

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE  
COMMISSION

In the Matter of:

Application of Kentucky Power Company for Approval of )  
its Environmental Compliance Plan, Approval of its Amended ) CASE NO. 2011-00401  
Environmental Cost Recovery Surcharge Tariffs, and for the )  
Grant of Certificates of Public Convenience and Necessity )  
for the Construction and Acquisition of Related Facilities )

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PETITION OF TOM VIERHELLER, BEVERLY MAY, AND  
SIERRA CLUB FOR FULL INTERVENTION

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Pursuant to K.R.S. § 278.310 and 807 K.A.R. 5:001 § 3(8), Tom Vierheller, Beverly May, and Sierra Club (collectively “Movants”), petition the Commission for full intervention in this case. The Movants have a wealth of knowledge and experience in a wide variety of the complex and rapidly changing issues which impact Kentucky Power Company (“KPC”) application for Certificates of Public Convenience and Necessity, and interests in this proceeding that are not adequately represented by any other party to the proceeding. The Movants seek full intervention to help to ensure that any Certificates of Public Convenience and Necessity are approved only if they represent the best option to satisfy their members’ interest in low cost energy service.

On December 6, 2011, KPC filed an application for Certificates of Public Convenience and Necessity for the installation of pollution control equipment on Unit 2 of the Big Sandy power plant pursuant to the Public Service Commission’s authority under the Kentucky Revised Statutes and Kentucky Administrative Code to regulate the electric utilities in the state. KRS § 278.020(1), and 807 KAR 5:001, Sections 8, 9, and 11. KPC seeks approval for the retrofit work so that it can recover the full costs of installing this pollution control equipment, which it

estimates at \$940 million.<sup>1</sup> KPC needs to install this equipment because the Big Sandy power plant does not comply with existing and expected federal Clean Air Act requirements to control emissions of nitrogen oxide (“NO<sub>x</sub>”), sulfur dioxide (“SO<sub>2</sub>”), particulate matter, and hazardous air pollutants (“HAPs”).<sup>2</sup>

In order to comply with the Clean Air Act, the proposed environmental controls projects (“Projects”) would involve extensive work to retrofit the plant. For NO<sub>x</sub> and SO<sub>2</sub> abatement, KPC proposes to install flue gas desulfurization technology on Unit 2.<sup>3</sup>

The alternative compliance path for KPC is to retire Big Sandy unit 2 and replace the capacity, if such capacity is actually needed, or to significantly curtail its operation.<sup>4</sup> KPC purports to have evaluated the revenue requirements of these options and determined that retrofitting Big Sandy unit 2 is the most cost-effective means of complying with existing and expected law.<sup>5</sup> The Company considered three alternatives to the proposed project: a new combined cycle natural gas plant, repowering the Big Sandy Unit 1 with natural gas, and a market purchase alternative.<sup>6</sup>

This proceeding comes at a critical juncture for KPC. Existing or expected federal Clean Air Act and Clean Water Act regulations will require KPC to either install pollution controls on coal units or to retire such units. Technological advances and changes in market conditions have made a larger suite of both supply- and demand-side options available for KPC to provide service to their customers. Moreover, growing awareness of the public health, environmental, and economic impacts of energy production have increased the importance of the pursuit of

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<sup>1</sup> Application of KPC for Approval of Its 2011 Compliance Plan for Recovery by Environmental Surcharge and Grant of Certificate of Public Convenience and Necessity (hereafter KPC Application) at pg. 8.

<sup>2</sup> KPC Application at pg. 5; *see also* Direct Testimony of John M. McManus, at 6-8.

<sup>3</sup> KPC Application at pg. 6; *see also* Direct Testimony of Scott C. Weaver, Jr. at 8.

<sup>4</sup> *See, e.g.*, Direct Testimony of Scott C. Weaver at 8.

<sup>5</sup> KPC Application at 7, Direct Testimony of Rahnie Wohnhas at 7, 19.

