

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

DEC 05 2011

PUBLIC SERVICE
COMMISSION

In the Matter of:

Joint Application Of Louisville Gas And Electric Company)
and Kentucky Utilities Company for Certificates of Public)
Convenience and Necessity for the Construction of a Combined)
Cycle Combustion Turbine at the Cane Run Generating) CASE NO. 2011-00375
Station and the Purchase of Existing Simple Cycle Combustion)
Turbine Facilities from Bluegrass Generation Company, LLC)
in LaGrange, Kentucky)

**JOINT REPLY SUPPORTING PETITION OF SIERRA CLUB
AND THE NATURAL RESOURCES DEFENSE COUNCIL
FOR FULL INTERVENTION**

On November 22, 2011, Sierra Club and the Natural Resources Defense Council (collectively, "Movants"), respectfully requested that the Commission grant them full intervention in Case No. 2011-00375, which concerns Louisville Gas & Electric ("LG&E") and Kentucky Utilities Company's (collectively, the "Companies") application for Certificates of Public Convenience and Necessity and a Site Compatibility Certificate for the construction of a 640 MW net summer rating natural gas combined cycle combustion turbine ("NGCC") at the Companies' Cane Run Generating Station, including a 20-inch natural gas pipeline, and for the purchase of Bluegrass Generation Company, LLC's facilities in LaGrange, Kentucky, which include natural gas simple cycle combustion turbines ("SCCT"). On December 1, 2011, the Companies jointly responded in opposition to these motions. Movants now offer this reply.

INTRODUCTION

Rather than respond to the arguments set forth in the Movants' Petition, the Companies argue against a straw man by pretending that Movants' stated interest is the impact of the Companies' decisions on public health, the environment, and national economic concerns.¹ In fact, Movants expressly stated that they "are not seeking intervention to opine about the environmental impacts of the Companies' proposed generation plan."² Instead, Movants' interests are exactly the issues the Commission will address in this proceeding – namely the promotion of a robust examination of the Requests for Proposals to ensure that the Companies have selected the most cost-effective option.

The Companies also contend that the Attorney General's participation in this proceeding forecloses the Movants' intervention. The Companies' argument, however, would render the Commission's intervention provision a virtual nullity, as the Commission would almost always deny intervention to a public interest group on the grounds that their interests are already adequately represented.³ In addition, the Companies ignore the fact that the Attorney General is in the unenviable position of representing all of the various and often-competing consumer interests in Kentucky, and that other customer interests have regularly intervened in Commission proceedings including the present one. The Companies also overlook the fact that the Attorney General has repeatedly taken the position that certain rate recovery mechanisms for demand side management are not in the public interest, which stands in stark contrast to the Movants'

¹ Joint Opposition of LG&E and KU's to Movants' Petition to Intervene at 6.

² Movants' Petition for Full Intervention at 7.

³ Movants' Petition for Full Intervention at pg 11.

position.⁴ Therefore, the Attorney General does not adequately represent Movants, which are national public interest organizations who have numerous individual ratepayer members.

In their Intervention Petition, Movants meticulously analyzed the two part test for intervention under 807 K.A.R. 5:001 § 3(8). The Companies have not offered a legitimate reason to deny the Movants intervention and, instead attempted to create a higher pleading standard for intervenors who are concerned about environmental issues as well as rate and service issues. The Commission should flatly reject the Companies' theory and grant Movants' Petition.

I. Environmental Intervenors Do Not Have a Higher Pleading Standard.

On November 22, 2011, Movants filed a petition to intervene in this proceeding. In the petition, Movants described with as much specificity as possible the nature of their individual interests. In fact, Movants' pleading provided more specificity than the other party's request to intervene filed to date.⁵ Nevertheless, the Companies object to Movants' request, in part on the basis that Movants have purportedly offered only conclusory statements regarding their interests in, and the expertise they would bring to, these proceedings.

As an initial matter, it appears that the Companies are requesting that the Commission establish a separate, higher standard of pleading for Movants because environmental issues are part of the myriad of issues that concern them.⁶ Were the Commission to grant the Companies'

⁴ Movants' Petition for Full Intervention at pg 11.

