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PUBLIC SERVICE
COMMISSION

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

**APPLICATION FOR REHEARING
OF PETITION TO INTERVENE
OF GEOFFREY M. YOUNG**

Pursuant to Section 2 of the Kentucky Constitution and KRS 278.400, I, Geoffrey M. Young, respectfully request that the Commission reverse its decision of June 10, 2011 and grant me full intervenor status in the above-captioned proceeding. I believe the following analysis will show that the Commission is seeking to eliminate most or all of the existing limits on its discretion to deny petitions requesting full intervention in Commission proceedings. If my allegation is correct, if it persists in this misguided course of action, and if no one convinces it to change or successfully challenges it, the Commission will obtain absolute and arbitrary power over citizens petitioning for full intervention if they happen to have a special interest in the environment and/or energy efficiency. It will have carved out for itself an area of arbitrary power where the Kentucky Constitution does not apply.

The Commission notes that full intervention by any party other than the Attorney General "is permissive and within the sound discretion of the Commission." However, if

the Commission demonstrates reasoning that is unsound when denying a petition for full intervention, or provides no reasons at all for certain key conclusions, it would be violating the cited standard and exceeding its discretion.

In its denial Order of June 10, 2011, the Commission cited a clause from an unreported case to the effect 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." [*EnviroPower v. PSC*, 2007 WL 289328, at 3.] The notion that KRS 278.040(2) imposes any restriction on an applicant for full intervention is highly questionable. I believe the above-quoted clause is a dictum by the Kentucky Court of Appeals, not an essential element of its decision in the *EnviroPower* case. It seems to me, as a non-attorney, that KRS 278.040(2) grants authority to and imposes restrictions on the Commission alone and does not and should not apply in any way to an applicant for full intervention. Once the Commission has duly initiated a proceeding, all an applicant for full intervention needs to do is to meet one or both of the prongs of 807 KAR 5:001, Section 3(8). To attempt to manufacture a new restriction for the purpose of giving itself another rationale to deny requests for full intervention constitutes, in my opinion, an unlawful and unconstitutional attempt by the Commission to exceed its authority.

In the alternative, even if KRS 278.040(2) does impose a new restriction on an applicant for full intervention, it is a restriction that is exceedingly nonrestrictive because the definitions of "rates" and "services" found in KRS 278.010 (12) and (13) are so exceedingly broad. A "rate" is defined to mean:

any individual or joint fare, toll, charge, rental, or other compensation for service rendered or to be rendered by any utility, and any rule, regulation, practice, act, requirement, or privilege in any way relating to such fare,

toll, charge, rental, or other compensation, and any schedule or tariff or part of a schedule or tariff thereof;

A “service” is defined to include:

any practice or requirement in any way relating to the service of any utility, including the voltage of electricity, the heat units and pressure of gas, the purity, pressure, and quantity of water, and in general the quality, quantity, and pressure of any commodity or product used or to be used for or in connection with the business of any utility, but does not include Voice over Internet Protocol (VoIP) service;

Other than a case involving an unsuccessful bidder such as EnviroPower, it is hard for me to imagine any realistic scenario in which an applicant for full intervention would not have a legitimate interest in some aspect of the utility’s rates or services as defined by the applicable statute. My own application clearly set forth my interests in KU’s rates and services as defined by the statute. Energy efficiency and DSM programs are so obviously related to the subject matter of this proceeding that it would be ludicrous to assert otherwise. KU’s tariffs, including its DSM tariff, obviously affect the amount of energy efficiency investment that will occur in KU’s service territory during the next 15 years, while the quantities and types of supply-side and demand-side investments KU plans to make during the next 15 years obviously affect the number of heat units KU will use in connection with its business of supplying electricity to customers. This proceeding is obviously related to KU’s rates and services, and my special interests are obviously related to KU’s rates, services, and the subject matter of this proceeding. If this IRP proceeding were not related to KU’s rates and services, KRS 278.040(2) would have prohibited the Commission from initiating this case or any other IRP case, which would be counterfactual and a logical absurdity in view of the existence of 807 KAR 5:058, Kentucky’s IRP regulation.

