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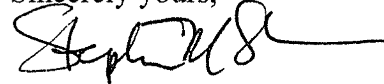
June 1, 2005



JUN 0 2 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 EnviroPower, LLC's Request For the Commission To Take Judicial Notice.

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
Ms. Elizabeth Blackford
Mr. Frederic Cowan
Mr. Michael Kurtz
Mr. Brent Caldwell

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED
JUN 0 2 2005
PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF EAST KENTUCKY POWER COOPERATIVE, INC. FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY, AND SITE COMPATABILITY CERTIFICATE 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

CASE NO. 2005-00053

REQUEST FOR THE COMMISSION TO TAKE JUDICIAL NOTICE

The Commission has been presented with issues relating to the interests of EnviroPower LLC in the above captioned matter. The Commission's repeated denial of EnviroPower's Petitions to Intervene have given rise to legal challenges in the Franklin Circuit Court and, in a sister case arising from PSC case no. 2004-00423, the Kentucky Court of Appeals. To assist the Commission in understanding why the matter of intervention is paramount to the smooth and efficient operation of the electric power market in Kentucky and to the proper discharge of the Commission's statutory duty, EnviroPower hereby requests that the Commission take Judicial Notice of the attached two articles from the May, 2005 issue of Platts Power magazine. (Platts Power, vol. 149, no. 4).

In the editorial, entitled "Back to Basics", copy attached, Dr. Robert Peltier, the editor-in chief, notes that often state regulators do not "fully explore the "hidden costs" that accrue when a utility (here, EKPC) opts to build a plant rather than contract for supply" (parenthetical added). Those "hidden costs" are precisely the kind of costs which EnviroPower maintains, in part, disguises and renders null and void the bid evaluation models of EKPC/EnerVision.

The editorial goes on to note that it is well-known in the industry that, ". . .utilities' procurement processes likely will be biased toward the self-build option." Quoting Jean-Louis Porier, senior strategist at GF Energy, the article notes, as EnviroPower has contended, "it's hardly a level playing field." The reason that this bias and lack of a level playing field is so important to the instant proceeding before the Commission, was summed up by Steve Schleimer, VP of market and regulatory affairs at Calpine, when the editorial noted that he "believes that in many cases utilities' procurement practices are 'rigged' to favor their affiliates or the self-build option, although the latter often incurs hidden costs that ratepayers must bear."

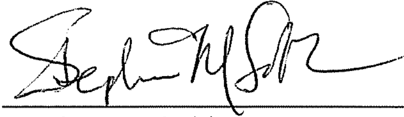
The reason that fraud in the RFP, bid manipulation and self-dealing is so critical to the honest discharge of the statutory duties of the Commission is clear. As Mr. Schleimer explained, " when a utility (EKPC) signs a fixed-price, long-term contract with an IPP (EnviroPower, for example), the merchant (EnviroPower) is responsible for cost overruns and for a plant heat rate that turns out to be higher than anticipated. By contrast, an IOU (investor owned utility or in the instant case, a cooperative, EKPC) that builds its own plant can apply (to the Commission) to recover costs from consumers if the project comes in over budget or does not perform as well as expected …" (parentheticals added for clarity) (all quotes are from page 4). As noted by the affidavit submitted by Siemens-Westinghouse, EKPC's deception has now included a world-class equipment supplier. EKPC wishes to dismiss Siemens-Westinghouse as having the same "mere pecuniary interest" and "disgruntled bidder" status as EnviroPower. Will the Commission allow EKPC to mislead the Commission, the ratepayers and the key market players over the real cost of electric power generation?

This is precisely what has happened in Kentucky. Spurlock #3 had cost overruns and delays. EKPC lied about the real costs of power generation in this case. How many times in its

history has EKPC sought and been granted additional rate increases to cover its cost overruns, delays and underperforming power plants? Note how EKPC/EnerVision penalized EnviroPower for having provided long-term price guarantees. This bogus evaluation process skews reality, fairness and the marketplace. This is a critical issue for the Commission to evaluate and on which to enter a finding, in determining whether EKPC submitted a proper application in this case.

