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December 7, 2009

VIA HAND DELIVERY

Jeff DeRouen
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, KY 40601

RE: ***Application of Kentucky Utilities Company for Certificates of Public Convenience and Necessity and Approval of Its 2009 Compliance Plan for Recovery by Environmental Surcharge***
Case No. 2009-00197

Application of Louisville Gas and Electric Company for a Certificate of Public Convenience and Necessity and Approval of Its 2009 Compliance Plan for Recovery by Environmental Surcharge
Case No. 2009-00198

Dear Mr. DeRouen:

Enclosed please find and accept for filing two originals and ten copies of Kentucky Utilities Company's and Louisville Gas and Electric Company's Response and Objection to Kentucky Waterways Alliance's Motion for Leave to Intervene in the above-referenced matters. Please confirm your receipt of this filing by placing the stamp of your Office with the date received on the enclosed additional copies and return them to me in the enclosed self-addressed stamped envelope.

Should you have any questions please contact me at your convenience.

Yours very truly,

W. Duncan Crosby III

WDC:ec
Enclosures
cc: Michael L. Kurtz (w/encl)
W. Henry Graddy, IV (w/encl)

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COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE APPLICATION OF KENTUCKY UTILITIES FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND APPROVAL OF ITS 2009 COMPLIANCE PLAN FOR RECOVERY BY ENVIRONMENTAL SURCHARGE	)	CASE NO. 2009-00197

In the Matter of:

THE APPLICATION OF LOUISVILLE GAS AND ELECTRIC COMPANY FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY AND APPROVAL OF ITS 2009 COMPLIANCE PLAN FOR RECOVERY BY ENVIRONMENTAL SURCHARGE	)	CASE NO. 2009-00198

RESPONSE AND OBJECTION OF KENTUCKY UTILITIES COMPANY AND LOUISVILLE GAS AND ELECTRIC COMPANY TO KENTUCKY WATERWAYS ALLIANCE'S MOTION FOR LEAVE TO INTERVENE

Kentucky Utilities Company ("KU") and Louisville Gas and Electric Company ("LG&E") (collectively the "Companies") respectfully request that the Commission deny the Motion for Leave to Intervene in these proceedings filed by Kentucky Waterways Alliance ("KWA"). The Commission articulated all of the bases for denying KWA's requested intervention in its October 30, 2009 Order denying intervention to the CDH/Cunningham parties: (1) KWA's Motion to Intervene is egregiously out of time, coming more than 180 days after the Companies filed their Notice of Intent; (2) KWA's only claimed expertise (obtained via outside consultants) concerns the merits of certain environmental permits, which matters the

Commission correctly has stated are outside its jurisdiction; and (3) KWA, in a manner unsurprisingly similar to that of the CDH/Cunningham parties, alleges that Trimble County Unit No. 2 is unnecessary, a claim which is both false and which the Commission held to be an improper collateral attack on the Certificate of Public Convenience and Necessity the Commission granted in Case No. 2004-00507. Finally, KWA's claim that the Commission should grant it full intervention because no party hereto represents the public interest ignores the Commission's role: "The Commission, in its role as the enforcer of KRS Chapter 278 and all regulations promulgated pursuant to that chapter, represents the public interest. *See* KRS 278.040(1) and (3)."[1] For these reasons, the Commission should deny KWA's Motion to Intervene.

I. Persons Who, Like KWA, Fail to Meet the Intervention Requirements Stated in the Commission's Regulations, Are Not Entitled to Intervene in Commission Proceedings.

There is only one person in the Commonwealth of Kentucky who may claim intervention in Commission proceedings as a matter of right: the Kentucky Attorney General.[2] Anyone and everyone else seeking intervention in Commission proceedings must meet the requirements for intervention authored by the Commission, which are set out in 807 KAR 5:001 § 3(8).

The threshold requirement for intervention under 807 KAR 5:001 § 3(8) is that a person seeking intervention must make a **timely** request: "[A]ny person who wishes to become a party to a proceeding before the commission may by timely motion request that he be granted leave to intervene." *Assuming* the threshold requirement of a timely request is met, the requirements for

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[1] *In re Louisville Gas and Electric Company and BellSouth Telecommunications, Inc.: Alleged Violation of Commission Regulations 807 KAR 5:041, Section 3 and 807 KAR 5:061, Section 3*, Case No. 96-246, Order at 3 (Oct. 15, 1996), citing Philipps, *Ky. Prac.*, 5th ed., Civil Rule 24.01 at 422.

[2] *See* KRS 367.150(8).

full intervention, as requested by KWA, are found in 807 KAR 5:001 § 3(8)(b), which provides in pertinent part:

> If the Commission determines that a person has a special interest in the proceeding which is not otherwise adequately represented or that full intervention by party is likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings, such person shall be granted full intervention.

The "special interest" justifying intervention must relate to a utility's rates or service.[3]

II. The Commission Should Deny KWA's Motion to Intervene for Being Exceedingly Untimely.

As stated above, the Commission's regulations require motions to intervene to be made timely.[4] On May 29, 2009, the Companies filed with the Commission their Notices of Intent to file applications in these proceedings, which the Companies subsequently filed on June 26, 2009. Prior to filing their applications, the Companies caused to be published in newspapers in their respective service areas notices of the filing of their applications.[5] In addition, the Companies included in customers' bills in the June 29, 2009 billing cycle general statements explaining the applications.[6] Both notices stated, "Any corporation, association, body politic or person may, **by motion within thirty days after publication**, request leave to intervene...."[7] KWA was on notice of the proceedings and the invitation to intervene within 30 days, and chose to ignore the notice.

