Implementation of the Kentucky Power Company Collaborative Demand-Side Management Programs* (Case No. 2008-00350), Order, October 13, 2008.

Companies respectfully request that the Commission deny the Individuals' Petition to intervene as their involvement would unduly complicate and disrupt this proceeding.

II. THE ENVIRONMENTAL GROUPS

A. *The Commission Should Deny the Environmental Groups' Petition to Intervene Because They Do Not Have a Special Interest in the Proceeding.*

(1) **The Environmental Groups' Stated Interests Are Not Within the Commission's Jurisdiction.**

In addition to the Individuals' Petition for Intervention, two Environmental Groups, the Sierra Club and the Natural Resources Defense Council have moved to intervene in this proceeding. As explained above, permissive intervention may only be granted if the prerequisites set forth in 807 KAR 5:001 § 3(8) are satisfied. The Environmental Groups cannot satisfy the first basis for permissive intervention, which requires the movant to demonstrate a special interest in the proceeding that is not already represented by another party to the action.¹⁷

The Petition's description of the Environmental Groups is telling. The Natural Resources Defense Council is described as an "environmental organization, headquartered in New York, that has worked for its 40 year history to, among other things, promote energy efficiency and renewable energy sources, and to protect air and water quality."¹⁸ The Natural Resources Defense Council does not have a Kentucky office or chapter; the Midwest Office of the organization, located in Chicago, Illinois, is the division of the organization that seeks to intervene in this proceeding.¹⁹ The Sierra Club is a self-described "national grassroots nonprofit

¹⁷ 807 KAR 5:001, § 3(8).

¹⁸ Petition at 3.

¹⁹ *Id.*

conservation organization.”²⁰ In prior pleadings to the Commission, the Sierra Club has defined itself as an “environmental organization.”²¹

The Environmental Groups’ stated “special interest” in this proceeding is closely aligned with the groups’ self-identifying label; both demonstrate that the Environmental Groups seek to utilize this action to advance environmental concerns that are not only beyond the scope of an IRP proceeding,²² but are beyond the scope of the Commission’s jurisdiction.²³ The Petition states that the Environmental Groups have a “wealth of knowledge and experience” regarding “critical issues” that include alternatives to coal-fired generation and “increased awareness of the significant economic and environmental impacts that coal-fired generation can have.”²⁴ The “special interest” the Environmental Groups have claimed in the present proceeding demonstrates that their real interest in this action is to further protest the Companies’ use of coal-fired generation and related environmental externalities. These issues are beyond the Commission’s jurisdiction.

Both the Kentucky Court of Appeals and the Commission have made clear that a person seeking intervention must have “an interest in the ‘rates’ or ‘service’ of a utility, since those are the only two subjects under the jurisdiction of the PSC.”²⁵ In ruling upon a petition to intervene in the Companies’ last IRP proceeding the Commission stated:

Notably absent from the Commission’s jurisdiction are environmental concerns, which are the responsibility of other agencies within Kentucky state government... .To the extent that [the proposed intervenor] seeks to address issues in this proceeding

²⁰ *Id.*

²¹ *In the Matter of: An Investigation into East Kentucky Power Cooperative, Inc.’s Continued Need for Certificated Generation* (Case No. 2006-00564) Petition to Intervene of Cumberland Chapter of Sierra Club, February 12, 2007.

²² 807 KAR 5:058(8)(1) and (4)(“lowest possible cost”)

²³ KRS 278.040(2)(“rates and services”).

²⁴ *Id.* at 5.

²⁵ *EnviroPower, LLC v. Public Service Commission of Kentucky*, 2007 WL 289328 at *4 (Ky. App. 2007) (not to be published); *In the Matter of: The 2008 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company* (Case No. 2008-148) Order, July 18, 2008.

that deal with the impact of air emissions on human health and the environment, this is not the proper venue for those issues to be considered.²⁶

A careful examination of the Environmental Groups' alleged "special interest" in this proceeding reveals that their true motivation is to address environmental concerns, including the impact of air emissions on human health and environment – the precise issues this Commission held were not within its jurisdiction in the Companies' last IRP proceeding. In fact, in East Kentucky Power Cooperative, Inc.'s last IRP proceeding, the Commission held that the Sierra Club did not have a special interest in the proceeding that is not otherwise adequately represented.²⁷

There are, of course, federal and state agencies that do have jurisdiction over environmental issues. For example, the Sierra Club actively objected on both the state and federal level to the air quality permits issued to LG&E for the new coal-fired generating unit at Trimble County. They were heard by Kentucky's Environmental and Public Protection Cabinet²⁸ and by the United States Environmental Protection Agency.²⁹ The Sierra Club also petitioned the Energy and Environment Cabinet to overturn the water discharge permit for Trimble County.³⁰

These efforts are consistent with the information on the Sierra Club's website, which includes the headline "Beyond Coal: Kentucky" and states that the Sierra Club is "working to stop the construction of new coal-burning power plants."³¹ This latter statement is of particular

²⁶ *In the Matter of: The 2008 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company* (Case No. 2008-148) Order, July 18, 2008 at 5-6.