The second article we attach from the same issue of the same magazine is entitled "Coal's Resurgence the Hot Topic at EP 2005". This article discusses the resurgence of clean coal technologies and their impact on new power plant development in the United States. Among the 50 states, the map illustrates that Kentucky ranks #2 for the planned gigawatts of power (4.9 GW), for the amount to be spent on power plant construction ($6.3B) and for the number of plants to be built (8 Power Plant projects). As of December, 2004 according to the caption on the map, the US DOE reported a total capacity increase in the US of 65 gigawatts, at an expected total cost of $80 Billion, comprising a total of 106 new coal-fired power plants. This is the context in which the Commission is faced with deciding the instant case. This is the context in which the prima facie frauds of EKPC must be judged. It is the marketplace for electricity in Kentucky and the potential gouging of the ratepayers that is at stake. We urge the Commission to understand this new economic paradigm shift and to issue findings accordingly when deciding this case.

Respectfully submitted,



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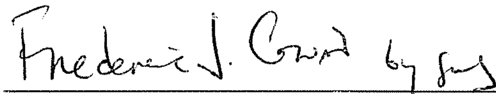

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CERTIFICATE OF SERVICE

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 1st day of June, 2005.

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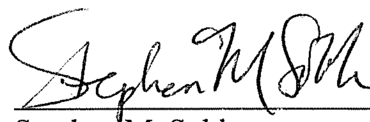

Stephen M. Soble

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COVER STORIES

ELECTRIC POWER 2005: WHERE THE GENCOS MEET

22 **Coal's resurgence the hot topic at EP 2005**

CEOs at EP 2005 didn't see change coming quickly or easily in the generation industry—for a number of reasons. One point on which they did agree was that coal-fired plants have supplanted combined-cycle plants as the current darlings of the U.S. industry, primarily due to the high (and still rising) price of natural gas.

Back to basics

Few dispute that there is a need for new generating capacity in many regions of the U.S. Investor-owned utilities (IOUs), flush with cash after a couple of good years, are pursuing an aggressive growth strategy that could freeze out independent power producers (IPPs) from building future plants. Merchants must realize who the real competition is and evolve, consolidate, or die.

Going head to head

The real competition for future merchant projects will be the incumbent IOU in regions where deregulation was unsuccessful or avoided and whose regulator is concerned about system supply and reliability. A bellwether of this trend was Southern California Edison's (SCE's) permission to buy the Mountainview Project, which was begun by AES in September 2001 but later suspended at the 15%-complete stage. Because SCE had been forced to sell off its fossil plants years earlier, market power played no role in determinations by the California Public Utilities Commission and the Federal Energy Regulatory Commission that the IOU's purchase of Mountainview would benefit customers. The revival of this 1,054-MW project, whose start-up is now scheduled for next summer, was a real wakeup call to the merchant sector.

Competition for future projects in regulated areas of high growth—including California—will be fierce, so merchant plant developers will need to be flexible as they negotiate power-purchase agreements (PPAs). But that doesn't mean they should roll over and play dead. IPPs should press state regulators to fully explore the "hidden costs" that accrue when a utility opts to build a plant rather than contract for supply. "Let the market decide" should be their mantra.

Merchant operators will be players in building the next generation of plants, but "one would have to be blind not to see that utilities are flexing their muscles," said Jean-Louis Poirier, senior strategist at GF Energy, at the recent Platts Global Power Markets Conference. Poirier estimates that about 50 GW of capacity will be built between now and 2012. He believes that, although IPPs may build up to 55% of that capacity, utilities' procurement processes likely will be biased toward the self-build option, so the number could be lower. "The winds are blowing in favor of rate-basing generation," Poirier said.

In Poirier's view, it's hardly a level playing field. "It's like the Titanic. Merchant plant developers could be sliding down the deck while regulators play the violins."

Unfair advantage

Furthermore, utility procurement processes are often complicated and vary from state to state. So if merchants are to make hay with long-term deals, they must consider this battle a guerilla war. The state level is "where the battle is," Poirier said, advising merchant developers to proceed state by state, solicitation by solicitation.