In its denial Order of 6/10/11, the Commission next referred to 807 KAR 5:001 Section 3(8) as “the regulatory limitation” [page 4]. Here the Commission once again engages in some sleight of hand with respect to who and what is being limited. Just as the Commission tried to apply the statutory limitation on its own activities, KRS 278.040(2), to an applicant for full intervention, it is also trying to apply the regulatory limitation on its own activities to certain applicants for full intervention. On the bottom of page 3, the Commission correctly refers to 807 KAR 5:001 Section 3(8) as one of “the limits on the Commission’s discretion in ruling on motions for intervention,” but by the top of page 4, only one paragraph later, the same regulation has been transmuted into something that requires an applicant to demonstrate certain things in his or her application for full intervention. In point of fact, the *only* thing 807 KAR 5:001 Section 3(8) requires an applicant to do is to specify, in writing, his or her name, address, and interest in the proceeding. It is the Commission’s obligation then to exercise sound discretion and determine whether the applicant meets either one (or both) of the regulation’s two prongs. The Commission sometimes asks an applicant to provide additional information before arriving at its intervention decision. For the Commission to attempt to shift the burden of a regulation from itself to the applicant for full intervention represents, in my opinion, a second unlawful and unconstitutional attempt by the Commission to exceed its authority.

The Commission has a tremendous amount of discretion to grant motions for full intervention, and that is fitting for an agency with the word “Public” in its name. In numerous proceedings in the past, the Commission has allowed the full intervention of customers who have stated only that they have an interest in the utility’s rates. In several cases involving one Robert Madison, the Commission granted full intervention, over the

objections of LG&E. In my view, the Commission was well within its lawful rights to do so, simply on the grounds that it judged that Mr. Madison was “likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings” i.e., the second prong of 807 KAR 5:001 Section 3(8). If LG&E had tried to challenge any of the Commission’s orders granting full intervention to Mr. Madison in the Franklin Circuit Court, I believe it would have lost the case decisively. Even today, if Mr. Madison were to apply for full intervention in LG&E’s next rate case, I believe the Commission would be well within its authority to grant his application on the grounds that he might have changed his ways or acquired some new expertise since the last time one of his applications was denied. At the present time, the Commission has the authority to grant full intervention to virtually any applicant who timely submits a letter specifying his or her name, address, and interest in the proceeding. The Commission has even been known to name an entity as a full intervenor in the absence of an application.

The Commission’s discretion in *denying* applications for full intervention, however, is not quite so sweeping. Said discretion is limited by 807 KAR 5:001 Section 3(8), in the sense that the Commission is required to demonstrate, in a logical manner, both that the applicant does not have a special interest in the proceeding which is not otherwise adequately represented, and that the applicant is not likely to present issues or to develop facts that assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings. If the Commission denies an application without demonstrating both of these things in a logical manner, or if it simply makes an unsupported assertion, it has exceeded its discretion and acted in an arbitrary manner.

The Commission quotes one of its previous denial orders at the top of page 5 in a paragraph that begins, “Notably absent from the Commission’s jurisdiction are environmental concerns, which are the responsibility of other agencies within Kentucky state government, including the Division for Air Quality within the Energy and Environment Cabinet, which issues air quality permits to coal-burning electric generating facilities in Kentucky.” This argument was counterfactual, illogical, arbitrary, and unreasonable when the Commission put it forth in 2008 and it remains so today. Re counterfactual: On pages 1 and 2 of my application, I demonstrated conclusively that environmental concerns are explicitly within the purview of the Commission’s jurisdiction in the context of IRP cases, including the current proceeding. I cited the obvious and undeniable facts that all IRPs must discuss, among other things, actions that the utility plans to take to meet the requirements of the CAAA of 1990; its demand-side management programs including energy efficiency programs; and the types of electric generation technologies it plans to use, each of which comes with a different set of environmental impacts. Re illogical: I have never asked the Commission to usurp the statutory role of the Division for Air Quality and start issuing or denying air quality permits, nor would I do so in the future. What I have asked the Commission to do is to assess the effects of environment-related considerations on KU’s rates and services; in other words, I have assumed that the Commission and its staff will simply do their jobs as defined in KRS Chapter 278 and the IRP regulation, 807 KAR 5:058. The Commission’s argument above is a transparent example of a fallacious straw-man argument.

