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APR 11 2005

PUBLIC SERVICE
COMMISSION

April 11, 2005

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

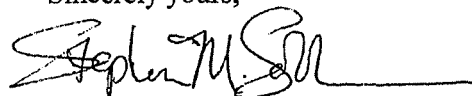
Re: Case No. 2004-000423

Dear Ms. O'Donnell:

Please find enclosed the original and twelve (12) copies of the Petition of EnviroPower, LLC for Full Intervention in Case No. 2004-00423, which we are filing on behalf of EnviroPower, LLC.

By copy of this letter, all parties listed on the attached Certificate of Service have been served.

Sincerely yours,



Stephen M. Soble
O'Connor & Hannan, LLP

SMS/jm
Enclosure

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PUBLIC SERVICE
COMMISSION

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 11th day of April, 2005.

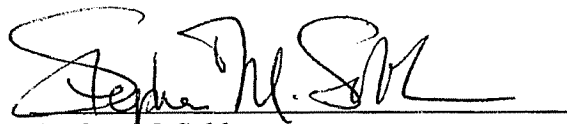
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APR 11 2005

PUBLIC SERVICE
COMMISSION

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF EAST KENTUCKY POWER)
COOPERATIVE, INC. FOR A CERTIFICATE OF)
PUBLIC CONVENIENCE AND NECESSITY, AND)
A SITE COMPATABILITY CERTIFICATE FOR) CASE NO. 2004-00423
THE CONSTRUCTION OF A 278 MW (NOMINAL))
CIRCULATING FLUIDIZED BED COAL FIRED)
UNIT IN MASON COUNTY, KENTUCKY)

PETITION OF ENVIROPOWER, LLC
FOR FULL INTERVENTION IN CASE NO. 2004-00423

Pursuant to K.R.S § 278.310 and 807 KRS 5:001 Section 3(8), EnviroPower, LLC (“EnviroPower”) requests that it be granted full intervenor status in the above-captioned proceeding and states in support of this petition the following matters of law and fact.

I. Background

On January 14, 2005, EnviroPower filed a timely and sufficient Petition seeking full intervention in this case. After an Objection filed by East Kentucky Power Cooperative, Inc. (“EKPC”) and a Response by EnviroPower, the Commission issued two (2) Orders on February 3, 2005, one of which mandated an investigation into the Request for Proposal No. 2004-01-Baseload Requirement issued by EKPC (“RFP”) as well as the procedures utilized by EKPC for evaluating the bids. In the Order mandating a full investigation, the Commission stated:

We are aware of East Kentucky Power’s prior request for expedited treatment in this case, but, absent a full investigation of its bidding procedures, no decision can be made on the merits of this case.

In the second Order of the same date, the Commission ruled that EnviroPower's petition for full intervention be temporarily denied, but that EnviroPower would be granted a right to a partial intervention. The hybrid intervention right created by the Commission put EnviroPower in the position of having greater rights than a "limited intervenor" under 807 KAR 5:001 Section 3(8)(a), but with substantially less power than a full intervenor. A full intervenor is treated as a Party to the proceedings. Specifically, the Commission ruled:

However, while we find that EnviroPower should be afforded an opportunity to monitor this investigation and submit further information and comment, we are unable to find **at this time** that EnviroPower has a special interest sufficient to justify granting intervention (Emphasis added).

As noted by the phrase "at this time" in the Order of the Commission, it is clearly contemplated that in the event that new facts or circumstances arose in this case, it would become appropriate and ripe for EnviroPower to file a new petition to intervene. The filings made by EKPC from April 5 to April 8 demonstrate that matters in this case are now ripe for the filing of this Petition for Full Intervention. These facts are detailed in sections II through VII below. The weight of the evidence clearly and satisfactorily demonstrates that no other Party can adequately represent the interests of EnviroPower. Moreover, the facts now demonstrate that the interests of EnviroPower are consonant with the interests of the ratepayers of the Commonwealth. Under these changed circumstances, it is wholly proper and timely, indeed necessary, for the Commission to grant full intervention.

II. **A Prima Facie Case Has Been Made Demonstrating That the RFP Issued By EKPC Was Null and Void Ab Initio.**

In the sworn Direct Testimony of Mr. Frank L. Rotondi, submitted on March 30, 2005

("Rotondi Direct"), on pages 4-10, Mr. Rotondi established the routine and customary standards in the industry for the issuance of a good faith, bona fide Request for Proposal to purchase long-term electric power. On April 5, EKPC filed a Response to the Rotondi Direct ("EKPC April 5 Response"), which included Comments of EKPC legal counsel ("EKPC Counsel Comment"), Second Supplemental Prepared Testimony of David G. Eames ("Eames Prepared-II"), and Supplemental Testimony from Mr. James Shipp and from Mr. Robert Hughes, Jr. ("Shipp Prepared", and "Hughes Prepared", respectively).

