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May 6, 2005

RECEIVED

MAY 10 2005

PUBLIC SERVICE  
COMMISSION

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

Re: Case No. 2005-00053

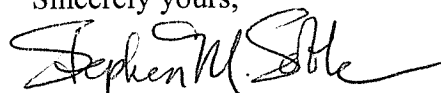
Filed by Fax, Original via Courier

Dear Ms. O'Donnell:

Please find enclosed the original and ten (10) copies of the Petition for Reconsideration of EnviroPower's Original Petition To Intervene and the Denial of the Petition by The Commission on April 18, 2005.

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

CC: Mr. Charlie Lile  
Mr. Roy Palk  
Mr. Richard Raff  
Ms. Elizabeth Blackford  
Mr. Michael Kurtz  
Mr. Brent Caldwell  
Mr. Frederic Cowan

**COMMONWEALTH OF KENTUCKY**  
**BEFORE THE PUBLIC SERVICE COMMISSION**

**RECEIVED**

MAY 10 2005

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, FOR THE )**  
**CONSTRUCTION OF A 278 MW (NOMINAL) )** **CASE NO. 2005-00053**  
**CIRCULATING FLUIDIZED BED COAL FIRED )**  
**UNIT AND FIVE 90 MW (NOMINAL) COMBUSTION )**  
**TURBINES IN CLARK COUNTY, KENTUCKY )**

**PETITION FOR RECONSIDERATION OF ENVIROPOWER'S ORIGINAL PETITION  
TO INTERVENE AND THE DENIAL OF THE PETITION BY THE COMMISSION ON  
APRIL 18, 2005**

Pursuant to KRS Section 278.310 and 807 KAR 5:001 Section 3(8) and other applicable law, EnviroPower, LLC ("EnviroPower") hereby respectfully requests reconsideration of the Commission's Order dated April 18, 2005 denying EnviroPower's Original Petition to Intervene in this case, dated March 31, 2005. EnviroPower asserts the following grounds in support of this Petition for Reconsideration:

1. EnviroPower has a property interest arising from the apparently fraudulent request for proposal issued by East Kentucky Power Cooperative, Inc. ("EKPC"), RFP No. 2004-01 ("RFP"), which gives rise to the Application by EKPC for a Certificate of Convenience and a Site Compatibility Certificate and other sanctions from the Commission ("Application").

2. As evidenced by sworn testimony submitted by Frank L. Rotondi of EnviroPower in case 2004-00423, dated March 30, 2005 and incorporated by reference to this Petition for Reconsideration, the Commission and EnviroPower concur that "East Kentucky Power conducted one bid solicitation and evaluation process which resulted in its filing of two

applications: the one pending in this case and the one pending in case No. 2004-00423”.

3. Based on the Affidavit of Frank L. Rotondi attached hereto, EnviroPower maintains that the information relating to the apparently fraudulent RFP and the process of bid manipulation which resulted in an the award of baseload power to the EKPC self-build option, known as Spurlock #4, as referenced in Case No. 2004-00423 is relevant, but not sufficient for the Commission to address the facts and circumstances of this case. The instant case involving the JK Smith self-build option includes bid evaluation steps and procedures including a different time period and different specific facts of which EnviroPower has direct knowledge. Therefore, it would have been inefficient and irrelevant for EnviroPower to have submitted information which it and its associates have in their possession relating to this case in the context of the other pending Case No. 2004-00423. The Commission, therefore, bases its April 18 Denial Order on an incorrect factual assumption, when it states: “All issues regarding that bid solicitation and evaluation have been the subject of an ongoing investigation in Case No. 2004-00423, and it would be inefficient and duplicative to conduct a second investigation of those same issues in this case.”

4. EnviroPower, as the Commission notes, “has a pecuniary interest”. However, the Commission is in error by asserting that the sole or governing pecuniary interest of EnviroPower is “to challenge any bid evaluation process that results in the rejection of its bid.” To the contrary, EnviroPower’s pecuniary interests includes, but are not limited to, a reasonable expectation of good governance, in other words, an assertion of its inherent, intangible right to honest service and good government arising from the integrity of the process governing the issuance of the requested certificates. EnviroPower received a similar certificate from the Commission, participating through the Kentucky Siting Commission, in a separate proceeding

for its Kentucky Mountain Power plant. That siting certificate and other approvals received from the Commonwealth of Kentucky were not obtained by EnviroPower through deceit, fraud, bid manipulation, self-dealing, chicanery, or trick. For the value of the property rights conferred by the Siting Commission (which included the Commission) and the Commonwealth on EnviroPower through its certification process, and which EnviroPower derived from its properly obtained statements and submissions to the Commission, to be held out to the public as equal to certificates which may be obtained by EKPC based on such improprieties as apparently exist here would result in an improper taking of the value of EnviroPower's property right by the Commission without affording EnviroPower due process of law. The only remedy for this unreasonable, unlawful and unconstitutional taking by the Commission is to grant EnviroPower the right of full intervention in the instant case.

