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April 27, 2011

Via Hand-Delivery

Mr. Jeffrey Derouen
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
P. O. Box 615
Frankfort, Kentucky 40602-0615

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Re: In the Matter of: The Joint Application of Duke Energy Corporation,
Cinergy Corp., Duke Energy Ohio, Inc., Duke Energy Kentucky, Inc.,
Diamond Acquisition Corporation, and Progress Energy, Inc., for
Approval of the Indirect Transfer of Control of Duke Energy Kentucky, Inc.
PSC Case No. 2011-00124


Dear Mr. Derouen:

Please find enclosed an original and nine (9) copies each of Joint Applicants' Motion to Amend Procedural Schedule to Allow for Rebuttal Testimony and Response in Opposition to Stand Energy Corporation's Motion to Intervene.

Please file these documents in the record and return file-stamped copies to me.

Please do not hesitate to contact me if you have any questions.

Sincerely yours,



David S. Samford

Enclosures

cc: Dennis G. Howard, II
Larry Cook

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

**THE JOINT APPLICATION OF DUKE ENERGY)
CORPORATION, CINERGY CORP., DUKE)
ENERGY OHIO, INC., DUKE ENERGY)
KENTUCKY, INC., DIAMOND ACQUISITION)
CORPORATION, AND PROGRESS ENERGY, INC.)
FOR APPROVAL OF THE INDIRECT TRANSFER)
OF CONTROL OF DUKE ENERGY KENTUCKY, INC.)**

CASE NO. 2011-00124

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APR 27 2011

**PUBLIC SERVICE
COMMISSION**

**JOINT APPLICANTS' MOTION TO AMEND PROCEDURAL
SCHEDULE TO ALLOW FOR REBUTTAL TESTIMONY**

Come now Duke Energy Corporation, Cinergy Corp., Duke Energy Ohio, Inc., Duke Energy Kentucky, Inc., Diamond Acquisition Corporation and Progress Energy, Inc. (collectively referred to as "Joint Applicants"), and move the Commission for an Order amending the Procedural Schedule contained in its April 21, 2011 Order to allow for the opportunity to file rebuttal testimony by Joint Applicants.

In support of this motion, the Joint Applicants state that the current Procedural Schedule does not provide for the opportunity to file rebuttal testimony. While the Joint Applicants recognize that the timeframe for adjudication of this case is compressed by virtue of the 120-day deadline contained in KRS 278.020(6),¹ the Joint Applicants believe that the parties and the Commission would benefit from an opportunity for Joint Applicants to file rebuttal testimony in the event that such filing becomes necessary in order to more efficiently adjudicate the entire

¹ In its April 21, 2011 Order, the Commission found that the investigation of the proposed indirect transfer of control cannot be completed within 60 days of the filing date of the application and that the consideration of the Joint Applicants' request for approval should be continued for an additional 60 days.

case, especially since the Attorney General has intervened in the case and there may be other similar interventions by third parties.

Depending upon how the case progresses, it may well prove unnecessary for Joint Applicants to file rebuttal testimony. However, in the event that it becomes necessary to do so, it is more prudent for the Commission to build this time into the Procedural Schedule now rather than waiting until the last minute to do so.

WHEREFORE, the Joint Applicants respectfully request that the Commission enter an Order amending its Procedural Schedule to allow for the opportunity to file rebuttal testimony.

This 27th day of April, 2011.

Respectfully submitted,



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*Counsel for Joint Applicants,
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Duke Energy Ohio, Inc.
Duke Energy Kentucky, Inc.
Diamond Acquisition Corporation
Progress Energy, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was mailed, first class postage prepaid, this 27th day of April, 2011 to the following parties of record:

Hon. Dennis G. Howard, II
Hon. Lawrence Cook
Assistant Attorneys General
Utility and Rate Intervention Division
P. O. Box 2000
Frankfort, Kentucky 40602-2000



*Counsel for Joint Applicants,
Duke Energy Corporation
Cinergy Corp.
Duke Energy Ohio, Inc.
Duke Energy Kentucky, Inc.
Diamond Acquisition Corporation
Progress Energy, Inc.*

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PUBLIC SERVICE
COMMISSION

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

THE JOINT APPLICATION OF DUKE ENERGY)
CORPORATION, CINERGY CORP.,)
DUKE ENERGY OHIO, INC., DUKE ENERGY) CASE NO. 2011-00124
KENTUCKY, INC., DIAMOND ACQUISITION)
CORPORATION, AND PROGRESS ENERGY, INC.,)
FOR APPROVAL OF THE INDIRECT TRANSFER)
OF CONTROL OF DUKE ENERGY KENTUCKY, INC.)