<sup>6</sup> *See Direct Testimony of Scott C. Weaver at 11-12, 42.*

energy efficiency and renewable energy resources from both a cost and environmental perspective. For the Commission, energy efficiency and conservation are paramount considerations for determining the rates and services of utilities and their importance will continue to grow “as more constraints are . . . placed on utilities that rely significantly on coal-fired generation.”<sup>7</sup> In short, KPC faces a new reality involving a growing set of costs to its existing generation fleet, an expanding set of options for how to service its customers, and an increasingly complex set of factors relevant to identifying the lowest cost mix of supply- and demand-side resources for meeting its customers’ needs. The organizational Movants, on behalf of their members, have gained significant expertise on these issues in proceedings throughout the country, and seek to bring such expertise to this proceeding.

#### I. THE MOVANTS

Movants seek full intervention in order to ensure that their interests in lower cost and cleaner energy options are fully represented, and to bring to this proceeding their expertise in developing plans for providing a lower cost and cleaner energy future. Movants Tom Vierheller and Beverly May are each KPC customers, are long time Sierra Club members, and have a deep interest in seeing KPC transform to meet the new reality in a way that is both low cost and cleaner. Their addresses are as follows:

Tom Vierheller  
PO Box 37  
Banner, Kentucky 41603

Beverly May  
363 Wilson Creek  
Langley, Kentucky 41645

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<sup>7</sup> *In the Matter of: Joint Application of PPL Corporation, E.ON AG, E.ON US Investments Corp., E.ON U.S. LLC, Louisville Gas and Electric Company, and Kentucky Utilities Company for Approval of an Acquisition of Ownership and Control of Utilities (Case No. 2010-00204) Order, Sept. 30, 2010 at 20 (noting that the Commission stated its support for energy-efficiency programs in a report “to the Kentucky General Assembly in July 2008 pursuant to Section 50 of the 2007 Energy Act”).*

Sierra Club is one of the oldest conservation groups in the country with over 625,000 members nationally in sixty-four chapters in all fifty states including the District of Columbia and Puerto Rico. Sierra Club has almost 5,000 members in Kentucky, which are part of the Cumberland Chapter. The Cumberland Chapter's address is:

Sierra Club  
Cumberland Chapter  
P.O. Box 1368  
Lexington, KY 40588-1368

## II. LEGAL BACKGROUND

The Commission's regulations regarding intervention provide that a person may seek leave to intervene in a Commission proceeding and, upon timely motion:

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 [the] 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 K.A.R. 5:001 § 3(8)(emphasis added). In other words, the Commission must grant full intervention if Movants either have interests in this proceeding that are not adequately represented or they offer expertise that would assist in evaluation of the application for Public Convenience and Necessity. As explained below, Movants satisfy both standards for intervention.

Movants are seeking intervention in a Certificates of Public Convenience and Necessity proceeding that is governed by KRS § 278.020(1).<sup>8</sup> Pursuant to that statute, KPC cannot install equipment until it receives a certificate that "public convenience and necessity require the service or construction." KRS § 278.020(1). The Commission has the right to "issue or refuse to issue the certificate, or issue it in part and refuse it in part." *Id.* KPC is also seeking to recover

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<sup>8</sup> KPC Application at 1.

\$940 million from the ratepayers for this project pursuant to KRS § 278.183.<sup>9</sup> This proceeding is intended to evaluate the reasonableness of KPC's submission and to identify possible improvements or less costly alternatives.

### **III. THE COMMISSION SHOULD GRANT MOVANTS FULL INTERVENTION**

#### **A. This Petition to Intervene is Timely Filed**

This request to intervene is timely. KPC filed its application for Certificates of Public Convenience and Necessity for the installation of pollution control equipment on Big Sandy Unit 2 on December 6, 2011. On December 28, 2011, the Commission issued a scheduling order in this proceeding, which requires the filing of all requests for intervention by January 6, 2012. Movants have submitted this Petition for intervention on January 6, 2012. As such, this Petition is timely.

#### **B. Movants Will Present Issues and Develop Facts That Will Assist the Commission in Fully Considering the Matter Without Unduly Complicating or Disrupting the Proceedings.**

The Commission should grant Movants full intervention because they 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." 807 K.A.R. 5:001 § 3(8). This proceeding involves complex questions regarding whether installing pollution control equipment on an existing coal-fired power plant units is a public convenience or necessity. According to KPC, retrofitting these plants is the most cost effective option of the alternatives it evaluated.<sup>10</sup> However, KPC's application and supporting testimony makes clear that the only other technology considered was a natural gas-fired combined cycle plant.<sup>11</sup> As parties to this

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<sup>9</sup> KPC Application at pg. 8.

