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January 31, 2005

Beth A. O'Donnell, Executive Director  
Kentucky Public Service Commission  
211 Sower Boulevard  
Frankfort, Kentucky 40602

RECEIVED

JAN 31 2005

PUBLIC SERVICE  
COMMISSION

Re: Case No. 2004-00423

Dear Ms. O'Donnell:

Please find enclosed the original and twelve (12) copies of the Response of EnviroPower, LLC, to the Objections of East Kentucky Power Cooperative, Inc., to EnviroPower's Petition to Intervene filed in the above-referenced matter.

By copy of this letter, all parties listed on the attached Certificate of Service have been served. Please place these documents on file.

Sincerely yours,



Stephen M. Soble  
O'Connor & Hannan, LLP

Enclosure

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

In the matter of:

JAN 3 1 2005

APPLICATION OF EAST KENTUCKY POWER )  
COOPERATIVE, INC., FOR A CERTIFICATE OF )  
CONVENIENCE FOR THE CONSTRUCTION OF )  
A 278 MW (NOMINAL) CIRCULATING FLUIDIZED )  
BED COAL FIRED UNIT IN MASON COUNTY )

PUBLIC SERVICE  
COMMISSION

CASE NO. 2004-00423

**RESPONSE OF ENVIROPOWER, LLC, TO THE OBJECTIONS  
OF EAST KENTUCKY POWER COOPERATIVE, INC.,  
TO ENVIROPOWER'S PETITION TO INTERVENE**

EnviroPower, LLC ("EnviroPower"), hereby respectfully submits to the Kentucky Public Service Commission (the "Commission" or "KPSC") this Response to the Objections of the East Kentucky Power Cooperative, Inc. ("EKPC"), to EnviroPower's Petition to Intervene, and hereby requests that the Commission enter an Order granting EnviroPower full intervenor status, pursuant to the EnviroPower Petition To Intervene, without limitation.

**1. EnviroPower's Petition to Intervene was Timely Filed.**

EnviroPower's petition to intervene does not violate any time restrictions in Kentucky statutes or the applicable regulations. 807 KAR 5:001 Section 3(8) permits the filing of timely intervention motions by interested parties. The regulation does not provide any defined time limit for filing such petitions, but instead vests the Commission with broad discretion to admit qualified intervenors.<sup>1</sup>

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<sup>1</sup> Despite EKPC's claim that some eleven weeks elapsed from the filing of EKPC's Application before EnviroPower's petition to intervene was lodged with the Commission, the actual time available to EnviroPower was much less. EKPC's Application was not publicly available from the Commission's website until November 16, 2004, or eight weeks prior to EnviroPower's petition. This interval includes the Thanksgiving, Christmas, and New Year's holidays, and therefore translates into forty (40) legal business days. Further, the successful intervention petition of Gallatin Steel Company was filed on December 13, 2004, just four weeks or twenty-two (22) legal business days before EnviroPower's petition was filed. Since that time, there has been no intervening order of the Commission that would prejudice any party if EnviroPower is permitted to intervene, as a full intervenor.

On January 12, 2005, EnviroPower contacted Mr. Richard Raff, of the Commission's General Counsel's, who advised that a timely intervention could be made in the instant case, provided that a petition to intervene and any relevant testimony was filed before the close of business on Friday, January 14, 2005. EnviroPower's Petition to Intervene of January 14, 2005 was timely and sufficient to for the Commission to issue an order granting EnviroPower the status of a full intervenor.

**2. Alternative Regulatory Standards for Qualifying as a Full Intervenor.**

807 KAR 5:001 Section 3 (8)(d) sets the standards for qualifying as a full intervenor before the Commission:

If the commission determines that a person has a special interest in the proceeding which is not otherwise adequately represented or that full intervention by party is likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings, such person shall be granted full intervention. (807 KAR 5:001 Section 3 (8)(d), emphasis added.)

This regulation establishes two alternative means of qualifying as a full intervenor. A petitioner must either have "a special interest in the proceeding which is not otherwise adequately represented" (the "First Alternative Standard") or the party's full intervention must be "likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings" (the "Second Alternative Standard").