5. Further, EnviroPower has a property interest arising from its commitment to build Kentucky Mountain Power, an approximately 576 Megawatt power plant in Knott County. This investment by EnviroPower makes EnviroPower a committed participant in the electric power generation market in the Commonwealth of Kentucky. EnviroPower, consistent with the Energy Policy of the Commonwealth, has attracted new investment to Kentucky, has designed a power plant to be built at a Kentucky mine site and will utilize only Kentucky coal, including waste coal. To be denied standing as an interested party in this proceeding would be to deny the due process rights afforded EnviroPower by the Constitution of Kentucky, Section 2 and the Constitution of the United States, Amendments 14 and 5 which assure equal protection under the laws and guarantee due process rights in order to protect one's property or pecuniary interest. It is apparent that the value of the electric power generation market and the ability of EnviroPower to continue to build power plants would be adversely affected, were the Commission to publicly

herald that Certificates of Convenience and Necessity and other permits may be obtained despite misdeeds and unclean hands on the part of the Applicant (EKPC), without affording interested parties such as EnviroPower access to the adjudicatory process, and to all other procedural due process rights protected by law, through a grant of full intervention.

6. The Commission was restrained by the Franklin Circuit Court from holding a hearing in Case No. 2004-00423 because EnviroPower has asserted substantial support for demonstrating the question of unlawful, unconstitutional and unreasonable actions by the Commission in that case. A declaratory judgment action filed simultaneously with the Motion for a Restraining Order remains pending. The outcome of that case, if favorable to EnviroPower, may be outcome determinative with regard to EnviroPower's right to intervene in the instant proceeding. Among the issues raised by EnviroPower include the argument that the Commission has exceeded its statutory authority by holding intervenors who have a recognized property interest to an undefined, arbitrary standard, promulgated by the Commission, without legislative authority. The governing statute, EnviroPower argues, requires that "all interested persons" be afforded a right to intervene, if the Commission holds a public hearing. KRS § 278.020. The Commission, EnviroPower contends, has acted unreasonably, unlawfully and unconstitutionally by promulgating and interpreting its own regulation which narrowed the statute when the Commission applied, in the April 18 Denial Order, the test requiring "a special interest ... sufficient to justify granting ... full intervention". It is EnviroPower's view that as a matter of constitutional and statutory law the Commission's order of 18 April denying intervention is based on an improper standard which abridges EnviroPower's due process and equal protection rights.

7. Based on the attached affidavit, EnviroPower states that it has direct evidence

relating to incidents of fraud, bid manipulation and self-dealing in the context of the application of the instance case (Case No. 2005-00053), information not presented in Case No. 2004-00423.

8. There is no other party to this proceeding that is or will be able to adequately represent the property interests of EnviroPower before the Commission in this proceeding.

9. EnviroPower states that its participation in this case will assist the Commission in reaching its decision, will foster the ends of honest service and good government, will enable the Commission to focus on the complete facts and circumstances directly affecting the issues before the Commission in the context of the Application by EKPC and will enable the Commission to discharge its statutory duties in accordance with law. The participation of EnviroPower will not unduly interrupt the proceedings, nor prejudice any party.

10. EnviroPower is aware of the petition of Siemens-Westinghouse to intervene in this case. EnviroPower welcomes the participation of Siemens-Westinghouse and states that Siemens-Westinghouse is not in a position to adequately represent the interests of EnviroPower; nor is EnviroPower in a position to adequately the represent the interests of Siemens-Westinghouse.

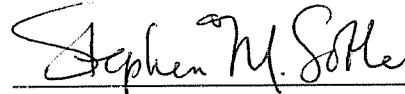
11. EnviroPower incorporates by reference all factual, legal, constitutional and equitable arguments which it has made before the Courts of the Commonwealth of Kentucky in connection with Case No. 2004-00423. EnviroPower's arguments in those court cases are applicable, by analogy, to this case.

