

Robert A. Patrick
144 Greenwing Court
Georgetown, Kentucky 40324

September 20, 2005

Beth O'Donnell, Executive Director
Public Service Commission
211 Sower Boulevard
Frankfort, Kentucky 40601

Re: Case No. 2005-000235

RECEIVED


SEP 21 2005

PUBLIC SERVICE
COMMISSION

Dear Ms. O'Donnell:

Enclosed please find the original and 10 copies of my Petition for Rehearing or Reconsideration of the Order issued by the Commission dated September 2, 2005, in the above referenced matter.

Very truly yours,



Robert A. Patrick

Enclosures

cc: James M. Mooney, Esq.
David E. Spenard, Esq.

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF MALLARD POINT DISPOSAL)	
SYSTEMS, INC., FOR AN ADJUSTMENT OF)	CASE NO.
RATES PURSUANT TO THE ALTERNATIVE)	2005-00235
RATE FILING PROCEDURE FOR SMALL)	
UTILITIES)	

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PETITION FOR REHEARING OR RECONSIDERATION

SEP 21 2005

PUBLIC SERVICE
COMMISSION

Pursuant to KRS 278.400, Robert A. Patrick (the Petitioner) petitions for a

rehearing or reconsideration of the Order dated September 2, 2005, issued by the

Commission in this case on the grounds that:

- I. The Order is inconsistent with Commission Orders in other cases, resulting unfairly in the imposition of standing requirements upon the Petitioner not applied to applications for full intervention status by petitioners similarly situated in rate adjustment cases;
- II. The Order denies the Petitioner administrative due process in that it prevents the Petitioner from gathering evidence and from engaging in other procedural action relevant to the issuance of a final Commission Order that directly affects the Petitioner, and requires the Petitioner to rely upon the Office of the Attorney General to represent the Petitioner in this case; and
- III. The Petitioner has demonstrated that full intervention is likely to present issues or to develop facts that will assist the Commission in fully considering the matter.

ARGUMENT

I.

The Order is inconsistent with Commission Orders in other cases, resulting unfairly in the imposition of standing requirements upon the Petitioner not applied to

applications for full intervention status by petitioners similarly situated in rate adjustment cases, which is prejudicial to the rights of the Petitioner.

- A. The Commission has granted full intervention status to residential customers who did not plead any *special interest* beyond that plead by the Petitioner and other residential customers in this case.

The Order dated September 2, 2005, states that the movants, “do not state any special interest in the proceedings.”

The facts stated in the Petitioner’s Motion to Intervene in this case are these:

- That he resides at 144 Greenwing Court, Georgetown, Kentucky, and
- That he is a customer of Mallard Point Disposal Systems, Inc.

In previous cases, the Commission has granted full intervention status to commercial and residential customers on the basis that they would be directly affected as customers of the applicant. In Willabrook Sanitation, Inc., Case No. 1996-00568, the Commission granted full intervention status to Brooks Motel Associates and Budgetel Motel. See, PSC Orders dated Jan. 3, 1997, and Jan. 9, 1997. Similarly, in Harrington Haven Wastewater Co., Inc., Case No. 1996-00317, the Commission granted full intervention status to Ellen L. Martin. See, PSC Final Order dated July 8, 1996, referencing intervener’s status. In addition, in Reidland Water & Sewer District, Case No. 1996-00314, the Commission granted full intervention status to Ronnie Freeman. See, PSC Order dated Aug. 28, 1996.

It is noteworthy that in each of these cases the Office of the Attorney General through the Office of Rate Intervention, was granted full intervention status along with the above referenced citizen customers.

More recently, the Commission granted full intervention status to The Kroeger Co., in the Matter of the Merger Between Cinergy Corporation and Duke Energy Corporation, Case No. 2005-00228. See, Commission Order dated July 22, 2005. The Attorney General was also granted interventions status. See, Commission Order dated June 20, 2005.

In its Petition to Intervene, the Kroeger Co. alleged that it is one of the 20 largest electric customers of the Union Light Heat & Power Company, which may seem to differentiate that case based upon the alleged size of the petitioner as a customer of one of the utilities. However, it should be born in mind that in this case nearly ten percent of the residential customers of the applicant sought intervention status and full intervention status was not granted to any of them. Surely, the Commission should consider the total breadth of the collective customer interest in an application, just as it may consider the depth of the interest of a particular applicant, in weighing the interests of residential customers in a proceeding that affects them just as directly. Certainly, the alternatives available to individual residential customers to defer the impact of a rate increase are more limited than those of substantial corporate interveners.

Applying one set of standards to find that citizen customers based upon their pleading possess a special interest meriting full intervention in other cases and applying a

stricter, but unspecified, standard to deny Petitioner's motion to intervene is prejudicial to the Petitioner's rights and should be modified, granting the Petitioner full intervention status.