At no point in the EKPC April 5 Response does EKPC rebut the standard for the issuance of a good faith, bona fide Request for Proposal to purchase long-term electric power defined by Rotondi. In EKPC Counsel Comment on page 3, EKPC, in effect, rebuts everything submitted by EnviroPower. However, when a party bears the burden of proof, as EKPC does in this proceeding, the mere fact that they have made no effort to deny specific allegations, as a matter of well-established American jurisprudence, means that they have accepted or stipulated to the fact of the allegation. To be specific, EKPC has totally failed to deny or even attempted to deny any of the following points:

1. EKPC issued its RFP in a manner which materially misled the bidders into believing that the Self-Build Option was to be used as a "benchmarking" tool.
2. The RFP established no process to avoid the appearance of impropriety or the actual occurrence of improprieties, such as self-dealing, manipulation, bias, or fraud.
3. The burden of proof to establish that a good faith bona fide RFP has been issued rests with the issuer of the RFP, not the victimized bidder.
4. The RFP must disclose the evaluation methodology. The EKPC RFP did not.
5. The RFP must disclose the identity of both (a) those persons employed by the Owner (EKPC) who are also responsible for the RFP Issuer's (EKPC's) Self-Build Option, if it is intended to be competitive; and (b) the Owner's (EKPC's) representatives eligible to contribute to or participate on the Evaluation Team. The EKPC RFP did not.

6. The RFP should have established a procedure for each bidder to have submitted a non-confidential summary bid, so that upon bid opening, each bidder would be aware of the identity and non-confidential parameters of the other bidders. The EKPC RFP did not.
7. The RFP should have identified an independent firm to lead and to conduct the bid evaluation process. The EKPC RFP gave that authority and responsibility to EKPC itself.
8. The RFP should have established detailed rules regarding communication between bidders, including the EKPC self-build option, and the evaluation team in order to define transparency. The EKPC RFP did not.
9. The RFP should have defined the penalty for breach of the rules regarding the appearance of impropriety, misconduct, confidentiality, communication, etc. in order to establish a level playing field. The EKPC RFP did not.
10. The RFP should have provided for a mechanism obligating the Evaluation Team to inform each of the remaining bidders of any waiver of any formality, technicality, requirement or irregularity in any of the proposals, so that the bidders would be aware of the decision to waive by the Evaluation Team. The EKPC RFP did not provide this.
11. The RFP should have obligated the Evaluation Team to have treated every bidder equally or equitably in light of any waiver granted to any party. The EKPC RFP did not provide for this.
12. The RFP process was fraught with errors including the refusal of EKPC to conduct a public bid opening. EKPC does not refute the EnviroPower evidence, which includes the fact that this issue was decided by the CEO of EKPC.

While other improprieties may have been present in this flawed process, EKPC does not refute the detailed, specifics of the Rotondi Direct. In Eames Prepared-II on pages 2 and 3, Mr. Eames simply casts a wide net and denies that the RFP was improperly defined. He simply asserts that it met the standards of a “level playing field”, and that the statement in the RFP regarding the intent of EKPC to submit a self-build option for evaluation was sufficient. He states conclusions, without challenging the standards for good faith, bona fide conduct, which are detailed in the Rotondi Direct. In making conclusory statements without supporting evidence, Eames and EKPC, as a matter of law, admit that the standards for good faith, bona fide issuance of an RFP detailed by the Rotondi Direct are accurate.

Eames Prepared-II states only the conclusion or opinion of EKPC that what EKPC did was fine with Mr. Eames and his employer, EKPC. It does not in any way question the accuracy or validity of the standards for good faith, bona fide issuance of an RFP in evidence by Rotondi Direct. Then EKPC Counsel Comment on page 3 characterizes Eames Prepared-II as sworn factual testimony, as though by doing so, the reader and the Commission are supposed to confuse the standards for proper conduct with the self-serving, conclusory characterizations made by EKPC. Such a position demonstrates arrogance, defies logic and dishonors the proper use of the rules of evidence.

The Commission has in its possession the actual RFP issued. Any reasonable person applying the standards for a good faith, bona fide RFP, can see the fatal deficiencies in the RFP. EKPC Counsel Comment on page 3 asserts that EKPC should not have to “prove a negative”. This is a weak attempt to disguise another fact. The burden of establishing a proper, good faith, bona fide RFP rests with EKPC. EKPC issued the RFP and is solely responsible for its contents. And, EKPC comes to the Commission seeking the Commission to stamp its approval on the RFP and the resulting award, of which EKPC was the sole beneficiary. The fact that EKPC did meet the standards for proper conduct has nothing to do with proving a negative. EKPC affirmatively failed to issue a good faith, bona fide RFP.

