

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE APPLICATION OF EAST KENTUCKY POWER )	
COOPERATIVE, INC. FOR A CERTIFICATE OF )	
PUBLIC CONVENIENCE AND NECESSITY, AND A )	CASE NO.
SITE COMPATIBILITY CERTIFICATE, FOR THE )	2004-00423
CONSTRUCTION OF A 278 MW (NOMINAL) )	
CIRCULATING FLUIDIZED BED COAL FIRED UNIT )	
IN MASON COUNTY, KENTUCKY )	

O R D E R

On January 14, 2005, EnviroPower, LLC (“EnviroPower”) filed an affidavit of its Vice President, Randall Alan Bird, which alleges that the procedures utilized by East Kentucky Power Cooperative, Inc. (“East Kentucky Power”) for receiving and evaluating power supply bids were not transparent and may have been less than objective to achieve a preordained outcome. A copy of the Bird affidavit is attached hereto as Appendix A.

While the Commission recognizes that the Bird affidavit sets forth bare allegations and very few facts, the issues raised regarding East Kentucky Power’s bid evaluation process are very serious. East Kentucky Power is requesting the Commission to approve the expenditure of close to \$500 million to construct a new generating unit. However, before such approval can be granted, the Commission must be confident that East Kentucky Power has conducted a proper evaluation of all power supply bids and selected the most reasonable bid. Consequently, we intend to conduct a thorough investigation of East Kentucky Power’s bidding procedures and evaluation

process. We are aware of East Kentucky Power's prior request for expedited treatment in this case, but, absent a full investigation of its bidding procedures, no decision can be made on the merits of this case.

To expedite this investigation, we will direct East Kentucky Power to file, within 10 days of the date of this Order, supplemental testimony which describes in detail the procedures it utilized to review and evaluate the power supply bids listed in Application Exhibit 4, p. 7. That testimony should include, but need not be limited to, the following: (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 baseload requirement price for the EnviroPower bid was lower than those of the East Kentucky Power self-construct bid.

In addition, since East Kentucky Power utilized the services of an outside consultant, EnerVision, Inc., to assist in the evaluation and economic rankings of the bids, that consultant should also file testimony which describes in detail: (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.

IT IS THEREFORE ORDERED that:

1. East Kentucky Power shall file, within 10 days of the date of this Order, supplemental testimony, in verified prepared form, of its witnesses and those of its consultant on the issues discussed in the findings above.
2. East Kentucky Power shall file, within 10 days of the date of this Order, its responses to the request for information attached hereto as Appendix B.

Done at Frankfort, Kentucky, this 3<sup>rd</sup> day of February, 2005.

By the Commission

ATTEST:



Executive Director

Case No. 2004-00423

APPENDIX A

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE  
COMMISSION IN CASE NO. 2004-00423 DATED FEBRUARY 3, 2005

RECEIVED

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COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

PUBLIC SERVICE  
COMMISSION

In the Matter of:

Application of East Kentucky Power Cooperative, Inc.,)  
For a Certificate of Convenience And Necessity and )  
A Site Compatibility Certificate, For The Construction )  
of A 278 MW (Nominal) Circulating Fluidized Bed )  
Coal Fired Unit In Mason County )

CASE NO. 2004-0423

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Affidavit In Support of Motion To Intervene.

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COMMONWEALTH OF KENTUCKY

SS:

CITY OF LEXINGTON

I, Randall Alan Bird, being duly sworn, depose and say that the information provided below in the matter referenced above pending before the Kentucky Public Service Commission has been written by or under my direction; that the substance and views expressed herein have been carefully read by me, and are true to my own knowledge, except those stated to have been made on information and belief, or which express my own opinion, and as to those statements and opinions, I believe them to be true.

1. I am an officer of EnviroPower LLC. ("EnviroPower"), a Kentucky limited liability company with an address of 66 Ever Ridge Road, Bulan, Kentucky 41722. I serve as Vice-President of EnviroPower and have held that position for about two years.

2. Prior to joining EnviroPower, I have had more than 20 years of experience in the electric power industry, including about 20 years of service with American Electric Power, where I rose to the position of District Manager, responsible for power transmission in southern Kentucky, about 10 years of experience with Eagle Electrical Contractors, where I have had executive management duties and have served as President, and about 5 years of project management experience with Bird Consulting. In these various capacities, I have dealt with East Kentucky Power Cooperative, Inc. since about 1987, and have had experience in the preparation, evaluation and award of Requests for Proposal and other bids in the electric power industry in the Commonwealth of Kentucky. I received a B.S (civil engineering) degree from West Virginia Institute of Technology in Montgomery, West Virginia and have had Executive Management training at Ohio State University and The University of Notre Dame.

3. As a Vice President at EnviroPower I have responsibility for certain matters relating to government relations, customer relations and various matters arising from the relationship of

EnviroPower with East Kentucky Power Cooperative, Inc. ("EKPC"). I have also assisted the President and other officers in their dealings with the matters discussed herein and have had direct personal knowledge of each matter addressed herein, except for the opinions which I express and the statements which are inferred from information and belief. All statements herein, including my expressed opinions and inferences, in my firm belief, are true.