Without offering any explanation for its delay, KWA filed its motion for leave to intervene in these proceedings more than **180 days** after the Companies' notices of intent were filed, and more than **150 days** after the Companies completed their publication of notice. In its

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[3] *EnviroPower, LLC v. Public Service Commission of Kentucky*, 2007 WL 289328 at *3 (Ky. Ct. App. 2007).
[4] 807 KAR 5:001 Section 3(8).
[5] *See* Certificates of Completed Notice (Aug. 28, 2009).
[6] *See id.* The Companies also posted notices at their offices and posted copies of their applications on their websites. *Id.*
[7] *See* Exhibits A and B to Certificates of Completed Notice (Aug. 28, 2009) (emphasis added).

October 30, 2009 Order denying the CDH/Cunningham Motion to Intervene in this proceeding, the Commission noted, "[T]he motion to intervene was clearly untimely."[8] If the CDH/Cunningham motion was "clearly untimely" when they filed it on October 6, KWA's December 1 Motion to Intervene is even more "clearly untimely." For this reason alone the Commission should deny KWA's request for intervention; failing to do so would render utterly meaningless the timeliness requirement of 807 KAR 5:001 § 3(8).

Moreover, this case now stands submitted to the Commission, excepting the disposition of the KWA motion. The Companies have submitted two rounds of testimony and responded to discovery requests from the Commission Staff and the Kentucky Industrial Utility Customers, Inc. ("KIUC"). After arm's length negotiations, the Companies and KIUC filed in the record of this proceeding a final settlement agreement on October 16, 2009. The Commission conducted public hearings in this proceeding on November 3, 2009, and December 1, 2009. There are no dates or events remaining on the Commission's procedural schedule for this case. In sum, there is nothing left to be done in this proceeding other than for the Commission to consider the evidence of record and to enter its order thereon, so there could not be a less timely motion to intervene than KWA's.

Also, as a practical matter, there is not sufficient time remaining in these proceedings to grant KWA its egregiously late request to intervene and file new testimony, with all that would entail. KRS 278.183(2) requires the Commission to issue orders approving the Companies' 2009 environmental surcharges and plans within six months of the Companies' filing thereof (i.e., by December 26, 2009, in these proceedings), assuming the Commission "finds the plan[s] and rate surcharge[s] reasonable and cost-effective for compliance with the applicable environmental requirements." It simply is not feasible—and it would certainly be inadvisable—to cram at least

[8] Order at 7.

one round of testimony, discovery, possibly a public hearing, and the Commission's deliberations and drafting of an order into the less than three weeks remaining before the Commission must issue an order in these proceedings under KRS 278.183(2).

Therefore, in sum, the Commission should deny KWA's Motion for Leave to Intervene because: (1) it is grossly untimely per se, coming more than **180 days** after the Companies' notices of intent were filed, and more than **150 days** after the Companies completed their publication of notice; (2) the Commission has already denied the less untimely (though still "clearly untimely") CDH/Cunningham intervention motion; (3) it simply is not possible to fit KWA testimony, discovery, possibly a hearing, and the drafting of a carefully considered order before the statutory deadline of December 26, 2009; and (4) the Commission has consistently denied untimely motions to intervene.[9]

III. The Commission Should Deny KWA's Motion to Intervene Because KWA Does Not Satisfy the Criteria for Intervention Set Forth in 807 KAR 5:001 Section 3(8)(b).

Assuming only for the sake of presenting a complete argument that KWA's exceedingly untimely filing of its Motion for Leave to Intervene is somehow timely, the Commission should

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[9] *In re Adjustment of Gas Rates of the Union Light, Heat and Power Company*, Case No. 2001-00092, Order (Sept. 13, 2001) (motion to intervene by Stand Energy denied when it was filed 80 days after notice and application was filed); *In the Matter of: Application of Kentucky Frontier Gas, LLC for Approval of Financing and Transfer of Control*, Case No. 2008-00394, Order of February 13, 2009 (denying joint motion to intervene filed by B&H Gas Company and Johnson County Gas fifteen days after final order was issued); *In the Matter of: The Petition of Kentucky-Ohio Gas Company for Approval of a Certificate of Convenience and Necessity to Construct Pipeline Facilities, Approval of Financing and Approval of Special Contract*, Case No. 93-144, Order of September 3, 1993 (denying intervention to Columbia Gas of Kentucky when motion to intervene was filed over fours months after the case was established); *In the Matter of: Application of Clark Energy Cooperative, Inc. for Routine Revision of Existing CATV Pole Attachments*, Case No. 2004-00442, Order of March 29, 2005 (denying motion for intervention by Kentucky Cable Telecommunications Association one day before final order entered); *In the Matter of: The Joint Application of Sandy Valley Water District, Southern Water and Sewer District and the City of Pikeville for Approval of the Transfer of Facilities and for the Assumption of Debt by Southern Water and Sewer District*, Case No. 2006-00327, Order of January 29, 2008 (denying as untimely motion to intervene filed by the City of Prestonsburg 85 days following entry of final order); *In the Matter of: Application of Sprintcom, Inc. for Issuance of a Certificate of Public Convenience and Necessity to Construct a Personal Communications Services Facility in the Cincinnati Basic Trading Area [Crittenden Facility]*, Case No. 99-103-UAC, Order of November 4, 1999 (denying motion to intervene filed by the Grant County Planning Commission six months after case was docketed); and *In the Matter of: the Petition of Kentucky-Ohio Gas Company for Approval of Special Contract and Certificate of Convenience and Necessity*, Case No. 92-317, Order of September 21, 1992 (denying motion for intervention filed by Columbia Gas 56 days after filing of petition).

nonetheless deny the motion because there is no basis on which KWA can intervene in these proceedings under 807 KAR 5:001 Section 3(8)(b).

A. KWA cannot have an interest meriting intervention in these proceedings because it does not claim to be a customer of LG&E or KU, nor does it substantiate any claim to represent customers of LG&E or KU.