EKPC, the Party so concerned about delay (see e.g., EKPC Counsel Comment, p. 3), may now wish to submit yet another attempt to explain away their defective RFP. If it does so, EnviroPower must be able to present independent industry experts to testify on the issue of what constitutes a routine and customary good faith, bona fide RFP in the context of EKPC intending from the beginning to submit a competitive self-build option.¹ The problem is that unless and until EnviroPower has been granted the rights of a full intervenor, EnviroPower has no standing to

call industry experts to assist the Commission in understanding just how egregious the EKPC misconduct has been.

If the Commission were to find that EKPC did not issue a good faith, bona fide RFP, it would be improper for the Commission to grant the EKPC application for A Certificate of Convenience and Necessity and a Site Compatibility Certificate in this matter. As a Party, EKPC would have a right of appeal, of course. On the other hand, unless and until EnviroPower has been granted the rights of a full intervenor, EnviroPower has no right of appeal.

As a matter of public policy, the potential harm which would be caused by failing to investigate fully the existence of *prima facie* facts demonstrating that the RFP may have been so tainted, so unfair in its design and issuance, would have serious, long-term repercussions for the ratepayers of Kentucky and for the operation of an open, fair and competitive electric power market in Kentucky. EKPC and others would be given a green light to design bogus requests for proposals and to conduct sham evaluations to meet their own definition of what is in the best interests of the Kentucky ratepayers. The Commission should not permit EKPC's naked assertions, made without third party substantiation, to form the basis for such a significant public policy matter. This case will have long-term effects on the competitiveness and fairness of the electric power generation market in Kentucky. EnviroPower, when granted the rights of a full intervenor, is prepared to introduce independent third part testimony, to prove the standards and the misconduct of EKPC on this issue.

Thus, in order to afford EnviroPower a fair opportunity to address the existence of a *prima facie* set of facts demonstrating that the EKPC RFP was void *ab initio*, EnviroPower must be granted the status of full intervenor, and made a Party to this case.

¹ Eames Prepared-II, p. 3.

III. The Facts Establish a *Prima Facie* Case Demonstrating Self-dealing by EKPC in the Evaluation of the Bids.

The EKPC April 5 Response contains two important admissions on the record which constitute *prima facie* evidence of self-dealing by EKPC. Self-dealing occurs when an entity (EKPC) uses its position (issuer of the RFP and controlling member of the Evaluation Team of the RFP) to dominate or to consummate a commercial transaction (the award of the Spurlock #4 self-build option to itself) for its own benefit to the detriment of others (the ratepayers and EnviroPower).

Both Mr. Shipp and Mr. Hughes have now testified that they were directed by EKPC to engage in self-dealing on behalf of EKPC. In Shipp Prepared, page 2, Mr. Shipp, admits that he was the lead person for technical and construction aspects of the Spurlock #4 self-build and that he "...attended certain meetings with bidders." He tried to distinguish his role by saying that he was only there "...for the purpose of clarifying technical aspects of the generating facilities involved in the other proposals." In Rotondi Direct, pages 13 to 15, there is testimony identifying Mr. Shipp as the lead person from the EKPC/EnerVision Evaluation Team who conducted the technical and construction evaluation of the EnviroPower bid. Mr. Shipp admits that he did not share any technical information about the EKPC self-build with EnviroPower (Shipp Prepared, pp. 2-3). Yet he also admits that he did ask detailed questions about the EnviroPower technical and construction portion of the bid.

EKPC tries to cover up the admitted fact that Mr. Shipp both advised the Evaluation Team on the technical acceptability of the EnviroPower proposal based on information he obtained from EnviroPower during the evaluation process and that, at the same time, he was the prime advocate for the EKPC self-proclaimed superiority of the EKPC technical solution contained in the Spurlock #4 bid, which he championed. EKPC would have us believe that these facts do not matter because

Mr. Shipp did not read the actual EnviroPower proposal and because he did not discuss price.

It is noteworthy that Mr. Shipp admits that EKPC instructed him to conduct and to lead the technical evaluation of the technical aspects of the EnviroPower bid, which resulted in a finding by Mr. Shipp that the EKPC self-build, which he designed, was the superior technological solution.

Mr. Hughes' testimony offers the world an even more startling example of *prima facie* self-dealing. Mr. Hughes admits that he was personally responsible for preparing the EKPC Spurlock #4 self-build option's application for an air quality permit. (Hughes Prepared, p. 2). He also admits that he has intimate knowledge of the bid evaluation process. For example, he testified, "There was no evaluation of environmental issues used, to my knowledge, during the review of proposals". (Hughes Prepared, p. 3). Then, he admits, "Each project was assumed...to be in compliance with environmental regulatory requirements". (Hughes Prepared, p. 3). He also substantiated the testimony in Rotondi Direct, that EnviroPower had received fully effective and final environmental permits, while EKPC did not file its application for an air quality permit until about September 13, just about the same time as the award was made to Spurlock #4. In the Rotondi Direct, on page 31, Mr. Rotondi explained that the preparation of a DAQ air quality permit typically would have taken Mr. Hughes and EKPC months and have required significant costs to prepare for the September 13 submission. Mr. Hughes' testimony silently accepted the accuracy of Mr. Rotondi's testimony. This fact creates a reasonable inference, at a minimum, that EKPC planned from the beginning of the RFP process to award the bid to itself.