<sup>10</sup> KPC Application at 7, Direct Testimony of Rahnie Wohnhas at 7, 19.

<sup>11</sup> See Direct Testimony of Scott C. Weaver at 11-12, 42.

proceeding, the Movants will ensure that the appropriate suites of alternatives were examined, such as replacing the capacity with renewable energy sources, and/or efficiency and that retrofitting this coal-fired unit is truly more cost effective than a natural gas alternative.<sup>12</sup>

Movants bring to this docket their unique perspective and experience in advancing technical and regulatory solutions to increasing renewable and demand side energy sources to all regions of the country.

Movants Sierra Club has developed expertise that encompasses a broad range of environmental and energy concerns that fully complement the myriad of technical and policy issues parties will face in this proceeding. In particular, Sierra Club's staff and consultants have extensive experience in resource planning, analyzing the potential for cost effective energy efficiency, and in the laws and regulations regulating energy production. Sierra Club has jointly or individually intervened and/or provided testimony on these issues in a multitude of similar proceedings in a number of states including Arkansas, Arizona, California, Colorado, Florida, Illinois, Iowa, Louisiana, Michigan, Mississippi, Missouri, New York, New Jersey, Nevada, Ohio, Oklahoma, Oregon, South Carolina, Utah, Wisconsin, and Wyoming. Moreover, Sierra Club recently intervened and provided testimony on these issues in three other dockets before this Commission.<sup>13</sup> Sierra Club has also regularly presented testimony before the U.S. Congress

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<sup>12</sup> “[A]s more constraints are . . . placed on utilities that rely significantly on coal-fired generation,” this is an important issue for the Commission to consider. *See, e.g., In the Matter of: Joint Application of PPL Corporation, E.ON AG, E.ON US Investments Corp., E.ON U.S. LLC, Louisville Gas and Electric Company, and Kentucky Utilities Company for Approval of an Acquisition of Ownership and Control of Utilities* (Case No. 2010-00204) Order, Sept. 30, 2010 at 20 (noting that the Commission stated its support for energy-efficiency programs in a report “to the Kentucky General Assembly in July 2008 pursuant to Section 50 of the 2007 Energy Act”).

<sup>13</sup> *See*, Application of Louisville Gas & Electric for Certificates of Public Convenience and Necessity and Approval of Its 2011 Compliance Plan for Recovery by Environmental Surcharge (Docket No. 2011-00162), Application of Kentucky Utilities for Certificates of Public Convenience and Necessity and Approval of Its 2011 Compliance Plan for Recovery by Environmental Surcharge (Docket No. 2011-00161); Joint Application of Louisville Gas & Electric and Kentucky Utilities for Certificates of Public Convenience and Necessity to Construct Combined Cycle Natural Gas Plant (Docket No. 2011-00375).

and various state legislatures on issues related to the electric utility industry, including energy efficiency, renewable energy, and coal generation.

Movants are aware of past holdings by the Commission that it does not make decisions about environmental regulations.<sup>14</sup> However, the Movants are not seeking intervention to opine about the environmental impacts of KPC's coal plants and its environmental compliance plans. Instead, Movants are seeking to present testimony regarding whether the compliance plan proposed by KPC is the least cost option in light of the full range of regulatory, capital, operating, and fuel costs that KPC's plants face, whatever need exists, and the increasing availability of low cost energy efficiency and renewable energy alternatives. The Commission cannot reach a logical determination on the reasonableness of KPC's request to recoup \$940 million from its ratepayers to pay for environmental controls without evaluating each of those issues. As such, Movants are seeking intervention to address topics that are directly at issue in this proceeding.

The Commission must examine the entire suite of emerging federal regulations in order to accurately determine what is the least cost option. In its application, KPC insists that it must address certain federal regulations. However, it has completely failed to consider a number of emerging federal requirements that will require additional expenditures on control technology (emerging retrofits) or may lead to Big Sandy Unit 2 being repowered or retired. In this way, KPC is asking ratepayers to fund piecemeal work that it could do more efficiently or not at all once KPC has a better understanding of the full suite of federal requirements. KPC has stated that retrofitting these plants is the most cost effective compliance option.<sup>15</sup> However, since KPC has only analyzed a subset of the expected regulatory obligations, the accuracy of that conclusion

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<sup>14</sup> In the Matter of The 2008 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company (Case No. 2008-148) Order, July 18, 2008 at 5-6.