In its motion, KWA neither claims to be a customer of LG&E or KU, nor does it claim to represent customers of LG&E or KU; as such, KWA cannot intervene in the proceedings on the Companies' applications.[10] (Though KWA's counsel asserted at the December 1, 2009 public comment hearing that KWA does count LG&E and KU customers among its members, KWA's motion makes no such assertion, nor has KWA or its counsel provided any evidence to substantiate such a claim.) A 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,"[11] and a non-customer (or customer-representative) cannot have such an interest. Indeed, this is the explicit ground on which the Commission denied intervention to the CDH/Cunningham parties in the LG&E proceeding (2009-00198) in its October 30, 2009 Order:

> In analyzing the motion to intervene filed by CDH/Cunninghams, we find that they are customers of KU, not LG&E. Since they are not customers of LG&E, they have no interest in the rates or service provided by LG&E and, therefore, they do not satisfy the statutory criteria that must be met to justify being granted intervenor status in an LG&E proceeding.[12]

Because KWA's motion does not state a Commission-jurisdictional interest in the rates or service of LG&E or KU, the Commission should deny the group intervention in both

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[10] *See In re Application of Columbia Gas of Kentucky, Inc., for an Adjustment in Rates*, Case No. 2009-00141, Order at 4 (July 15, 2009) (denying non-customer's motion to intervene); *In the Matter of: Filing of East Kentucky Power Cooperative, Inc. to Request Approval of Proposed Changes To Its Qualified Cogeneration and Small Power Production Facilities Tariff*, Case No. 2008-00128 Order at 4 (April 28, 2008) (denying Geoffrey Young's petition for full intervenor status because he is not a customer of EKPC).

[11] *EnviroPower, LLC v. Public Service Commission of Kentucky*, 2007 WL 289328 at *3 (Ky. Ct. App. 2007) (not to be published).

[12] Order at 5.

proceedings, just as it denied the CDH/Cunningham parties intervention in the LG&E proceeding for not being LG&E customers.

B. KWA's claimed special interest in environmental issues is not jurisdictional to the Commission and cannot be a ground for intervention.

Just as the Commission held in its October 30, 2009 Order in these proceedings that the CDH/Cunningham parties' environmental concerns were outside the Commission's jurisdiction, so the Commission should find KWA's primary interest and proposed ground for intervention—environmental interests—are beyond the jurisdiction of the Commission, requiring the Commission to deny KWA intervention herein. Little more than a month ago in these very proceedings, the Commission held:

> The Commission's jurisdiction is limited by statute to the regulation of utility rates and service. To the extent that CDH/Cunninghams seek to pursue environmental issues, such as the "significant air pollution" from KU's coal-fired generating plants or the regional level of per capita carbon emissions in Kentucky, those issues are beyond the scope of the Commission's jurisdiction.[13]

Similarly, the Commission stated in a recent order denying a petition to intervene in the Companies' IRP proceeding, "Notably absent from the Commission's jurisdiction are environmental concerns, which are the responsibility of other agencies within Kentucky state government ...."[14] This is consistent with KRS 278.040(2), which grants the Commission jurisdiction with respect to "the regulation of rates and service of utilities," and the Kentucky Court of Appeals' statement, in an unpublished decision, that:

> The PSC's exercise of discretion in determining permissive intervention is, of course, not unlimited. 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"**

[13] October 30, 2009 Order at 8.
[14] *In re The 2008 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company*, Case No. 2008-00148, Order at 5 (July 18, 2008).

> **of a utility, since those are the only two subjects under the jurisdiction of the PSC.**[15]

Thus, to the extent KWA seeks to intervene to express its views on the environmental impact of the Companies' facilities, the Commission and the Court of Appeals have clearly stated that the Commission's jurisdiction simply does not extend to such issues. Those concerns are consequently irrelevant to the Commission's ruling on the Companies' applications, and KWA cannot intervene on those grounds.[16]

Yet KWA's motion could not be clearer in stating that the group's primary interest in this proceeding is environmental, having nothing to do with the rates or service of LG&E or KU.

> "Specifically, KWA is a statewide organization whose mission includes protection of the water quality in the waters of the Commonwealth, including the Ohio River and the Kentucky River."[17]
>
> ...
>
> KWA has a unique and particularized and long-standing interest in abating existing water pollution sources, restoring impaired water bodies and preventing the creation of new or increased sources of water pollution throughout the Commonwealth of Kentucky, including the Ohio River. As such, KWA brings to the Commission both the general public interest in preventing water pollution and the particularized special interest of an established organization with special expertise in the area of water pollution.[18]

Whatever the merits of KWA's environmental concerns, they lie entirely outside the jurisdiction of this Commission, as the Commission stated as recently as October 30, 2009, and

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[15] *EnviroPower, LLC v. Public Service Commission of Kentucky*, 2007 WL 289328 at *3 (Ky. Ct. App. 2007) (not to be published) (emphasis added).

[16] State agencies other than the Kentucky Public Service Commission are statutorily tasked with addressing environmental concerns. In the Commonwealth, the Energy and Environment Cabinet ("EEC") has the statutory responsibility to "[p]repare and develop a comprehensive plan or plans related to the environment of the Commonwealth." KRS 224-10.100(2). And the Kentucky Division for Air Quality, a division of the EEC, has jurisdiction over air emissions issues. *See* 401 KAR 50:012.

[17] KWA Motion at 2.

[18] *Id.* at 6-7.

cannot be the "special interest in the proceeding which is not otherwise adequately represented" justifying KWA's intervention.

KWA makes only one other claim of interest in this proceeding, namely, "No other party to this proceeding represents the public interest."[19] This claim is simply incorrect. "The Commission, in its role as the enforcer of KRS Chapter 278 and all regulations promulgated pursuant to that chapter, represents the public interest. *See* KRS 278.040(1) and (3)."[20] Claiming to represent the general public interest therefore cannot be sufficient ground for intervention in these proceedings.