⁵ Compare 12-page Petition of Sierra Club and the Natural Resources Defense Council for Full Intervention with 2-page Kentucky Industrial Utilities Customers Petition to Intervene.

⁶ The following passage from the Companies' Opposition is an example of how the Companies are advocating for a different pleading standard for environmental intervenors:

“Other than conclusory statements about their purported qualifications and a list of other jurisdictions in which their witnesses have testified, the Petition provides no evidence of the Environmental Groups' ability to present issues or develop facts that will assist the Commission.”

request, it would establish, for the first time, different pleading standards for intervenors that also have an interest in environmental matters. This is especially true because Kentucky Industrial Utilities Customers (“KIUC”) was granted full party status despite its pleading the most generalized of interests. In particular, KIUC merely stated that, as an association of large electric and gas public utility customers in Kentucky, “[t]he matters being decided by the Commission in this case may have a significant impact on the rates paid by KIUC for electricity. Electricity represents a significant cost of doing business for KIUC.”⁷ Its entire petition was 2-pages in length and only stated a special interest in rates.⁸ KIUC’s petition did not address with any specificity why another party does not adequately represent its interest, aver any experience or

Joint Objection of LG&E and KU to Movants’ Petition to Intervene at 5-6. The Companies did not object to the general interests averred by the other intervenor, Kentucky Industrial Utilities Customers, or require them to submit a comprehensive list of evidence that it will present and develop. Yet, the Companies objected to the Movants not providing such a list and falsely implied that Movants lied about their stated experience and expertise.

Sierra Club and NRDC have participated in ratemaking proceedings similar to the present one in states around the country. The following is a partial list of similar proceedings in which one or both of the organizational Movants are currently participating: *In the Matter of Entergy Arkansas, Inc.’s Request for a Declaratory Order Approving the Addition of the Environmental Controls Project at the White Bluff Steam Electric Station Near Redfield, Arkansas* (Arkansas PSC, Docket No. 09-024-U); *In the Matter of a General Investigation Into KCP&L and Westar Generation Capabilities Including as these Capabilities May Be Affected By Environmental Requirements* (Kansas PSC, Docket No.: 11-GIME-492-GIE); *In the Matter of the Petition of Kansas City Power & Light Company (KCP&L) for Determination of Ratemaking Principles And Treatment That Will Apply to the Recovery in Rates of the Cost to be Incurred by KCP&L for Certain Electric Generation Facilities Under K.S.A. 66-1239* (Kansas PSC, Docket No.: 11-KCPE-581-PRE); *In the Matter of the Application of Rocky Mountain Power for Authority to Increase its Retail Electric Utility Service Rates in Utah and for Approval of its Proposed Electric Service Schedules and Electric Service Regulations* (Utah PSC, Docket No. 10-035-124); *In the Matter of the Application of Arizona Public Service Company for Authorization of Generating Assets from Southern California Edison and for an Accounting Order* (Arizona PSC, Docket No. APS 10-0474); *In the Matter of Portland Electric Company 2009 Integrated Resource Plan* (Oregon PSC, Docket No. LC48); *In the Matter of the Application of Consumers Energy Co. for Authority to Increase Its Rates For the Generation and Distribution of Electricity and for Other Relief* (Michigan PSC, Case No. U-16794).

⁷ Kentucky Industrial Utilities Customers Petition to Intervene at p. 2.

⁸ Kentucky Industrial Utilities Customers Petition to Intervene at p. 2.

expertise that would assist the Commission, or discuss how its participation would not unduly complicate these proceedings.⁹ By contrast, it strains credulity for the Companies to contend that Movants' detailed 12-page Petition somehow fails to sufficiently address the standards for intervention.

