

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF EAST KENTUCKY )  
POWER COOPERATIVE, INC. FOR )  
A CERTIFICATE OF PUBLIC )  
CONVENIENCE AND NECESSITY, )  
AND A SITE COMPATIBILITY CERTIFICATE, ) CASE NO. 2005-00053  
FOR THE CONSTRUCTION OF A )  
278 MW (NOMINAL) CIRCULATING )  
FLUIDIZED BED COAL FIRED UNIT AND )  
FIVE 90 MW (NOMINAL) COMBUSTION )  
TURBINES IN CLARK COUNTY, KENTUCKY )

O R D E R

On May 6, 2005, EnviroPower, LLC (“EnviroPower”) filed a petition for reconsideration of the Commission’s April 18, 2005 Order denying EnviroPower’s petition to intervene. In support of its request for reconsideration, EnviroPower claims that it has a property interest arising from what it characterizes as “the apparently fraudulent” solicitation of power supply bids conducted by East Kentucky Power Cooperative, Inc. (“East Kentucky Power”). In support of reconsideration, EnviroPower filed an affidavit, dated May 6, 2005, of Frank L. Rotondi, President and Chief Executive Officer of EnviroPower, and also incorporates by reference comments that were filed in the form of testimony by Mr. Rotondi in Case No. 2004-00423<sup>1</sup> and the arguments it has

---

<sup>1</sup> Case No. 2004-00423, The Application of East Kentucky Power Cooperative, Inc. For a Certificate of Public 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, Kentucky.

presented to the Franklin Circuit Court and the Kentucky Court of Appeals in challenging its denial of intervention in Case No. 2004-00423,

EnviroPower admits that East Kentucky Power conducted only one bid solicitation and evaluation process which resulted in its filing of two applications for certificates to construct different generating units, the Smith Unit, which is the subject of this case, and the Spurlock #4 Unit, which is the subject of Case No. 2004-00423. However, EnviroPower now claims that it has direct knowledge of specific facts, relevant to the Smith Unit, which were not previously filed in Case No. 2004-00423 because they were not relevant to the Spurlock #4 Unit. Thus, EnviroPower claims that the Commission erred in finding that there was no need to conduct an investigation of East Kentucky Power's bidding procedures and evaluation process in this case due to the pendency of an investigation of those same issues in Case No. 2004-00423. EnviroPower further claims that its pecuniary interest is not limited to a self-serving interest to have its own bid accepted, rather than rejected, but includes a reasonable expectation of good governance and integrity regarding the process by which the Commission issues construction certificates. EnviroPower asserts that it has a property right arising from its possession of a certificate, issued by the Kentucky State Board on Electric Generation and Transmission Siting ("Siting Board"), authorizing EnviroPower to construct a merchant electric generating plant and that it has a due process right to intervene in this case.

EnviroPower also argues that it has a property interest arising from its commitment to build a merchant electric generating facility in Knott County, Kentucky, and that this interest is sufficient to justify its intervention. Citing KRS 278.020(1),

EnviroPower opines that the Commission must grant intervention to any person who has an “interest” without restricting interventions to persons who satisfy the criteria set forth in the Commission’s regulation on intervention, 807 KAR 5:001, Section 3(8).

On May 11, 2005, East Kentucky Power filed a response in opposition to EnviroPower’s petition for reconsideration. East Kentucky Power asserts that EnviroPower has no property right in having its bid accepted by East Kentucky Power, or in selling the output of the EnviroPower generating facility to East Kentucky Power. East Kentucky Power claims that EnviroPower, as an unsuccessful bidder, has suffered nothing but the hypothetical loss of an expectancy of potential future business, and that this expectancy does not entitle EnviroPower to be afforded any rights of due process that would otherwise be afforded when a vested property right exists. East Kentucky Power further states that this case does not deal with EnviroPower’s ability to construct its own generating facility or its ability to sell the output of that facility to any willing buyer. East Kentucky Power notes that the certificate to construct issued to EnviroPower by the Siting Board was not conditioned upon any commitment that the output be sold to East Kentucky Power, and that EnviroPower gained no property right by submitting a bid to East Kentucky Power, and that East Kentucky has no contract to purchase power from EnviroPower.