**RESPONSE IN OPPOSITION TO STAND ENERGY CORPORATION'S
MOTION TO INTERVENE**

Comes now Duke Energy Corporation (“Duke Energy”), Cinergy Corp. (“Cinergy”), Duke Energy Ohio, Inc. (“Duke Energy Ohio”), Duke Energy Kentucky, Inc. (“Duke Energy Kentucky”), Diamond Acquisition Corporation (“Diamond”), and Progress Energy, Inc. (“Progress Energy”) (collectively, “Joint Applicants”), and tenders their response in opposition to the motion to intervene filed on or about April 21, 2011 by Stand Energy Corporation (“Stand”), respectfully stating as follows:

I. INTRODUCTION

Despite being unsuccessful in urging the Commission to *sua sponte* implement retail competition in the natural gas market in Kentucky last year, Stand now seeks a second bite at the apple by attempting to inject a non-issue into the Joint Applicants’ indirect transfer of control application. Stand’s thinly-veiled attempt to better position itself vis-à-vis potential competitors in the unlikely event that Kentucky’s retail utility markets ever become deregulated has nothing to do with the merger of Duke Energy and Progress Energy and Stand’s improper involvement of a subsidiary of Duke Energy that does no business in Kentucky is wholly irrelevant to the

questions at hand and, frankly, is a waste of the Commission's time and resources. Stand has asserted no interest that is within the scope of the Commission's jurisdiction and, even if it had, Stand's motion demonstrates that it is unable to represent this interest itself or in an undisruptive manner. Stand's motion to intervene should be denied.

II. RESPONSE

The Joint Applicants filed the Application for approval of the indirect transfer of control of Duke Energy Kentucky on April 4, 2011. The Commission is required to examine the proposed indirect transfer of control occasioned by Duke Energy's merger with Progress Energy and determine whether Duke Energy will retain the requisite financial, technical and managerial abilities to provide reasonable service following the completion of the transaction as well as whether the merger is in accordance with law, for a proper purpose and consistent with the public interest. *See* KRS 278.020(5), (6). Thus, this proceeding involves a narrowly-focused inquiry that must be completed within one hundred twenty days from the filing date. *See* KRS 278.020(6). Stand's motion for full intervention – which is riddled with factual errors – discusses none of these considerations, however. Stand instead urges the Commission to require Duke Energy Kentucky to propose a competitive retail natural gas program and to preemptively restrict participation in such a program by a Duke-affiliated company that does not currently operate in the Commonwealth.

The Commission has broad authority to conduct this proceeding. *See* KRS 278.310. In accordance with that authority, a two-step procedure applies to gaining status as a full intervenor in a Commission proceeding. First, the movant "shall specify his interest in the proceeding." 807 KAR 5:0001, Section 3(8)(b). Second, the Commission must then determine whether the asserted interest rises to the level of "a special interest in the proceeding which is not otherwise

adequately represented....” As an alternative to this second element, the Commission may also consider whether “full intervention by [the] 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....” The only exception to this procedure occurs when the Attorney General exercises his statutory right of intervention on behalf of consumers pursuant to KRS 367.150(8), which has already occurred in this case.

The contours of the permissive intervention regulation have been well-examined in precedent established by Kentucky’s courts and the Commission itself. For instance, it is well established that the interest asserted by a movant for full intervention must relate to either the “rates” or the “service” of a utility. *See EnviroPower, LLC v. Kentucky Public Service Comm’n*, Slip. Op., 2007 WL 289328, *4 (Ky. App. 2007).¹ Beyond that jurisdictional requirement, however, it is equally clear that intervention has been left to “the exercise of a sound discretion in the matter of affording permission to intervene” by the Commission. *See Inter-County Rural Elec. Co-op. Corp. v. Public Service Comm’n*, 407 S.W.2d 127, 129 (Ky. 1966). The burden is upon the movant to demonstrate that it meets the regulatory prerequisites for being granted full intervention status.² Moreover, the fact that a person has been allowed to intervene in previous cases is no guarantee that he will be allowed to intervene in future cases as each motion must be

¹ This unpublished opinion is cited pursuant CR 76.28(4)(c) and a copy of the entire opinion is attached hereto as Exhibit 1. More broadly, the case of *Public Service Comm’n v. Blue Grass Natural Gas Co.*, 303 Ky. 310, 197 S.W.2d 765, 768 (Ky. 1946) makes the point that the Commission’s jurisdiction is limited to the “rates” and “services” of utilities.

² *See Adjustment of the Rates of Kentucky-American Water Company*, Order, Case No. 2000-00120, p. 2 (Ky. P.S.C. May 30, 2000).

evaluated on its merits.³ Commission precedent consistently highlights the characteristics of situations where permissive full intervention is appropriate and further demonstrates why this particular proceeding is not one of those situations.