In other words, Mr. Hughes was the person responsible for environmental compliance for the EKPC self-build at Spurlock #4. He was also the senior environmental expert on the EKPC/EnerVision Evaluation Team. And, he made the decision that an air quality permit issued to EnviroPower was the bid evaluation equal to an EKPC self-build application, for which he was

responsible. Presumably, Mr. Hughes made the judgment that he could rely on his own ability to obtain an air quality permit for Spurlock #4, and therefore he could discount the obvious, inherent value of an already issued air quality permit to EnviroPower.

In these circumstances, the evidence is overwhelming that either the Shipp Prepared testimony or the Hughes Prepared testimony, or both, constitute *prima facie* evidence of self-dealing, and that the participation of EnviroPower in this case was the prime reason that the Commission has learned these facts.

Without being a Party to the proceedings, EnviroPower finds itself at an irreparable disadvantage to assist the Commission in establishing the truth. If the Commission dismisses the EKPC application, which is subject of this case, it would render this Petition for Full Intervention moot. On the other hand, if the process is to proceed, EnviroPower must have the right to examine witnesses, present evidence, and the right to fully participate in order to demonstrate that the *prima facie* self-dealing, itself, or in concert with the *prima facie* defects of the issued RFP, render the entire award to EKPC null and void. Finally, it would be futile for EnviroPower to fully participate, if it is to be denied the right to appeal.

As a matter of public policy, self-dealing is pernicious. It means that an issuer of a request for proposal like EKPC can find ways to award itself a massive project based on secret assumptions, deceitful access to confidential data and self-serving—not ratepayer serving—assessments of reality. The irony is that EKPC could then, lawfully, pass all of the costs of its self-dealing, erroneous assumptions and gamesmanship onto the ratepayers. If EKPC's goal were to create a barrier to competition in the eastern Kentucky electric power generation market, so as to create monopolistic power for itself, the blatant, and now admitted, self-dealing of EKPC was aptly designed.

IV. A Prima Facie Case Has Been Established That the EKPC Award of the RFP to the Self-Build Option Known As Spurlock #4 Was Not the Lowest Cost, Or the Most Reasonable Option.

Despite EKPC's shrill proclamations that Spurlock #4 was the lowest cost, most reasonable option, the admissions and testimony contained in the EKPC April 5 Responses actually establish a *prima facie* case that EnviroPower had the lowest cost option and that EKPC was forced to manipulate its own self-build bid in order to have a colorable argument that EKPC had the low cost, most reasonable option. EKPC did not and could not refute the careful, factual testimony of the Rotondi Direct on numerous points. Any one of a few points clearly established by the evidence make out the *prima facie* case that the EKPC pricing was flawed and a likely cover-up of reality:

1. EKPC improperly evaluated its own estimated costs as being of equal weight with the actual costs guaranteed by EnviroPower.

2. EnerVision did not have the mandate, skill, experience or depth of knowledge to insure a proper cost evaluation. They did EKPC's bidding. This coupled with the self-dealing of the EKPC team calls all of the EKPC calculations and assumptions into question. There was no independence--or even the appearance of independence--in the evaluation process.

3. The request for detailed substantiation and data by the EKPC/EnerVision Evaluation Team was a sham. On page 11 of the Eames Prepared-II, Mr. Eames testifies that, on September 9, 2004, the EKPC/EnerVision Evaluation Team requested documentation regarding the financial security related to their performance guarantees. With great bravado, he then declares, "No details or documentation were ever provided to EKPC [by EnviroPower], despite EKPC's request for such documentation." (bracket added) This is quite curious. September 9 was a Thursday. By

Monday, September 13 the award had been made to Spurlock #4. If EKPC cared about the financial guarantees which were offered, why did it wait four months, from May 10 until September 9, to ask for the documentation? It was available and could have been proffered under reasonable circumstances.