C. The Testimony KWA Proposes to Submit If It Is Allowed to Intervene Would Be Irrelevant, Serving Only to Complicate Unduly and to Disrupt these Proceedings.

Only two issues are relevant to the Companies' applications – (1) whether the public convenience and necessity require the proposed new facilities and whether the facilities will create wasteful duplication,[21] and (2) whether the Companies' proposed plans and surcharges "are reasonable and cost-effective for compliance with the applicable environmental requirements."[22] Nothing in KWA's Motion for Leave to Intervene suggests the group will be able to assist the Commission in deciding either issue.

KWA first proposes to offer environmental testimony, which would be wholly irrelevant to these proceedings because it would address subject matter not jurisdictional to the Commission:

> KWA has obtained the professional services of experts to assess the recently proposed draft KPDES discharge permit for the

[19] KWA Motion at 3.
[20] *In re Louisville Gas and Electric Company and BellSouth Telecommunications, Inc.: Alleged Violation of Commission Regulations 807 KAR 5:041, Section 3 and 807 KAR 5:061, Section 3*, Case No. 96-246, Order at 3 (Oct. 15, 1996), citing Philipps, *Ky. Prac.*, 5th ed., Civil Rule 24.01 at 422.
[21] KRS 278.020(1). *See also Kentucky Utilities Company v. Public Service Commission of Kentucky*, 252 S.W.2d 885, 890 (Ky. 1952) (analyzing whether the pubic convenience and necessity require the proposed new facilities are needed and will not create wasteful duplication)
[22] KRS 278.183(2)(a).

> Trimble County facilities ... that are or will discharge wastewater into the Ohio River. These are the same Trimble County facilities described in the above referenced applications. KWA and Sierra Club retained Mr. Mark Quarles, Globally Green Consulting, who provided written comments in opposition to the proposed KPDES permit.[23]

As KWA's motion says, this is testimony appropriate for the Kentucky Division of Water, which issues permits under the KPDES, the Kentucky Pollutant Discharge Elimination System. But it is not testimony appropriate for the Commission, which has no jurisdiction over environmental matters. This indicates that KWA's intervention in these proceedings, rather than helping the Commission to consider the only two issues relevant herein, would serve to "unduly complicat[e] or disrupt[] the proceedings."

KWA further proposes to submit irrelevant testimony on what it describes as "proposed new requirements" that the "US EPA is very close to announcing" concerning "coal combustion residue."[24] What is in fact the case is that the U.S. Environmental Protection Agency has over the last 20 years considered how to classify coal combustion byproducts, and has twice declined to determine coal combustion wastes to be hazardous material. Though it now appears that the agency will indeed submit for public comment and a rulemaking process a set of proposed regulations concerning such byproducts, neither KWA nor the Companies know the precise content of the proposed rules. Moreover, such proposed regulations typically change, sometimes dramatically, over the course of the EPA's rulemaking process, which ordinarily takes at least 18 months. Though actual EPA regulations are indirectly relevant to proceedings of this kind, draft federal environmental regulations that have not even been proposed have no bearing on the only two issues that are relevant to this case as a matter of statutory law: (1) whether the proposed

[23] KWA Motion at 2.
[24] *Id.* at 3.

new facilities are needed and will not create wasteful duplication,[25] and (2) whether the Companies' proposed plans and surcharges "are reasonable and cost-effective for compliance with the applicable environmental requirements."[26] Draft EPA regulations that are not publicly available and that may not be enacted at all, much less in their original draft form, are not "applicable environmental requirements"; at best, they are potential environmental requirements. If and when federal, state, or local authorities enact environmental regulations that impact how the Companies handle or dispose of coal combustion byproducts, the Companies will propose to the Commission what they believe to be the most reasonable and cost-effective means of complying therewith. Until that time comes, if ever it does, testimony on hypothetical draft federal environmental regulations would be irrelevant and would serve only to delay and disrupt these proceedings. Indeed, the Commission adequately considered this contingency at the hearing.[27]

D. The Remainder of the KWA Motion, Which Is Nearly Word-for-Word Identical to the Equivalently Numbered Paragraphs of the CDH/Cunningham Motion for Leave to Intervene, Shows that KWA's Intervention Would Serve Only to Complicate Unduly and to Disrupt these Proceedings.

KWA and the CDH/Cunningham parties, the latter of which the Commission denied intervention in these proceedings on October 30, 2009, have at least one thing in common: common counsel. It is perhaps not coincidental, then, that the paragraphs numbered 6 through 9 in the KWA Motion for Leave to Intervene are nearly identical to the equivalently numbered paragraphs of the denied CDH/Cunningham Motion for Leave to Intervene. Just as the Commission did not find cause to grant the CDH/Cunningham parties on the basis of those

[25] *Kentucky Utilities Company v. Public Service Commission of Kentucky*, 252 S.W.2d 885, 890 (Ky. 1952).
[26] KRS 278.183(2)(a).
[27] *See* Transcript of Evidence at 48-50, 52-54, and 57-58 (Nov. 3, 2009).

paragraphs, so the Companies respectfully request the Commission not to find reason to grant intervention to KWA on the basis of the content of the nearly identical paragraphs in its motion.

Specifically, the first three sentences of KWA's paragraph 6 is nearly identical to the CDH/ Cunningham paragraph 6, which allege that certain of the Companies' facilities "cause significant air pollution" and "pose threats to water quality."[28] Similarly, KWA's paragraph 7 is nearly identical to the CDH/ Cunningham paragraph 7, asserting that several parts of Kentucky have large carbon footprints. As already noted above, these environmental concerns simply are not jurisdictional to this Commission. Concerning the CDH/Cunningham parties' motion on these same points, the Commission wrote: "The Commission's jurisdiction is limited by statute to the regulation of utility rates and service. To the extent that CDH/Cunninghams seek to pursue environmental issues, such as the 'significant air pollution' from KU's coal-fired generating plants or the regional level of per capita carbon emissions in Kentucky, those issues are beyond the scope of the Commission's jurisdiction."[29] The Commission should so find concerning KWA's motion, as well.