The Companies also argue that when environmental groups want to intervene in a Commission docket they are required to list individual rate-payers who are members of the organization.¹⁰ It is established law, both in state and federal court, that organizations do not have standing to participate in lawsuits or administrative proceedings to represent their organizational view.¹¹ However, it is also established law that organizations can participate to assert the rights of their members and that general averments as to how members are impacted is sufficient to establish organizational standing.¹² Once again the Companies are attempting to establish a different, higher standard of pleading for Movants if the organization is concerned about environmental issues as well as rate impacts. The Commission should decline the Companies' request that the Commission establish a party-based, unfair, and likely unlawful,

⁹ Kentucky Industrial Utilities Customers Petition to Intervene at p. 2.

¹⁰ Joint Opposition of LG&E and KU's to Movants' Petition to Intervene at 4-5.

¹¹ See also, *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977) (this is the seminal U.S. Supreme Court decision establishing an organization's ability to participate in litigation on behalf of its members).

¹² See, e.g., Community Action Council for Lexington-Fayette, Bourbon, Harrison and Nicholas Counties, Inc. (CAC) Motion to Intervene in *In the Matter of: the Application of Kentucky Utilities Company for Certificates of Public Convenience and Necessity and Approval of its 2011 Compliance Plan for Recovery by Environmental Surcharge*, Case No. 2011-00161. (This Petition did not list individuals and the Commission granted its intervention on June 16, 2011 without any mention of "nameless non-parties" since only organizations were listed); Motion of Metropolitan Housing Coalition for Full Intervention in *In the Matter of: the Application of LG&E for Certificates of Public Convenience and Necessity and Approval of its 2011 Compliance Plan for Recovery by Environmental Surcharge*, Case No. 2011-00162. (This Petition did not list individuals and the Commission granted its intervention on June 23, 2011 without any mention of "nameless non-parties" since only organizations were listed).

tiered intervenor pleading standard that requires all environmental organizations to also list individuals in each intervention.¹³

Movants do not dispute that KIUC established the requisite interest to participate in this public proceeding. Nevertheless, in sharp contrast to the other intervenor, Movants far surpassed the specificity evidenced in the other pleadings to date. Even though there is no way to predict all of the subjects that may arise during the course of this proceeding, the test is simply that Movants have a special interest in the proceeding and that no other party to the proceeding adequately protects those interests or that Movants are likely to present issues or to develop facts that assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings. Movants meticulously analyzed each prong of this test and, in fact, exceeded the two-part test under 807 K.A.R. 5:001 § 3(8) by satisfying both intervention standards. Thus, the Commission should affirmatively reject the Companies' request that the Commission establish a party-based, unfair, and likely unlawful, tiered intervenor pleading standard.

II. The Companies Advance No Substantive Reason to Deny Intervention.

Despite the fact that the pleading standard dichotomy advanced by the Companies is inappropriate, Movants will briefly address the issues raised in their objection. The Companies' primary objection to Movants' involvement is based on the fact that the Attorney General's office is participating in these proceedings, in part, to protect the public interest and Kentucky

¹³ However, if the Commission requires impacted rate-payers that environmental organizations are required to list individuals, here is a list of ratepayers that would agree to serve as co-movants in this petition: (1) Rick Clewett (KU customer), 225 Aberdeen Drive, Lexington, Kentucky 40517; (2) Lane Boldman (KU customer), 114 Woodford Drive, Lexington, Kentucky 40504; (3) Drew Foley (LG&E customer), 7406 Springvale Drive, Louisville, Kentucky 40241; and (4) Judy Lyons (LG&E customer), 1033 Garvin Place, Louisville, Kentucky 40203.

ratepayers.¹⁴ The Companies allege that the Attorney General adequately represents Movants' interest in "demand-side management, energy efficiency, and renewable resources."¹⁵ However, with all due respect, the Attorney General's objectives may be different than Movants. For instance, the Attorney General has historically opposed various rate recovery measures for demand side management ("DSM"), which stands in stark contrast to the Movants' interest of achieving all cost-effective DSM.¹⁶

