

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF KENTUCKY UTILITIES	)	
COMPANY FOR A CERTIFICATE OF PUBLIC	)	
CONVENIENCE AND NECESSITY AND	)	CASE NO.
APPROVAL OF ITS 2009 COMPLIANCE PLAN	)	2009-00197
FOR RECOVERY BY ENVIRONMENTAL	)	
SURCHARGE	)	
APPLICATION OF LOUISVILLE GAS AND	)	
ELECTRIC COMPANY FOR A CERTIFICATE	)	
OF PUBLIC CONVENIENCE AND NECESSITY	)	CASE NO.
AND APPROVAL OF ITS 2009 COMPLIANCE	)	2009-00198
PLAN FOR RECOVERY BY ENVIRONMENTAL	)	
SURCHARGE	)	

O R D E R

Pending before the Commission is a Motion filed jointly by CDH Preserve, LLC, Dennis Cunningham, and Cathy Cunningham (collectively, "CDH/Cunninghams") requesting (1) full intervention in the two above-captioned unconsolidated cases; and (2) an extension of time until November 5, 2009 for the filing of direct testimony by intervenors. The Motion states that the Cunninghams purchased 150 acres in Hardin County, Kentucky; they transferred that property to a limited liability company known as CDH; and they want to keep this farmland from being developed. They further state that they are customers of Kentucky Utilities Company ("KU"), they will be impacted if the environmental projects proposed in this case are approved, and they have a special interest in this proceeding that is not otherwise adequately represented which justifies intervention under 807 KAR 5:001, Section 3(8)(b).

The Motion notes that CDH/Cunninghams were previously granted intervention in three prior cases in which Louisville Gas and Electric Company ("LG&E") and KU requested authority to construct transmission facilities that would cross their property and that they challenged the need for those facilities in those cases. They also state that they have taken separate legal action to oppose and challenge KU's efforts to obtain by condemnation a right of way across their property.

The Motion then references a number of the coal-fired power plants owned by LG&E and KU, states that the plants "cause significant air pollution," and notes the existence of a recent study ranking Lexington, Kentucky and the Louisville metropolitan area as first and fifth, respectively, in per capita carbon emissions. Citing a recent decision by the United States Environmental Protection Agency ("EPA") to disapprove an air permit for LG&E's operation of the Trimble County 2 generating unit ("TC2"), the motion claims that EPA's action forms a basis for the Commission to reexamine the scheduled start-up and operation of the TC2 facility. The position of CDH/Cunninghams is that, if the TC2 facility does not receive an air permit, or if it is not needed to serve customers by June 2010, the environmental cost recovery proposed by LG&E and KU in this case can be delayed.

The Motion also asserts that LG&E and KU have not obtained other necessary operating permits, including a Kentucky Pollutant Discharge Elimination System ("KPDES") permit at the Trimble County Generating Station, for facilities whose costs are proposed to be recovered by surcharge in this case. The lack of these permits, according to CDH/Cunninghams, justifies extending the due date for intervenor testimony. CDH/Cunninghams request that the evidentiary record in this case be

expanded to include a recent study issued by the Federal Energy Regulatory Commission ("FERC") assessing demand response, both nationally and by states, which projects that, with full participation in demand response, Kentucky could achieve a total potential peak load reduction of 17.5 percent by 2019.

LG&E/KU filed a Response in opposition to the intervention request by CDH/Cunninghams, citing numerous grounds in support of a denial of the motion. First, the Response states that the Motion is not timely as required by the Commission's intervention regulation and the public notice given at or about the time these cases were filed, and that no explanation for the movants' delay has been offered. Next, the Response states that, since CDH/Cunninghams are not customers of LG&E, they have no interest in LG&E's rates or service and, therefore, their request to intervene in the LG&E proceeding should be denied.

The Response also claims that, although CDH/Cunninghams are customers of KU, they have identified no special interest in any of the issues raised in this proceeding, only a general interest that they share in common with every other ratepayer of KU. The Response also claims that CDH/Cunninghams are not likely to present issues or develop facts that will assist the Commission in fully considering these cases without unduly complicating or disrupting the proceedings because their Motion to intervene: (1) includes no information to indicate that they have any particular knowledge, experience or expertise relating to the need for the environmental facilities or surcharges proposed here; and (2) questions the need and timing for TC2 and the pursuit of those issues constitutes a collateral attack on the Commission's prior approval of construction of TC2.

In response to the claim that the EPA disapproved an air permit for TC2, LG&E/KU state that the air permit was issued; that the permit is still valid; and that, although negotiations are ongoing to address the comments and concerns raised by EPA, LG&E/KU expect to be able to operate TC2 with no changes to the emission control equipment. With respect to the KPDES permit, the Response states that there is an existing permit and a renewal and modification of that permit has been requested. Finally, the Response notes that the Commission has previously denied intervention when, as here, attempts are made to raise environmental issues that are beyond the scope of the Commission's jurisdiction.

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. KRS 367.150(8). All other persons may request permissive intervention. In a recent unreported case, EnviroPower, LLC v. Public Service Commission of Kentucky, 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 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."<sup>1</sup>

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<sup>1</sup> 2007 WL 289328, at 3.

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.

In analyzing the motion to intervene filed by CDH/Cunninghams, we find that they are customers of KU, not LG&E. Since they are not customers of LG&E, they have no interest in the rates or service provided by LG&E and, therefore, they do not satisfy the statutory criteria that must be met to justify being granted intervenor status in an LG&E proceeding.