²⁷ *In the Matter of: 2009 Integrated Resource Plan of East Kentucky Power Cooperative, Inc.* (Case No. 2009-00106) Order, July 13, 2009 at 9.

²⁸ *Sierra Club, et al. v. Environmental and Public Protection Cabinet and Louisville Gas and Electric Company* (File No. DAQ-27602-042).

²⁹ *In the Matter of the Proposed Operating Permit for: Louisville Gas and Electric Company to Operate the Proposed Source Located at 487 Corn Creek, Bedford, Trimble County, Kentucky* (Permit No. V-02-043 Revision 2).

³⁰ *Kentucky Waterways Alliance, Sierra Club, and Valley Watch, Inc. v. Energy and Environment Cabinet and Louisville Gas and Electric Company* (File No. DOW-41106-047).

³¹ <http://www.sierraclub.org/coal/ky/default.aspx> .

importance in light of the Petition, which states that the Environmental Groups plan to “accelerate the Companies’ proposal to retire Cane Run, Green River, and Tyrone coal units ... reduc[e] the Companies’ coal dependency, and present evidence and argument in support of policies that would promote aggressive implementation of ... renewable energy sources.”³² The statements in the Petition are likewise consistent with the statements of the Natural Resources Defense Council, which has asserted that “Coal-fired power plants threaten the environment and your health” and that “we must move away from dirty coal-based energy.”³³

The Environmental Groups’ campaign against coal-based generation is, simply put, not a Commission issue. The Commission has expressly so held, explaining [1] that when a utility proposes to construct a new generating unit, the Commission’s review is limited to determining whether there is a need for the additional generation and [2] that KRS Chapter 278 does not permit the Commission to consider environmental externalities.³⁴ Moreover, the General Assembly has stated that the Commission “may consider the policy of the General Assembly to foster and encourage use of Kentucky coal by electric utilities serving the Commonwealth.”³⁵ The Environmental Groups may advocate their beliefs regarding the impacts of coal-fired generation in various proceedings before other state and federal agencies, as well as to the Kentucky General Assembly; but the Commission is not the agency to hear them. Because such considerations are not within the Commission’s jurisdiction, the Environmental Groups’ stated interests cannot constitute a special interest so as to warrant permissive intervention in this proceeding.

³² Petition at 6.

³³ <http://www.nrdc.org/health/effects/coal/index.asp>.

³⁴ *Kentucky Utilities Co. v. Public Service Comm’n*, 252 S.W.2d 885 (Ky. 1952); *In re: An Assessment of Kentucky’s Electric Generation, Transmission and Distribution Needs* (Case No. 2005-00090) Order, September 15, 2005.

³⁵ KRS 278.020(1).

(2) To the Extent that the Environmental Groups Have Demonstrated an Interest in Issues Within the Commission’s Jurisdiction, the Interests Are Adequately Represented by the Attorney General.

The Environmental Groups’ Petition also alleges a special interest based upon the fact that the “Organizational Movants NRDC and Sierra Club each have members who are customers and ratepayers of the Companies.”³⁶ Of course, as explained above, the ratepayers’ interests are statutorily represented by the Attorney General, who moved to intervene in this proceeding on May 20, 2011. Because the Attorney General adequately represents customers’ interests, the Commission has repeatedly held that a customer’s interest as a ratepayer does not constitute a “special interest” for intervention purposes.³⁷

Finally, the Environmental Groups have asserted an interest in the issues related to environmental concerns that are within the Commission’s jurisdiction, including energy efficiency and peak demand reduction.³⁸ The Commission has held that although these issues are properly considered in IRP proceedings, the Attorney General represents customers’ interests with regard to these issues, as well.³⁹ Because the Environmental Groups’ stated interest in this proceeding on behalf of its ratepayer constituents is already adequately represented by the Attorney General in this action, including with regard to the issues that relate to environmental concerns, the Environmental Groups do not have a special interest in this proceeding warranting intervention.

