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November 13, 2008

PUBLIC SERVICE COMMISSION

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Stephanie Stumbo, Executive Director
Kentucky Public Service Commission
211 Sower Boulevard, PO Box 615
Frankfort, Kentucky 40602-0615

Re: Case No. 2008-00248

Dear Ms. Stumbo:

Please find attached for filing with the Commission an original and ten copies of an Application for Rehearing related to the above-referenced proceeding.

Sincerely,

Geoffrey M. Young

Enclosures

cc: Parties listed on the Certificate of Service

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE 2008 INTEGRATED RESOURCE PLAN	)	**CASE NO.**
OF DUKE ENERGY KENTUCKY, INC.	)	**2008-00248**

APPLICATION FOR REHEARING RE THE
PETITION FOR FULL INTERVENTION
OF GEOFFREY M. YOUNG

On November 5, 2008, the Commission issued an Order denying my 9/2/08 petition for full intervention in the above-styled proceeding. Pursuant to KRS 278.400, I respectfully request that the Commission grant a hearing to reconsider and reverse its determination of 11/5/08. I believe the following arguments will address all of the points the Commission made in its Denial Order:

1. The Commission is attempting to use the same fallacious argument it rejected almost two years ago.

On February 12, 2007, the Cumberland Chapter of the Sierra Club ("Sierra Club") filed a petition for full intervention in Case No. 2006-00472, *General Adjustment of Electric Rates of East Kentucky Power Cooperative, Inc.* On February 19, 2007, EKPC filed an unsolicited document responding and objecting to the Sierra Club's petition. EKPC's objections can be summarized as follows:

1) "The Commission's jurisdiction is strictly limited by KRS 278.040(2) to issues of the rates and service of regulated utilities." (EKPC Objections at 1)

2) "The Commission 'must give effect to all factors which are prescribed by the legislative body, but may not act on a matter which the legislature has not established.'" [Id. at 2, citing South Central Bell Telephone Co. v. Utility Regulatory Commission, 637 S.W.2d 653 (Ky. 1982)] (Id. at 2)

3) No provisions of KRS Chapter 278 recognize environmental impacts as proper matters for consideration by the Commission. (Id.)

4) "The Sierra Club in no way represents the rates or service interests of the members systems of EKPC, or their member consumers, and is attempting to improperly inject into this case its own interests in environmental issues which are beyond the Commission's jurisdiction and scope of review." (Id.)

This is almost exactly the same argument the Commission used in its 11/5/08 Order denying my petition for full intervention in this proceeding. (Order at 2-4)

On February 22, 2007, the Sierra Club responded to EKPC's arguments by citing KRS 278.285, the statute that provides for Commission approval of utility companies' proposed demand-side management (DSM) programs and cost recovery mechanisms via a general rate case or a separate DSM proceeding. The Sierra Club noted that because KRS 278.285 allows the Commission to establish rate structures that provide economic incentives for DSM programs, "consideration by the Commission of rate structures and their effects on DSM programs is specifically permitted by statute and is therefore a proper matter for consideration in this case." The Sierra Club noted that "The very case law that

EKPC cited in its attempt to exclude Sierra from this proceeding actually provides support for Sierra's request for full intervenor status." (Sierra Club Response at 1-3)

At a hearing at the Commission on March 6, 2007, Chairman Mark David Goss announced orally that the Sierra Club would be granted full intervention in Case No. 2006-00472, and on March 21, 2007, the Commission put its stated intention into effect via a written Order granting the Sierra Club's intervention petition. In so doing, the Commission implicitly rejected EKPC's faulty argument and endorsed the logic of the Sierra Club's response.

We have now come full circle. The Commission is now making the same fallacious argument that EKPC made in 2007 in its attempt to exclude environmentalists from full participation in a case that had clear implications for the environment. The environmentalists' position – the Sierra Club's in 2007 and mine today – has remained quite consistent, but the Commission has reversed itself 180 degrees.

In my 9/2/08 petition for full intervention, I described the connection between my personal special interests and the subject matter of this proceeding as follows:

> If Duke were able to reduce the amount of time this plant had to operate per year because of improved end-use efficiency in their customers' homes and businesses, or if Duke were able to retire the plant sooner than expected and replace it with more sustainable supply-side and demand-side resources, the magnitude of environmental hazards arising from the plant would be reduced.

In this proceeding, my interests as an environmentalist relate directly to 807 KAR 5:058, the regulation that governs integrated resource planning by electric utilities, and KRS 278.285, the same DSM statute that the Sierra Club cited in February, 2007, in its response to EKPC's objections to its intervention petition. For the Commission to resort to a

fallacious argument that it found unpersuasive in 2007 when it was made by EKPC is arbitrary, capricious, and unjust.

