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Via Courier

January 29th 2013

Mr. Jeff Derouen, Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, Kentucky 40602

Re: Docket 2012-00578 Sierra Club Motion to Intervene

Dear Mr. Derouen:

Enclosed for the filing are an original and ten copies of the *Petition of Alexander Desha, Tom Vierheller, Beverly May, and Sierra Club for Full Intervention* and a certificate of service in docket 2012-00578 before the Kentucky Public Service Commission. This filing contains no confidential information.

Sincerely,

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Sierra Club Environmental Law Program
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(415)977-5638

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

In the Matter of:

The Application of Kentucky Power Company For:)
(1) A Certificate of Public Convenience and Necessity)
Authorizing the Transfer to the Company of An)
Undivided Fifty Percent Interest in the Mitchell)
Generating Station and Associated Assets; (2) Approval)
Of The Assumption by Kentucky Power Company of) CASE NO. 2012-00578
Certain Liabilities In Connection With the Transfer Of)
The Mitchell Generating Station; (3) Declaratory Rulings;)
(4) Deferral of Costs Incurred In Connection With The)
Company's Efforts to Meet Federal Clean Air Act And)
Related Requirements; and (5) For All Other Required)
Approvals and Relief)

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

Pursuant to K.R.S. § 278.310 and 807 K.A.R. 5:001 § 3(8), Alexander DeSha, Tom Vierheller, Beverly May, and Sierra Club (collectively “Movants”), petition the Commission for full intervention in this proceeding. 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’s (“KPC”) application for a Certificate of Public Convenience and Necessity (“CPCN”), and interests that are not adequately represented by any other party to the proceeding. The Movants seek full intervention to help to ensure that the requested CPCN is approved only if it represents the best option to satisfy its members’ interest in low cost energy service.

KPC’s Big Sandy power plant does not comply with existing and expected federal Clean Air Act requirements to control emissions of nitrogen oxide (“NO_x”), sulfur dioxide (“SO₂”),

particulate matter, and hazardous air pollutants (“HAPs”). In order to comply with a binding, federally enforceable consent decree and promulgated or emerging Clean Air Act standards, KPC would need to retrofit the Big Sandy coal-fired power plant if it were to continue to operate past June 2015. In December 2011, KPC sought from this Commission a CPCN for the then-proposed \$940 million retrofit of Big Sandy Unit 2. Movant Sierra Club was granted intervention in that proceeding and presented expert testimony showing that the proposed retrofit was not the least cost option. After withdrawing that retrofit proposal, KPC’s re-evaluation found, consistent with Sierra Club’s position in the retrofit proceeding, that it would be more economic to retire Big Sandy Unit 2 in June 2015 rather than to spend nearly \$1 billion in ratepayer money to retrofit that aging plant. .

The present proceeding deals with the question of the least cost option for replacing, to the extent necessary, the energy and capacity provided by Big Sandy Unit 2. KPC has proposed to achieve that goal through the purchase of a 50% ownership interest in the Mitchell Generating Station, which is located approximately twelve miles south of Moundsville, West Virginia. On December 19, 2012, KPC filed an application for a CPCN to carry out such purchase. KPC seeks this certificate pursuant to the 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 ownership transfer so that it can recover the full costs of acquiring this unit and the costs incurred to date to determine what is the least cost compliance plan, which it estimates at \$566 million.¹ Movants seek intervention to provide expertise and represent their interests regarding the question of whether KPC’s proposed Mitchell acquisition is the least cost option for replacing Big Sandy Unit 2.

¹ Application of KPC for Approval of Certificate of Public Convenience and Necessity to Acquire an undivided Fifty Percent Ownership Interest in the Mitchell Generating Station (hereafter KPC Application) at pg. 2, 5.

This proceeding comes at a critical juncture for both KPC and the state of Kentucky.

Existing or expected federal Clean Air Act and Clean Water Act regulations will require coal-fired power plants 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 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.”² 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. While acquiring a coal-fired power plant with pollution controls at net book value may represent the least cost alternative, Movants seek to ensure that proper consideration was given to a full range of potentially lower cost options, including energy efficiency, demand side management, and renewable resources. Movant Sierra Club, on behalf of its members, has gained significant expertise on these issues in proceedings throughout the country, and seeks to bring such expertise to this proceeding.

I. THE MOVANTS

² *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”).

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 Alexander DeSha, 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:

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Whitesburg, KY 41858

Tom Vierheller
P.O. Box 37
Banner, Kentucky 41603

Beverly May
363 Wilson Creek
Langley, Kentucky 41645

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, the District of Columbia, and Puerto Rico. Sierra Club has almost 5,000 members in Kentucky, who 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 CPCN application. As explained below, Movants satisfy both standards for intervention.

This CPCN proceeding is governed by KRS § 278.020(1).³ Pursuant to that statute, KPC cannot acquire an ownership interest in the Mitchell plant 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 \$566 million from the ratepayers for this project.⁴ 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 CPCN application for the purchase of a 50% interest in the Mitchell generating station on December 19, 2012. On January 25, 2013, the Commission issued a scheduling order in this proceeding, which requires the filing of all requests for intervention by January 30, 2013. Movants have submitted this Petition for intervention on January 29, 2013. As such, this Petition is timely.

³ KPC Application at pg. 2, 5.

⁴ KPC Application at pg. 2, 5.