Moreover, the Attorney General's office is required to balance the interests of all classes of ratepayers. The Attorney General is not allowed to advocate for one particular segment or subclass over another. While this proceeding may impact all electric customers who have an interest in keeping rates down, the real-life impacts differ for different ratepayers. For instance, increases in utility costs constitute a significant challenge to residential ratepayers who live on fixed income relative to the average utility customer. A rate increase could cause economic hardships for this rate class requiring them to alter their way of life. This class of rate payers, thus, has a different motivation than industrial ratepayers, who while interested in protecting their bottom-line profits may have a greater capacity to absorb such rate increases. That is why representatives of sub-classes, such as industrial rate payers and large commercial interests,¹⁷ are allowed to intervene independently in order to focus representation on their particular interest. And, it is for

¹⁴ Joint Opposition of LG&E and KU's to Movants' Petition to Intervene at pp. 5.

¹⁵ The Companies never state why they did not oppose the intervention of Kentucky Industrial Utilities Customers even though they are all customers of the Companies and, according to the Companies' arguments are adequately represented by the Attorney General.

¹⁶ See, e.g., *Kentucky Public Service Commission v. Commonwealth*, 2007-CA-001635-MR. (Ky. Ct. App. 2008) (Unpublished) (Attorney General appealed PSC's orders that approved Duke Energy's Accelerated Main Replacement Program (AMRP) Rider. The AMRP Riders were meant to avoid general rate increase procedures, and were pursuant in part to KRS 278.285, authorizing recovery for demand-side management through a general rate increase or separate proceeding).

¹⁷ See, e.g., PSC Order Granting Kentucky Industrial Utilities Customers Intervention (September 29, 2011).

this reason that Movants seek to participate in their capacity as public interests entities representing their members who are residential rate payers. Allowing these different rate-payers to bring their unique perspective to these proceedings is consistent with the proceedings to date as the Commissions has granted intervention to different rate classes, such as industrial ratepayers.

The Commission also cannot interpret its regulations to provide that the mere fact that the Attorney General intervened in this case to mean that the public interest Movants' interest are adequately represented, for that is the situation in every case. Such an interpretation would render the intervention provision for parties other than the Attorney General superfluous, which would run contrary to the rules of statutory and regulatory interpretation. *See Lexington-Fayette Urban County Government v. Johnson*, 280 S.W.3d 31, 34 (Ky. 2009), *University of Cumberlands v. Pennybacker*, 308 S.W.3d 668, 683-84 (Ky. 2010). The Companies did not even attempt to refute this argument.¹⁸

Next, the Companies allege that since Movants are public interest environmental organizations, they cannot possibly offer assistance in this pleading. The Companies are merely maligning the Movants for their environmental affiliation and ignoring Movants' actual pleadings and the stated interests Movants' asserted.

Movants are trying to ensure that the Commission makes a reasonable and prudent decision and avoids the wasteful expenditure of resources. Part of that decision-making process is examining the Companies' analysis to see if the selected alternatives out of the 50 requests for proposals received truly represent the least cost option for ratepayers. For instance, Movants want to ensure that a full range of alternatives is considered because the Commission cannot

¹⁸ Joint Opposition of LG&E and KU's to Movants' Petition to Intervene.

reasonably and prudently determine that this is the least cost compliance option without a searching review of different alternatives and their estimated costs. In addition, the Movants want to ensure that the Commission examines the application to ensure that energy efficiency through DSM is maximized.

The Companies' assertion that the Movants' interests here are simply environmental policy concerns¹⁹ is wrong. A full assessment of alternatives, including energy efficiency and demand side management, and their respective costs, fits squarely within the scope of the analysis the Commission is required to perform. Kentucky statute states that the Commission shall allow companies to recover rates that are "fair, just and reasonable." KRS 278.030(1). An essential element of fair, just and reasonable is ensuring that the proposed course of action is not wasting time, effort, or expense because, for example, there are less costly ways to serve the Companies' energy needs that at the same time produce less pollution.