**3. EnviroPower Qualifies Under the First Alternative Standard, and EKPC's Objection Acquiesces to EnviroPower's Qualification as a Full Intervenor on its face.**

The mandate of the Commission under the First Alternative Standard is to broadly allow intervention by persons in Kentucky who are or may be significantly impacted by Commission decisions. EnviroPower has a special interest in the proceedings before the Commission (see

Affidavit of Randall Alan Bird, ¶¶ 6, 10-15, 18, 25, 30, and esp. 33) that is clearly not represented by any other party to this proceeding. The EKPC Objection raises no objection on these grounds, and therefore acquiesces to the EnviroPower position that it has met the First Alternative Standard for full intervention.

**4. EKPC’s Objections to EnviroPower’s Qualifications Under the Second Alternative Standard are Without Substance.**

EKPC chose to object to EnviroPower’s petition on grounds that it “introduces information that will unduly disrupt and complicate the proceedings in this case,” EKPC merely recites the language of the regulation without providing any evidentiary or factual support to its claim. There is no direct testimony or affidavit submitted in support of EKPC’s Objection. Therefore, the EKPC argument is vague, unspecific, and *ad hominem* in character.

EnviroPower has conducted its affairs in accordance with the rules, procedures and professional decorum of the Commission. EnviroPower seeks a fair determination by the Commission based on the best available facts and evidence. EnviroPower has taken no action which could be properly characterized as disruptive or unduly complicated. EKPC’s objection is premature, designed to be preemptive and calculated to chill the full disclosure of relevant information to the Commission.

EKPC further suggests—again by reciting the regulation without evidentiary support—that EnviroPower’s intervention “will not present issues or develop facts which would assist the Commission in fully considering the matter.” The issue of what facts will assist the Commission in considering this matter is one for the Commission, not EKPC, to decide. However, EnviroPower has demonstrated that it is in a unique position to be able to provide types of information to Commission that it has not yet considered. This includes information which EnviroPower has not yet provided, but which it is willing to provide to the Commission upon

request after admission as a full intervenor. The information which EnviroPower may provide to the Commission as a full intervenor goes to the heart of the best interests of the ratepayers of the Commonwealth of Kentucky and includes, but is not limited to:

1. The comparative capital costs of projects considered pursuant to the RFP.
2. The conditions proposed by each respondent to the RFP and the impact of these conditions on the costs and risks to be borne by the ratepayers. (For example, financial and performance guarantees, permitting risks, environmental approvals, financing costs and risks, ownership risk, reliability risk, as well as matters relating to the rationalization of power generation and distribution.
3. The costs and risks associated with each proposal's necessary external variable costs such as: fuel, construction scheduling, exposure to electricity market volatility, operations and maintenance.
4. The costs and risks associated with obtaining Siting Board approvals. These are approvals which EnviroPower's Kentucky Mountain Power project have received, but which EKPC has yet to receive, for example.
5. The objectivity, consistency and fundamental fairness of the evaluation methodology under the RFP and the resultant impact on the ratepayers of the Commonwealth of Kentucky.
6. The potential for irrational or overlapping electric power production, which may affect the smooth and efficient operation of the electricity system in the Commonwealth of Kentucky.

EKPC objects that EnviroPower's intervention in this case "is motivated by self-interest as a rejected bidder." The language of the governing regulation specifying the standards for full

intervention, 807 KAR 5:0001 Section 3 (8)(d).<sup>2</sup> in no way states or implies that the issue of an intervenor's motivation is a condition for qualifying as a full intervenor. Thus, that objection is irrelevant. However, EnviroPower rejects, emphatically and categorically, EKPC's characterization of EnviroPower's motivation as factually incorrect and unsubstantiated.. Protecting the rights of the ratepayers of the Commonwealth of Kentucky may only be accomplished when all relevant information sees the sunshine of disclosure to the Commission. To limit or deny EnviroPower's right to intervene will injure the ratepayers and leave the Commission in the position of adjudicating an important matter based on imperfect and insufficient information, to the benefit of only EKPC.

The overriding interest of the KPSC process is for full disclosure in order to serve the public interest. The public interest may only be served in this case by an order granting EnviroPower full intervention rights. Any limitation will injure both EnviroPower and the ratepayers. EKPC merely complains that it dislikes what it is hearing from EnviroPower; that is not a legal basis for denying full intervention.