Steve Schleimer, VP of market and regulatory affairs for the big IPP Calpine, believes that in many cases utilities' procurement processes are "rigged" to favor their affiliates or the self-build option, although the latter often incurs hidden costs that ratepayers must bear. As an example, Schleimer explains that when a utility signs a fixed-price, long-term contract with an IPP, the merchant is responsible for cost overruns and for a plant heat rate that turns out to be higher than anticipated. By contrast, an IOU that builds its own plant can apply to recover costs from consumers if the project comes in over budget or does not perform as well as expected, he said.

Size will matter

IPPs cannot afford to wait the several years it will take for demand and spark spreads to recover. To prosper or even survive, they must be bullish about consolidation and acquisitions.

"Hope is not a strategy," said Bruce Williamson, chairman, president, and CEO of Dynegy Inc. Today, the top 10 IPPs hold only 33% of the U.S. deregulated generation market. If America's power market were in line with other U.S. commodity markets (oil, chemicals, and pulp) or the UK generation industry, the market share of the 10 largest players would be 70% to 80%.

> ***The winds are blowing in favor of ratebasing generation.***

Accordingly, there's plenty of room for "consolidation of existing wholesale and independent power companies," Williamson explained. There are now 10 to 12 major market players. In a few years, the number will shrink to just three or four, Williamson predicted.

The benefits of consolidation are extensive and obvious, continued Williamson. They include: overhead cost savings, improved best practices, greater ability to weather problems and fund capital expenditures, and stronger credit ratings. All have resulted from consolidation in other commodity industries, he said. According to David Crane, president and CEO of NRG Energy Inc.—another big IPP—the size and range of these benefits will force all existing wholesale generators and IPPs to become involved in consolidation "to some extent."

Meanwhile, the characteristics of the PPAs needed to convince investors to fund a new plant also are evolving. The changes favor limited recourse debt financing; equity partnerships; the shifting of more risk to engineering, procurement, and construction firms; and fewer long-term O&M contracts. "Lenders will no longer force us into long-term service deals with major vendors. We're quite capable of running and maintaining our own plants," Crane said.

Let the games begin. ■

—Dr. Robert Peltier, PE
Editor-in-Chief

Coal's resurgence the hot topic at EP 2005

ELECTRIC POWER 2005

By John Javetski

Attendance at the 7th Annual Electric Power Conference and Exhibition was 8% higher than at last year's event, reflecting the quality of the technical program and the range of equipment and services showcased. Most of the 5,357 engineers and technicians from 41 countries—including 558 visitors from outside the U.S.—who came to Chicago's McCormick Place at the beginning of April did so to attend the preconference tutorials and workshops, as well as three days of sessions organized on 20 tracks and covering topics such as fuels, interfacing to the grid, steam and gas turbines, burning coal, plant O&M, renewable energy, and asset optimization. But some came to attend the co-located conferences of ASME's Power and Internal Combustion Engine divisions, the International Conference on Power Engineering, or the annual meetings of the PRB Coal Users' Group (see page 26) and Combined Cycle Users' Group (see page 28).

Electric Power 2005 was presented by The Trade Fair Group Inc. (Houston). Its partner, POWER magazine, was once again the show's official publication.