- B.** The Commission has granted full intervention status to residential customers who did not plead any *special ability* that would assist the Commission in developing a complete record beyond that plead by the Petitioner and other residential customers in this case.

In the Order dated September 2, 2005, the Commission stated that the movants failed to state any special ability that would assist the Commission in developing a complete record.

However, in two active cases, the Commission has granted full intervention status based upon the special interest standard to petitioners whose Motions to Intervene allege interests in these cases practically identical to (and certainly not superior to) those interest raised by the Petitioner in this Case.

In Case No. 2005-00142 and Case No. 2005-00207, the Commission granted full intervention status to Petitioners Robert N. Kiefer and John H. Colliver.

The facts stated in Petitioner Kiefer's motion are these:

- That he is the owner of property that will be directly affected by one of the proposed transmission lines;
- That this property is his principle residence; and

- That he is a customer of Kentucky Utilities/LG&E and that any rate changes due to construction costs will impact him directly.

The facts stated in the Colliver motion are these:

- That he is a landowner in the proposed transmission line construction area in Barron County, Kentucky.

The facts stated in the Petitioner's Motion to Intervene in this case are these:

- That he resides at 144 Greenwing Court, Georgetown, Kentucky, and
- That he is a customer of Mallard Point Disposal Systems, Inc.

Both the Keifer and the Petitioner's motions state that they are customers of the applicable utility. While the Keifer petition states it directly, it is implicit that any customer of a utility will be directly affected by any rate change. Both motions state that the petitioner's reside at the affected property.

The Keifer motion states that he is the owner of property that will be directly affected. The Colliver motion states merely that he is a landowner in the proposed transmission line construction area.

As a customer of Mallard Point Disposal Systems, Inc. by virtue of being a resident of the Mallard Pont Development, the property of the Petitioner in this case is physically

linked to the Disposal Systems treatment facility. And therefore, any change in the sewer rate assessed affects the Petitioner as directly as changes in the rates of the electric utilities would affect the petitioners in these other cases.

As of the date of this Petition, the electronic record is devoid of any indication that either Mr. Keifer or Mr. Colliver has provided the Commission with any information that is intended to present issues and develop facts that will assist the Commission. Mr. Colliver has asked that the Commission provide him with certain information.

Nonetheless, the Commission found with respect to Mr. Keifer and Mr. Coliver that full intervention by each of them is likely to present issues and develop facts that will assist the Commission in fully considering the matter. To the contrary, the Commission found that the Petitioner in this case, indeed all customers of the Disposal System, lacked that status and denied full intervention status to all of them.

Applying one set of standards to find that residential customers based upon their pleadings possess a special ability that would assist the Commission meriting full intervention in some cases and to apply a stricter, but unspecified, standard in denying Petitioner's motion to intervene is prejudicial to the Petitioner's rights and should be modified, granting the Petitioner full intervention status.

II.

The Order denies the Petitioner administrative due process in that it prevents the Petitioner from gathering evidence relevant to a final Commission Order that directly affects the Petitioner, and requires the Petitioner to rely upon the Office of the Attorney General to represent the Petitioner in this case.

- A. The Commission's motion effectively denies the Petitioner administrative due process of law.

According to the Order dated September 2, 2005, the Petitioner will not be served with filed testimony, exhibits, pleadings, correspondence or any other documents submitted by full intervening parties. In addition, the Petitioner will not: (1) have the right to issue data requests or otherwise engage in discovery; (2) attend informal conferences; (3) request a hearing; (4) file a motion or brief; or (5) to petition for judicial review. The only right expressly granted the Petitioner is to comment on the proposed rate adjustment.

The ability to comment on a proposed rate adjustment is, essentially, no right at all. Any person, even a non-resident of Kentucky, a person wholly unaffected by a rate adjustment, or a person with a tangential interest such as a journalist can provide the Commission with comments on a proposed rate adjustment. In other words, anyone with sufficient postage and the inclination can file comments. Surely it is these individuals whose interests are tangential or remote as to whom the Commission should grant limited intervention status.

However, to deny a residential customer of the applicant full intervention is to deny individuals with a significant financial stake in the outcome of the proceedings with the ability to meaningfully participate. The inability to engage in discovery deprives the Petitioner with the ability to gather relevant evidence based upon information filed by the applicant either in the application or other filings. Evidence gathered through discovery has a level of credibility not associated with materials subsequently attached to a “comment,” as to which authenticity may be in doubt or at least arguable. In fact, in the absence of the ability to conduct discovery, there is no way for the Petitioner to test effectively any factual assertion made by the applicant.