The fact that my interest in DSM and energy efficiency is shared by other LG&E/KU customers is completely and logically irrelevant to the decision of whether to

grant my application for full intervention. So is the fact that the Attorney General (AG) has previously filed comments in other proceedings related to DSM, energy efficiency, and renewable resources. [Denial Order at 5] Pursuant to the first prong of 807 KAR 5:001 Section 3(8), the only relevant question is whether I have specified a special interest in this proceeding which is not otherwise adequately represented.

The Commission's argument that my interest in energy efficiency is adequately represented by the AG is the same argument LG&E/KU used in their unsolicited and meritless responses to my application for full intervention and the application of Rick Clewett, Drew Foley, Janet Overman, Gregg Wagner, the Natural Resources Defense Council, and the Sierra Club (collectively, "Movants"). The Movants' reply, received at the Commission on June 16, 2011, was closely reasoned, well-supported in fact and law, and persuasive, and I will borrow from it here as needed and appropriate.

The Commission's contention that the AG's participation in this proceeding forecloses full intervention by an individual environmentalist such as myself would render the Commission's intervention regulation a virtual nullity, as an environmentalist or environmental group would almost always be denied intervention on the grounds that their interests are already adequately represented. In addition, the Commission ignores the fact that the AG has been placed, by statute, in the position of representing all of the various and often-competing consumer interests in Kentucky. [KRS 367.150] The interests of an individual environmentalist and energy efficiency specialist such as myself are simply not identical to the interests of the AG.

The mere fact that the AG is authorized to represent his or her understanding of consumer interests in Commission proceedings does not compel the conclusion that other

individuals or organizations representing consumer interests are foreclosed from intervening. To the contrary, such an interpretation would render the Commission's intervention regulation for parties other than the AG superfluous, which would run contrary to the rule of statutory and regulatory interpretation that "no part should be construed as 'meaningless or ineffectual.'" *Fayette Urban County Government v. Johnson*, 280 S.W.3d 31, 34 (Ky. 2009); *Brooks v. Meyers*, 279 S.W.2d 764, 766 (Ky. 1955).

The AG cannot adequately represent my special interests because he has the task of representing all consumers, with their diverse and sometimes diametrically opposed interests. For example, in the context of utility rates and services, industrial, commercial, municipal, and individual customers often have different positions regarding energy policy issues such as promoting energy efficiency and renewable energy. While the AG is tasked with representing the overall, and sometimes conflicting, public interest(s) in this proceeding, I have more narrow interests and concerns in ensuring that KU and LG&E make an accurate assessment of the potential for energy efficiency and demand-side resources, the feasibility of renewable energy and low-carbon generating sources, and the costs facing the utility's coal-burning units. Given the diverse interests that governmental entities such as the AG's Office must balance, it is not surprising that courts have "repeatedly held that private companies can intervene on the side of the government, even if some of their interests converge." *See, e.g., Hardin v. Jackson*, 600 F. Supp. 2d 13, 16 (D.D.C. 2009). That is because "government entities are usually charged with representing the interests of the American people, whereas aspiring intervenors, like the [Movants] here, are dedicated to representing their personal interests or the interests of their members or members' businesses." *County of Sun Miguel, Colo. v. MacDonald*, 244 F.R.D. 36, 48

(D.D.C. 2007); *Purnell v. Akron*, 925 F.2d 941, 949 (6th Cir. Ohio 1991) (granting intervention in a wrongful death suit when intervenors' interests were personal and narrower than the current defendants); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 737 (D.C.Cir. 2003) (movant satisfied its burden where it sought to protect interests that were "more narrow and parochial" than the government's interests); *Am. Horse Prot. Ass'n v. Veneman*, 200 F.R.D. 153, 159 (D.D.C. 2001) (granting intervention of right where intervenors had "more narrow interests and concerns" than the government entity); *Southern Utah Wilderness v. Norton*, 2002 WL 32617198, at *5 (D.D.C. June 28, 2002) (concluding that the government entity may not adequately represent specific interests of a private entity). A similar result should be reached here. [Movants, 6/16/11 at 3-6]

The entity Kentucky Industrial Utility Customers ("KIUC") submitted a petition for full intervention, of approximately one page in length, that was received on May 6, 2011 and was granted by an Order of the Commission entered on May 11, 2011. The only interest specified in KIUC's petition was the interest of its industrial clients, as major consumers of electricity, in KU's and LG&E's future rates for industrial customers. KIUC did not claim or attempt to demonstrate that its clients have any special interests in the proceeding that are not adequately represented by the AG.