An industry overview

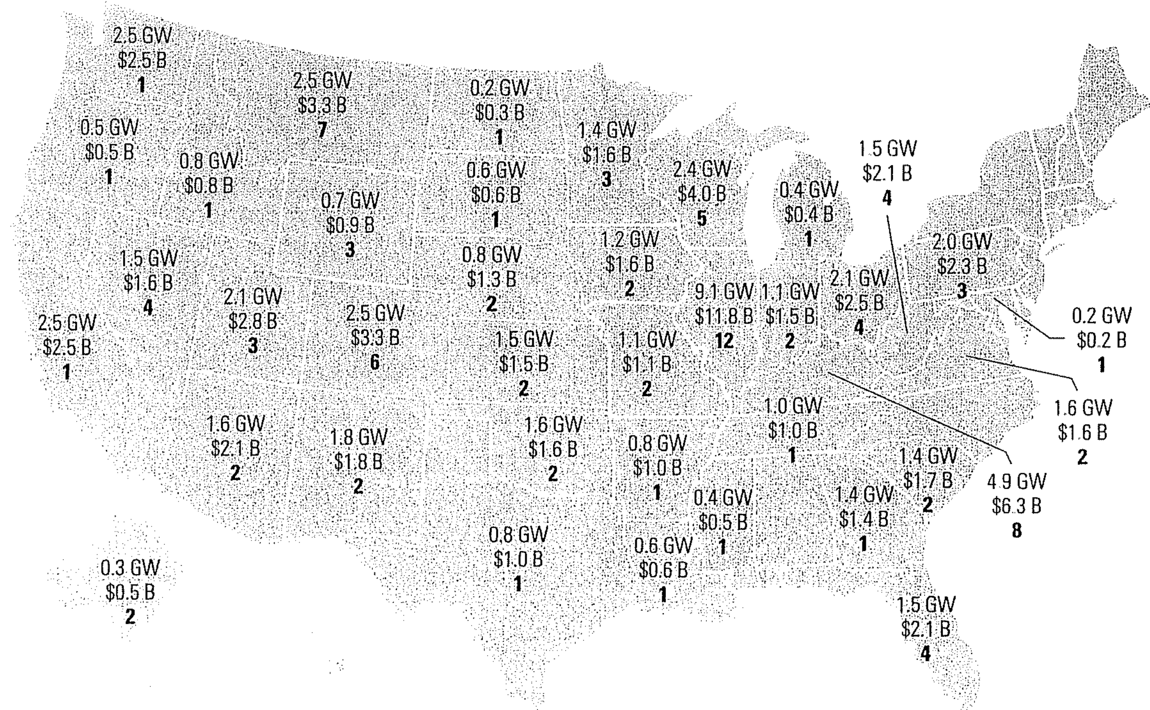
After the power industry banquet on the eve of the first day of sessions and the opening of the exhibition hall (see the "Electric Power Gallery of Exhibitors" beginning on page 36), the conference officially kicked off with an insightful keynote speech by John Rowe, chairman and CEO of Exelon Corp. He said the industry is "at a watershed of change from business models that failed to models that are untested."

Addressing the "purported demise of the integrated utility," Rowe explained that the U.S. industry now has three different models. One, most prevalent in southeast and northwest states, is dominated by traditional, vertically integrated utilities and features rate-based regulation, little retail competition, and modest wholesale competition. Another, found in a few states (including California), is still experimenting with integrated resource management. The third model (seen in New England, the Midwest, and Texas) features substantial wholesale competition and unlimited rights to retail competition. According to Rowe, these three models "will slowly and uncleanly converge."

Rowe explained that increased competition will be accompanied by increased state regulation, continuing the tension between the old and new models. But deregulation has already left its mark, he said: Some 40% of U.S. generation is now owned by entities other than traditional utilities, and these entities have added 167 GW to America's installed capacity.

Rowe also said that "significant new coal and nuclear capacity will be needed soon, but come slowly." Will clean-coal technologies help fill the near-term gap?

3. Proposals. Some 106 new coal-fired projects with a total capacity of 65 GW and a total expected cost of $80 billion are proposed for the U.S. *Source: U.S. DOE's National Energy Technology Laboratory, December 2004*



Notes: GW = gigawatts; B = billions. Number below dollar figure indicates number of plants proposed for that state.
"Undecided locations" total 3.8 GW, $4.8 B, and 4 plants.

In Rowe's opinion, the answer is no, because "We need to know more about integrated gas combined-cycle [IGCC] technology and carbon sequestration" and because the time frame of a national carbon policy remains uncertain. As for the contribution of nuclear capacity, Rowe said the use of combined construction and operating licenses will help to reduce the "time to market" of new reactors. But, he added, "Companies such as mine are reluctant to invest in new nuclear plants without a binding and effective solution to the problem of spent-fuel disposal." (For a summary of the discussions of nuclear power at EP 2005, see page 34.)