Next, the Companies allege that the Commission should deny Movants' application because the same organizations failed to add value to the Companies' most recent ECR proceedings. Movants completely disagree with the Companies' assessment. The Movants showed that a robust analysis would have addressed various uncertainties through the use of sensitivity analyses that measure the impact of a range of different input scenarios combined with an assignment of probabilities to each scenario. Movants helped the Kentucky ratepayers avoid making a \$225 million bad investment in retrofitting the Brown coal-fired power plant, which the Movants still believe will be the more costly alternative once this power plant is required to control its nitrogen oxide emissions through the installation of a selective catalytic converter either to comply with new ozone National Ambient Air Quality Standards or a

¹⁹ Joint Opposition of LG&E and KU's to Movants' Petition to Intervene at pp. 6-7.

subsequent revision to the Cross State Air Pollution Control Rule. While the Movants did originally run the model with nominal values rather than real values, the Movants corrected that error and were still able to demonstrate that the Brown power plant was a risky investment that only penciled out economically if a certain set of assumptions were assumed and that under practically every other sensitivity analysis it was the non-economic decision. While the Companies view that saving Kentucky ratepayers from a risky investment offered no value, Movants emphatically disagree.

Finally, the Companies claim that the Commission should deny Movants' request as untimely. Movants' petition is timely, however, as the Commission did not set a deadline for intervention motions, and Movants filed their motion well in advance of the close of discovery.²⁰ Movants have submitted their requests for information before the Commission-established deadline expired and fully intend to file direct testimony by December 20, 2011.²¹ And the Companies still have the ability under the case management schedule to submit any appropriate requests for information to Movants and to file rebuttal testimony addressing the points that Movants would raise. In fact, the only possible prejudice against the Companies is self-imposed. The Companies have determined that it will not begin to gather responses to Movants' request for information until after the Commission rules on this petition. However, if "time is of the essence" as the Companies claim, they could prepare discovery responses that they will serve as soon as the Commission rules on this petition.

²⁰ Sierra Club and Natural Resources Defense Council are non-profit corporations with limited resources. While these organizations may have known that the Companies filed this application earlier, it took time to determine whether these organizations had resources to effectively and adequately participate in these dockets. As soon as these entities determined that they had adequate resources so that they could truly add value to this proceeding, the Movants petitioned for intervention.

²¹ Movants reserve the right to request supplemental testimony if the Companies refuse to answer our discovery requests until right up to or after the December 20, 2011 filing deadline.

Conclusion

For the reasons identified herein and in Movants' Petition, the Movants respectfully request full intervention in this matter.

Respectfully submitted,



Edward George Zuger III, Esq.
Zuger Law Office PLLC
Post Office Box 728
Corbin, Kentucky 40702
(606) 416-9474

Of counsel:

Shannon Fisk
Senior Attorney
Natural Resources Defense Council
2 N. Riverside Plaza, Suite 2250
Chicago, IL 60660
Phone: (312) 651-7904
Fax: (312) 234-9633
sfisk@nrdc.org

Kristin Henry
Staff Attorney
Sierra Club
85 Second Street
San Francisco, CA 94105
Phone: (415) 977-5716
Fax: (415) 977-5793
kristin.henry@sierraclub.org

Dated: December 5, 2011

CERTIFICATE OF SERVICE

I certify that I mailed a copy of this Joint Reply Supporting Petition For Full Intervention by first class mail on December 5, 2011 to the following:

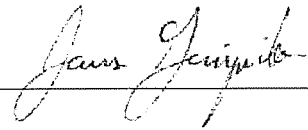
Lonnie Bellar
Vice President, State Regulation & Rates
LG&E and KU Services Company
220 West Main Street
Louisville, KY 40202

Allyson K. Sturgeon
Senior Corporate Attorney
LG&E
220 West Main Street
Louisville, KY 40202

Kendrick R. Riggs, Esq.
Stoll, Keenon & Odgen, PLLC
2000 PNC Plaza
500 West Jefferson Street
Louisville, KY 40202

Dennis G. Howard II
Lawrence W. Cook
Attorney General's Office of Rate Intervention
1024 Capital Center Drive, Suite 200
Frankfort, KY 40601-8204

Michael L. Kurtz
Kurt J. Boehm
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202



James Giampietro
Sierra Club
85 2nd Street
San Francisco, CA 94105