

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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| 2009 INTEGRATED RESOURCE PLAN OF |) | CASE NO. |
| EAST KENTUCKY POWER COOPERATIVE, |) | 2009-00106 |
| INC. |) | |

O R D E R

On July 30, 2009, East Kentucky Power Cooperative, Inc. ("EKPC") filed an application for rehearing of that portion of the Commission's July 13, 2009 Order ("July 13 Order") granting the joint intervention of three environmental advocacy groups, consisting of the Sierra Club, Kentucky Environmental Foundation, and Kentuckians for the Commonwealth ("KFTC").¹ (The three joint Intervenors are collectively referred to herein as "Environmental Groups.")² EKPC requests that the Commission reconsider its decision allowing their intervention and deny it or, in the alternative, prohibit the Environmental Groups from accessing any confidential information and more clearly define their role in this review of EKPC's Integrated Resource Plan ("IRP"). In response

¹ EKPC does not request rehearing of that portion of the July 13, 2009 Order granting intervention to the Attorney General's Office ("AG").

² Although the Environmental Groups refer to themselves as "public interest intervenors," stating that KFTC is not an environmental group (Reply at 1), the Commission notes that their motion to intervene, at 3, states that one of KFTC's issues is "reducing environmental destruction." Since intervention was granted to these groups "on behalf of members . . . who are ratepayers of EKPC's distribution cooperatives," (July 13 Order at 8), and the record is devoid of any evidence that they represent the interests of the public within EKPC's service area, the only apparent common thread binding these groups together is their environmental interests.

to EKPC's request for rehearing, the Environmental Groups filed a reply in opposition (referred to herein as "Reply"), and EKPC then filed a reply thereto.

EKPC's request for rehearing begins by discussing the Commission's decision to grant intervention to the Environmental Groups based on a finding that they had "sufficient" expertise in issues relevant to this IRP review. Focusing on the Commission's use of the word "sufficient," and noting that a more superlative adjective was not used, EKPC theorizes that the Commission was really finding that the Environmental Groups' expertise was only marginal in comparison to the expertise of the AG and Commission Staff. Based on this theory, EKPC argues that the Environmental Groups will not be able to present issues or develop facts to assist in this IRP review. Next, EKPC states that the Commission has, on prior occasions, held that the AG's participation in an IRP review is grounds to deny an individual's request to intervene therein. Claiming that the circumstances are the same here, EKPC argues that the Commission's prior decisions constitute longstanding precedent for the denial of intervention to the Environmental Groups in this IRP review.

EKPC also argues that the common interest among the Environmental Groups is their opposition to new coal-fired electric generating facilities, and that their real purpose for intervening in this case is to stop the construction of EKPC's Smith 1, a coal-fired facility in Clark County, Kentucky. EKPC then references the Environmental Groups' motion to intervene, which states that their participation in this case will provide them access to information not publicly available which will be used to strengthen an existing written analysis supporting the cancellation of Smith 1. EKPC characterizes these

efforts by the Environmental Groups as “a complete misappropriation of both the IRP statute and the regulation” and urges the Commission to reject them.

As further support of its claim that the Environmental Groups’ intent in this case is to attack Smith 1, EKPC references certain data requests issued by the Environmental Groups seeking detailed information on the costs and construction schedule of Smith 1. EKPC states that providing such information will unduly complicate or disrupt this IRP case, and that this situation can be prevented by reversing the decision to allow the Environmental Groups to intervene. EKPC also argues that, since much of the information sought by the Environmental Groups has already been granted confidential treatment by the Commission, the Environmental Groups will use the confidential information in other litigation against EKPC and in attacking the Certificate of Public Convenience and Necessity (“CPCN”) previously issued by the Commission authorizing the construction of Smith 1.

The Environmental Groups, in their Reply to EKPC’s request for rehearing, first argue that there is no legal authority for reversing the July 13, 2009 Order granting their intervention. They claim that, since no hearing was held prior to the decision granting their intervention, no rehearing can be considered under KRS 278.400. They also argue that the Commission, unlike a court, has no inherent power to reconsider its decisions. Next, the Environmental Groups state that they will adhere to the terms of any confidentiality agreement and that the production of confidential information will neither unduly complicate nor disrupt this case.

The Environmental Groups deny that their sole purpose for intervening here is to stop the construction of Smith 1, and they then present a five-page discussion (based

on a four-page declaration attached to their Reply as Exhibit 1) of an individual who is not served by EKPC, supports renewable energy, and opposes using coal to generate electricity because he believes emissions from coal combustion adversely affect his health. Reference is also made to a study, which is attached to the Reply as Exhibit 2, supporting the cancellation of Smith 1. The Environmental Groups then present another discussion (based on a two-page declaration attached to the Reply as Exhibit 3) of an individual who is served by EKPC, supports demand-side management and energy efficiency programs, and opposes EKPC's reliance on coal to generate electricity because he believes it does not result in the lowest rates for customers.