³⁶ Petition at 7.

³⁷ *In the Matter of: Application of Kentucky Utilities Company to File Depreciation Study* (Case No. 2007-00565) and *In the Matter of Application of Kentucky Utilities Company for an Adjustment of Electric Base Rates* (Case No. 2008-00251) Order, December 5, 2008.

³⁸ Petition at 7.

³⁹ *In the Matter of: The 2008 Integrated Resource Plan of Duke Energy Kentucky, Inc.* (Case No. 2008-00248) Order, November 5, 2008 at 4.

B. The Commission Should Deny the Environmental Groups' Petition to Intervene Because They Will Not Present Issues or Develop Facts that Will Assist the Commission in Fully Considering the IRP Proceeding.

Because the Environmental Groups do not have a special interest in this proceeding under which permissive intervention is warranted, intervention can only be granted if the Environmental Groups' Petition demonstrates that it will present issues or develop facts that will assist the Commission in considering this proceeding.⁴⁰ The Petition fails this requirement because the Petition provides nothing more than conclusory statements regarding its members "wealth of knowledge and experience" regarding issues that are largely beyond the scope of this Commission's jurisdiction. The Environmental Groups' Petition simply fails to make the demonstration required by the Commission's regulation.

In East Kentucky Power Cooperative, Inc.'s 2009 IRP proceeding, the Commission departed from its numerous precedents to permit the Sierra Club, Kentucky Environmental Foundation, and Kentuckians for the Commonwealth to intervene, finding that the environmental organizations possessed sufficient expertise regarding issues within the scope of the Commission's jurisdiction.⁴¹ Prior to permitting intervention in the East Kentucky Power Cooperative, Inc. proceeding, however, the Commission had repeatedly denied requests from environmental organizations, such as the Sierra Club, and persons expressing environmental concerns to intervene in Commission proceedings because the scope of their interests are not within the Commission's jurisdiction, and as such, it was unlikely that the persons and

⁴⁰ 807 KAR 5:001 § 3(8).

⁴¹ *In the Matter of: 2009 Integrated Resource Plan of East Kentucky Power Cooperative, Inc.* (Case No. 2009-00106) Order, July 13, 2009 at 9.

organizations would present issues or develop facts pertinent to the proceeding.⁴² Included among these orders are two decisions arising from a proceeding involving East Kentucky Power Cooperative Inc.'s Continued Need for Certificated Generation.⁴³ The Commission, in denying the Sierra Club's petition to intervene stated that the environmental consequences of energy generated by coal was not within the scope of the proceeding and that the Sierra Club had not presented any evidence of its special expertise or knowledge regarding East Kentucky Power Cooperative Inc.'s expected power requirements.⁴⁴ This holding is analogous to the present Petition, as expected power requirements and load forecasts are certainly integral to IRP proceedings. The Commission affirmed its ruling in denying the Sierra Club's application for rehearing, expressly denying the organization's attempt to obfuscate its "preference for non-coal sources of generation," by couching its argument "in terms of costs to ratepayers."⁴⁵ The Companies believe the Commission's analysis in these orders is not only cogent and convincing, but is also consistent with the Commission's previous interpretations of the scope of its jurisdiction in its prior orders.

⁴² *In the Matter of: An Investigation into East Kentucky Power Cooperative Inc. 's Continued Need for Certificated Generation* (Case No. 2006-00564) Order March 22, 2007; *In the Matter of: The 2008 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utility Company*, Case No. 2008-00148, Order (July 18, 2008); *In the Matter of: Filing of East Kentucky Power Cooperative, Inc. to Request Approval of Proposed Changes to Its Qualified Cogeneration and Small Power Production Facilities Tariff*, Case No. 2008-00128, Order (April 28, 2008); *In the Matter of: Application of Louisville Gas and Electric Company to File Depreciation Study*, Case No. 2007-00564 and *In the Matter of: Application of Louisville Gas and Electric Company for an Adjustment of Its Electric and Gas Base Rates*, Case No. 2008-00252, Order (October 10, 2008); *In the Matter of: Application of Kentucky Utilities Company to File Depreciation Study*, Case No. 2007-00565 and *In the Matter of: Application of Kentucky Utilities Company for an Adjustment of Electric Base Rates*, Case No. 2008-00251, Order (December 5, 2008);

⁴³ *In the Matter of: An Investigation into East Kentucky Power Cooperative Inc. 's Continued Need for Certificated Generation* (Case No. 2006-00564) Order March 22, 2007

⁴⁴ *Id.* at 4.

