

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

2009 INTEGRATED RESOURCE PLAN OF EAST) CASE NO.
KENTUCKY POWER COOPERATIVE, INC.) 2009-00106

O R D E R

Pending before the Commission are two motions for full intervention in this review of East Kentucky Power Cooperative, Inc.'s ("EKPC") Integrated Resource Plan ("IRP"): one filed by the Attorney General's Office, Rate Intervention Division ("AG"); and the other filed jointly by three environmental advocacy groups; Sierra Club, Kentucky Environmental Foundation, and Kentuckians for the Commonwealth ("KFTC") (collectively referred to herein as "Environmental Groups"). EKPC filed a response to the motions, stating that it does not object to the AG's intervention based on the AG's statutory right to do so, but it does object to the Environmental Groups' intervention. The Environmental Groups filed a reply to EKPC's response.

AG Intervention

The AG's Motion references his statutory right to appear before a rate-making or regulatory body and to be made a real party in interest on behalf of consumer interests involving a rate-making proceeding. EKPC's response acknowledged the AG's authority to intervene and stated that this Motion should be granted.

Based on the AG's Motion, the Commission finds that the AG is entitled to intervene as a matter of right pursuant to KRS 267.150(8), and that he should be granted full intervention.

Environmental Groups Intervention

The Environmental Groups' Motion to Intervene states that their respective organizations include members and ratepayers of EKPC's distribution cooperatives and that the Environmental Groups, their counsel, and their consultants, "have a wealth of knowledge and experience in a wide variety of complex and rapidly changing issues which impact [EKPC's IRP]."¹ The motion also describes the respective interests of each of the three organizations as follows:

Sierra Club - "encompasses a broad range of energy and pollution concerns," including reducing dependency on fossil fuels and "reducing the need for fossil-fueled plants;"²

KEF -- "worked for over 18 years to ensure the safe disposal of the Army's stockpile of outdated chemical weapons stored in Richmond, Kentucky and 7 other sites," and "works to ensure that Kentucky has clean energy and that Kentuckians' exposure to toxic chemicals is minimized;"³ and

¹ Environmental Groups' Motion to Intervene at 1.

² Id. at 2.

³ Id. at 3.

KFTC -- “restoring voting rights, promoting sustainable economic development policies, reducing environmental destruction, and advancing sustainable energy policies and practices.”⁴

The Motion also states that the Environmental Groups have experience with issues such as renewable energy and demand-side management (“DSM”) programs, technical aspects of power plants and utility planning, and are knowledgeable of environmental and other regulatory systems.

The Environmental Groups state that they “have a long history of working on the whole life cycle of energy production and of educating the public and governmental decision-makers regarding that life cycle.”⁵ They claim that they will be likely to present issues and develop facts to assist the Commission in reviewing EKPC’s IRP in this case. They expand on this claim by referencing two reports they recently issued: one on how EKPC can meet its projected demand through energy efficiency and DSM programs; and the other on how EKPC’s ratepayers will benefit from cancelling Smith 1, a coal-fired base load generating unit to be built in Clark County, Kentucky. The Environmental Groups also state that they have employed experts to analyze EKPC’s energy needs and optimum resource mix, and that their intervention in this IRP case will allow them access to information, some of which is confidential, to enhance the quality of that analysis.

⁴ Id.

⁵ Id. at 4.

The Environmental Groups further claim that their members who are ratepayers of ERPC's distribution cooperatives share an interest in equality and sustainability, and they seek to intervene in this case to ensure that EKPC's rates and service reflect that interest. Thus, they claim that they possess a special interest in this case that is not otherwise adequately represented. They also claim that, since electric distribution cooperatives in Kentucky are monopolies, it would be unjust to require a ratepayer to buy electricity from a source that the ratepayer finds objectionable unless that ratepayer is allowed to participate in determining the source of that electricity. Finally, the Environmental Groups claim that their members have "legally protected interests in their property and their health which can be adversely impacted by [EKPC's] rates and services."⁶

In its response objecting to this intervention, EKPC argues that the Environmental Groups do not satisfy the criteria for intervention as set forth in 807 KAR 5:001, Section 3(8). EKPC claims that the Environmental Groups lack the requisite special interest in EKPC's rates or service, and their actual interest is in environmental issues which are beyond the scope of the Commission's jurisdiction. EKPC further claims that the issues which the Environmental Groups assert having expertise to address, such as energy efficiency, demand-side management, and renewable energy, are issues that the Commission has historically found to be adequately represented by the AG.