A. Stand Fails to Clearly Articulate the Interest it Seeks to Represent as Well as Who it Seeks to Represent

Stand never explicitly states what interest it seeks to represent in its motion to intervene. It claims to have “differing commercial goals and direction than Duke Energy Kentucky, Inc.” and “unique facts, experience and knowledge to contribute in this case that are not possessed by any other party,”⁴ but it fails to actually identify its peculiar goals and direction or to give an example of the uniqueness of its facts, experience and knowledge. Claiming general industry experience or familiarity with a particular utility is insufficient.⁵ The Commission has never been in the habit of granting full intervention because a movant has recited magic words and phrases. The interest sought to be asserted must be real, tangible and plainly articulated.

Equally ambiguous is Stand’s representation that “it and it’s [sic] customers behind Duke Energy Kentucky are concerned because the merger application indicates the utility is planning to file for rate increases with the Kentucky PSC, for both electric and natural gas customers within months.”⁶ The statement is factually incorrect because there is nothing in the Application or testimony indicating that Duke Energy Kentucky is planning to file a natural gas rate case. To

³ See *In the Matter of: Application of Mallard Point Disposal Systems, Inc. for an Adjustment of Rates Pursuant to the Alternative Rate Filing Procedure for Small Utilities*, Order, Case No. 2005-00235, p. 3 (Ky. P.S.C. Sept. 2, 2005) (“While we have granted Mr. and Mrs. van der Gaag and Mr. Warhus full intervenor status in past Commission proceedings, such action does not establish a right to intervene in all proceedings involving Mallard Point. For each proceeding, all Movants must show that they meet the regulatory prerequisites for such status.”).

⁴ Stand’s Motion to Intervene, pp. 1, 2.

⁵ See *Adjustment of Gas Rates of the Union Light, Heat and Power Company*, Order, Case No. 2001-00092, p. 3 (Ky. P.S.C. Sept. 13, 2001) (“[Stand] has failed to demonstrate how its general experience in the industry and its experience with Cincinnati Gas & Electric Company will assist the Commission in this matter.”).

⁶ Stand’s Motion to Intervene, p. 2.

the extent that Duke Energy Kentucky may file an electric rate case at some point in the future, it is of no concern to Stand. Stand is not an electric customer of Duke Energy Kentucky and is not a competitive retail electric service provider in Kentucky. Moreover, the testimony offered in this case demonstrates how the proposed merger is unrelated to such a case. Any legitimate interests relating to Duke Energy Kentucky's rates should properly be addressed in a rate case – not in an indirect transfer of control case. More puzzling is the suggestion that Stand Energy may be seeking to represent the interests of individual customers and not its own interests. The Commission has previously prevented Stand from doing this very thing.⁷ A corporation cannot represent the interests of others and Stand has not even alleged that it is itself a customer of Duke Energy Kentucky.⁸

B. Stand Misstates the Legal Standard Applicable to Transfers of Control

Stand incorrectly asserts that “merger requests usually must show savings to the ratepayers to gain approval of regulators.”⁹ There is no statutory requirement that a proposed merger “must show savings to ratepayers.” As set forth above, the statutory considerations are whether Duke Energy will retain the requisite financial, technical and managerial abilities to provide reasonable service following the completion of the transaction and whether the merger is in accordance with law, for a proper purpose and consistent with the public interest. *See* KRS 278.020(5), (6). While lower rates is one indication of a public benefit resulting from a transfer

⁷ *See Adjustment of Gas Rates of the Union Light, Heat and Power Company*, Order, Case No. 2001-00092, p. 2 (Ky. P.S.C. Sept. 13, 2001) (“The Commission finds that the interest claimed by [Stand] is actually that of ULH&P’s IT customer and that it cannot be asserted by [Stand].”).

⁸ In *Adjustment of Rates of Columbia Gas of Kentucky, Inc.*, Case No. 2007-00008, the Commission denied the motion of a third-party natural gas transporter that served a number of commercial and industrial customers located in the Columbia Gas of Kentucky, Inc. service area on the basis that the third-party transporter did not participate in Columbia’s Choice Program and was not a customer of Columbia. *See id.*, p. 2 (Ky. P.S.C. May 3, 2007). Here, Duke does not offer and has not proposed a Choice Program, making Stand’s lack of standing all the more apparent.

⁹ Stand’s Motion to Intervene, p. 3.

of control, Commission precedent indicates that there are other avenues by which the public benefits from transactions such as the one presented in this case, including “improved service quality, enhanced service reliability, the availability of additional services...or a reduction in utility expenses to provide present services.”¹⁰

Even though the Commission has held that the benefits of a merger which inure to ratepayers need not be immediate or readily quantifiable,¹¹ there is considerable testimony in this case that Duke Energy Kentucky’s customers will benefit in many ways, including lower rates over time, as a result of this transaction. The Joint Applicants have also already expressly indicated their willingness to consent to appropriate regulatory conditions as a means to avoid any potentially adverse effects of the proposed indirect transfer of control.¹² Given that the Attorney General has a statutory duty to represent the interests of consumers, the interest raised by Stand is adequately represented through the Attorney General’s participation in this case.