⁴⁵ *In the Matter of: An Investigation into East Kentucky Power Cooperative Inc. 's Continued Need for Certificated Generation* (Case No. 2006-00564) Order, April 19, 2007.

In contrast to these decisions is the East Kentucky Power Cooperative Inc. proceeding in which the Sierra Club was permitted to intervene. The Companies believe that the Commission erred in this decision. In contrast, the Companies believe the Commission's decisions denying intervention by environmental groups are correct and demonstrate that these Environmental Groups lack expertise in the issues involved herein. As such, the Environmental Groups are unable to present issues or develop facts that will assist the Commission in considering the Companies' IRP and therefore, their Petition should be denied. Indeed, Staff's Report in Case No. 2009-00106 demonstrates the lack of expertise in the IRP issues through its numerous rejections of the arguments by the environmental groups⁴⁶ Given this record, the Companies believe the Commission's concerns and reasoning in its prior orders continues to be valid and the correct evaluation under intervention standards.

C. The Commission Should Deny the Environmental Groups' Petition to Intervene Because Their Intervention Will Unduly Complicate and Disrupt the Proceeding.

Even if the Environmental Groups could demonstrate a special interest in this proceeding or that their involvement would assist in developing facts or issues, their intervention will unduly complicate and disrupt the proceeding. As discussed above with regard to the Individuals, permitting parties to intervene that seek to unduly expand the scope of the proceeding will

⁴⁶ The November 2010 PSC Staff Report states in part: "The Environmental Groups' reference to EKPC's forecast being "wrong" in 2009 reflects a lack of understanding of 1) the manner in which forecasts are prepared for inclusion in a utility's IRP, 2) the nature of forecast assumptions in developing long-term forecasts, and 3) the factors that can impact electric sales on a year-to-year basis. ... None of the criticisms offered by the Environmental Groups' leads Staff to conclude that this result in any way invalidates EKPC's forecast. ... Finally, the Environmental Groups' criticism of how EKPC treats the load of Gallatin for forecasting purposes calls for using a "macro" approach, while ignoring the "micro" approach that EKPC and Gallatin's retail electric supplier, Owen Electric, have been using for many years. Staff sees no validity in this criticism. ... Staff disagrees that EKPC's consideration of DSM is "less aggressive than is reasonable" as the Environmental Groups contend."

consequentially complicate and disrupt the proceeding in contravention of 807 KAR 5:001 §3(8).⁴⁷

The Commission Staff's IRP reports often and accurately describe the IRP process as follows:

The goal of the Commission in establishing the IRP process was to create a comprehensive, but non-adversarial review of demand and supply projections to ensure that all reasonable options for meeting future supply needs were being considered and pursued in a fair and unbiased manner, and that ratepayers will be provided a reliable supply of electricity at the lowest possible cost. The regulation specifies that IRP reviews be conducted by Staff, and that Staff is responsible for issuing a report summarizing its review and recommendations.

Granting intervention to the Environmental Groups, however, will not serve the stated goal of a "non-adversarial review." The Environmental Groups, based on their Petition in this case, and positions taken in other proceedings, can reasonably be expected to continue to advocate for their legislative-type policy arguments, which only the Kentucky General Assembly has the legal authority to consider and decide. The Commission certainly does not have the legislative authority to decide issues such as renewable portfolio standards, greenhouse gas regulation, and compliance with Environmental Protection Agency regulations. Granting intervention to permit arguments on the inadequacy of the Commission's long-standing and well-established sound principals of regulation such as least-cost resource planning will only cause the proceeding to become unduly complicated and disruptive, contrary to the standards in 807 KAR 5:001 § 3(8).

⁴⁷ *In the Matter of: Application of Louisville Gas and Electric Company to File Depreciation Study*, Case No. 2007-00564 and *In the Matter of: Application of Louisville Gas and Electric Company for an Adjustment of Its Electric and Gas Base Rates* (Case No. 2008-00252) Order, October 10, 2008; *In the Matter of: The Joint Application Pursuant to 1994 House Bill No. 501 for the Approval of Kentucky Power Company Collaborative Demand-Side Management Programs and Authority to Implement a Tariff to Recover Costs, Net Lost Revenues and Receive Incentives Associated with the Implementation of the Kentucky Power Company Collaborative Demand- Side Management Programs* (Case No. 2008-00350) Order, October 13, 2008.