The last two sentences of paragraph 6, which do not have an analog in the CDH/Cunningham motion, assert that KU gave "vague and evasive" responses to data requests and questions at hearing concerning the age and plans for retiring the E.W. Brown generating units.[30] KU denies being vague or evasive; regardless, the Commission has clearly stated that merely having a position on an issue is not a sufficient ground for intervening in a Commission proceeding.[31]

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[28] KWA Motion at 4.
[29] October 30, 2009 Order at 8.
[30] KWA Motion at 4.
[31] *In re Joint Application of Louisville Gas and Electric Company, Association of Community Ministries, Inc., People Organized and Working for Energy Reform, and Kentucky Association for Community Action, Inc. for the Establishment of a Home Energy Assistance Program*, Case No. 2007-00337, Order at 6 (Sept. 14, 2007)

Paragraph 8 of the KWA motion is verbatim identical to paragraph 8 of the CDH/Cunningham motion, and makes erroneous and misleading claims about the status of the air permit necessary for the operation of TC2, leading KWA to conclude, again erroneously, that there is a basis for "re-examin[ing] the scheduled start-up and operation of the TC2 facility."[32] KWA further claims, "If that facility is not permitted or if it is not needed by June 2010, the imposition of these surcharges is likewise able to be delayed."[33]

Notwithstanding KWA's speculations, its assertions about these permits are incorrect. The EPA orders and letter cited in the KWA motion as evidencing EPA's "disapproval" of the air permit are merely the mechanism by which EPA notifies the Kentucky Division for Air Quality of permit deficiencies which must be corrected in the course of the permitting process. The Companies are working with the Division on permit revisions which address EPA's comments. Nothing in the EPA determinations changes the legal status of the air permit: *it is and remains in full force and effect.* The Companies expect to be able to operate the plant with no changes to its emission controls. Likewise, the Trimble County Station currently has a KPDES permit for water discharges. The Companies are currently seeking a renewal of that existing permit which includes various changes to address the operational requirements of the Trimble County Generation Station generally, and not just for TC2. It is, therefore, inaccurate to assert that LG&E and KU lack all the permits necessary to operate TC2, and these arguments are simply a red herring asserted by KWA for the purpose of seeking to delay these proceedings.

Moreover, the Commission has, in case after case, successfully discharged its responsibility under KRS Chapter 278 to act on cases before it in a timely manner, without

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("[H]old[ing] a particular position on issues pending in ... [a] case does not create the requisite 'special interest' to justify full intervention under 807 KAR 5:001, Section 3(8)(b)").

[32] KWA Motion at 4-5.

[33] *Id.* at 5.

waiting on the resolution of parallel issues or the actions of other agencies. Commission orders dealing with issues across the spectrum of utility regulation demonstrate that the Commission has routinely issued final orders conditioned upon the *future* occurrence of certain necessary events, or the issuance of other agency approvals or permits.[34] The construction of power plants and pollution control equipment is not an exception. Multiple federal, state, and local approvals and permits must be obtained to construct, operate, and maintain these facilities, all of which approvals and permits are pursued and obtained on multiple and ongoing paths. The argument that all permits and approvals must be obtained before an agency acts on the next approval is a classic obstructionist strategy. Early this year, the Commission observed:

> The Commission frequently reviews transactions before the requisite approvals from other entities have been obtained and before all conditions precedent have been satisfied. In these situations, if the Commission finds that the transaction should be approved and that there are conditions precedent which are of critical importance, the transaction can be approved with appropriate conditions to insure that the conditions precedent are satisfied.[35]

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[34] *See, e.g., Application of Bluegrass Wireless LLC for Issuance of a Certificate of Public Convenience and Necessity to Construct a Cell Site (Woodbine) in Rural Service Area #11 (Whitley) of the Commonwealth of Kentucky,* PSC Case No. 2008-00080 (Order dated Sept. 26, 2008) (issuing final order even though the applicant's applications with the Federal Aviation Administration and the Kentucky Airport Zoning Commission remained pending, and instructing the applicant to file copies of the final decisions of the FAA and KAZC within ten days of receiving them); *Joint Application of Class Construction, Inc. and Coolbrook Utilities, LLC for Approval of the Transfer of Wastewater Treatment Plant to Coolbrook Utilities, LLC*, PSC Case No. 2008-00257 (Order dated Oct. 21, 2008) (approving the transfer of the utility upon the condition that the buyer obtain an irrevocable letter of credit and line of credit and the necessary permits for the operation of the utility, including a Kentucky Pollutant Discharge Elimination System Permit); *Joint Application for Transfer of Louisville Gas and Electric Company and Kentucky Utilities Company in Accordance with E.ON AG's Planned Acquisition of Powergen PLC,* PSC Case No. 2001-104 (Order dated Aug. 6, 2001) (approving the transfer upon numerous conditions, including the requirement that the necessary approvals of other federal and state agencies be filed with the Commission within ten days of receipt).

[35] *See, The Application of Big Rivers Electric Corporation for: (i) Approval of Wholesale Tariff Additions for Big Rivers Electric Corporation, (ii) Approval of Transactions, (iii) Approval to Issue Evidences of Indebtedness, and (iv) Approval of Amendments to Contracts; and of E.ON U.S. LLC, Western Kentucky Energy Corp., and LG&E Energy Marketing, Inc. for Approval of Transactions*, PSC Case No. 2007-00455 (Order dated March 6, 2009); *Joint Application of PowerGen plc, LG&E Energy Corp., Louisville Gas and Electric Company and Kentucky Utilities Company for Approval of Merger*, PSC Case No. 2000-00095 (Order dated May 15, 2000), and *Joint Application for Transfer of Louisville Gas and Electric Company and Kentucky Utilities Company in Accordance with E.ON AG's Planned Acquisition of PowerGen plc,* PSC Case No. 2001-00104 (Order dated Aug. 6, 2001). Indeed, KRS 278.020(1), pursuant to which the Commission approves utility construction, expressly contemplates that the

There is, therefore, no reason to believe that TC2 will experience any delay associated with its environmental permits, nor does the Commission need to delay issuing a final order in this proceeding on the basis that a permit or permits are not in place in order to discharge its responsibilities under KRS 278.183. To the extent that a utility proceeds imprudently with the construction or operation of facilities, the Commission has not hesitated to protect the customers.