12. EnviroPower reincorporates by reference all of its representations in its Petition to Intervene of March 31, 2005.

**WHEREFORE**, EnviroPower respectfully requests the Commission to grant its Petition for Reconsideration to Intervene and to allow EnviroPower to participate with full intervenor status in this proceeding.


Dated this 6<sup>th</sup> day of May, 2005.

Respectfully submitted,



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fcowan@lcgandm.com

May 6, 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 6<sup>th</sup> day of May, 2005.

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Winchester, Kentucky 40392-0707

Mr. Roy M. Palk  
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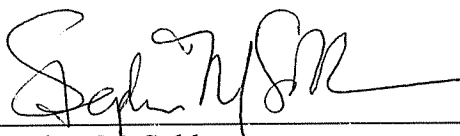
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\_\_\_\_\_  
Stephen M. Soble





5. Members of the EnviroPower Team have direct and specific knowledge as described herein which was not relevant to the Spurlock Case and which, therefore, was never submitted to the Commission.
6. The information which the EnviroPower Team possesses in connection with the Spurlock Case was never fully submitted to the Commission because EnviroPower was denied the right to intervene.
7. The information and analysis which the EnviroPower Team and I would provide to the Commission, if permitted to do so, is extensive and voluminous and supports my testimony in the Spurlock Case, yet it is different because it applies to the JK Smith situation. It is my view that EKPC issued a dishonest and fraudulent RFP. EKPC and its outside advisor EnerVision conducted a fraudulent evaluation process. The evaluation process was manipulated and preordained to guarantee the award of the RFP as it relates to the second power plant to EKPC itself for the JK Smith self-build option. I have information concerning the JK Smith baseload bid, while others on the EnviroPower Team, upon information and belief, have information relating to both the baseload bid and the peaking power requirements.
8. EnviroPower has an interest in this CON Proceeding because (a) EnviroPower has a pecuniary, or property interest which would be irreparably injured and abridged by the Commission if it issued a Certificate of Convenience and Necessity and/or a Site Compatibility Certificate in the face of blatant fraud, self-dealing, manipulation and dishonesty by the applicant, EKPC; (b) EnviroPower has an interest, which would be irreparably injured, in insuring that the actions of the Commission are perceived by the investment community, our suppliers and potential suppliers of goods and services, customers and potential customers and other parties that are stakeholders in the success of EnviroPower's Kentucky Mountain Power ("KMP") plant, to be fair, just, equitable, honest and not arbitrary, capricious or a whitewash of the frauds of EKPC, and (c) EnviroPower has an interest in protecting its goodwill and its commercial reputation, which would be irreparably injured, if the Commission is permitted to conduct a sham Hearing, devoid of a full and thorough investigation into the frauds of EKPC, which caused the EnviroPower bid to be rejected.
9. If the CON Proceeding is permitted to go forward without EnviroPower being granted the right to participate as a full party in the Proceeding, it will be impossible for EnviroPower to adequately protect the interests I have detailed in the previous paragraph.
10. Without full participation by EnviroPower in this CON Proceeding, and an opportunity for EnviroPower to be heard on the issues it has raised, a finding of the Commission awarding a Certificate of Convenience and Necessity or a Site Compatibility Certificate to EKPC would validate in the marketplace the EKPC contention that during the bid evaluation process, EnviroPower was unable to substantiate its financial backing, its guarantees, its fuel supply and its Engineering, Procurement and Construction contract prices, all of which are false.
11. Without full participation by EnviroPower in this CON Proceeding, and an opportunity for EnviroPower to be heard on the issues it has raised, a finding of the Commission awarding a Certificate of Convenience and Necessity or a Site Compatibility Certificate to EKPC

would send a loud message to the investors, the construction firms, the equipment suppliers, the plant design and engineering firms, and the coal industry that the Commission will permit fraud, self-dealing and bid manipulation. This would create an substantial adverse public opinion in the marketplace and would irreparably injure EnviroPower's ability to operate its business in Kentucky.