In addition, even at this early stage of the case, the Environmental Groups' show that they will, if granted intervention, unnecessarily complicate and disrupt it.⁴⁸ While the Companies submitted their application initiating this proceeding on April 21, 2011, the Environmental Groups did not move to intervene until May 26, 2011, which coincides with the last date by which the Commission Staff and intervenors may serve initial discovery on the Companies. The discovery requests are highly detailed and extensive, including twenty-nine interrogatories and thirty-seven requests for productions of documents. The breadth of the discovery requests is objectionable, and if LG&E and KU are compelled to provide answers, significant effort and time will be required by the Companies in order to respond. Because the Environmental Groups have not been granted intervention in this proceeding, the Companies will not begin working on responses to their requests until the Commission rules on their Petition to intervene.

The Environmental Groups have filed numerous citizen suits challenging various environmental permits issued to utilities. The Sierra Club has filed permit challenges LG&E permits on two separate occasions, contesting the air and water discharge permits for Trimble County, one of the cleanest coal-fired units in the country.⁴⁹ The thirty-seven requests for productions of documents and other information sought through the twenty-nine data requests

⁴⁸ The analysis in this section applies with equal force to the Individuals, as well. The argument is placed in this portion of the Response because the discovery propounded by the proposed intervenors seeks to require the utilities to serve its responses to the discovery to the Natural Resources Defense Council's Chicago, Illinois office.

⁴⁹ See *Sierra Club, Valley Watch, Inc. and Save the Valley, Inc. v. Environmental and Public Protection Cabinet and Louisville Gas and Electric Company* (File No. DAQ-27602-042, Permit No. V-02-043 R2), filed December 16, 2005 and *Kentucky Waterways Alliance, Sierra Club, and Valley Watch, Inc. v. Energy and Environment Cabinet and Louisville Gas and Electric Company* (File No. DOW-41106-047, Permit No. KY0041971), filed May 3, 2010.

may provide the basis for the Environmental Groups bring future claims against LG&E or KU before the Energy and Environmental Cabinet.

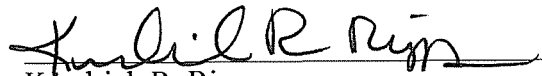
The Environmental Groups have already attempted to unduly complicate and disrupt this proceeding. Their Petition should be denied.

III. CONCLUSION

Neither the Individuals nor the Environmental Groups have satisfied either of the bases for permissive intervention set forth in 807 KAR 5:001 § 3(8). Neither has articulated any special interest in this proceeding that is within the Commission's jurisdiction that is not already adequately represented by the Attorney General. Nor have they shown an ability to present issues or develop facts that will assist the Commission in considering the Companies' IRP. Finally, as evidenced by their conduct thus far, the Individuals and Environmental Groups will, if permitted to intervene, unduly complicate and disrupt this proceeding. To the extent the Individuals or the Environmental Groups wish to express their views, they, like other members of the public, can submit written public comments in the record. For these reasons, the Companies respectfully request that the Commission deny their Petition to intervene.

Dated: June 3, 2011

Respectfully submitted,



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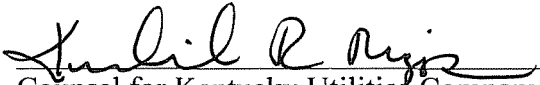
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Response was served via U.S. mail, first-class, postage prepaid, this 3rd day of June 2011 upon the following persons:

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RCP Rule 76.28(4) before citing.

Court of Appeals of Kentucky.

ENVIROPOWER, LLC, Appellant

v.

PUBLIC SERVICE COMMISSION OF KENTUCKY,
East Kentucky Power Cooperative, Inc.,
Gregory D. Stumbo, Attorney General of
Kentucky, and Gallatin Steel Company, Appellee.

No. 2005-CA-001792-MR. Feb. 2, 2007.

Appeal from Franklin Circuit Court, Action No. 05-
CI-00553; Roger L. Crittenden, Judge.

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Company.

Before BARBER¹ and DIXON, Judges; PAISLEY, Senior
Judge.²

Opinion

OPINION

DIXON, Judge.

*I EnviroPower, LLC, appeals the Franklin Circuit Court's
dismissal of its case challenging a Public Service Commission
("PSC") order denying intervention.