Finally, just as did the CDH/Cunningham parties in paragraph 9 of their motion, KWA appears to argue in its paragraph 9 that the Companies may be able to satisfy their anticipated increased demand through demand-side management, rendering TC2—and the proposed landfill and surcharge associated with TC2—unnecessary.[36] KWA's position does not justify intervention.

First, the Cunninghams' argument that TC2 may be rendered unnecessary (or may ultimately not come to fruition, as KWA argues in paragraph 8) is merely a collateral attack on the CPCNs this Commission previously granted for TC2.[37] The Commission made clear in its October 30, 2009 Order in these proceedings that such a line of argument is irrelevant to, and inappropriate in, these proceedings:

> With respect to the issues raised by CDH/Cunninghams relating to the need and timing of TC2, the Commission finds that those issues are beyond the scope of the issues raised by KU's application in this proceeding. In addition, the need and timing of TC2 are issues that were previously adjudicated in Case No. 2004-00507, which resulted in LG&E and KU being granted CPCNs to

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Commission will issue its orders without reference to matters within the jurisdiction of other agencies, providing that the year-long "shelf life" of a CPCN can be extended beyond one year if other necessary "grant[s] or consent[s]" have not yet been obtained. The statute's factual scenario presupposes that issues outside the Commission's jurisdiction can (and do) remain unresolved after the Commission issues its orders.

[36] KWA Motion at 5-6.

[37] *In re Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company for a Certificate of Public Convenience and Necessity, and a Site Compatibility Certificate, for the Expansion of the Trimble County Generating Station*, Case No. 2004-00507, Order at 7 (Nov. 1, 2005) (granting CPCN for TC2); *In re Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company for the Construction of Transmission Facilities in Jefferson, Bullitt, Meade and Hardin Counties, Kentucky*, Case Nos. 2005-00467 and 2005-00472, Order at 23 (May 26, 2006) (granting CPCN to construct proposed 345 kV transmission line).

> construct TC2. The need and timing for TC2 cannot now be collaterally attacked in this case, irrespective of whether that attack is by presenting a recent FERC study on the potential to reduce peak electric load 10 years from now or by questioning the status of operating permits issued by other agencies.[38]

In an analogous case, the Commission ruled in *In the Matter of: the 2008 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company*, that certain parties' opposition to the construction of an already-certificated facility is not a proper basis for intervention in other proceedings.[39] In that case, the Cunninghams, their witness, Geoffrey Young, and their lawyer, Elizabeth Bennett, all attempted to intervene and raise many of the same issues KWA seeks to raise here. For example, they questioned the need for TC2, argued about demand-side management issues, and expressed environmental concerns. In its order of July 18, 2008, the Commission found that neither the Cunninghams, their witness, nor their lawyer had a special interest not otherwise adequately represented. It found that it had no jurisdiction to consider their environmental concerns. It made the following additional finding:

> The CDH/Cunningham/Bennett petitioners argue that if LG&E/KU were able to meet their anticipated growth in demand through demand-side management and electric generation other than coal-burning facilities, the transmission facilities that were approved by the Commission in Case Nos. 2005-00467 and 2005-00472 would not be needed. LG&E/KU allege in their response that this argument is merely a collateral attack on the CPCN. The Commission agrees with LG&E/KU that such grounds are not proper for intervention pursuant to 807 KAR 5:001, Section 3(8)(b), and, therefore, the Commission denies the CDH/Cunningham/Bennett petition on those grounds.[40]

The Cunninghams and Mr. Young sought rehearing of the July 18, 2008, order denying their requests for full intervention. By order dated August 25, 2008, the Commission denied rehearing

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[38] Order at 7-8.
[39] *In re The 2008 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company*, Case No. 2008-00148, Order at 11 (July 18, 2008).
[40] *Id.*

and reiterated its determination that they should not be granted full intervenor status.[41] The Commission properly denied full intervention in the IRP case and the same reasoning compels denial of KWA's Motion for Leave to Intervene here.

In sum, the irrelevant, extra-jurisdictional, and extraneous issues KWA discusses in its motion are a clear indication that KWA will unduly disrupt and complicate these proceedings. The Commission consistently denies requests for full intervention when the proposed intervenor has not demonstrated that he/she is likely to present issues or develop facts that will assist the Commission in fully considering the matter,[42] but instead will unduly complicate or disrupt the proceedings.[43] Moreover, just over a month ago the Commission denied intervention to the

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[41] *In re the 2008 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company*, Case No. 2008-00148, Order at 2-6 (August 25, 2008).