Mr. Eames brazenly admits that “at various points during discussions with EnviroPower personnel, references were made to some kind of relationship with West LB Bank” (*ibid*). Thus, he admits that EnviroPower disclosed the existence of the financial backing for the guarantees in many meetings, but that he didn’t ask for the documentary support until September 9. This one issue alone exposes the absurdity of the process and makes the *prima facie* case that EKPC never intended to have a legitimate competitive bid process. This was all a sham.²

4. In the testimony, Eames Prepared-II, pages 8-14, Mr. Eames makes much of the guarantees. What his testimony really does, however, is to illustrate the extraordinary lengths to which EKPC had to go in order to recalculate the commercial viability of Spurlock #4 in order to justify the award of the contract to itself rather than to the EnviroPower Kentucky Mountain Power (“KMP”) project. EKPC misconstrued and twisted the EnviroPower guarantees in order to create unjustified value for EKPC. This is an unmistakable conclusion, for the following reasons:

In Eames Prepared-II, Mr. Eames takes the position that:

1. EnviroPower’s availability guarantee has no meaning, because EKPC only needed to use its acquired “baseload” source at a 75% load factor.

² The EKPC April 5 Response ignores, misstates and misleads on many points including the facts that: (a) members of the EnviroPower team have actually built more electric power than EKPC operates; (b) EnviroPower provided documentary evidence of its financial strength and project financing support, and was not informed during the evaluation process prior to September 9 that EKPC required additional information; and (c) EnviroPower offered and EKPC declined additional detail and documentation concerning the EPC contract. There are more points to which EnviroPower could respond, but only a Party is afforded a predictable, appropriate process in which to refute such falsehoods.

2. Circulating fluidized bed (“CFB”) power generating units routinely outperform the EnviroPower guarantee levels on the basis of AVAILABILITY.
3. Thus, the EKPC/EnerVision base case analysis of EnviroPower’s bid charged the EnviroPower KMP project with an AVAILABILITY factor. Since EnviroPower had a requirement obligating EKPC to take the energy which it asked for in the RFP (load factors of 88% to 93% were offered by EnviroPower) EKPC/EnerVision decided to add an extra energy cost to the EnviroPower price. The way this extra charge was calculated was to treat that extra energy (that is the roughly 88% offered minus the 75% secretly required by EKPC) which EKPC would have received under the EnviroPower bid, as having no value, as if the only thing EKPC could do with extra power from EnviroPower is to jettison it into outer space, instead of to use it to offset more expensive power produced by EKPC or procured from the market by EKPC. At the same time, EKPC had to recognize that the efficiency of a CFB plant which it would build would likely produce more than 75% load factor. So, EKPC/EnerVision adopted an ingenious rule. Surplus power offered by EnviroPower would have no value, but would bear a cost to EKPC because it was an obligation of EKPC to take the power. But surplus power produced by EKPC at its self-build would only yield a positive value to EKPC, because, it was their own power. In other words, EKPC could market surplus power from its own self-build at a profit, but the same surplus power from EnviroPower would yield a loss, and the power would be jettisoned into outer space, or otherwise lost. This admitted evaluation methodology is absurd and unfair on its face, but it is also fascinating. It is fascinating for Mr. Eames to admit under oath that any surplus energy over the 75% load factor produced by Spurlock #4 will have market value, because that is how EKPC admits it calculated the Spurlock #4 power output for purposes of the evaluation. (see, Eames Prepared-II, pp. 6-9)

In order to understand what Mr. Eames has testified that he and EKPC did in order to win the bid for Spurlock #4, additional explanation is required. First, the EKPC/EnerVision Evaluation Team created a secret waiver of an RFP requirement, and EnviroPower was never informed of that change. What did EKPC do? It created a new standard of evaluating its new source at a 75% load factor. This is a fundamental and huge change in the definition of the RFP, of which EnviroPower only had knowledge when it read the Eames Prepared-II testimony.

This is such a monumental change in the bid requirements that this one secret waiver by EKPC ought to render the RFP completely null and void. This is true because, in the industry, it is not routine and customary to call a 75% load factor product a “baseload” requirement as EKPC did in its RFP. The proper term for this level of load factor is “intermediate load”.

Intermediate load power is a completely different product than “baseload” power. If EnviroPower had known that it was expected to bid a 75% load factor, EnviroPower would have eliminated the obligation for EKPC to purchase all power, eliminated the so-called availability bonuses and penalties and simply planned to run the KMP plant at a fixed 90% load factor. EnviroPower would have then planned to take the remaining available energy that EKPC did not use and sell it into the market for its own account. This would have changed the economics of the EnviroPower bid.

The Commission is urged to take note of the fact that the sale of surplus power into the electricity market from EnviroPower’s plant provides an hourly contribution to profit margin on dispatch or sale of surplus power into hourly wholesale markets. Due to the likely higher cost of fuel, it is not clear that power dispatched from Spurlock #4 would produce the same level of profits. Thus, EnviroPower would have calculated an additional, non-EKPC profit source which would have been used, subject to competitive market circumstances, to lower the price of electricity to EKPC. But, of course EnviroPower was never informed of this monumental change. This admission by EKPC demonstrates that EKPC may have never had the intent of allowing EnviroPower or anyone else to become the low cost, successful bidder on the RFP. This evidence certainly suggests that EKPC was predisposed to engage in any manner of sleight of hand necessary for EKPC/EnerVision to devise a mechanism in order to achieve a bid award to EKPC’s self-build option at Spurlock #4.