C. Pecuniary Advantage is not a Jurisdictional Interest

In addition to being vague as to its intentions and misstating the applicable statutory standards which apply to this proceeding, Stand makes several statements which are simply irrelevant to this proceeding. Stand devotes a disproportionate amount of its motion to discussing a separate and distinct subsidiary of Duke Energy that is an Ohio corporation conducting business in Ohio’s deregulated energy markets. Duke Energy Retail Sales, LLC

¹⁰ See *In the Matter of the Joint Petition of Kentucky-American Water Company, Thames Water Aqua Holdings GMBH, RWE Aktiengesellschaft, Thames Water Aqua US Holdings, Inc. and American Water Works Company, Inc. for Approval of a Change in Control of Kentucky-American Water Company*, Order, p. 9 (Ky. P.S.C. Apr. 16, 2007).

¹¹ See *id.* citing *In the Matter of Joint Application of NiSource, Inc., New NiSource, Inc., Columbia Energy Group, and Columbia Gas of Kentucky for Approval of a Merger*, Order, Case No. 2000-00129 (Ky. P.S.C. June 30, 2000).

¹² See *In the Matter of the Joint Petition of Kentucky-American Water Company, Thames Water Aqua Holdings GMBH, RWE Aktiengesellschaft, Thames Water Aqua US Holdings, Inc. and American Water Works Company, Inc. for Approval of a Change in Control of Kentucky-American Water Company*, Order, pp. 8-9 (Ky. P.S.C. Apr. 16, 2007) (“The Commission has previously held that a proposed transfer is in the public interest if it will not adversely affect the existing level of utility service or rates or that any potentially adverse effects can be avoided through the Commission’s imposition of reasonable conditions on the acquiring party.”) (emphasis in original).

("Duke Energy Retail") is a certified retail electric and natural gas supplier in Ohio and provides competitive services in Ohio – as does Stand.¹³ It is registered with and subject to the jurisdiction of the Public Utilities Commission of Ohio. Duke Energy Retail, as an affiliate of Duke Energy Ohio, is subject to an affiliate code of conduct in Ohio and there has never been a finding that either Duke Energy Retail or Duke Energy Ohio have acted improperly or that Duke Energy Ohio has somehow subsidized Duke Energy Retail's activities. Duke Energy Retail does not offer services in Kentucky and Duke Energy Kentucky does not monitor, direct or participate in the business decisions of Duke Energy Retail. This is substantiated by the two service agreement audits that have examined Duke Energy Kentucky's affiliate transactions in the period since the merger of Duke Energy and Cinergy and the fact that Duke Energy Kentucky is bound by the code of conduct set forth in KRS 278.2201, *et seq.*

The Commission has repeatedly recognized that self-serving attempts to intervene in a Commission proceeding for the purpose of improving one's own pecuniary position or weakening that of a competitor is not a special interest or a perspective that is helpful to developing the record and issues facing the Commission. For instance, "[t]he fact that [movant] is a competitor does not enlarge or enhance its interest in this proceeding and it should not be permitted to intervene on that ground."¹⁴ The Court of Appeals agreed:

EnviroPower, as a potential merchant energy supplier, has far different interests than that of Gallatin Steel, an energy consumer. Gallatin's interests relate directly to the rates and services of EKPC

¹³ Stand's motion incorrectly states that Duke Energy Retail Sales, LLC was formed in Ohio in June of last year. The documents from the Ohio Secretary of State's website that are attached to Stand's motion clearly demonstrate, however, that although Duke Energy Retail Services, LLC assumed its current name in June of 2010, the company was actually established on January 28, 2004. *See* Stand Motion to Intervene, Exhibit 1.

¹⁴ *A Formal Review of Western Kentucky Gas Company's Decision to Terminate a Natural Gas Sales, Transportation and Storage Agreement with Noram Energy Services, Inc. and Enter into a Natural Gas Sales, Transportation and Storage Agreement with Woodward Marketing, LLC*, Order, Case No. 1999-00447, p. 2 (Ky. P.S.C. Mar. 2, 2000).

while EnviroPower's pecuniary interests relate solely to the marketing of its wholesale power produced.

EnviroPower, LLC v. Public Service Commission of Kentucky, et al., Slip. Op., 2007 WL 289328, *5 (Ky. App. 2007).