2. The EnviroPower case that the Commission cited has no value as a precedent, the footnote based upon it is a misrepresentation, and the cited finding itself is open to serious question.

In its Denial Order, the Commission cited EnviroPower, LLC v. Public Service Commission of Kentucky, 2007 WL 289328 (Ky. App. 2007). (Order at 3) This Opinion by the Kentucky Court of Appeals included the instruction, "Not to Be Published." According to Civil Rule 76.28, Section 4(c), "Opinions that are not to be published shall not be cited or used as authority in any other case in any court of this state."

Despite this rule, the Commission included the following footnote in its Denial Order:

> *See also* the unreported decision in [EnviroPower], wherein the Court of Appeals held that "the PSC retains the power in its discretion to grant or deny a motion for intervention," and that the "special interest" a person seeking intervention under 807 KAR 5:001, Section 3(8), must have is one relating only to the "'rates' or 'service' of a utility." (Order at 3)

The last clause of this footnote appears to be a misrepresentation of what the Court of Appeals wrote. The actual sentence from the not-to-be-published opinion reads as follows: "First, there is the statutory limitation under KRS 278.040(2) that the person seeking intervention must have an interest in the 'rates' or 'service' of a utility, since those are the only two subjects under the jurisdiction of the PSC." (Case No. 2005-CA-001792-MR, Opinion Affirming at 9) Because this sentence was not sufficiently useful or restrictive to suit the Commission's attorneys as written, they designed a footnote that artificially brought 807 KAR 5:001, Section 3(8) into the middle of the sentence.

Although the Court of Appeals treated the limitation arising under KRS 278.040(2) separately from that arising under 807 KAR 5:001, Section 3(8), the Commission's footnote combined the two in a single sentence, apparently for the purpose of implying that the first limitation makes the second limitation more restrictive.

If one considers the two limitations separately, as the Court of Appeals did, it would be possible for a petitioner first to demonstrate that it has an interest in the rates or service of the utility, and then to demonstrate that it meets one or both of the prongs of the intervention regulation. It appears to this non-attorney that the PSC's formulation goes beyond the Court of Appeals' finding. (Id.; PSC Order at 3) Not content with the extensive discretion it has under 807 KAR 5:001, Section 3(8), the Commission appears to be grasping for more by using the Court of Appeals' words out of context in order artificially to restrict the definition of the term, "special interest," which is found in the regulation. The Commission appears to be exceeding the authority granted to it by KRS 278.040(3), the statute which allows the PSC to adopt and enforce reasonable regulations.

Finally, the Court of Appeals may have erred when it, in effect, treated its interpretation of the provisions of KRS 278.040(2) as a third prong of 807 KAR 5:001, Section 3(8)(b). The cited section of the statute reads as follows:

> (2) The jurisdiction of the commission shall extend to all utilities in this state. The commission shall have exclusive jurisdiction over the regulation of rates and service of utilities, but with that exception nothing in this chapter is intended to limit or restrict the police jurisdiction, contract rights or powers of cities or political subdivisions.

While this section might limit the Commission's jurisdiction, it says nothing at all about intervenors or petitioners for full intervention. Specifically, even if the rates and service of utilities are the only two subjects under the jurisdiction of the PSC, the statute simply does

not say that a person seeking intervention must have interests only in one or both of these two subjects. The statute itself is silent on the question. Instead, it could be the case that a petitioner has legitimate interests that are directly *affected* by the rates and/or service of a utility. It seems to me that the plain language of KRS 278.040(2) would not bar such a petitioner from full intervention. If this view is correct, once the Commission has duly and lawfully initiated a proceeding, pursuant to the provisions of KRS 278.040(2) and all other pertinent statutes and regulations, the only requirement facing a petitioner for full intervention is to demonstrate convincingly to the Commission that it fulfills one or both of the prongs set out in 807 KAR 5:001, Section 3(8)(b).

3. I have a legitimate, personal, special interest in the rates and service of Duke Energy Kentucky ("Duke").

The Commission stated, "Mr. Young's interest in Duke Kentucky's 2008 Integrated Resource Plan ("IRP") does not arise from his status as a Duke Kentucky ratepayer, since he is not one." (Order at 3) That statement is correct. The next sentence, however, is a complete non-sequitur: "Consequently, Mr. Young has no actual legal interest in the rates or service of Duke Kentucky." (Id.) It is a non-sequitur because it is not based on the governing regulation, 807 KAR 5:001, Section 3(8)(b), which the Commission had restated near the top of the same page. (Id.)