> *"Companies such as mine are reluctant to invest in new nuclear plants without a binding and effective solution to the problem of spent-fuel disposal."*
>
> —John Rowe

Hot-button issues

Following Rowe's keynote were two 90-minute roundtable discussions. The first, among four CEOs of generating companies, was moderated by Michael Zimmer of the law firm Thompson Hine LLP. During this plenary session, William P. Utt—president and CEO of Suez Energy North America Inc.—called the five-year (and counting) delay in enacting national energy legislation the main reason for the "patchwork quilt of competition and deregulation we see in the U.S. today." Another panelist, David Wilks—president of Xcel Energy Supply—explained that environmentalism played a major role in his company's decision to build a new, rate-based clean coal plant. "It wasn't our least-cost option," he said, "but it's the one our customers want."

During the same roundtable, Frederick W. Buckman—chairman and CEO of Trans-Elect Inc.—changed the subject to transmission. He said that as the Federal Energy Regulatory Commission's traditionally heavy hand in the background of the business became more tentative in an effort to foster open markets, "The result has been greater uncertainty in decision-making." Two possible solutions to this problem, Buckman believes, are national energy legislation and more regional transmission organizations.

The fourth panelist—John Young, president of Exelon Generation—had his own take on the issue that Buckman raised. Young said, "Historically, the industry has been better at providing data to state regulators than at gaining the skills needed to make investment decisions in an environment of uncertainty."

By comparison, the second plenary roundtable discussion—among executives of generation equipment vendors, and moderated by John Roebel—VP of generation resources for Cinergy Corp.—produced less consensus. But one point on which the speakers agreed was that coal-fired plants have supplanted combined-cycle plants as the current darlings of the U.S. industry, primarily due to the high (and still rising) price of natural gas. Some 106 new coal plants with a cumulative capacity of 65 GW have been proposed nationwide (see Figure 3). However, building these plants will take a total of $80 bil-

lion, and several executives on stage in this and other sessions said they feel the U.S. industry is already "behind the curve" for building new generation.

New plants for old?

In a later session of the "Power Industry Trends—Near Term" track, Steve Gilliland—CEO of Federal Power—shed some light on the need for new capacity, the types of plants that will be built, and who will build them and when. Gilliland said that, although there is an urgent need for new capacity in California and the New York City region, most of that capacity may not get built for a variety of reasons, including environmental regulations and financing uncertainty. He added that new plants are

"We'll continue to go from crisis to crisis. Either we'll have shortages or very high prices."
—Steve Gilliland

most likely to be constructed soon in Florida, the Pacific Northwest, and near the Houston Ship Channel—three regions also in need of new capacity. But Gilliland said new plants aren't likely to be built in Midwest or Great Plains states or in New England "in our lifetime."

As to who will build which types of plants, Gilliland said fuel will be a key differentiator. Renewables-powered plants, he expects, will be built by independent power producers (IPPs), whereas the majority of new coal-fired projects will be undertaken by regulated investor-owned utilities or by cooperatives working alone or together. Natural gas, Gilliland predicted, will "continue to represent the majority of fuel for new generation built by IPPs and regulated utilities."

Gilliland ended his presentation on a somewhat pessimistic note. Answering his own question about the overall timing of new capacity construction, he predicted that "We'll continue to go from crisis to crisis. Either we'll have shortages or very high prices." Gilliland wasn't sanguine about prospects for clean-coal technologies, either. "IGCC will only grow when [project] completion risks can be passed from ratepayers to construction and technology companies."

At the end of the day, however, the profit potential of a proposed power project will remain the deciding factor in whether it is built. That was the subject of an excellent presentation by Jacob (Jay) Worenklein—president and CEO of US Power Generating Co., LLC—during a finance-focused session of the "Power Industry Trends" track of EP 2005. Aided by several detailed charts of national and regional capacity market prices and spark spreads, Worenklein explained that, "Overall, market price signals don't indicate a need for new capacity until the end of this decade." To him, that indicates either of two things: "The relationship is false in theory as well as in practice, or the markets aren't working." In New England, for example, the current cost-recovery level of $30/kW-yr is $80 short of a new-build signal. However, the good news is that monthly-average, on-peak baseload coal spreads remain high, at $30 to $40/MWh.

Mark your calendar

Electric Power 2006 will be held at the Ernest N. Morial Convention Center in New Orleans, March 28–30. ■