Simply put, administrative proceedings are not appropriate venues for seeking competitive advantages. See *Lexington Retail Beverage Dealers Ass'n v. Alcoholic Beverage Control Bd.*, 303 S.W. 2d 268, 270 (Ky. 1957) ("The only possible basis of plaintiffs' claim is that their competitive position in the liquor business may be adversely affected. This is not only remote and speculative and a normal business risk, but they have no right to be free from competition."). Borrowing from a prior Commission order decided upon similar facts, Stand presents nothing more than "a self-serving financial interest that does not fall within the Commission's purview under KRS Chapter 278."¹⁵

D. Stand's Intervention Will Unduly Complicate and Disrupt the Proceeding

The Commission must also take into account the likelihood that Stand would unduly complicate or disrupt the proceeding in the event that it is allowed to intervene. There is no presumption that an intervenor's participation in a case will not be disruptive or cause complications.¹⁶ Stand must affirmatively demonstrate that its participation would be productive

¹⁵ See *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*, Order, Case No. 2005-00053, p. 2 (Ky. P.S.C. Apr. 18, 2005).

¹⁶ See *Application of Kentucky-American Water Company for Approval of Accounting Accruals*, Order, Case No. 2003-00478, p. 3 (Ky. P.S.C. May 3, 2004):

As to FLOW's claim that it is entitled to a presumption that it is likely to assist the Commission in this case because it has assisted the Commission in past cases, each case and each party's request to intervene in such cases must be considered individually. Moreover, the Commission reminds FLOW that in Case No. 2002-00317 the Commission expressed its strong dissatisfaction with FLOW's presentation of witnesses and with the lack of preparation and

and effective. In point of fact, the only evidence it has offered points to the contrary. As stated above, most of Stand's motion recites information that is irrelevant – sponsorship of the Cincinnati Reds by an affiliate operating in another jurisdiction without any involvement by Duke Energy Kentucky has no bearing on the issues in this proceeding. And Stand's suggestion that the Commission should use this proceeding to create retail competition in the natural gas service areas of Duke Energy Kentucky squarely contradicts the reasoned and measured position taken by the Commission in its recent administrative case examining this very issue:

The Commission finds that it would not be reasonable or consistent with its statutory responsibility to mandate that its regulated utilities offer choice programs or expanded transportation services without the additional statutory authority and consumer protections mentioned above and without the opportunity to review each utility's proposed transportation service offerings and its current rate design.¹⁷

Stand fails to satisfy its burden of demonstrating that its participation in this case would not unduly complicate the case or be disruptive. To the contrary, it seeks to raise an issue which the Commission has already indicated should be addressed legislatively.

III. CONCLUSION

This is an important case which must be decided in accordance with a narrow statutory framework within a very brief period of four months. The General Assembly did not intend – and the Commission should not allow – for this proceeding to turn into a fishing expedition. Stand has failed to satisfy its burden of proof to demonstrate why it should be given permission to intervene in this case and the Commission should deny its motion forthwith.

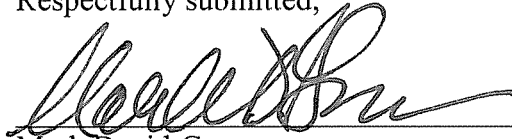
professionalism exhibited by one of its witnesses. Consequently, the Commission does not believe that a presumption is warranted.

¹⁷ See *An Investigation of Natural Gas Retail Competition Programs*, Final Order, Administrative Case No. 2010-00146, p. 22 (Dec. 28, 2010).

WHEREFORE, on the basis of the foregoing, the Joint Applicants respectfully request the Commission to deny Stand's Motion to Intervene.

This 27th day of April, 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served by both email and depositing same into the custody and control of the U.S. Postal Service, postage-prepaid, on this 27th day of April, 2011, addressed to the following:

John M. Dosker, General Counsel
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Lawrence W. Cook, Esq.
Division of Rate Intervention
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Westlaw

Page 1

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(Cite as: 2007 WL 289328 (Ky.App.))

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Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

Court of Appeals of Kentucky.
ENVIROPOWER, LLC, Appellant

v.

PUBLIC SERVICE COMMISSION OF KENTUCKY, East Kentucky Power Cooperative, Inc.,
Gregory D. Stumbo, Attorney General of Kentucky,
and Gallatin Steel Company, Appellee.

No. 2005-CA-001792-MR.
Feb. 2, 2007.

Appeal from Franklin Circuit Court, Action No. 05-CI-00553; Roger L. Crittenden, Judge.
Stephen M. Soble, Washington, DC, Frederic J. Cowan, Louisville, KY, for appellant.

David S. Samford, Richard G. Raff, Frankfort, KY, for appellee, Public Service Commission of Kentucky.

Charles Lile, Dale Henley, East Kentucky Power Cooperative, Inc., Winchester, KY, for appellee, East Kentucky Power Cooperative, Inc.

Dennis Howard, Elizabeth Blackford, Office of the Attorney General, Frankfort, KY, for appellee, Gregory D. Stumbo, Attorney General of Kentucky.