[42] *In re the 2008 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company*, Case No. 2008-00148, Order (July 18, 2008); *In re Joint Application of Louisville Gas and Electric Company, Association of Community Ministries, Inc., People Organized and Working for Energy Reform, and Kentucky Association for Community Action, Inc. for the Establishment of a Home Energy Assistance Program*, Case No. 2007-0037, Order at 7 (Sept. 14, 2007) (denying intervention where individual had not demonstrated educational and professional background to intervene as expert witness); *In re An Investigation into East Kentucky Power Cooperative, Inc.'s Continued Need for Certificated Generation*, Case No. 2006-00564, Order at 4 (March 22, 2007) (expertise in alternative energy strategies would not assist Commission in proceeding involving utility's expected power requirements); *In re Application of East Kentucky Power Cooperative, Inc. for a Certificate of Public Convenience and Necessity, and a Site Compatibility Certificate, for the Construction of a 278 MW (Nominal) Circulating Fluidized Bed Coal Fired Unit and Five 90 MW (Nominal) Combustion Turbines in Clark County, Kentucky*, Case No. 2005-00053, Order at 2 (April 18, 2005) (denying intervention where issues raised were subject of ongoing investigation "and it would be inefficient and duplicative to conduct a second investigation of those same issues in this case"); *In re Application of Louisville Gas and Electric Company and Kentucky Utilities Company for a Certificate of Public Convenience and Necessity for the Acquisition of Four Combustion Turbines and a Site Compatibility Certificate for the Facility*, Case No. 2002-00381, Order at 2 (Feb. 20, 2003) (denying intervention where sole interest was a matter not at issue in proceeding); *In re The Joint Petition of Kentucky-American Water Company, Thames Water Aqua Holdings GmbH, RWE Aktiensgeselschaft, Thames Water Acquisition Company and American Water Works Company, Inc. for Approval of a Change of Control of Kentucky-American Water Company*, Case No. 2002-00317, Order at 2-3 (Oct. 3, 2002) (denying intervention to group that operated internet site with resources on globalization of water sources and international multi-utility ownership where site was accessible to general public); *In re the Joint Application of Kentucky Power Company, American Electric Power Company, Inc. and Central and South West Corporation Regarding a Proposed Merger*, Case No. 99-149, Order at 2(May 20, 1999) (denying intervention where proposed interest was already under investigation by the Commission in another matter); *In re The Proposed Tariff of South Central Bell Telephone Company for Proposed Area Calling Service Expansion*, Case No. 93-114, Order at 3-4 (June 11, 1993) (denying motion to intervene where issues raised were resolved in prior proceeding to which proposed intervenor was a party and all relevant facts and issues had been fully developed in that proceeding).

[43] *In re the 2008 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company*, Case No. 2008-00148, Order (July 18, 2008) (denying intervention on basis of issues not relevant or jurisdictional to proceeding and/or within Commission's jurisdiction; *In re An Investigation into East Kentucky*

CDH/Cunningham parties, who expressed nearly identical concerns and views as those KWA expresses in its motion—often in exactly the same words. For these reasons, the Companies respectfully request the Commission to deny KWA intervention in these proceedings.

IV. The Commission Should Explicitly Deny KWA's Attempted Incorporation by Reference of the "Exhibits" Presented at the December 1, 2009 Public Comment Hearing.

KWA's Motion for Leave to Intervene creates an evidentiary issue by claiming to incorporate by reference material that: (1) the Commission has not accepted into evidence in these or any other proceedings; and (2) was presented after the close of testimony in these proceedings. Specifically, the motion claims to incorporate by reference, "the Exhibit #30 attached to the written comments submitted by Graddy for Sierra Club, KWA, Valley Watch and Save the Valley on December 1, 2009,"[44] as well as, "all of the written comments submitted by the Sierra Club, KWA, Valley Watch and Save the Valley, with all supporting Exhibits at the December 1, 2009 public hearing in this matter ...."[45] This is an attempt to turn hundreds of pages of hearsay non-evidence into evidence of record, and it is important that the Commission explicitly reject that attempt.

The Commission has expressly addressed in 807 KAR 5:001 § 5 both the timing of when the Commission will receive evidence and the narrow manner in which it will allow

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Power Cooperative, Inc.'s Continued Need for Certificated Generation, Case No. 2006-00564, Order at 4, 6 (April 19, 2007) (injecting issues outside Commission's jurisdiction would unduly complicate and disrupt the proceeding); *In re An Adjustment of the Electric Rates, Terms, and Conditions of Louisville Gas and Electric Company*, Case No. 2003-00433, Order at 3 (Jan. 21, 2004) ("The filing of what purports to be expert testimony by one who is not an expert tends to complicate and disrupt the proceedings, rather than presenting issues or developing facts that will assist the Commission."); *In re Louisville Gas and Electric Company: Alleged Failure Pursuant to 807 KAR 5:041, Section 3, to Comply with National Electric Safety Code ("NESC"), 1990 Edition, Section 23, Clearances, Rule 234 B, 1&2*, Case No. 98-592, Order at 2 (Jan. 25, 1999) (intervention to assert interest outside scope of proceeding with unduly complicate proceeding in which no material facts remained in dispute); *In re Ronald and Kimberly Woods v. Louisville Gas and Electric Company and Salt River Electric Cooperative Corporation*, Case No. 97-098, Order at 3 (July 14, 1997) (where issues raised by proposed intervenors were better addressed by other forums, intervention was "likely to unduly complicate and delay" proceedings).

[44] KWA Motion at 6.

[45] *Id.* at 7.

incorporation by reference. KWA's attempted incorporation by reference violates both relevant subsections:

> (4) Except as may be expressly permitted in particular instances, the commission will not receive in evidence or consider as a part of the record any book, paper or other document for consideration in connection with the proceeding after the close of the testimony.
>
> (5) Upon motion of any party to a proceeding, any case in the commission's files or any document on file with the commission, at the discretion of the commission may be made a part of the record by "reference only." By reference only, the case or document made a part of the record will not be physically incorporated into the record. Upon action in the Franklin Circuit Court, excerpts from any case or part of any document may be made a part of the record before such court, at the instance of any party.

Concerning 807 KAR 5:001 §5(4), the close of testimony occurred in this proceeding no later than the first public hearing in this proceeding—which KWA's counsel attended—on November 3, 2009. Because the Commission has not granted, nor has KWA requested, "express[] permi[ssion] in [this] particular instance[]" to introduce the hundreds of pages of mostly irrelevant "Exhibits" presented at the public comment hearing on December 1, the "Exhibits" cannot be introduced into the record of this proceeding by any means.