4. EnviroPower is the sole owner of Kentucky Mountain Power, LLC which owns the Kentucky Mountain Power electric generation project in Knott County, Kentucky ("KMP"). KMP, as detailed below, has received certain necessary permits for the timely completion of this electric power generation facility.

5. On April 2, 2004, EKPC issued, for public consideration and response, a Request for Proposals No. 2004-01—Power Supply Resources ("RFP"), which in Section II, on page 3 detailed the Baseload Requirements sought from potential bidders.

6. EnviroPower carefully studied, evaluated and considered the RFP and on May 7, 2004 EnviroPower submitted a complete and timely proposal to satisfy the Baseload Requirements section of the RFP ("EP Proposal").

7. The EP Proposal included, among other provisions, that:

- EnviroPower would dedicate the full output of KMP to a long term guaranteed power purchase agreement, through which EKPC would receive baseload capacity and energy.
- Baseload capacity and energy would be provided at guaranteed fixed prices with no fuel adjustments for a term of up to 30 years, commencing with the first required delivery date, established in the RFP as April 1, 2008.
- KMP was fully described and demonstrated as able to meet the required schedule based, in part, on having received several permits, including Federal Air Permit PSD #V-00-045 and its Siting Certificate granted by the Kentucky Siting Commission on September 4, 2002. These authorizations allow EnviroPower to meet the schedule set forth in the RFP.
- KMP would be directly interconnected to the EKPC transmission grid in order to facilitate reliable delivery.
- EKPC would operate KMP in order to maximize its ability to control dispatch, cost of supply, etc., for power under the RFP.
- EnviroPower and/or its affiliates would provide bankable guarantees of all performance parameters of the contract, including but not limited to:
  - commercial operation for power generation date

- annual plant availability
  - peak season plant availability
  - power deliveries
  - operating requirements
- The EP Proposal included an accompanying credit support drawn upon global financial institutions, in order to provide independently verifiable, third-party bankable support and long-term reliable, substance to the financial guarantees.

8. During the period of June through September, 2004 EnviroPower and EKPC engaged in extensive dialogue concerning EKPC's evaluation of the EP Proposal.

9. Prior to the end of June, 2004, EKPC requested extensive technical data from EnviroPower, which was provided promptly and completely.

10. Prior to the end of June, 2004, EnviroPower discussed with EKPC the unusual structure of the RFP, which authorized EKPC to submit a self-built option, while EKPC would also serve as the sole judge of the submitted RFPs.

11. In response, EKPC offered EnviroPower the opportunity to ask questions about the RFP evaluation process. EnviroPower specifically requested that EKPC schedule a public, simultaneous opening of the bids in order to avoid the very clear potential for conflict of interest, self-dealing, and the appearance of an arbitrary and capricious proceeding. EKPC denied this request.

12. EnviroPower raised questions concerning the methodology of review and the basis upon which EKPC could assure the bidders that the process would be fair and that any varying assumptions contained in the responses to the RFP would be adequately weighed and balanced. EKPC provided EnviroPower with no objective methodology to insure fairness.

13. EnviroPower raised with EKPC the specter of a non-analytically sound, presumptive award to the self-built proposal of EKPC. EKPC took no steps known to EnviroPower to address this problem.

14. In August, 2004, EKPC informed EnviroPower that the EP Proposal was short listed to provide the baseload requirement.

15. In late August or early September, 2004, EKPC informed EnviroPower that the EP Proposal was one of only two remaining options which remained under consideration.

16. In this context, EKPC presented EnviroPower with a unique and highly unusual request. EKPC asked EnviroPower to increase its bid price to include all cost variables which could conceivably justify a cost increase since the EP Proposal had been submitted on May 7.

17. EnviroPower responded to EKPC by reaffirming its pricing in the EP Proposal, with no price increases. The official EKPC response, however, was puzzling. EKPC informed EnviroPower

that EKPC would make an independent re-assessment of fuel costs contained in the other remaining viable bid option ( the EKPC self-built proposal).

18. Within days of this event, EKPC announced to EnviroPower that the first half of the baseload requirement had been awarded to the EKPC self-built facility, known as Spurlock #4. While EnviroPower was then considered to be one of two finalists to supply the other half of the baseload, within a few weeks, the remaining half of the requirement was awarded to a second EKPC self-built facility, which is not a part of the current rate case before the KPSC.

19. At no time during the EKPC evaluation of the EP Proposal did EKPC take steps, to my knowledge, calculated "...to find the best 'least-cost' power supply alternative to meet the needs of EKPC", as EKPC has asserted in its filings to the KPSC.

20. Upon information and belief, at no time did EKPC disclose to EnviroPower that the United States Department of Justice (on behalf of the US Environmental Protection Agency) had filed on January 28, 2004, a lawsuit (in the Eastern District of Kentucky, case # 5:04-CV-00034-KSF) against EKPC alleging violations of the Clean Air Act at the Spurlock electric power generating facility, and that the relief sought under that action included injunctive relief which could cause the cessation of operations at Spurlock and result in fines of up to \$25,000 per day for each violation prior to January 31, 1997 and \$27,500 per day for each violation on or after January 31, 1997.