The special interests I have in Duke's rates and service are the same as those the Sierra Club demonstrated in its petition to intervene in Case No. 2006-00472. Duke's rate structures, as expressed in its tariffs, establish economic incentives and disincentives for the utility and its customers that either encourage or discourage the implementation of energy efficiency programs and measures. If Duke is penalized financially when its

customers significantly reduce their energy consumption, the utility will tend not to implement DSM programs that help customers save energy, or it might implement such programs on a much smaller scale than the economically optimum level. (See my prepared testimony on behalf of the Sierra Club in Case No. 2006-00472, June 29, 2007 at 6-26) The Commission's finding that I have "no actual legal interest in the rates and service of Duke Kentucky" is therefore incorrect. (Order at 3)

4. I have a legitimate, personal, special interest in the subject matter of this proceeding.

In my 9/2/08 petition, I clearly described the direct connection between the subject matter of this proceeding and my personal, special interests as an environmentalist, a person dedicated to improving the energy efficiency of Kentucky's economy, and a person who breathes the air of Kentucky:

> I have a personal interest in the quality of the air I breathe. It is hard to imagine an interest more deeply personal than my own internal airways and blood vessels and those of my wife. The quality of air we breathe is likely to affect the amount of money my wife and I will be forced to spend in future years to treat health problems that we may suffer because of Duke Energy Kentucky's ("Duke's") existing and planned power plants. As an environmentalist, I have an interest in reducing pollution that can harm people and the natural environment. (Young, Petition, 9/2/08 at 1)

The central focus of an IRP proceeding is the utility company's plan for meeting its customers' future needs for energy and power. The types of power plants that will be used, built, or retired are a key element of the utility's plan. The Commission did not challenge any aspect of this argument in its Denial Order. Nevertheless, based solely on the fact that I am not a customer of Duke, it concluded that "Mr. Young has no actual legal interest in the rates or service of Duke Kentucky." (Order at 3) The clear implication is

that the Commission must have rejected the idea that the special, personal interests I cited are "actual" or "legal" interests. Such a finding, however, is arbitrary and unsupported. It is well-settled in Kentucky law that an administrative decision may be challenged and vacated if it "is wholly unsupported by the evidence." [Foster v. Goodpaster, 161 S.W.2d 626, 627 (Ky. 1942), adopting the rule established by the US Supreme Court in Silberschein v. United States, 45 S.Ct. 69, 71 (1924)]

I claimed a special interest in the subject matter of the proceeding and described what it is and how it arose. Once a petitioner does that, it is then up to the Commission to determine whether or not the cited special interest is closely enough related to the subject matter of the proceeding to justify a determination that the petitioner has met the first prong of 807 KAR 5:001, Section 3(8)(b). The Commission did not attempt to make such an assessment, however, in its Order. Instead, once it determined that I am not a customer of Duke, the Commission halted its assessment and declared the matter closed. (Order at 3) By ignoring the argument I had made showing the connection between my special interests and the subject matter of the proceeding, the Commission acted in an arbitrary manner and failed to follow its regulation.

5. The Commission's argument that it "has no jurisdiction over the quality of the air" I breathe is a fallacious straw-man argument.

The Commission stated that it "understands and appreciates Mr. Young's interest as an environmentalist in seeking to reduce pollution, but the Commission has no jurisdiction over the quality of air he breathes, the 'significant health problem' associated with mercury pollution from coal-fired power plants, or 'the carbon dioxide released [which] contributes to global warming.'" (Id. at 4) It concluded that "the issues he seeks to

raise relating to the quality of the air and the level of pollution emitted by Kentucky Power's coal-fired power plants are beyond the scope of the Commission's jurisdiction." (Id.)

I have informed the Commission on numerous previous occasions that I have never asked it to do the job of any other agency of state government such as the Division for Air Quality, and I have no intention of doing so now or in the future. The fact remains, however, that certain aspects of Duke's integrated resource plan are very likely to have effects on Kentucky's environment, the Commonwealth's level of energy efficiency, and the quality of air I will have to breathe. (Young, Petition at 1-2) No matter how many times the Commission may insist that it does not have statutory authority to regulate Kentucky's air quality – which is technically true – the fact remains that certain of its decisions will have impacts on Kentucky's environment anyway. For the Commission to overlook or ignore that fact and to repeat the same previously-refuted argument in proceeding after proceeding is reminiscent of the psychological phenomenon known as denial and constitutes an arbitrary abuse of the Commission's discretion.