<sup>15</sup> KPC Application at 7, Direct Testimony of Rahnie Wohnhas at 7, 19.

is doubtful. Movants want to ensure that the Commission evaluates the full regulatory and capital costs facing the Big Sandy plants, including the expected Clean Water Act effluent limitation guidelines and capital costs associated with keeping this 42 year old plant running for another 15-20 years as KPC projects,<sup>16</sup> so it can accurately determine the least cost option for moving forward. Movants are not advocating any particular resource mix or alternative at this time, and instead simply endorse a robust examination of the comparative costs and benefits of viable options once the full suite of emerging federal requirements are considered and the full costs of each alternative assessed.

Through full intervention, Sierra Club, on behalf of its members, including the individual Movants, will use its expertise and consultants to provide current data and analysis to investigate the adequacy of KPC's proposed compliance plan, explore additional alternatives for replacing capacity, investigate the adequacy of KPC's cost analyses, and present evidence and argument in support of energy efficiency, renewable energy resources, and other low carbon generation technologies if they represent reasonable and prudent alternatives for KPC to pursue.

KPC's application deals with complicated topics. However, the Movants helping the Commission to explore many of the assumptions and inputs will not unduly complicate the matter. Rather, it will allow for a more robust examination to ensure that the Commission approves the least cost alternative for KPC. Finally, the Movants are represented by experienced counsel and will comply with all deadlines in the proceeding established by the Commission. As such, Movants' participation will not disrupt this proceeding.

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<sup>16</sup> Big Sandy Unit 2, which began operation in 1969, is already 42 years old. KPC has projected that retrofitting this plant is the most effective option assuming that this plant will operate for another 15-20 years. *See* Direct Testimony of Scott C. Weaver at 32, 36; Direct Testimony of Rahnie Wohnhas at 14-15. Such a continued operating life would probably require significant non-environmental capital investments projects, such as replacing superheaters, reheaters, or waterwall tubes. Movants want to ensure that all of these capital costs were considered by KPC in its cost effectiveness analysis.



**C. Movants Have Special Interests in This Proceeding Which Are Not Adequately Represented.**

As noted above, 807 K.A.R. 5:001 § 3(8) provides two alternative bases for granting full intervention. Parties either need to have a special interest not adequately represented or present issues and facts that will help the Commission fully consider the matter. As explained in Section III.B., above, the Movants will present issues and facts that will help the Commission fully consider the matter. Therefore, the Commission can grant full intervention on that basis alone and need not consider the Movants' special interest. Nevertheless, as explained below, the Movants also have special interests that are not adequately represented.

The individual Movants are all customers and rate payers of KPC. As such, they help fund KPC's operations, and the Commission's decision about whether to grant the Certificates of Convenience and Necessity for installation of pollution control equipment and subsequent surcharges for \$940 million will directly impact their bills. In addition, the individual Movants live within the KPC service territory and, therefore, are impacted by the economic, public health, and environmental effects of the resource decisions that KPC makes. Organizational Movant Sierra Club has members who are customers and ratepayers of KPC and, therefore, have the same interests as the individual Movants. In addition, Movants' desire to promote energy efficiency, peak demand reduction, renewable energy, and cost-effective low carbon energy sources in Kentucky is directly related to the issues of this proceeding, in which KPC has proposed and the parties are evaluating whether to install pollution control equipment on existing plants or pursue a different options.

Movants' interests are not adequately represented by any of the parties in the proceeding, as none of the other parties can adequately represent the organizational Movant's interests as a national organization that is interested in the promotion of energy efficiency, renewable energy,

and other low carbon generation sources as the most reasonable and cost effective way for KPC to maintain essential electric services and meet emerging federal regulatory requirements.