The PSC denied EnviroPower's Motion for Intervention in
a Certificate of Public Convenience and Necessity ("CON")
hearing. The hearing was initiated by East Kentucky Power
Cooperative, Inc's., ("EKPC") application to the PSC for
permission to self-construct a 278 MW coal-fired generating
plant at its Spurlock Station site in Maysville, Kentucky.

Prior to making the CON application to begin construction,
EKPC had issued a "Request for Proposals ("RFP") in
April 2004, for various contractors to bid on supplying the
necessary power. EKPC anticipated a need to substantially
increase its power generation capacity to serve a new retail
customer and sought proposals from outside power suppliers
to determine whether it was more economically feasible for
EKPC to self-build a new power facility or purchase power
from other suppliers. Ultimately, the lowest bid was EKPC's
proposal to construct the facility itself. KRS 278.020 requires
a CON certificate be issued before construction begins.

The CON application was docketed as PSC Case
No.2004-00423 ("CON Case"). Intervention was granted
to the Office of the Attorney General and Gallatin Steel,
the largest electric consumer of EKPC power. The PSC
established a procedural schedule and a hearing was initially
scheduled on February 18, 2005.

EnviroPower was one of thirty-nine (39) unsuccessful bidders
in the earlier RFP request for power supply bids issued by
EKPC. EnviroPower owns no electric generating facilities,
but it proposed to construct a merchant generating plant and
sell the output to EKPC. In mid-September 2004, EKPC
informed EnviroPower that its bid had been rejected. On
January 14, 2005, EnviroPower filed its first request to
intervene at the PSC to challenge EKPC's bid solicitation and
evaluation process. By PSC order dated February 3, 2005,
EnviroPower's first request to intervene was denied upon
the findings that: (1) it was not a ratepayer of EKPC, but
a rejected bidder whose interests were not identical to rate-
payers; and (2) EnviroPower had a legal duty to its members
to maximize profits; a far different goal from protection
of the ratepayers. EnviroPower's interest would be served
by challenging any bid evaluation process that rejected its
bid and, that interest did not coincide with the interests of
ratepayers. Although intervention was denied, EnviroPower's
name was added to the service list so it could monitor the
proceedings, submit further information, and even comment
upon the issues. EnviroPower filed neither a timely request
for rehearing at the PSC under KRS 278.400, nor a timely

action for review in the Franklin Circuit Court under KRS 278.410(1).

On the same date that the PSC denied EnviroPower's first request to intervene, the PSC issued another order in the CON Case initiating a full investigation of EKPC's bidding procedures and evaluation process. The PSC directed EKPC to file supplemental testimony that included, but was not limited to the following issues:

- *2 1. A detailed description of the nature and extent of participation by East Kentucky Power's distribution cooperatives and Warren Rural Electric Cooperative Corporation in the bid evaluation process;
2. The details of each discussion with each bidder regarding revisions to any provision of that bidder's bid; and
3. Sufficient details to enable the Commission to objectively determine whether the capital cost and the base load requirement price for the EnviroPower bid was lower than those of the East Kentucky Power self-construct bid.

The PSC also required testimony to be filed by EnerVision, Inc., an outside consultant retained by EKPC to assist in the evaluation and economic rankings of the power supply bids. The consultant was directed to file detailed testimony on the following issues:

1. Its role in evaluating and ranking the power supply bids;
2. The extent to which its role was performed independently of East Kentucky Power;
3. Whether its economic rankings of the power supply bids coincide with those of East Kentucky Power as shown in Application Exhibit 4, p. 7; and
4. Any other information necessary or appropriate for a full and complete understanding of the bid evaluation process.

That PSC order further required EKPC to respond to a number of requests for information, including the filing of a complete copy of each of the thirty-nine (39) power supply bids received. Each of the bids, including EnviroPower's, was filed under seal and EnviroPower has never seen the details of EKPC's bid. All of the testimony and information required by the PSC's February 3, 2005, order was filed. EnviroPower filed extensive comments in the form of prepared testimony.

On April 11, 2005, EnviroPower filed a second petition to intervene at the PSC. Finding no change in circumstances

since the first petition had been denied-EnviroPower was not a ratepayer and had no interest in either the "rates" or "service" of EKPC-the PSC denied EnviroPower's second intervention petition by order dated April 18, 2005. That order also found that EnviroPower was unlikely to present issues or develop facts to assist in the consideration of the CON Case. The PSC explained "EnviroPower had no role in either the development of EKPC's bidding procedures or the evaluation of the bids received. Only East Kentucky Power and its consultants were involved in those activities."