The Environmental Groups filed a reply, stating that their intervention is to ensure that EKPC's IRP "results in rates and services which are in the public interest as defined

⁶ Id. at 13.

by the [Environmental Groups].”⁷ The Environmental Groups acknowledge that the Commission does not have jurisdiction to grant or deny environmental permits, but assert that it does have jurisdiction to consider environmental issues and cites EKPC’s estimate of the future price of carbon emissions as an example. The reply also states that one of the Environmental Groups’ members, KFTC, is not strictly an environmental group but is organized to seek social justice, and that the Commission can properly “ensure that EKPC offers rates and services that are just.”⁸

Finally, the reply claims that, since the AG is obligated to represent all consumers, he may not be able to adequately represent the interest of the Environmental Groups. Citing the Commission’s grant of intervention to an industrial customer in a prior EKPC IRP case, the Environmental Groups assert that the Commission cannot interpret its intervention regulation to exclude the Environmental Groups whenever the AG is an intervenor, claiming that such an interpretation would render the intervention regulation superfluous.

Based on the motions and being otherwise sufficiently advised, the Commission finds that the AG is the only person who has a statutory right to intervene in a Commission case and his Motion for Full Intervention is granted by this Order. All other persons may request permissive intervention. In a recent, unreported case, EnviroPower, LLC v. Public Service Commission of Kentucky, No. 2005-CA-001792-MR, 2007 WL 289328 (Ky. App. February 2, 2007), the Court of Appeals ruled that “the PSC retains the power in its discretion to grant or deny a motion for intervention,” but

⁷ Environmental Groups’ reply at 2.

⁸ Id.

that this discretion is not unlimited. The Court then enumerated the limits on the Commission's discretion in ruling on motions for intervention: one arising under statute; the other arising under regulation. The statutory limitation, KRS 278.040(2), requires 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."⁹

The regulatory limitation is set forth in 807 KAR 5:001, Section 3(8), which requires a person to demonstrate either (1) a special interest in the proceeding which is not otherwise adequately represented in the case, or (2) that intervention 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.

The Commission begins its analysis of the Environmental Groups' request to intervene by noting that in this case EKPC is not requesting the Commission to approve a change in rates or the construction of a new generating facility. Rather, EKPC has filed its triennial IRP in accordance with the mandates of 807 KAR 5:058. That regulation requires certain electric utilities, including EKPC, to file an IRP which "shall include historical and projected demand, resource, and financial data, and other operating performance and system information, and shall discuss the facts, assumptions, and conclusions upon which the plan is based and the action it proposes."¹⁰ More specifically, with respect to resource assessment and acquisition, EKPC's IRP must provide for "an adequate and reliable supply of electricity to meet

⁹ 2007 WL 289328, at 3.

¹⁰ 807 KAR 5:058, Section 1(2).

forecast electricity requirements at the lowest possible cost,” and must include a description and discussion of, among other cost-effective resource options, “[c]onservation and load management or other demand-side management programs not already in place.”¹¹

In addition, the IRP regulation includes a very specific procedure for the review of a utility's IRP. The Commission is required to establish a procedural schedule that leads to a report prepared by staff, not an Order issued by the Commission. The procedural schedule must provide for discovery by staff and intervenors; written comments by staff and intervenors; conferences, if needed; a staff report summarizing its review and providing recommendations and suggestions for subsequent IRP filings; and the utility's responses to staff's recommendations are to be included in the utility's next IRP filing.¹² Noticeably absent from this procedure is any provision for an evidentiary hearing or the entry of findings of fact or conclusions of law in a decision by the Commission.

IRP filings are thus unique in the sense that the Commission's role under 807 KAR 5:058 is limited to addressing procedural issues, not substantive issues. Consequently, a case to review an IRP is not an appropriate forum for a utility to establish a need to construct a new generating unit. By statute, the requisite need for a new generating facility can be demonstrated only in a proceeding on an application for a certificate of public convenience and necessity (“CPCN”) filed pursuant to KRS 278.020(1). Similarly, a case to review an IRP is not an appropriate forum for an

¹¹ Id. at Sections 8(1) and (2)(b).