Michael L. Kurtz, Cincinnati, OH, for appellee, Gallatin Steel Company.

Before BARBER ^{FN1} and DIXON, Judges; PAISLEY, Senior Judge. ^{FN2}

FN1. Judge David A. Barber concurred in this opinion prior to the expiration of his term of office on December 31, 2006. Re-

lease of the opinion was delayed by administrative handling.

FN2. Senior Judge Lewis G. Paisley, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

OPINION

DIXON, Judge.

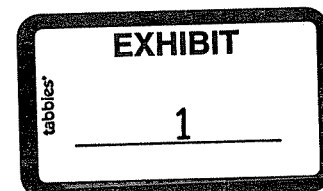
*1 **EnviroPower**, LLC, appeals the Franklin Circuit Court's dismissal of its case challenging a Public Service Commission ("PSC") order denying intervention.

The PSC denied **EnviroPower's** Motion for Intervention in a Certificate of Public Convenience and Necessity ("CON") hearing. The hearing was initiated by East Kentucky Power Cooperative, Inc's., ("EKPC") application to the PSC for permission to self-construct a 278 MW coal-fired generating plant at its Spurlock Station site in Maysville, Kentucky.

Prior to making the CON application to begin construction, EKPC had issued a "Request for Proposals ("RFP") in April 2004, for various contractors to bid on supplying the necessary power. EKPC anticipated a need to substantially increase its power generation capacity to serve a new retail customer and sought proposals from outside power suppliers to determine whether it was more economically feasible for EKPC to self-build a new power facility or purchase power from other suppliers. Ultimately, the lowest bid was EKPC's proposal to construct the facility itself. KRS 278.020 requires a CON certificate be issued before construction begins.

The CON application was docketed as PSC Case No.2004-00423 ("CON Case"). Intervention was granted to the Office of the Attorney General and Gallatin Steel, the largest electric consumer of

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(Cite as: 2007 WL 289328 (Ky.App.))

EKPC power. The PSC established a procedural schedule and a hearing was initially scheduled on February 18, 2005.

EnviroPower was one of thirty-nine (39) unsuccessful bidders in the earlier RFP request for power supply bids issued by EKPC. **EnviroPower** owns no electric generating facilities, but it proposed to construct a merchant generating plant and sell the output to EKPC. In mid-September 2004, EKPC informed **EnviroPower** that its bid had been rejected. On January 14, 2005, **EnviroPower** filed its first request to intervene at the PSC to challenge EKPC's bid solicitation and evaluation process. By PSC order dated February 3, 2005, **EnviroPower's** first request to intervene was denied upon the findings that: (1) it was not a ratepayer of EKPC, but a rejected bidder whose interests were not identical to rate-payers; and (2) **EnviroPower** had a legal duty to its members to maximize profits; a far different goal from protection of the ratepayers. **EnviroPower's** interest would be served by challenging any bid evaluation process that rejected its bid and, that interest did not coincide with the interests of ratepayers. Although intervention was denied, **EnviroPower's** name was added to the service list so it could monitor the proceedings, submit further information, and even comment upon the issues. **EnviroPower** filed neither a timely request for rehearing at the PSC under KRS 278.400, nor a timely action for review in the Franklin Circuit Court under KRS 278.410(1).

On the same date that the PSC denied **EnviroPower's** first request to intervene, the PSC issued another order in the CON Case initiating a full investigation of EKPC's bidding procedures and evaluation process. The PSC directed EKPC to file supplemental testimony that included, but was not limited to the following issues:

*2 1. A detailed description of the nature and extent of participation by East Kentucky Power's distribution cooperatives and Warren Rural Electric Cooperative Corporation in the bid evaluation process;

2. The details of each discussion with each bidder regarding revisions to any provision of that bidder's bid; and

3. Sufficient details to enable the Commission to objectively determine whether the capital cost and the base load requirement price for the **EnviroPower** bid was lower than those of the East Kentucky Power self-construct bid.

The PSC also required testimony to be filed by EnerVision, Inc., an outside consultant retained by EKPC to assist in the evaluation and economic rankings of the power supply bids. The consultant was directed to file detailed testimony on the following issues:

1. Its role in evaluating and ranking the power supply bids;

2. The extent to which its role was performed independently of East Kentucky Power;

3. Whether its economic rankings of the power supply bids coincide with those of East Kentucky Power as shown in Application Exhibit 4, p. 7; and

4. Any other information necessary or appropriate for a full and complete understanding of the bid evaluation process.

That PSC order further required EKPC to respond to a number of requests for information, including the filing of a complete copy of each of the thirty-nine (39) power supply bids received. Each of the bids, including **EnviroPower's**, was filed under seal and **EnviroPower** has never seen the details of EKPC's bid. All of the testimony and information required by the PSC's February 3, 2005, order was filed. **EnviroPower** filed extensive comments in the form of prepared testimony.