EnviroPower then filed on April 19, 2005, an action in the Franklin Circuit Court requesting injunctive and declaratory relief. The Court held a brief hearing that same day and issued a restraining order which among other things, prohibited the PSC from holding its scheduled hearing. Subsequently, the Court issued its May 6, 2005, Order, which among other things, dissolved the restraining order, rejected all of EnviroPower's challenges to the PSC's denial of intervention, and denied a temporary injunction to prohibit a PSC hearing in the CON Case. EnviroPower requested interlocutory relief in the Court of Appeals, which was denied by Order entered May 31, 2005, and then interlocutory relief in the Kentucky Supreme Court, which was denied by Order entered June 7, 2005.

*3 After further briefing and oral argument, the circuit court dismissed EnviroPower's action by reaffirming the findings and conclusions in its May 6, 2005, order that EnviroPower did not have a legally protected interest which would entitle it to intervene in the CON Case, and the PSC did not abuse its discretion by denying intervention.

STANDARD OF REVIEW

At the outset, EnviroPower asserts this Court should review the PSC's decision *de novo* citing cases from other agencies. EnviroPower argues these cases establish a standard for review of PSC's decision. We find however, the cases do not support EnviroPower's conclusion..

The Court's standard for review of a decision by the PSC is set forth by statute. KRS 278.410(1) provides that an order of the PSC can be vacated or set aside only if it is found to be unlawful or unreasonable. As Kentucky's highest Court declared in *Kentucky Utilities Co. v. Farmers RECC*, 361 S.W.2d 300, 301 (Ky.1962), a PSC order may be appealed only when there has been strict compliance with KRS 278.410(1) because, "this statute provides the exclusive method by which an order of the commission can be

reviewed by the circuit court.” The strict compliance standard found in KRS 278.410(1) was subsequently reaffirmed in *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450 (Ky. 1964).

Moreover, this Court has previously reviewed denials of intervention in PSC proceedings. In *Inter-County Rural Electric Cooperative Corporation v. Public Service Commission*, 407 S.W.2d 127 (Ky. 1966), this Court held the PSC decision to deny intervention was reviewed only for an abuse of discretion. We find this appeal is governed by KRS 278.410(1), and the commission's decisions are reviewed only for an abuse of discretion.

ARGUMENTS FOR REVERSAL

EnviroPower makes three arguments for reversal of the circuit court: (1) PSC's denial of intervention was arbitrary and unlawful; (2) PSC's denial of intervention was error because EnviroPower alleged fraud in award of bid; and (3) denial of intervention deprived EnviroPower of procedural due process and equal protection of the laws.

I. Denial of Intervention as Arbitrary

EnviroPower argues it had a right to intervene in this action under KRS 278.0201(1):

Upon the filing of an application for a certificate, and after any public hearing which the commission may in its discretion conduct for *all interested parties*, the commission may issue or refuse to issue the certificate ... (Emphasis added).

From this language EnviroPower insists it is an interested party within the meaning of this statute and, as such, has a right to intervene. The Court does not read this statute in the manner suggested by EnviroPower. The statute is clear on its face and it does not establish any specific rules defining an “interested party.” Furthermore, the controlling statute here is KRS 278.310(2), which requires the PSC to adopt rules governing hearings and investigations before the commission. The PSC has acted to adopt specific rules governing all commission proceedings. Intervention is specifically addressed in 807 KAR 5.001, Section 3(8). Under this regulation, the PSC retains the power in its discretion to grant or deny a motion for intervention. The Kentucky Attorney General has a statutory right to intervene. KRS 367.150(8)(b).

*4 The PSC's exercise of discretion in determining permissive intervention is, of course, not unlimited. First, there is the statutory limitation under KRS 278.040(2) that the person seeking intervention must have an interest in the “rates” or “service” of a utility, since those are the only two subjects under the jurisdiction of the PSC. Second, there is the limitation in the PSC intervention regulation, 807 KAR 5.001, Section 3(8), which requires the showing of either “a special interest in the proceeding which is not otherwise adequately represented,” or a showing that intervention “is likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings.”

The PSC properly found that since “EnviroPower had no role in either the development of EKPC's bidding procedures or the evaluation of the bids received,” and its intervention was not likely to present issues or develop facts to assist the PSC in fully considering the CON Case. Moreover, the PSC noted the intervention of Gallatin Steel, EKPC's largest retail customer, and the Attorney General was adequate to protect EnviroPower's interest. In conclusion, the Court finds the denial of intervention to EnviroPower was neither unlawful nor unreasonable.