The Order granting KIUC's intervention stated, "It appears to the Commission that such intervention is likely to present issues and develop facts that will assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings." That was a verbatim recitation of the second prong of 807 KAR 5:001, Section 3(8). The Commission did not comment at all on the first prong, nor did it provide any reasons in support of its decision. In my opinion, that was within the Commission's

sound discretion. 807 KAR 5:001 Section 3(8) does not logically require the Commission to address or comment on both of its prongs, nor does it require very much in the way of logical reasoning, when the Commission decides to *grant* full intervention. It is clear, however, that the interests KIUC represents are standard consumer interests – low rates for its clients – that are adequately represented by the AG. KIUC’s petition thus met only one of the regulation’s two prongs, the second one.

The Commission included precisely one sentence in its denial Order of my petition that relates to the second prong of 807 KAR 5:001 Section 3(8), as follows: “Mr. Young has not demonstrated that he is likely to present issues or develop facts that will assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings.” [Denial Order at 6] There are three problems with this forlorn, solitary sentence, any one of which would be fatal to the Commission’s position: (a) The regulation does not require an applicant to demonstrate that; (b) The sentence is a mere conclusion that is completely unsupported by any facts or reasoning; and (c) The sentence is contradicted by several facts I included in my petition to intervene; in other words, I did in fact demonstrate what the Commission (improperly) claims I was required to demonstrate.

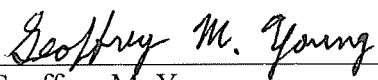
The information I provided about my professional background would lead a reasonable person to conclude that I possess information and could submit data requests that could help the Commission evaluate the utility’s joint IRP. The fact that I participated in Commission Case No. 99-430, Case No. 2002-00367 (two IRP cases involving KU and LG&E), and many other Commission proceedings over a period of 15 years in a constructive manner would persuade a reasonable person that I would be likely to do so again in this proceeding. Because the Commission did not challenge these statements in

any way, they are uncontroversial and undisputed. The Commission's conclusory, one-sentence finding, cited above, was made in the face of undisputed evidence to the contrary. That seems arbitrary and unreasonable to me. According to Section 2 of the Kentucky Constitution, "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."

I believe I have shown that my petition meets both prongs of 807 KAR 5:001 Section 3(8).

For all of the foregoing reasons, I respectfully request that the Commission reverse its denial Order of 6/10/11 and grant me full intervenor status in the above-captioned proceeding.

Respectfully submitted,



Geoffrey M. Young
454 Kimberly Place
Lexington, KY 40503
Phone: 859-278-4966
E-mail: energetic@windstream.net

6/21/11

Date

CERTIFICATE OF SERVICE

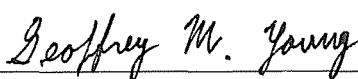
I hereby certify that an original and twelve copies of the foregoing Application for Rehearing were hand-delivered to the office of Jeff Derouen, Executive Director of the Kentucky Public Service Commission, 211 Sower Boulevard, Frankfort, KY 40601, and that copies were mailed to the following parties on this 21st day of June, 2011. All envelopes were mailed with first-class postage prepaid. (I am also providing courtesy copies via email to certain of the Movants, who have not been granted full intervention as of today's date.)

Rick E. Lovekamp and Allyson K. Sturgeon
KU and LG&E
220 West Main Street
Louisville, KY 40202

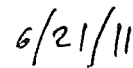
Honorable Dennis G. Howard II and Lawrence W. Cook
Attorney General's Office of Rate Intervention
1024 Capital Center Drive, Suite 200
Frankfort, KY 40601-8204

Honorable Michael L. Kurtz and Kurt J. Boehm
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202

Signed,



Geoffrey M. Young



Date