The inability to file a motion or a brief further deprives the Petitioner of administrative due process. Apparently, the Petitioner may not file a brief pointing out errors of law made in any brief filed by the applicant. The Petitioner may not petition for rehearing based upon errors made in conducting the administrative hearing. And this is so, even if the Attorney General were to conclude that, notwithstanding prejudicial errors, he would not petition for rehearing based upon allocation of resources or some other cost benefit determination.

The lack of due process evidenced by the denial of the Petitioner's right to file a petition for judicial review of the Commission's final order in a rate adjustment directly affecting the Petitioner is sufficiently obvious as to require no additional discussion.

Because the Order dated September 2, 2005, denies the Petitioner administrative due process, it should be modified to grant the Petitioner full intervention status.

B. As a matter of law, the Attorney General does not appear on behalf of and represent the interest of all citizen customers in matters before the Commission.

The Order dated September 2, 2005, states that the Attorney General has already been granted intervention in this proceeding and represents and appears on behalf of consumers' interests. In taking this position, the Commission has adopted precisely the position advocated by Kentucky-American Water in opposition to intervention by Bluegrass FLOW, Inc., in the Matter of Adjustment of Rates of Kentucky-American Water Company, Case No. 2004-00103. This position was expressly rejected by the Attorney General in his Response to Bluegrass FLOW, Inc. Motion to Intervene dated June 24, 2004.

The Attorney General may intervene as a matter of statutory law.¹ The Commission may not deem his interest as not a special interest or as an interest that is too remote to permit intervention. Consequently, according to the Attorney General, where the State has intervened, it may be appropriate for the Commission to deny intervention to petitioners where the claim of special interest is illusory or remote.

The Attorney General, however, does not believe that his participation is a proper basis for denying all requests for intervention made under a "special interest" claim.

Response, p. 3.

¹ KRS 367.150(8).

The position taken by the Commission in this case suggests that no residential consumer could satisfy either the *special interest* or *special ability* grounds for intervention if the Attorney General has been given intervention status. That produces illogical results. Would the Commission, for example, revoke full intervention status previously granted to a residential customer if the Attorney General subsequently moved to intervene? Moreover, ratemaking is by its very nature a quasi-legislative process in which participation by the public is encouraged and is, indeed, a right. Ratemaking is not simply a judicial process in which the applicant and the Attorney General square off as adversaries and the Commission sits as a detached judicial umpire.

It is, in fact, impossible for the Attorney General to represent all of the varied interests of citizen customers in rate adjustment cases. The Attorney General does not have the staff to become intimately familiar with and gather all evidence relevant to every application with respect to which his intervention is possible. Nor should he. That process is best left to those who have a special interest in the application as a result of the direct financial impact of the rate adjustment process, and by virtue of that relationship have both the special interest and the special ability to gather evidence regarding a particular applicant, namely the citizen customers of the utility seeking the adjustment.

The Attorney General, with respect to a statute that he administers, has stated that his Office of Rate Intervention does not represent the interest of all citizen customers in rate adjustment cases. Therefore, the finding in the Order dated September 2, 2005, that

the Petitioner is adequately represented by the Attorney General should be modified, granting the Petitioner full intervention status.

III.

The petitioner has demonstrated that full intervention is likely to present issues or to develop facts that will assist the Commission in fully considering the matter.

On August 29, 2005, the Petitioner in this Case filed with the Commission a First Set of Interrogatories demonstrating the Petitioner's ability to present issues and develop facts that will assist the Commission. Specifically, the Petitioner inquired as to robustness of the accounting practices applied to reports filed by the Applicant with the Commission, the Applicant's valuation of the Utility Plant, specific expenses associated with motor vehicles and office space claimed by the Applicant, and the disposition of proceeds connected with long term debt assumed by the Applicant. These areas of inquiry go beyond or significantly augment questions raised by the Commission Staff and Interrogatories submitted by the Office of Rate Intervention.

By any objective measure, the Petitioner has demonstrated an ability to develop facts that will assist the Commission in fully considering the matter beyond that demonstrated by the petitioners in Case No. 2005-0142 and No. 2005-00207. To deny the Petitioner full interventions status is to apply the regulation in an inconsistent manner

that, in effect, denies the Petition administrative due process and should be modified,
granting full intervention status to the Petitioner

Respectfully Submitted:

Robert A. Patrick

Robert A. Patrick
Petitioner

Certificate of Service

This is to certify that a true and correct copy of the forgoing Petition for Rehearing or Reconsideration has been served by mailing the same, this 20th day of September 2005, to the following:

Kentucky Public Service Commission
P.O. Box 615 211 Sower Boulevard
Frankfort, Kentucky 40602-0615
(Original and 10 copies)

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