

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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In the Matter of:

**THE 2011 JOINT INTEGRATED RESOURCE)
PLAN OF LOUISVILLE GAS AND ELECTRIC) CASE NO. 2011-00140
COMPANY AND KENTUCKY UTILITIES)
COMPANY)**

**REPLY IN SUPPORT OF PETITION OF RICK CLEWETT, DREW FOLEY, JANET
OVERMAN, GREGG WAGNER, THE NATURAL RESOURCES DEFENSE COUNCIL,
AND THE SIERRA CLUB FOR FULL INTERVENTION**

Petitioners Rick Clewett, Drew Foley, Janet Overman, Gregg Wagner, the Natural Resources Defense Council (“NRDC”), and the Sierra Club (collectively “Movants”) seek full intervention in Louisville Gas & Electric and Kentucky Utilities Company’s (collectively, “Companies”) Integrated Resource Plan (“IRP”) filing because Movants have interests in this proceeding that are not adequately represented by the existing parties, and to bring their wealth of knowledge and experience to the evaluation of the complex issues presented in the IRP.

Rather than respond to the arguments set forth in the Movants’ Petition, the Companies argue against a straw man by pretending that Movants’ seek only to raise issues regarding the environmental impacts of the Companies’ coal-fired power plants. In fact, Movants’ interests are exactly the issues the Commission will address in this proceeding – namely the promotion of energy efficiency, demand side management, renewable energy, and cost-effective retirement of coal units needed to ensure that the Companies’ IRP truly reflects the required low cost resource plan.

The Companies also contend that the Attorney General’s participation in this proceeding forecloses the Movants’ intervention. The Companies’ argument, however, would render the

Commission's intervention provision a virtual nullity, as a public interest group would almost always be denied intervention on the grounds that their interests are already adequately represented. In addition, the Companies ignore the fact that the Attorney General is in the unenviable position of representing all of the various and often-competing consumer interests in Kentucky. Therefore, the Attorney General does not adequately represent the individual Movants, who are ratepayers of the Companies, or the organizational Movants, which are national public interest organizations who have numerous individual ratepayer members.

While the Companies have argued well against straw men, they have not offered a legitimate reason to deny the Movants intervention. Therefore, Movants respectfully ask the Commission to grant their Petition.

I. Movants Have Special Interests in This Proceeding Which Are Not Adequately Represented.

Movants' special interests in this proceeding arise in two ways. (Petition at 6-7). First, both the individual Movants and a number of the organizational Movants' members are the Companies' customers who live within the Louisville Gas & Electric or Kentucky Utilities Company service territories. As such, the resource decisions being evaluated in this IRP proceeding will impact these individuals and organization members economically as these decisions will affect their future rates. In addition, the organizational Movants have long held interests in promoting energy efficiency, peak demand reduction, renewable energy, and cost-effective low carbon energy sources, which are precisely the types of energy options that this IRP proceeding will evaluate.

The Companies try to discount the Movants' special interests in this proceeding by attacking a straw man. In particular, the Companies ignore the interests that Movants identified and, instead, pretend that the Movants are interested solely in "protest[ing] the Companies' use

of coal-fired generation and related environmental externalities.” (Companies’ Resp. at 8).

Contending that environmental concerns are not related to the utility rates or services that the Commission oversees, the Companies contend that the Movants should be confined to raising their interests before the Kentucky Environment and Public Protection Cabinet, the U.S.

Environmental Protection Agency, and other “environmental” agencies. (Companies’ Resp. at 9).

Movants are aware of past holdings by the Commission that it does not make decisions about environmental regulations.¹ But, the Companies’ assertions to the contrary notwithstanding, the Movants are not seeking intervention to opine about the environmental impacts of the Companies’ coal-fired power plants or their resource plan. For example, not a single one of the interrogatories or requests for production of documents that the Movants submitted in this proceeding seeks information regarding the environmental impacts of the Companies’ coal units.²

Instead, as the Movants’ motion states and their discovery requests reflect, the Movants are seeking to evaluate and present comments regarding whether the resource plan offered by the Companies is truly the lowest cost plan in light of the potential for energy efficiency and demand side management, the increasing availability of renewable energy and lower-carbon power sources, and the capital, operating, fuel, and regulatory costs that the Companies would have to incur to keep the coal units operating. Such interests are plainly relevant to the Companies’ rates and services at issue in this proceeding. The Commission has also previously noted that energy efficiency and conservation are paramount considerations for determining the rates and services

¹ In the Matter of The 2008 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company (Case No. 2008-148) Order, July 18, 2008 at 5-6.