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 acquiring a 50% interest in the coal-fired Mitchell Generating Station represents the least cost option for replacing the retiring Big Sandy 2 unit. According to KPC, purchasing an existing coal-fired power plant represents the most cost effective option of the alternatives it evaluated. However, KPC’s application and supporting testimony do not provide adequate information regarding why certain alternatives were eliminated. As parties to this 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.⁵ 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

⁵ “[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”).

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 five other dockets before this Commission, including KPC's previous application for a CPCN to retrofit Big Sandy Unit 2.⁶ Sierra Club has also regularly presented testimony before the U.S. Congress 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.⁷ 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 proposed purchase of 50% of the Mitchell Generating Station is the least cost option for replacing the retiring Big Sandy 2 unit 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 options such as energy efficiency and renewable energy resources. The Commission cannot reach a logical

⁶ 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); Application of KPC for Certificates of Public Convenience and Necessity and Approval of Its Compliance Plan for Recovery by Environmental Surcharge (Docket No. 2011-00401); Application of Big Rivers Electric Cooperative for Certificate of Public Convenience and Necessity and Approval of Its Compliance Plan for Recovery by Environmental Surcharge (Docket No. 2012-00063).

⁷ 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.

determination on the reasonableness of KPC's request to recoup \$566 million from its ratepayers without evaluating each of those issues. As such, Movants are seeking intervention to address topics that are directly at issue in this proceeding.

For example, KPC has represented to the Commission that 63 megawatts is the maximum amount of energy savings that can be gained from peak-reduction DSM programs.⁸ Movants have looked at DSM measures across the nation and sufficiently probe the application and the supporting documents to ensure that energy savings through DSM is maximized. By increasing DSM, we can avoid or reduce the need to acquire new polluting power plants.⁹ In short, DSM is the simplest and lowest cost way to address energy needs and, therefore, Movants seek intervention to help ensure that KPC is maximizing cost-effective DSM to the fullest extent possible as part of replacing Big Sandy Unit 2. . .

KPC has also represented that acquiring the Mitchell Generating Station is the least cost option compared to other generation sources. KPC arrived at this decision without issuing a RFP because "Company Witness Weaver's analysis approximated the price bids an RFP would have elicited."¹⁰ KPC eliminated all alternatives through this internal estimation process. It appears that KPC did not even consider renewable energy sources through this internal alternatives analysis.¹¹

Movants will apply their perspective and experience to ensure that cost effective renewable generating options were not inappropriately passed over. Movants believe that

⁸ See Scott Weaver Direct Testimony, Exhibit SCW-1 at pg. 7.

⁹ KPC has not yet finalized its plans regarding the future of Big Sandy Unit 1. So ensuring that a robust examination of DSM is done will assist with this docket and with the future dockets that KPC has acknowledged are necessary.

¹⁰ See Gregory G. Pauley Direct Testimony at pg. 17.

¹¹ See Scott C. Weaver Direct Testimony at pg. 37-39.

increasing renewable generation in Kentucky can help move our nation economically and environmentally in the right direction. Wind energy is the fastest-growing source of power on the planet. Wind energy accounted for 75 percent of total installed renewable electricity capacity in 2012. In fact, in 2008 the United States surpassed Germany as the world leader in installed wind capacity. The Department of Energy has stated that we can get 20 percent of our power from wind energy alone by 2030. Already, wind energy can compete with coal powered energy in terms of cost at around 4 cents per kilowatt hour. However, the federal government's National Renewable Energy Laboratory projects that the price of wind energy will fall even further over the next decade, making it the most economically competitive renewable energy technology.

Solar energy is the cleanest, most abundant, renewable energy source available, and the U.S. has ample supplies. Solar energy electricity generation more than tripled between 2000 and 2008. In the first quarter of 2012, developers installed 85 percent more solar panels compared to the first quarter of 2011. All of this activity has the solar PV industry aiming to provide half of all new U.S. electricity generation by 2025.

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 asset acquisition, explore additional alternatives for replacing energy and 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.

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 CPCN for acquisition of a 50% ownership interest in the Mitchell Generating Station and subsequent rate recovery for \$566 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 and throughout the Midwest is directly related to the issues of this proceeding, in which KPC has proposed and the parties are evaluating whether to acquire an existing coal-fired power plant or pursue 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.¹² 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

¹² The Attorney General had already intervened in each of the five dockets, listed in footnote 6 above, in which the Commission granted intervention to Sierra Club. .

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 the full range of energy options, including energy efficiency and renewable energy sources, are appropriately evaluated in this proceeding.

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.¹³ Moreover, the Commission cannot interpret its regulations to provide that the mere fact that the Attorney General intervened in this case means that the 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, the Attorney General's office will not marshal the same level of expertise as Movants with regard to the current state of renewable energy and energy efficiency development. As such Movants are uniquely positioned to share their expertise with the Commission to ensure that it does not authorize the proposed CPCN and accompanying \$566 million in rate recovery

¹³ 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).

only to discover that there were lower cost options for replacing the retiring Big Sandy 2 unit. 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 29, 2013

CERTIFICATE OF SERVICE

I certify that I mailed a copy of this Petition for Full Intervention by first class mail on January 29, 2013 to the following:

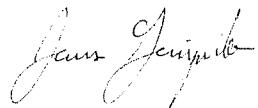
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