Finally, East Kentucky Power states that EnviroPower had a full and fair opportunity to file comments in Case No. 2004-00423 on the issue of whether the bid solicitation and evaluation process were tainted by fraud or otherwise manipulated to achieve a preordained outcome. Since EnviroPower did file comments on that issue in Case No. 2004-00423, East Kentucky Power supports the Commission’s finding in its

April 18, 2005 Order that conducting another investigation of these issues in this case would be inefficient and duplicative.

Based on the petition for reconsideration, and being otherwise sufficiently advised, the Commission finds that its jurisdiction is limited under KRS Chapter 278 to “rates” and “service” of utilities. KRS 278.040(2). EnviroPower does not challenge the finding in the Commission’s April 18, 2005 Order that EnviroPower is not a customer of East Kentucky Power. Thus, EnviroPower has no interest in the rates charged by East Kentucky Power or the service that it provides to its customers. Thus, EnviroPower has no right to intervene in this case to assert any interest involving the rates or service of East Kentucky Power.

Further, the Commission finds that EnviroPower has no vested property right in any interest at issue in this case. As an unsuccessful bidder in a competitive power solicitation, EnviroPower acquired no vested property right to sell the output of its proposed generating facility to East Kentucky Power, and EnviroPower has not alleged the existence of any commitment by East Kentucky Power to purchase power from EnviroPower. Under these circumstances, EnviroPower has only an expectancy of potential future business, not a vested property right. See Romero v. Administrative Office of the Courts, 157 S.W.3d 638 (Ky. 2005), and Calvert Investments v. Metropolitan Sewer Dist., 847 F.2d 304 (6<sup>th</sup> Cir. 1988).

While the May 6, 2005 Rotondi affidavit alleges that he has “direct and specific knowledge of the ways in which EKPC [East Kentucky Power] conducted the bid evaluation process,” he does not allege that he had any role in either the development of East Kentucky Power’s bidding procedures or the evaluation of the bids received. As

the Commission previously found in its April 18, 2005 Order in Case No. 2004-00423, “only East Kentucky and its consultant were involved in those activities.” EnviroPower has presented no evidence to contradict that finding.

To the extent that EnviroPower claims a right to a reasonable expectation of good governance and integrity in the Commission’s processing of East Kentucky Power’s pending application, that right is no greater for EnviroPower than it is for any other citizen of the Commonwealth of Kentucky, and there is no absolute right for every citizen to intervene in a certificate-to-construct case. Only the Office of the Attorney General (“AG”) has a right to intervene, pursuant to KRS 367.150(8), and the AG has been granted intervention in this case. Intervention was also granted to Gallatin Steel, the largest customer on the East Kentucky Power system. The Commission is not persuaded by EnviroPower’s claims that these intervenors cannot adequately protect the interests that EnviroPower shares with every other citizen in the expectation of good governance and integrity of the administrative process.

EnviroPower’s challenge to the Commission’s intervention regulation is without merit. The reference in KRS 278.020(1) to the Commission, in its discretion, holding a “public hearing ... for all interested parties,” cannot be read out of context. KRS Chapter 278 defines the scope of the Commission’s jurisdiction, which is limited to “rates” and “service,” and the Commission has adopted rules, pursuant to KRS 278.310, to determine when a person has an interest sufficient to justify intervention. While the Commission’s April 18, 2005 Order found that, “EnviroPower has a pecuniary interest to challenge any bid evaluation process that results in the rejection of its bid,” that interest is not within the jurisdiction of the Commission under KRS Chapter 278.

Finally, the Commission notes that the May 6, 2005 Rotondi affidavit alleges that East Kentucky Power's capacity costs for both the Spurlock #4 Unit proposed in Case No. 2004-00423, and the Smith Unit proposed in this case will exceed \$1 billion, while the EnviroPower project capacity cost was less than \$1 billion. However, EnviroPower does not allege that its bid price for the capacity cost would result in a lower charge to East Kentucky Power than East Kentucky Power's two proposed self-construct bids. The Commission has, in the record of Case No. 2004-00423, copies of East Kentucky Power's request for power supply bids and each bid received in response thereto. That information, plus all of the other evidence of record, will enable the Commission to determine the lowest-cost bids and whether there was anything improper about the contents of East Kentucky Power's request for power supply bids or the subsequent evaluation of those bids by East Kentucky Power and its consultant.

IT IS THEREFORE ORDERED that EnviroPower's request for reconsideration of the denial of its intervention is denied.

Done at Frankfort, Kentucky, this 26<sup>th</sup> day of May, 2005.

By the Commission

ATTEST:



Executive Director