Next, the Environmental Groups state that the effort of the Sierra Club to fight existing and planned coal-fired generation is only one of many energy-related programs designed to create green jobs, immediately reduce the country's reliance on coal and other fossil fuels, and curb climate change by adopting renewable energy, changing building codes, and deploying a smart grid to reduce energy consumption. The Environmental Groups then state their understanding that the Commission cannot in this IRP review revoke EKPC's authority to construct Smith 1, but they assert that a proper evaluation of EKPC's supply-side and demand-side options requires a comparison of coal-fired supply resources to renewable and demand-side resources. Finally, the Environmental Groups argue that granting their intervention was not inconsistent with prior Commission precedent because the Environmental Groups are representing an interest that is distinguishable from that of all other customers who are represented by the AG, and they have shown that they have the expertise to present issues and develop facts to assist in the review of EKPC's IRP.

Based on EKPC's request for rehearing and being otherwise sufficiently advised, the Commission finds that its longstanding practice has been to consider a request for rehearing filed under KRS 278.400 irrespective of whether the determination sought to be reheard was made after a hearing or without a hearing.³ The vast majority of Commission Orders, including those of a procedural nature as well as final adjudications, are entered without a hearing. To limit the application of KRS 278.400 to Orders entered after a hearing would eliminate the ability of an aggrieved party to allow the Commission to timely reconsider its decision before an appeal is filed in the Franklin Circuit Court under KRS 278.410(1). In addition, the Commission does have the continuing authority to reconsider its decisions under KRS 278.390, which provides in pertinent part that "Every order entered by the commission shall continue in force . . . until revoked or modified by the commission"

The Commission granted intervention to the Environmental Groups based on their representations that they were acting on behalf of their members who are served by EKPC and their statements indicating that they possessed sufficient expertise in demand-side management and energy efficiency programs to assist in the review of EKPC's IRP. None of the prior precedents cited by EKPC supports denying intervention when a finding has been made that an Intervenor has such expertise. While the finding in our July 13 Order refers to the Environmental Groups' expertise as "sufficient," we

³ See, e.g., the Commission's June 3, 2008 Order addressing a request for rehearing of the denial of intervention in Case No. 2008-00128, Filing of East Kentucky Power Cooperative, Inc. to Request Approval of Proposed Changes to Its Qualified Cogeneration and Small Power Production Facilities Tariff.

used the term to indicate that they satisfied the threshold to intervene, not to characterize the ranking of their expertise to that of other parties or Commission Staff.

A review of the statements contained in the Environmental Groups' Reply, as well as the studies referenced therein, indicates that EKPC may be correct in its assertion that the Environmental Groups have intervened here to stop construction of Smith 1. However, as the Commission stated in its July 13 Order granting the Environmental Groups' intervention, "[A] case to review an IRP is not an appropriate forum for an intervenor to challenge a prior Commission decision which granted a CPCN to construct a new generating unit based on a finding of need."⁴ Despite the clarity by which we thought this point was made in our July 13 Order, the Environmental Groups' Reply interprets the prohibition of an Intervenor challenging a CPCN in an IRP case to be limited to an inability of the Commission to revoke a CPCN in an IRP case.⁵ The Environmental Groups then rely upon their interpretation as the basis to support their request in this case to discover information relating to Smith 1, which they deem to be the appropriate supply-side resource to be used in comparison to EKPC's demand-side options.

Having reviewed our July 13 Order and the Environmental Groups' Reply, we find that the Environmental Groups have, perhaps inadvertently, misinterpreted the permissible scope of this case as that scope was established by the July 13 Order. The Commission's prior issuance of a CPCN authorizing EKPC to construct Smith 1 is not subject to challenge here. Thus, any effort to compare EKPC's demand-side options to

⁴ July 13 Order at 7.

⁵ Reply at 16.

Smith 1 constitutes a challenge to the need for Smith 1, and any challenge to Smith 1 is a direct challenge to the CPCN authorizing its construction. As discussed in the July 13 Order, there are legitimate ways in which a challenge to Smith 1 could be pursued, but the use of an IRP case is not one of them. Any comparison of EKPC's demand-side options must be made to its projected supply-side resources that have not already been authorized to be constructed pursuant to a CPCN. EKPC's IRP, which covers the 15-year period extending through 2023, projects a need for six additional supply-side resources after Smith 1. It is those resources that are not yet authorized to be constructed by a CPCN and that are properly compared to EKPC's demand-side options. Since the need for Smith 1 is not within the scope of this IRP review, EKPC need not provide the Environmental Groups any non-public information related to Smith 1.


IT IS THEREFORE ORDERED that:

1. That portion of EKPC's request for rehearing seeking reversal of the July 13, 2009 Order granting intervention to the Environmental Groups is denied.
2. That portion of EKPC's request for rehearing seeking clarification of the scope of issues in this IRP case is granted to the extent that any comparison in this IRP review of demand-side options shall be made to supply resources projected after Smith 1 and not authorized by a CPCN.
3. EKPC shall be under no obligation to provide the Environmental Groups any non-public information related to Smith 1.

By the Commission

ENTERED
AUG 19 2009 *M*
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:



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