On April 11, 2005, **EnviroPower** filed a second petition to intervene at the PSC. Finding no change in circumstances since the first petition had been denied-**EnviroPower** was not a ratepayer and

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had no interest in either the “rates” or “service” of EKPC—the PSC denied **EnviroPower's** second intervention petition by order dated April 18, 2005. That order also found that **EnviroPower** was unlikely to present issues or develop facts to assist in the consideration of the CON Case. The PSC explained “**EnviroPower** had no role in either the development of EKPC's bidding procedures or the evaluation of the bids received. Only East Kentucky Power and its consultants were involved in those activities.”

EnviroPower then filed on April 19, 2005, an action in the Franklin Circuit Court requesting injunctive and declaratory relief. The Court held a brief hearing that same day and issued a restraining order which among other things, prohibited the PSC from holding its scheduled hearing. Subsequently, the Court issued its May 6, 2005, Order, which among other things, dissolved the restraining order, rejected all of **EnviroPower's** challenges to the PSC's denial of intervention, and denied a temporary injunction to prohibit a PSC hearing in the CON Case. **EnviroPower** requested interlocutory relief in the Court of Appeals, which was denied by Order entered May 31, 2005, and then interlocutory relief in the Kentucky Supreme Court, which was denied by Order entered June 7, 2005.

*3 After further briefing and oral argument, the circuit court dismissed **EnviroPower's** action by reaffirming the findings and conclusions in its May 6, 2005, order that **EnviroPower** did not have a legally protected interest which would entitle it to intervene in the CON Case, and the PSC did not abuse its discretion by denying intervention.

STANDARD OF REVIEW

At the outset, **EnviroPower** asserts this Court should review the PSC's decision *de novo* citing cases from other agencies. **EnviroPower** argues these cases establish a standard for review of PSC's decision. We find however, the cases do not support **EnviroPower's** conclusion.

The Court's standard for review of a decision

by the PSC is set forth by statute. KRS 278.410(1) provides that an order of the PSC can be vacated or set aside only if it is found to be unlawful or unreasonable. As Kentucky's highest Court declared in *Kentucky Utilities Co. v. Farmers RECC*, 361 S.W.2d 300, 301 (Ky.1962), a PSC order may be appealed only when there has been strict compliance with KRS 278.410(1) because, “this statute provides the exclusive method by which an order of the commission can be reviewed by the circuit court.” The strict compliance standard found in KRS 278.410(1) was subsequently reaffirmed in *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450 (Ky.1964).

Moreover, this Court has previously reviewed denials of intervention in PSC proceedings. In *Inter-County Rural Electric Cooperative Corporation v. Public Service Commission*, 407 S.W.2d 127 (Ky.1966), this Court held the PSC decision to deny intervention was reviewed only for an abuse of discretion. We find this appeal is governed by KRS 278.410(1), and the commission's decisions are reviewed only for an abuse of discretion.

ARGUMENTS FOR REVERSAL

EnviroPower makes three arguments for reversal of the circuit court: (1) PSC's denial of intervention was arbitrary and unlawful; (2) PSC's denial of intervention was error because **EnviroPower** alleged fraud in award of bid; and (3) denial of intervention deprived **EnviroPower** of procedural due process and equal protection of the laws.

I. Denial of Intervention as Arbitrary

EnviroPower argues it had a right to intervene in this action under KRS 278.0201(1):

Upon the filing of an application for a certificate, and after any public hearing which the commission may in its discretion conduct for *all interested parties*, the commission may issue or refuse to issue the certificate ... (Emphasis added).

From this language **EnviroPower** insists it is

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an interested party within the meaning of this statute and, as such, has a right to intervene. The Court does not read this statute in the manner suggested by **EnviroPower**. The statute is clear on its face and it does not establish any specific rules defining an "interested party." Furthermore, the controlling statute here is KRS 278.310(2), which requires the PSC to adopt rules governing hearings and investigations before the commission. The PSC has acted to adopt specific rules governing all commission proceedings. Intervention is specifically addressed in 807 KAR 5:001, Section 3(8). Under this regulation, the PSC retains the power in its discretion to grant or deny a motion for intervention. The Kentucky Attorney General has a statutory right to intervene. KRS 367.150(8)(b).

*4 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" of a utility, since those are the only two subjects under the jurisdiction of the PSC. Second, there is the limitation in the PSC intervention regulation, 807 KAR 5:001, Section 3(8), which requires the showing of either "a special interest in the proceeding which is not otherwise adequately represented," or a showing that intervention "is likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings."