21. At no time did EKPC inform EnviroPower that the EP Proposal may be evaluated in light of the potential impact of the proposal to facilitate or influence a settlement in the federal lawsuit.

22. At no time did EKPC inform EnviroPower that the EP Proposal may be evaluated in light of the proposal's ability to enable EKPC to seek rate adjustments to offset its potential financial liability in the federal lawsuit.

23. Upon information and belief, at no time did EKPC inform EnviroPower or the KPSC of the evaluation comparison or results of the EP Proposal compared to the EKPC Spurlock #4, self-built proposal from the vantage point of technical viability, financial strength and impact and benefit to the public.

24. Upon information and belief, unlike the KMP project as guaranteed by the third party guarantees, and other financial instruments detailed in the EP Proposal, EKPC has not disclosed its plans for guaranteeing financial performance.

25. The Proposal Evaluation Process filed by EKPC with the KPSC deviates in substantial part from the RFP provided to bidders. At no time did EKPC ever disclose to EnviroPower the Proposal Evaluation Process, a process and document which therefore, was available only to one bidder—EKPC for its self-built unit. To illustrate but one example of the arbitrary and capricious nature of this evaluation process, I considered the issue of potential late delivery of power on the commencement date of April 1, 2008. Under the EP Proposal, EnviroPower offered full financial cover to EKPC in the event that power needed to be procured from market sources. Upon information and belief, the EKPC self-built plan could not legally provide such a guarantee. On page 3 of the RFP, it is stated that: "EKPC shall consider the option of the Bidder providing market power to bridge the gap if the April 1, 2008 commercial operation date cannot



be met until shortly thereafter.” On page 3 of the secret Proposal Evaluation Process, under the section Timing, it states : “This bridge power was priced at projected market prices and an estimate of expected cost of “firm” transmission for this bridge power...” On its face, no value or weight was given to the 100% guaranteed fixed price cover provided by the EP Proposal and cross-guaranteed by globally sound financial institutions.

26. Since “this bridge power was priced at projected market prices...”, at no time did EKPC explain to EnviroPower how volatility in market power prices and fuel prices would or would not be evaluated by EKPC from the vantage point of risk to the consuming public.

27. Upon information and belief, at no time during the evaluation of the EP Proposal did EKPC inform EnviroPower of its plan to file for a general rate increase in Case No. 2204-00401 and how the success or failure of that rate case would affect the evaluation of the final bidders in the RFP process, or whether the self-built facility made a material contribution to the EKPC position in that matter.

29. Upon information and belief, at no time did EKPC inform EnviroPower or any other respondent to the RFP of the extraordinary, unique potential value of a self-built facility to EKPC in light of the federal lawsuit, the general rate case, or any other business plan or business problem of EKPC.

30. While EnviroPower secured and demonstrated in its EP Proposal that we had secured full committed financing to complete KMP on time, upon information and belief, at no time did EKPC ever advise EnviroPower of its success or failure in securing committed financing, and I have seen no such indication in the record submitted to the KPSC in this case.

31. Upon information and belief, EKPC used its market advantage (control over transmission lines and control over the evaluation process), its techniques of controlled disclosures of material information, and the fruits of what might be considered to be a conflict of interest, as I have discussed above, to secure a Special Membership Agreement between Warren Rural Electric Cooperative Corporation (“WRECC”) and EKPC, which serves as the basis of its request for a ruling from the KPSC in the instant case.

32. Based upon my review of publicly available data and upon information and belief, the capital costs, fuel costs, timing and development risks associated with Spurlock #4 are tilted against the model of low-cost, reliable electric power generation, as compared to the EP Proposal, that EnviroPower felt compelled to request of EKPC an independent audit and evaluation of the final two bids. EKPC took no action to permit a sunshine review of the process.

33. Upon information and belief, WRECC was able to determine and confirm to EnviroPower that the EP Proposal represented the lowest capital cost, and the lowest baseload requirement price, of the alternatives available.

**FURTHER, AFFIANT SAYETH NOT.**

*Randall Alan Bird*  
Randall Alan Bird

January 14, 2005

Subscribed and sworn to or affirmed before me this 14<sup>th</sup> Day of January, 2005

*Mary Gwen Lockwood*  
Notary Public *12/22/2008 expiration*

(Affix seal or stamp)

## APPENDIX B

### APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE COMMISSION IN CASE NO. 2004-00423 DATED FEBRUARY 3, 2005

1. Provide copies of each power supply bid received by East Kentucky Power in response to its request for proposals.
2. Explain in detail how East Kentucky Power arrived at the results shown in the table of summary results in Application Exhibit 4, p. 7.
3. Refer to East Kentucky Power's response filed on December 15, 2004 to the Commission Staff's December 7, 2004 data request, Item No. 1. Is the sequence in which East Kentucky Power's four self-construct bids are listed on page 4 the same sequence in which those bids are listed in each of the tables on page 3? If no, identify which of East Kentucky Power's four self-construct bids is listed in rankings 1 through 4 of each table on page 3.