6. The Commission's argument that I seek to raise air quality issues in this proceeding is another fallacious straw-man argument.

The Commission found that I seek to raise issues "relating to the quality of the air and the level of pollution emitted by Duke Kentucky's coal-fired plants." (Order at 4) I have never stated that I either seek or plan to do so in the context of this proceeding. Rather, I stated explicitly that I plan to "submit information requests and written comments that are directly relevant to the process of assisting the Commission staff in assessing the reasonableness of Duke's integrated resource plan." (Young, Petition at 3-4) The

Commission's argument is therefore another fallacious straw-man argument. Its conclusion – that "To allow Mr. Young to intervene and raise issues that are beyond the scope of the Commission's jurisdiction would unduly complicate and disrupt this proceeding" – is wholly unsupported by the evidence and therefore arbitrary.

7. The Commission's arguments relating to the Attorney General ("AG") have already been refuted in one or more previous proceedings.

The Commission stated on page 7 of its Denial Order that "the AG has intervened in this case." The case record indicates that that statement is incorrect. It is possible that the Commission merely cut and pasted text from a different denial order into its 11/5/08 Order without proofreading the document with sufficient care.

The Commission went on at length about the AG and asserted that he represents the issues I would seek to promote if granted full intervenor status. (Order at 4-7) This is the same argument the Commission used in its Denial Order in Case No. 2008-00148, *The 2008 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company*. (Case No. 2008-00148, Denial Order, July 18, 2008 at 6-9) In my application for rehearing of that Order, I thoroughly addressed and refuted the Commission's argument. (Young, Application for Rehearing, August 5, 2008 at 4-6) In general, the Commission's argument re the AG is irrelevant because the AG's interests are not the same as those of environmentalists. I hereby incorporate my response in Case No. 2008-00148 into this application, with the appropriate name changes (E.ON to Duke). (Id.)

8. The Commission's repeated refusal to acknowledge that I have previously countered all of its unreasonable arguments and discriminatory *de facto* policies

constitutes arbitrary and abusive behavior that violates Section 2 of the Kentucky Constitution.

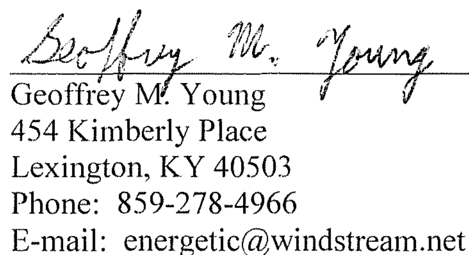
The Commission noted, "Mr. Young has never previously been granted intervention in a Commission proceeding, although he has previously testified on behalf of others." (Id. at 3) This point seems somewhat ironic because the PSC has had virtually everything to do with that outcome. It is reminiscent of the boy who kills his parents and then says to the judge, "Have mercy on me, Your Honor, because I'm only a poor orphan boy!"

Conclusion

The Commission did not raise any other points in its Denial Order of 11/5/08. I therefore continue to believe that my petition of 9/2/08 met the requirements of both prongs of 807 KAR 5:001, Section 3(8)(b), the regulation that determines whether full intervention should be granted. Because I have a legitimate special interest in Duke's rates and service, I have also met any requirement that might have arisen under KRS 278.040(2), although I believe that any such requirement would apply only to the Commission and not to a petitioner for full intervention.

WHEREFORE, I respectfully request that the Commission grant a hearing to reconsider and reverse its determination of 11/5/08 to deny my petition for full intervention in this proceeding. I also request that the Commission modify the procedural schedule to allow me to serve an information request upon Duke, recognizing that the subsequent dates listed in the procedural schedule would also need to be shifted accordingly.

Respectfully submitted,



11/13/08

Geoffrey M. Young — Date

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Lexington, KY 40503
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CERTIFICATE OF SERVICE

I hereby certify that an original and ten copies of the foregoing Application for Rehearing were mailed to the office of Stephanie Stumbo, Executive Director of the Kentucky Public Service Commission, 211 Sower Boulevard, PO Box 615, Frankfort, Kentucky 40602-0615, and that copies were mailed to the following parties on this 13th day of November, 2008.

Hon. Rocco D'Ascenzo
Duke Energy, Legal Department
139 E 4th St, Room 25 AT II
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Dennis G. Howard II
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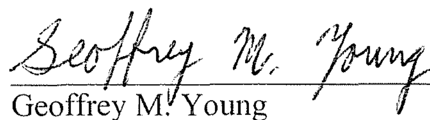
Signed,



11/13/08

Geoffrey M. Young — Date