The PSC properly found that since "**EnviroPower** had no role in either the development of EKPC's bidding procedures or the evaluation of the bids received," and its intervention was not likely to present issues or develop facts to assist the PSC in fully considering the CON Case. Moreover, the PSC noted the intervention of Gallatin Steel, EKPC's largest retail customer, and the Attorney General was adequate to protect **EnviroPower's** interest. In conclusion, the Court finds the denial of intervention to EnvrioPower was neither unlawful

nor unreasonable.

II. Allegations of Fraud

EnvrioPower has aggressively asserted that EKPC engaged in a fraudulent RFP by skewing its evaluation to support its own self-bid proposal. However, the cases cited, *Pendleton Bros. Vending, Inc. v. Comm. of Ky. Finance and Administration Cabinet*, 758 S.W.2d 24 (Ky.1988) and *HealthAmerica Corp. of Kentucky v. Humana Health Plan, Inc.*, 697 S.W.2d 946 (Ky.1985) do not apply because in those cases the issue involved a *claim of fraud against a public agency* as opposed to a claim of fraud against a private entity such as EKPC.

EnviroPower then argues that under Kentucky common law its allegations of fraud give it standing as a competitor "to challenge the granting of a license or permit to another competitor by an administrative agency," citing *PIE Mutual Insurance Co. v. Kentucky Medical Insurance Co.*, 782 S.W.2d 51, 54 (Ky.App.1990). But even this authority is unavailable here since the common law has been superseded by statutes expressly limiting the PSC's jurisdiction to "the regulation of rates and service of utilities," KRS 278.040(2), and further limiting the participation in a CON Case to "interested parties," KRS 278.020(1).

III. Constitutional Claims

EnviroPower also contends the PSC's denial of intervention deprived it of its right to procedural due process and equal protection of the law.

First, **EnviroPower** claims that it had a constitutionally protected property interest in its environmental permits, and by denying intervention, the PSC impermissibly deprived **EnviroPower** of the value of the permits. EKPC argues that **EnviroPower's** interest created a mere expectancy that it might develop a power plant project at a future date. Further, EKPC points out that **EnviroPower** never had any contract with EKPC to develop power, and nothing prevented **EnviroPower** from using its permits to establish other projects. The

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PSC argues that, as an agency, it had no jurisdiction over the environmental permits issued to **EnviroPower**.

*5 “It is well established that in order to succeed in either a procedural or substantive due process claim, such claimant must demonstrate a legitimate entitlement to a vested property interest.” *Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Co.*, 983 S.W.2d 493, 497 (Ky.1998) citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). Furthermore, a “mere subjective expectancy” of a property interest is not protected by procedural due process. *Perry v. Sindermann*, 408 U.S. 593, 603, 92 S.Ct. 2694, 2700, 33 L.Ed.2d 570 (1972).

EnviroPower insists that it has a substantial and concrete interest in the CON proceeding. **EnviroPower** obtained many of the critical permits requested to begin construction of the new power plant. The permits included a Construction Certificate and an Air Quality Permit. Both permits were required before construction could begin. **EnviroPower** also argues its reputation will be tarnished if it cannot participate in the CON proceedings.

These arguments are novel, but totally unpersuasive in establishing a right to intervene in a CON proceeding. **EnviroPower** could best be described as an unsuccessful bidder in the RFP. There were thirty-eight (38) other successful bidders. As a bidder, **EnviroPower** knew, or should have known, that EKPC had made a self-build proposal. PSC argues **EnviroPower** had a mere expectancy and no fundamental property right. The Court agrees with EKPC's analysis of this issue.

In the case at bar, it appears to the Court that **EnviroPower** had indeed, nothing more than an expectancy interest in the environmental permits. When the PSC denied **EnviroPower's** intervention in the CON proceeding, it did not render the environmental permits worthless. Furthermore, **EnviroPower** was free to use its permits in seeking out an-

other power plant project. Accordingly, we find that the Commission did not deprive **EnviroPower** of any right to procedural due process.

Finally, **EnviroPower** contends that the PSC violated its constitutional right to equal protection by allowing Gallatin Steel to intervene in the CON proceeding, but denying **EnviroPower's** petition to intervene. EKPC argues that the PSC's action is rationally related to the legitimate state interest of regulating utility rates. Appellees also point out that **EnviroPower** has no actual legal interest in the PSC proceeding, while Gallatin Steel is an interested ratepayer of EKPC. We agree with Appellee's position. **EnviroPower**, as a potential merchant energy supplier, has far different interests than that of Gallatin Steel, an energy consumer. Gallatin's interests relate directly to the rates and services of EKPC, while **EnviroPower's** pecuniary interests relate solely to the marketing of its wholesale power produced. Consequently, no constitutional violation occurred.

For these reasons, we respectfully affirm the decision of the Franklin Circuit Court.

ALL CONCUR.

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