If it is the actual intention of EKPC to operate Spurlock #4 at a 75% load factor, over the life of the contract award, the ratepayers of Kentucky will lose millions of dollars as a result of this legerdemain. The Commission ought to know how much will be lost by accepting what EKPC/EnerVision have done. An independent evaluation will advise the Commission of the

scope of the losses. However, EnviroPower, based on quick calculations is able to see that the costs to the ratepayers, from just this one secret machination, will run into the millions, perhaps the tens of millions, of dollars per year. This loss reflects the deemed lost value associated with the secret reduction of the load factor requirement to 75% and the assumption that the extra power which could have been supplied by EnviroPower would be jettisoned into outer space. This loss is also a measure of the amount by which the EnviroPower bid was arbitrarily penalized by this improper EKPC/EnerVision methodology. EnviroPower has provided a service to the ratepayers and to the Commission by causing EKPC to disclose this hidden cost to ratepayers.

Second, if EKPC only had a need to use the new source of power 75% of the time, then why on Earth is it announcing plans to seek Commission approval to build 1000MW of new power plants? This admission against interest by Mr. Eames vitiates the entire premise of the applications for the Certificates of Convenience and Necessity and the Site Compatibility Certificates for both Spurlock #4 and the JK Smith Clark County plant (KPSC Case No. 2005-00053). If EKPC only needed 75% of the new source plant at Spurlock #4, EKPC could have simply increased the capacity at Spurlock 4 to avoid the need to build the Smith Clark County facility or it could have downsized its 1000 MW requirement.³

EnviroPower is prepared to arrange for testimony from independent experts to substantiate that it is routine and customary for power generators to perform optimization analyses of the type suggested here and to modify operating practices to maximize efficiency for the ratepayers. EKPC has just admitted that it has no need to do that in Kentucky. It is important to note that EKPC previously estimated its annual load growth at 4.6%, which adds

³ In addition, if EKPC were to only use EnviroPower's plant 75% of the time, EKPC would have allowed its lowest cost resource to stand idle while it purchased or produced power at higher prices. Such sub-optimization is

about 100MW per year to its load. At this rate of adding additional power, EKPC, if it operated as a normal, responsible utility, would acquire the power for its additional growth needs from the lowest variable cost resource on their system, resulting in an increased capacity requirement of 100MW, in the first year alone. If EKPC were to acknowledge the truth that the EnviroPower KMP plant was that lowest cost resource, it would have required EKPC to rely more on KMP over time.

Third, the 75% load factor assertion has no credibility for several reasons, that EnviroPower is prepared to introduce into evidence by qualified experts:

- a. The use of CFB technology at the 75% load factor proposed by EKPC runs counter to the optimal design. CFB plants have slow ramp rates, and are very inefficient for “cycling.” At a 75% load factor, CFB plants suffer an approximate 5-10% heat rate degradation as compared to a 90% load factor, for example. In lay terms, this means EKPC will use 5-10% more fuel for every MWh generated. Such failure to maximize performance runs counter to the public policy of the Commission and cannot be in the best interests of the Kentucky ratepayers, and should not be permitted by the Commission.
- b. To cycle a CFB in order to achieve the 75% load factor creates the likelihood of significantly higher maintenance costs due to the wear and tear arising from the cycling the plant. EKPC apparently expects that the Commission will blindly allow the ratepayers to bear those costs.

Fourth, at a 75% load factor, the fact that EnviroPower has the lowest price fixed EPC contract price only magnifies the fact that, as a matter of mathematics, EnviroPower must be the lowest cost electricity provider. This is true because the lower the load factor, the fewer the

recognized in the industry to be a detriment to the ratepayers, and is prohibited or penalized in other circumstances.

number of units of produced energy (MWh) are available to spread over the fixed capital costs. Thus, the capital expenditure disadvantage which is inherent in a 278 MW (EKPC's Spurlock #4 plant) as compared to a larger EnviroPower KMP 576 MW plant is exacerbated, and must mathematically make the EnviroPower KMP project more cost efficient.

Fifth, the EKPC assertion, on page 9 of the Eames Prepared-II testimony, that KMP INCREASES the cost of power is absurd. In a capacity and energy calculation, the higher the load factor, the LOWER the price.