The Attorney General cannot adequately represent the Movants' interest.<sup>17</sup> The Attorney General has the unenviable task of representing all consumers and all of their diverse interests, even if some of the interests are diametrically opposed to each other. In fact, courts have “repeatedly held that private companies can intervene on the side of the government, even if some of their interests converge.” *See, e.g., Hardin v. Jackson*, 600 F. Supp. 2d 13, 16 (D.D.C. 2009). That is because “government entities are usually charged with representing the interests of the American people, whereas aspiring intervenors, like the [Movants] here, are dedicated to representing their personal interests or the interests of their members or members' businesses.” *County of San Miguel, Colo. v. MacDonald*, 244 F.R.D. 36, 48 (D.D.C. 2007); *Purnell v. Akron*, *Purnell v. Akron*, 925 F.2d 941, 949 (6th Cir. 1991) (granting intervention in a wrongful death suit when intervenors' interests were personal and narrower than the current defendants); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 737 (D.C. Cir. 2003) (movant satisfied its burden where it sought to protect interests that were “more narrow and parochial” than the government's interests); *Am. Horse Prot. Ass'n v. Veneman*, 200 F.R.D. 153, 159 (D.D.C. 2001) (granting intervention of right where intervenors had “more narrow interests and concerns” than the government entity); *Jansen v. Cincinnati*, 904 F.2d 336, 343 (6th Cir. 1990) (granting intervention when intervenors agreed with the government's conclusion but differed in their

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<sup>17</sup> The Commission allowed Sierra Club and other environmental organizations to recently intervene in three dockets in which the Attorney General had already intervened. *See* Application of Louisville Gas & Electric for Certificates of Public Convenience and Necessity and Approval of Its 2011 Compliance Plan for Recovery by Environmental Surcharge (Docket No. 2011-00162), Application of Kentucky Utilities for Certificates of Public Convenience and Necessity and Approval of Its 2011 Compliance Plan for Recovery by Environmental Surcharge (Docket No. 2011-00161); Joint Application of Louisville Gas & Electric and Kentucky Utilities for Certificates of Public Convenience and Necessity to Construct Combined Cycle Natural Gas Plant (Docket No. 2011-00375).

rationale); *Southern Utah Wilderness v. Norton*, 2002 WL 32617198, at \*5 (D.D.C. June 28, 2002) (concluding that government entity may not adequately represent specific interests of private entity). While the Attorney General is tasked with representing the overall, and sometimes conflicting, public interest(s) in this proceeding, the Movants have a more narrow interest and concern in ensuring that compliance with emerging federal regulations is not piecemealed and complete costs associated with each alternative are adequately presented to the Commission.

Thus, the Attorney General may not be able to represent the Movants' interest, or at least not as forcefully, because of the Attorney General's obligation to represent all consumers. The Attorney General has previously encouraged the Commission to allow public interest groups to intervene when the "Attorney General is not capable of providing the same perspective and representation" as a public interest group.<sup>18</sup> Moreover, the Commission 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).

Moreover, neither the Commission staff nor the Attorney General's office will marshal the same level of environmental expertise as Movants with regard to emerging federal regulatory

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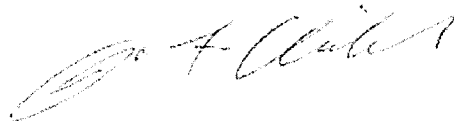
<sup>18</sup> *See In the Matter of: Application of Columbia Gas of Kentucky, Inc. for an Adjustment of Rates for Gas Service* (Case No. 2009-00141), Attorney General's Comments Regarding the Motion of Stand Energy Corporation Customer Group to Intervene, June 17, 2009 at 1 (arguing that the Commission should grant the SEC Customer Group's motion to intervene).

requirements and what pollution control upgrades utilities will need to make to meet those obligations. As such Movants are uniquely positioned to share their expertise with the Commission to ensure that it does not authorize the proposed Certificates of Convenience and Necessity and accompanying \$940 million in surcharges only to discover that another billion dollar investment is required to meet additional environmental compliance obligations. Finally, allowing Movants to intervene will serve the public interest because no other party to this proceeding has the capacity or the incentive to assure that Movants' concerns are adequately addressed.

#### **IV. CONCLUSION**

For the foregoing reasons, the Movants respectfully request full intervention in this matter.

Respectfully submitted,



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Dated: January 6, 2012

## CERTIFICATE OF SERVICE

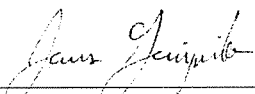
I certify that I mailed a copy of this Petition for Full Intervention by first class mail on January 6, 2012 to the following:

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