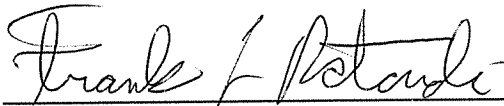
12. Such a finding, without EnviroPower's having the opportunity to present evidence and to state its case to the Commission as a full party, would result in irreparable harm to EnviroPower.
13. Despite any good faith efforts on the part of the Commission and its staff, the Commission does not and cannot have the degree of expertise and knowledge that the EnviroPower Team has concerning industry standards and practices.
14. Because of the unique position which the EnviroPower Team played in the bid process, the EnviroPower Team is in possession of facts and knowledge that the Commission does not and cannot possess without a detailed examination and investigation by the Commission of the knowledge in the possession of the EnviroPower Team.
15. The Attorney General and Gallatin Steel have been granted full intervention status by the Commission in the CON Proceeding, upon information and belief.
16. The projected costs of building the electric power generation plants by EKPC which were the subject of the EKPC RFP, the Spurlock #4 plant in Mason County (Commission Case No. 2004-00423) and the JK Smith plant in Clark County (Commission Case No. 2005-00053), based on EKPC's cost estimates will cost over \$1 Billion, while the EnviroPower project was significantly below \$1 Billion for the same amount of electricity.
17. If the CON Proceeding is permitted to go ahead without the participation of EnviroPower as a full party, EnviroPower, as an independent power producer, will lose bargaining power in the industry and will not be able to negotiate the construction of its power plants with suppliers, contractors and others on as favorable terms as it otherwise would be able. As a result, EnviroPower will not be able to build its future power plant projects on as low a cost basis as it otherwise would and will suffer irreparable harm in terms of bidding for such projects.
18. If the CON Proceeding is permitted to go ahead without the participation of EnviroPower as a full party, EnviroPower, as an independent power producer, will be injured because the Commission actions are likely to vitiate the public policy of the Commonwealth. The Energy Policy of the Commonwealth of Kentucky was promulgated by Governor Ernie Fletcher in response to The Legislative Research Commission's Interim Special Subcommittee on Energy. The Commission, the Attorney General, EKPC and EnviroPower all participated in the process leading to the promulgation of the Commonwealth's Energy Policy, entitled "Kentucky's Energy—Opportunities for Our Future: A Comprehensive Energy Strategy" ("the Commonwealth's Energy Policy"). As a participant in the process and as an effected Kentucky company, EnviroPower has an interest in seeing that the Commission conducts its affairs consistently with published public policy.

19. Recommendation 23 on page 29 of the Commonwealth's Energy Policy states that: "The Commonwealth of Kentucky should design and implement policy to promote electricity generation at Kentucky mine sites." The EnviroPower KMP project is a Kentucky electricity generation project at a Kentucky mine site, utilizing 100% Kentucky coal. The EKPC two projects at Spurlock #4 and JK Smith are not.
20. Recommendation 17 on page 27 of the Commonwealth's Energy Policy states that: "The Commonwealth of Kentucky should identify impediments to investment in electric generation, transmission and distribution and develop policies to promote investment while ensuring that appropriate environmental protections are maintained and local voices are heard." The actions of the Commission in denying EnviroPower's petition to intervene pose an impediment to investment, and stifle local voices, because EnviroPower is a Kentucky corporation which has assembled new investment for Kentucky. Moreover, the Commission has evidence that EnviroPower had received virtually all of its environmental permits prior to submission of its bid, and EKPC only filed for its first permit, which subsequently was rejected, on September 13, 2004, the same day that EnviroPower was informed of EKPC decision to award the Spurlock power plant bid to itself. There is testimony in the Spurlock Case that EKPC treated an issued permit as equivalent to a yet to be filed application for environmental permits, because the person in charge of the EKPC filings, was the same person responsible for the evaluation of the bids with regard to environmental issues. This issue from the Spurlock Case has general, but not specific relevance to the JK Smith case. The EnviroPower Team is prepared to provide information to the Commission which relates to the JK Smith case, and which, like the Spurlock Case will establish prima facie, blatant self-dealing, which the Commission, if it fails to grant intervention, would be, in my view, poised to whitewash.

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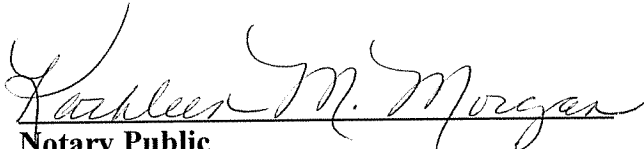
21. Recommendation 25 of the Commonwealth's Energy Policy states that: "The Commonwealth of Kentucky should support projects and initiatives intended to open new markets for Kentucky coal." The KMP plant of EnviroPower creates a new market for Kentucky coal and waste coal and provides a long term supply contract for the purchase of that coal. EKPC's plants have no such plan.

**FURTHER, AFFIANT SAYETH NOT.**

  
\_\_\_\_\_  
**Frank L. Rotondi**

**May 6, 2005**

**Subscribed and sworn to or affirmed before me the 6<sup>th</sup> day of May, 2005**

  
\_\_\_\_\_  
**Notary Public**