Certainly the "Exhibits" cannot be included in the evidentiary record of this proceeding by means of "incorporation by reference." 807 KAR 5:001 §5(5) sets the narrow boundaries within which such incorporation may occur: (1) a party to a proceeding must be the person seeking such incorporation; (2) the Commission can only grant such incorporation upon the motion of a party; and (3) the items to be incorporated must be "on file" with the Commission, which the Companies respectfully suggest means the items must have been accepted into the record of a Commission proceeding. KWA's attempted incorporation by reference must fail in its entirety due to the first two requirements: (1) KWA is not a party to these proceedings; and (2) it has not moved the Commission for permission to incorporate anything by reference. With

the exception of a small handful of documents (e.g., the testimony of John Voyles in these proceedings and the Companies' 2008 Integrated Resource Plan), all of the items KWA claims to incorporate fail the third requirement, too, because they are not in the record of *any* Commission proceeding. (Concerning KWA's claimed incorporation of the testimony of John Voyles and any other documents already in the record of these proceedings, an additional objection to KWA's incorporation of them is that it would be cumulative to introduce them into the record a second time, unnecessarily cluttering the record.)

Moreover, the Commission has on at least one occasion denied the incorporation by reference into the record of a proceeding the testimony filed in the record of another Commission proceeding on the grounds that: (1) 807 KAR 5:001 §5(5) pertains only to documentary, not testimonial, evidence; (2) due process required cross-examination of the witness; and (3) the party seeking incorporation had not shown that the witness who had testified in the other proceeding could not appear again to testify.[46] All of the same objections apply to all of the "Exhibits" that are testimonies, comments, and the like, including the one upon which KWA seems most to want to rely, namely the written comments Mark Quarles of Globally Green Consulting supplied to the Kentucky Division of Water.

Concerning the vast majority of the "Exhibits," which address environmental issues extra-jurisdictional to the Commission and irrelevant to these proceedings, additional support for refusing to admit them into the record of this proceeding is found in 807 KAR 5:001 § 5(2):

> (2) Where relevant and material matter offered in evidence by any party is embraced in a book, paper or document containing other matter not material or relevant the party must plainly designate the matter so offered. If such immaterial matter unnecessarily encumbers the record, such book, paper or document will not be received in evidence, but may be described for identification, and

[46] *In the Matter of: Auxier Water Co. v. City of Prestonsburg and Prestonsburg City's Utilities Comm'n*, Case No. 1996-00362, Order at 2 (Feb. 9, 1998).

> if properly authenticated, the relevant and material matter may be read into the record, or if the commission, or commissioner conducting the hearing, so directs, a true copy of such matter in proper form shall be received as an exhibit, and like copies delivered by the parties offering same to opposing parties, or their attorneys, appearing at the hearing, who shall be offered the opportunity to examine such book, paper or document, and to offer evidence in like manner other portions thereof if found to be material and relevant.

This regulatory provision establishes a rule that a single document containing material and relevant information "will not be received into evidence" if it also contains immaterial information so as to "unnecessarily encumber[] the record." *A fortiori*, documents containing nothing but immaterial and irrelevant information—nearly the whole of the "Exhibits"—must be excluded from the record of evidence in these proceedings.

Finally, there is no doubt about the status of the "Exhibits" or the public comments they accompanied; as KWA admitted in its motion, "At the December 1, 2009 public hearing, KWA and others who submitted comments were not actually giving testimony, were not sworn in and were not cross-examined. The 'Exhibits' KWA and others tendered were not actually admitted into evidence, and do not require any response from the utilities."[47] For all these reasons, the Commission should explicitly state in its order denying intervention to KWA that the "Exhibits" are not evidence, but rather are inadmissible hearsay documents addressing almost exclusively irrelevant and extra-jurisdictional environmental matters, presented to the Commission by a non-party, to which the Commission will appropriately give little, if any, weight, and that it is denying KWA's attempt to incorporate by reference the "Exhibits" into the record of these proceedings.

[47] KWA Motion at 2-3.

V. Conclusion

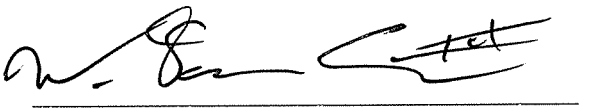
KWA's motion to intervene should be denied because it is untimely and the group's intervention would prejudice the parties to this proceeding. It is even more untimely than the CDH/Cunningham motion to intervene that the Commission found to be "clearly untimely" in its October 30, 2009 Order in this proceeding.

Moreover, KWA has not presented any ground upon which the Commission can grant the group intervention, and its motion should alternatively be denied for that reason. More specifically, KWA has not presented a special interest in these proceedings that is jurisdictional to the Commission, nor has KWA demonstrated that its participation would assist the Commission in any way; instead, it seems clear KWA's intervention would unduly complicate and disrupt the proceedings herein. Finally, to the extent KWA's interest in these proceedings is based on concerns about the environmental impact of the facilities involved, the law is clear that those issues are outside the Commission's jurisdiction.

If the Commission does indeed deny KWA's Motion for Leave to Intervene, the Companies respectfully request that the Commission clearly state that it is also denying KWA's attempted "incorporation by reference" of the "Exhibits" presented by those giving public comment at the December 1, 2009 hearing on the grounds given in 807 KAR 5:001 § 5(4)-(5), as well as 807 KAR 5:001 § 5(2).

Dated: December 7, 2009

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served on the following persons on the 7th day of December 2009, by United States mail, postage prepaid:

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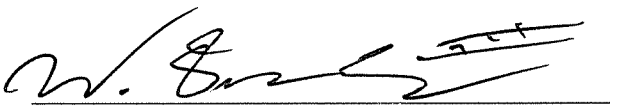

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