¹² Id. at Section 11.

intervenor to challenge a prior Commission decision which granted a CPNC to construct a new generating unit based on a finding of need. Such a challenge may be initiated by a complaint filed by an interested party, or by the Commission on its own motion, pursuant to KRS 278.260.

The Environmental Groups are requesting to intervene on behalf of members of their respective organizations who are ratepayers of EKPC's distribution cooperatives. To the extent that the Environmental Groups seek to address issues that impact the rates or service of EPKC, such as energy efficiency, demand-side management and renewable energy, those issues are within the scope of the Commission's jurisdiction and this IRP case. The Environmental Groups thus have an interest in the rates and service of EKPC and in its IRP, and that interest is sufficient to satisfy the statutory limitation for intervention under KRS 278.040(2). However, a number of the issues raised in the Environmental Groups' Motion to Intervene are beyond the scope of the Commission's jurisdiction, including protecting ratepayers' interests in their property and health; environmental, air emission, and pollution impacts; and life-cycle energy costs.

The Commission's jurisdiction, which is limited by KRS 278.040(2) to "the regulation of rates and service of utilities," does not extend to protecting ratepayers' rights in their property or health. The law in Kentucky is well settled that, "utility ratepayers have no vested property interest in the rates they must pay for a utility service despite the fact that it is provided by a regulated monopoly." Kentucky Industrial Customers v. Kentucky Utilities Co., 983 S.W.2d 493, 497 (Ky. 1998).

While the Commission does have jurisdiction over the financial impacts to a utility that result from the environmental requirements and decisions of other agencies, we

have no jurisdiction over those requirements and decisions. When a utility proposes to construct a new generating unit, the Commission reviews the proposal to determine if there is a need and to ascertain the absence of wasteful duplication. Kentucky Utilities Co. v. Public Service Comm'n, 252 S.W.2d 885 (Ky. 1952). The Commission has no jurisdiction to impose upon a utility environmental requirements that are more restrictive than the requirements already established by federal, state, and local environmental agencies. As to life-cycle energy costs, "which generally refer to external costs imposed without being accounted for in the cost of a product," the Commission has previously held that it "does not have jurisdiction under KRS Chapter 278 to explicitly allow for consideration of such externalities."¹³

With respect to the regulatory limitation upon intervention as set forth in 807 KAR 5:001 Section 3(8), the Commission is not persuaded by the Environmental Groups' claims that they have a special interest which is not otherwise adequately represented. While the Environmental Groups certainly have an interest in energy efficiency, demand-side management, and renewable energy, as well as an interest in ensuring that EKPC's rates and service reflect equitably and sustainability, they have not shown that their interest in these issues is different from the interest of all other ratepayers who are served by EKPC and who are represented here by the AG.

The Commission is, however, persuaded that the Environmental Groups possess sufficient expertise in issues that are within the scope of our jurisdiction and the

¹³ PSC Admin. Case No. 2005-00090, In Re: An Assessment of Kentucky's Electric Generation, Transmission and Distribution Needs, Order dated September 15, 2005, Appendix A at 50. See also PSC Admin. Case No. 2007-00477, In Re: An Investigation of the Energy and Regulatory Issues in Section 50 of Kentucky's 2007 Energy Act, Report to the General Assembly, at 46.

parameters of an IRP case, and, therefore, their intervention is likely to present issues or develop facts that will assist the staff in its review of EKPC's IRP without complicating or disrupting the review.

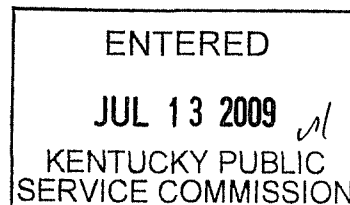
IT IS HEREBY ORDERED that:

1. The petitions of the AG and the Environmental Groups for full intervenor status are granted.

2. The AG and the Environmental Groups shall be entitled to the full rights of a party and each shall be served with the Commission's Orders and with filed testimony, exhibits, pleadings, correspondence, and all other documents submitted by parties after the date of this Order.

3. Should the AG or the Environmental Groups file documents of any kind with the Commission in the course of these proceedings, they shall also serve a copy of said documents on all other parties of record.

By the Commission



ATTEST:



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