II. Allegations of Fraud

EnviroPower has aggressively asserted that EKPC engaged in a fraudulent RFP by skewing its evaluation to support its own self-bid proposal. However, the cases cited, *Pendleton Bros. Vending, Inc. v. Comm. of Ky. Finance and Administration Cabinet*, 758 S.W.2d 24 (Ky. 1988) and *HealthAmerica Corp. of Kentucky v. Humana Health Plan, Inc.*, 697 S.W.2d 946 (Ky. 1985) do not apply because in those cases the issue involved a *claim of fraud against a public agency* as opposed to a claim of fraud against a private entity such as EKPC.

EnviroPower then argues that under Kentucky common law its allegations of fraud give it standing as a competitor “to challenge the granting of a license or permit to another competitor by an administrative agency,” citing *PIE Mutual Insurance Co. v. Kentucky Medical Insurance Co.*, 782 S.W.2d 51, 54 (Ky.App.1990). But even this authority is unavailing here since the common law has been superseded by statutes expressly limiting the PSC's jurisdiction to “the regulation of rates and service of utilities,” KRS 278.040(2), and further limiting the participation in a CON Case to “interested parties,” KRS 278.020(1).

III. Constitutional Claims

EnviroPower also contends the PSC's denial of intervention deprived it of its right to procedural due process and equal protection of the law.

First, EnviroPower claims that it had a constitutionally protected property interest in its environmental permits, and by denying intervention, the PSC impermissibly deprived EnviroPower of the value of the permits. EKPC argues that EnviroPower's interest created a mere expectancy that it might develop a power plant project at a future date. Further, EKPC points out that EnviroPower never had any contract with EKPC to develop power, and nothing prevented EnviroPower from using its permits to establish other projects. The PSC argues that, as an agency, it had no jurisdiction over the environmental permits issued to EnviroPower.

*§ "It is well established that in order to succeed in either a procedural or substantive due process claim, such claimant must demonstrate a legitimate entitlement to a vested property interest." *Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Co.*, 983 S.W.2d 493, 497 (Ky. 1998) citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). Furthermore, a "mere subjective expectancy" of a property interest is not protected by procedural due process. *Perry v. Sindermann*, 408 U.S. 593, 603, 92 S.Ct. 2694, 2700, 33 L.Ed.2d 570 (1972).

EnviroPower insists that it has a substantial and concrete interest in the CON proceeding. EnviroPower obtained many of the critical permits requested to begin construction of the new power plant. The permits included a Construction Certificate and an Air Quality Permit. Both permits were required before construction could begin. EnviroPower also argues its reputation will be tarnished if it cannot participate in the CON proceedings.

These arguments are novel, but totally unpersuasive in establishing a right to intervene in a CON proceeding. EnviroPower could best be described as an unsuccessful bidder in the RFP. There were thirty-eight (38) other successful bidders. As a bidder, EnviroPower knew, or should have known, that EKPC had made a self-build proposal. PSC argues EnviroPower had a mere expectancy and no fundamental property right. The Court agrees with EKPC's analysis of this issue.

In the case at bar, it appears to the Court that EnviroPower had indeed, nothing more than an expectancy interest in the environmental permits. When the PSC denied EnviroPower's intervention in the CON proceeding, it did not render the environmental permits worthless. Furthermore, EnviroPower was free to use its permits in seeking out another power plant project. Accordingly, we find that the Commission did not deprive EnviroPower of any right to procedural due process.

Finally, EnviroPower contends that the PSC violated its constitutional right to equal protection by allowing Gallatin Steel to intervene in the CON proceeding, but denying EnviroPower's petition to intervene. EKPC argues that the PSC's action is rationally related to the legitimate state interest of regulating utility rates. Appellees also point out that EnviroPower has no actual legal interest in the PSC proceeding, while Gallatin Steel is an interested ratepayer of EKPC. We agree with Appellee's position. EnviroPower, as a potential merchant energy supplier, has far different interests than that of Gallatin Steel, an energy consumer. Gallatin's interests relate directly to the rates and services of EKPC, while EnviroPower's pecuniary interests relate solely to the marketing of its wholesale power produced. Consequently, no constitutional violation occurred.

For these reasons, we respectfully affirm the decision of the Franklin Circuit Court.

ALL CONCUR.

Footnotes

- 1 Judge David A. Barber concurred in this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.
- 2 Senior Judge Lewis G. Paisley, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.