**5. EKPC's Characterization of the Affidavit of Randall Alan Bird in Support of EnviroPower's Petition to Intervene is Unsubstantiated and Improper.**

The Affidavit of Randall Bird is a duly sworn statement, properly prepared and submitted by the affiant. In the Commonwealth of Kentucky, a sworn affidavit is deemed to be under penalty of perjury, just like direct testimony and, therefore, may be a sufficient substitute for direct testimony before a court reporter in the instant proceeding. (See, Lipsteuer v. CSX Transportation, 37 S.W. 3d 732 (Ky. 2000), 2000 Ky LEXIS 197). If EKPC wishes to dispute any of the evidence contained therein, and prove that a particular perception of Randall Bird is "erroneous, disparaging, [or] unsupported", the Commission's process affords the parties

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<sup>2</sup> If the commission determines that a person has a special interest in the proceeding which is not otherwise adequately represented or that full intervention by party is likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings, such person shall be granted full intervention. (807 KAR 5:001 Section 3 (8)(d), emphasis added.)

adequate due process to address these issues. It is noteworthy that EKPC, itself, chose to make such a bald assertion, unsubstantiated by evidence in the form of either direct testimony or affidavit.

Mr. Bird's Affidavit serves the primary purpose of demonstrating that EnviroPower does meet the legal standards qualifying EnviroPower to be a full intervenor. It also serves the purpose of indicating, with specificity and particularity, the nature and types of relevant information which EnviroPower may be able to provide to the Commission, consistent with an orderly and judicious KPSC procedure.

**6. EKPC's Objection that EnviroPower's Intervention Will Result in the Improper Disclosure of Confidential Information is Without Basis .**

807 KAR 5:001 Section 7(2) provides the procedure for requesting that material be made confidential by the Commission. Specifically, it provides that:

- (a) Any person requesting confidential treatment of any material shall file a petition which:
  - 1. Sets forth specific grounds pursuant to KRS 61.870 et seq., the Kentucky Open Records Act, upon which the commission should classify that material as confidential; and
  - 2. Attaches one (1) copy of the material which identifies by underscoring, highlighting with transparent ink, or other reasonable means only those portions which unless deleted would disclose confidential material. Text pages or portions thereof which do not contain confidential material shall not be included in this identification. KAR 5:001 Section 7(2)(a).

This regulatory procedure is available to EKPC if it wishes to cause certain of its records to be deemed confidential, subject to the order of the Commission. EnviroPower sees no inherent defect in the existing regulation, and has full faith in the ability of the Commission to fairly apply this rule. EnviroPower, in its Petition to Intervene, requested no confidential information, yet EKPC seeks to deny EnviroPower its legally entitled standing before the

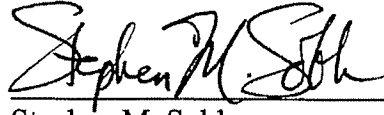
Commission as a full intervenor by asserting non-existent facts, fears, and the presumption of unfair future rulings by the Commission. The EKPC objection fails to state permissible grounds for denying full intervention.

EnviroPower intends to fully comply with the regulations of the KPSC, the applicable laws of the Commonwealth of Kentucky and the rulings of the Commission regarding the handling and disclosure of confidential data. To deny the Commission access to such data in order to protect EKPC's hypersensitivity is inconsistent with the law and regulations of the Commonwealth and places EKPC in direct opposition to the best interests of the ratepayers of the Commonwealth and in direct opposition to the smooth, efficient and provident adjudication of the pending EKPC petition by the Commission.

**WHEREFORE**, EnviroPower, LLC submits this Response to EKPC's Objection to EnviroPower's Petition to Intervene, and respectfully requests that the Commission grant the Petition to Intervene, by ordering that EnviroPower be granted the right to full intervenor status, without limitation.



Respectfully submitted,



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January 31, 2005

**CERTIFICATE OF SERVICE**


I hereby certify that a copy of the foregoing was served by mailing a true and correct copy, by regular U.S. mail (unless otherwise noted) to all parties on this 31st day of January, 2005.

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