V. The Importance of Intervention in this Case.

The ability of EnviroPower to organize and to introduce third party expert evidence, such as can be provided by EPC contractors and other independent experts depends on EnviroPower's right and ability to participate in the Hearing as a full intervenor. If EnviroPower is not granted full intervenor status, the ability of EnviroPower to help the Commission understand the validity of the Rotondi Direct, pp. 48 to 54 and the analysis above, will be severely limited. The EnviroPower data submitted under oath as the Rotondi Direct is only refuted by broad brush in the EKPC April 5 Response. Denial of this Petition for Full Intervention would also deny the Commission full access to the data necessary for the Commission to discharge its duties in evaluating the EKPC application. Without EnviroPower and the experts it can introduce, it will be impossible for the Commission to obtain all of the necessary information to render a proper ruling. Instead the Commission will be left with little choice but to simply accept the EKPC assertions, irrespective of the actual financial impact on the ratepayers and the competitive environment for electric power generation in Kentucky.

The probative value of the disputed facts can only be ascertained through a process of detailed, professional analysis, based upon a mutually fair and unfettered access to all relevant data, including discovery, the right to present witnesses and to conduct cross examination. The granting of full intervention to EnviroPower is a means of enabling the Commission to become informed before making a judgment which will affect the Kentucky ratepayers for an entire generation.

VI. EnviroPower Has Amply Demonstrated That it Has a Special Interest in the Proceeding Which is Not Adequately Represented by Another Party.

As discussed in detail in the Response of EnviroPower to The Objections of East Kentucky Power Cooperative, Inc. filed on January 31, 2005, 807 KAR 5:001 Section 3 (8)(d) sets forth the standards for qualifying as a full intervenor. Under the regulations there are two independent standards, either one of which is sufficient to qualify EnviroPower's status as a full intervenor. EnviroPower qualifies for full intervenor status if can demonstrate either (1) that it has "a special interest in the proceeding which is not otherwise adequately represented" or (2) that EnviroPower's full intervention 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." EnviroPower in the preceding sections of this Petition has demonstrated that it meets both tests.

In addition, the hybrid partial right of intervention previously granted to EnviroPower has proven to be wholly inadequate. For example, despite the fact that the Commission's Order of February 3 is silent on the issue of how EnviroPower's rights to hybrid partial intervention are to be perfected, counsel for the Commission has informed EnviroPower that it cannot file any comment, testimony, or any other document without first convening a conference call among

counsel to all of the Parties and obtaining their consent. This is a chilling requirement which creates an inherent delay. EKPC complains of this delay, but then fosters more delay itself.⁴

On Friday April 8, 2005 EnviroPower received a regular mail service copy of a Notice to the Commission filed by EKPC on April 5, stating that EKPC intends to commit \$4 Million to purchase steel pilings, so as not to delay its schedule because the Commission (and impliedly EnviroPower) have delayed in the issuance of the Certificate of Convenience and Necessity in the instant case. EKPC adds that this was discussed in a conference call with counsel to all Parties, but excluding EnviroPower. On what legal basis was EnviroPower excluded?

Had EnviroPower been afforded an opportunity to comment, which seemed to be the essence of the Commission's Order on February 3, EnviroPower would have taken the following position. The Commission should not object to the purchase of steel pilings, as requested, provided that EKPC agrees that such a no objection position by the Commission (1) does not constitute "constructive approval" of the Certificates sought in the instant case, (2) has no substantive bearing on the instant case; and (3) shall under no circumstances form a factual predicate for an argument or claim of right by EKPC in this or any other proceeding before the Commission or any other juridical body or tribunal. Without these provisos, EKPC may be establishing a backdoor precedent, a slippery slope, to undermine the full decision-making authority of the Commission, in much the same unfortunate way that EKPC excluded counsel to EnviroPower from the telephone discussion of this matter.

⁴ In one instance, receipt of the regular mail service copy by EnviroPower from EKPC took four business days. EKPC counsel complained that this showed that participation by EnviroPower entailed an inherent delay. Yet in this instance, EKPC counsel chose not to provide a service copy to EnviroPower counsel in Louisville. When EnviroPower counsel in Washington suggested that EnviroPower and EKPC enter into a gentlemen's agreement to exchange pleadings by overnight courier service henceforth, EnviroPower adhered to that agreement each time. EKPC, however, followed the practice of using a courier once, then reverted to providing service by first class mail. Counsel to EKPC could then, again, blame EnviroPower for delay.

This incident underscores the inability of EnviroPower to protect its rights, substantively and procedurally, under the hybrid partial intervenor status created by the Commission Order of February 3 and further supports the need to grant full intervenor status.

VII EnviroPower’s Participation Has Not Been Disruptive nor Has it Caused Undue Delay.

During the telephone conference call among counsel in which EnviroPower requested permission to submit the Rotondi Direct, counsel for EnviroPower specifically asked counsel whether the participation of EnviroPower had been disruptive to the process. Counsel for EKPC stated that EnviroPower had not disrupted the process in any way.