Having determined that CDH/Cunninghams are customers of KU, we must determine whether they meet the criteria for intervention as set forth in 807 KAR 5:001, Section 3(8). We note at the outset that the issues set forth in KU's application are whether or not it is entitled to receive Certificates of Public Convenience and Necessity ("CPCNs") for the construction of emission control equipment at the E. W. Brown Unit 3 and new landfills at the Ghent and Trimble County Generating Stations; and whether or not amended environmental compliance plans should be approved to allow the recovery by surcharge of the costs of the proposed environmental equipment and landfills. By statute, the factors to be considered in reviewing an application for a CPCN under KRS 278.020(1) are whether there is a need for the proposed facilities and the absence of wasteful duplication, while the factors to be considered in reviewing the compliance plan and surcharge under KRS 278.183(2)(a) are whether the plan and rate surcharge are

reasonable and cost-effective for compliance with the applicable environmental requirements.

The motion to intervene states that the interest of CDH/Cunninghams in the KU proceeding arises from their status as ratepayers of KU and that they will be impacted by the decision in this case. However, the motion does not show how the impact on CDH/Cunninghams will differ from the impact on the rest of KU's 536,000 ratepayers. The Commission finds that the interest of CDH/Cunninghams in the KU proceeding is the same general interest that is held by every one of KU's 536,000 customers. Absent a showing by CDH/Cunninghams that they will be impacted differently than will all other KU customers, they do not have a special interest to justify intervention under 807 KAR 5:001, Section 3(8).

The motion to intervene is grounded exclusively on the claim of a special interest in the KU proceeding by CDH/Cunninghams. However, the Commission finds that, even under the alternative basis for intervention set forth in 807 KAR 5:001, Section 3(8), intervention is not justified. The motion to intervene is devoid of any description of the background, knowledge, experience, or training of CDH/Cunninghams on the issues of: (1) the need for, and absence of wasteful duplication from, emission control equipment and landfills; and (2) cost recovery by surcharge of utility expenses and capital investments. Thus, CDH/Cunninghams have presented no basis to support a finding that they will likely present issues or develop facts that will assist us in fully considering the issues in the KU proceeding without unduly complicating or disrupting the proceedings.

The Commission also notes that the motion to intervene was clearly untimely. KU published and mailed public notices of this proceeding in late June of this year, and those notices invited interventions to be filed within 30 days of the notices. The motion is silent as to a reason for the delay in filing.

The three prior cases in which CDH/Cunninghams were granted intervention are clearly distinguishable.<sup>2</sup> Those cases involved applications by KU for CPCNs to construct transmission facilities that would cross their property. Thus, their interest in those cases was a special interest that was not shared by all of KU's customers. None of the facilities proposed by KU in this proceeding will be located in Hardin County, Kentucky, where the CDH/Cunninghams property is located.

With respect to the issues raised by CDH/Cunninghams relating to the need and timing of TC2, the Commission finds that those issues are beyond the scope of the issues raised by KU's application in this proceeding. In addition, the need and timing of TC2 are issues that were previously adjudicated in Case No. 2004-00507,<sup>3</sup> which resulted in LGE and KU being granted CPCNs to construct TC2. The need and timing

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<sup>2</sup> Case No. 2005-00142, Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company for a Certificate of Public Convenience and Necessity for the Construction of Transmission Facilities in Jefferson, Bullitt, Meade, and Hardin Counties, Kentucky; Case No. 2005-00467, Application of Louisville Gas and Electric Company and Kentucky Utilities Company for a Certificate of Public Convenience and Necessity for the Construction of Transmission Facilities in Jefferson, Bullitt, Meade and Hardin Counties, Kentucky; and Case No. 2005-00472, Application of Louisville Gas and Electric Company and Kentucky Utilities Company for a Certificate of Public Convenience and Necessity for the Construction of Alternative Transmission Facilities in Jefferson, Bullitt, Meade and Hardin Counties, Kentucky.

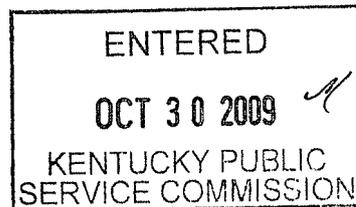
<sup>3</sup> Case No. 2004-00507, Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company for a Certificate of Public Convenience and Necessity, and a Site Compatibility Certificate, for the Expansion of the Trimble County Generating Station.

for TC2 cannot now be collaterally attacked in this case, irrespective of whether that attack is by presenting a recent FERC study on the potential to reduce peak electric load 10 years from now or by questioning the status of operating permits issued by other agencies.

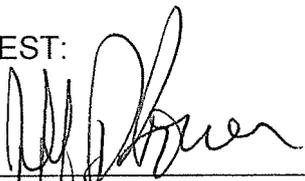
The Commission's jurisdiction is limited by statute to the regulation of utility rates and service. To the extent that CDH/Cunninghams seek to pursue environmental issues, such as the "significant air pollution" from KU's coal-fired generating plants or the regional level of per capita carbon emissions in Kentucky, those issues are beyond the scope of the Commission's jurisdiction.

IT IS HEREBY ORDERED that the motion of CDH/Cunninghams to intervene is denied on the merits and their motion to extend the filing date for intervenor testimony is denied as moot.

By the Commission



ATTEST:

  
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