There is a legal, substantive difference between testimony which irritates EKPC and testimony that is disruptive or causes undue delay. Some issues are complicated. When EnviroPower develops and submits facts and insights which affect the ratepayers and the operation of fair and open market level playing field conditions for electric power generation in the Commonwealth of Kentucky, such information assists the Commission in the discharge of its statutory duty. It is wholly consistent with the February 3 Order. But, as long as EnviroPower remains in the legal status limbo of a hybrid partial intervenor, EKPC will continue its meritless mantra of “delay and disruption.”

VIII. To Deny EnviroPower the Opportunity To Participate As A Party to the Proceedings Would Deny EnviroPower of Inherent Legal Rights Granted by the Constitution of the Commonwealth of Kentucky, the Constitution of the United States and Other Applicable Laws and Statutes.

EnviroPower has an inalienable right to due process and an inalienable right to its property, which is secured by the Constitutions of the Commonwealth of Kentucky and of the United States. The protection of EnviroPower’s rights is a solemn, statutory obligation of the Commission,

because EnviroPower has amply demonstrated that it has a legitimate special interest which is not adequately represented by another party to the proceeding. The fact that one may characterize EnviroPower's interest as pecuniary simply reinforces the constitutional protections afforded to EnviroPower.

Under the Kentucky Constitution, Section 2, the mere fact that EKPC has provided electric power to Eastern Kentucky for many years and has appeared successfully before this Commission many times affords it no greater rights under the law than EnviroPower. EKPC may supply the vast majority of power to its members and it may wish to expand its markets. The political power and plans of EKPC for its own future role in the electric power generation market in Kentucky, are, nonetheless, constitutionally irrelevant. In fact, what is relevant is that the Commission has a duty to avoid acquiescing to the arbitrary exercise of power by EKPC. That arbitrary exercise of power is evidenced by its improperly issued RFP, its self-dealing, its improper bid evaluation processes and techniques, and its other machinations. The Commission has a duty to avoid the trap of reflexively supporting the longer established, familiar power cooperative, EKPC, in the face of *prima facie* wrongdoing. Section 2 of the Kentucky Constitution is eloquent in its plain spoken and enduring command:

Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.

The rights of EnviroPower, including the due process and property rights which have been, at a minimum, bruised in this case to date, are also protected by the US Constitution and a long litany of binding judicial opinion. Simply put, the Fifth Amendment to the US Constitution prohibits any governmental body from depriving any citizen of its property, without due process of law. The Fourteenth Amendment to the US Constitution, and the judicial interpretation thereof,

insures that no state or its authorized agencies and instrumentalities may:

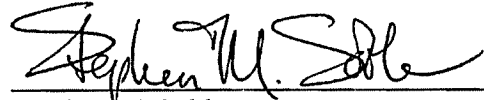
**...deprive any person of life, liberty, or property, without due process of law;
nor deny to any person within its jurisdiction the equal protection of the laws**

On the facts as presented in this case, the right of EnviroPower to be granted full intervention is a right protected by both the Kentucky Constitution and the US Constitution,. The right of EnviroPower to demand a full and fair process to enable the public and the ratepayers to have faith in the technical process of the Commission blessing and authorizing the building of electric power generation facilities in Kentucky places EnviroPower's property interests squarely and consistently in line with the rights and best interests of the ratepayers of the Commonwealth. The right of EnviroPower to be granted status as a full intervenor in order to assist the Commission in insuring a competitive, honest and fair, electric power generation market in Kentucky is a matter involving hundreds of millions, if not billions, of dollars. It is a matter involving thousands of jobs for Kentuckians, tens of millions of dollars of taxpayer revenue for the Commonwealth and the fundamental ability of Kentucky to provide an attractive environment in which to raise families and grow businesses. The issues of fraud in the RFP, self-dealing, manipulation and other improprieties by EKPC, which EnviroPower has brought to light in this proceeding, place EnviroPower resolutely in the shoes of serving the best interests of the ratepayers of Kentucky, not the entrenched, self-serving interests of EKPC.

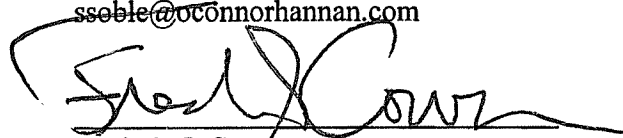
IX Conclusion.

WHEREFORE, EnviroPower respectfully submits this petition to intervene and respectfully requests that the Commission grant the petition to intervene, by ordering that EnviroPower be granted the right to full intervenor status, without limitation.

Respectfully submitted,



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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 8th day of April, 2005.

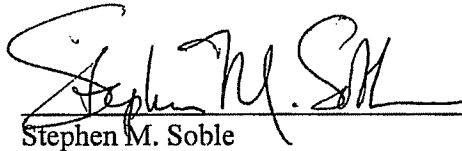
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