² A copy of the Movants’ first set of discovery requests is attached as Exhibit A.

of utilities.³ In addition, the Companies' suggestion that the Movants' interest in addressing whether various coal units should be retired or retrofitted is irrelevant to rates and services strains credulity given that a core portion of the IRP filing in this proceeding is the Companies' evaluation of whether to retire or retrofit a number of coal units.

Perhaps realizing the futility of portraying as irrelevant the Movants' interests in the issues raised in the IRP, the Companies next contend that such interests are adequately represented by the state Attorney General's intervention in the proceeding. (Companies Resp. at 3, 11). In support, the Companies note that Kentucky state law provides the Attorney General with the right to intervene in Commission proceedings on behalf of customers. K.R.S. 367.150(8)(b). The Companies then extrapolate from that statutory provision that intervention based on a movant's status as a customer of a utility or interest in energy policy issues is foreclosed because the Attorney General will also address those issues. (Companies Resp. at 3, 11).

The Commission should reject such argument for at least two reasons. First, the mere fact that the Attorney General is authorized to represent his or her understanding of consumer interests in Commission proceedings does not compel the conclusion that other entities representing consumer interests are foreclosed from intervening. To the contrary, such an interpretation would render the Commission's intervention provision for parties other than the Attorney General superfluous, which would run contrary to the rule of statutory and regulatory interpretation that "no part should be construed as 'meaningless or ineffectual.'" *Lexington-*

³ In the Matter of: Joint Application of PPL Corporation, E.ON AG, E.ON US Investments Corp., E.ON U.S. LLC, Louisville Gas and Electric Company, and Kentucky Utilities Company for Approval of an Acquisition of Ownership and Control of Utilities (Case No. 2010-00204) Order, Sept. 30, 2010 at 20 (noting that the Commission stated its support for energy-efficiency programs in a report "to the Kentucky General Assembly in July 2008 pursuant to Section 50 of the 2007 Energy Act").

Fayette Urban County Government v. Johnson, 280 S.W.3d 31, 34 (Ky. 2009); *Brooks v. Meyers*, 279 S.W.2d 764, 766 (Ky. 1955).

Second, the Attorney General cannot adequately represent the Movants' interest because he has the unenviable task of representing all consumers, with their diverse and sometimes diametrically opposed interests. For example, in the context of utility rates and services, industrial, commercial, municipal, and individual customers often have different positions regarding energy policy issues such as promoting energy efficiency and renewable energy. While the Attorney General is tasked with representing the overall, and sometimes conflicting, public interest(s) in this proceeding, the Movants have a more narrow interest and concern in ensuring that an accurate assessment of the potential for energy efficiency and demand side resources, the feasibility of renewable energy and lower-carbon generating sources, and the costs facing the Companies' coal units are fully assessed and presented in this proceeding.

Given the diverse interests that governmental entities such as the Attorney General's office must balance, it is not surprising that courts have "repeatedly held that private companies can intervene on the side of the government, even if some of their interests converge." *See, e.g., Hardin v. Jackson*, 600 F. Supp. 2d 13, 16 (D.D.C. 2009). That is because "government entities are usually charged with representing the interests of the American people, whereas aspiring intervenors, like the [Movants] here, are dedicated to representing their personal interests or the interests of their members or members' businesses." *County of San Miguel, Colo. v. MacDonald*, 244 F.R.D. 36, 48 (D.D.C. 2007); *Purnell v. Akron, Purnell v. Akron*, 925 F.2d 941, 949 (6th Cir. Ohio 1991) (granting intervention in a wrongful death suit when intervenors' interests were personal and narrower than the current defendants); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 737 (D.C. Cir. 2003) (movant satisfied its burden where it sought to protect interests that

were “more narrow and parochial” than the government’s interests); *Am. Horse Prot. Ass’n v. Veneman*, 200 F.R.D. 153, 159 (D.D.C. 2001) (granting intervention of right where intervenors had “more narrow interests and concerns” than the government entity); *Southern Utah Wilderness v. Norton*, 2002 WL 32617198, at *5 (D.D.C. June 28, 2002) (concluding that government entity may not adequately represent specific interests of private entity). A similar result should be reached here.

II. Movants Will Present Issues and Develop Facts That Will Assist the Commission in Fully Considering the Matter.

The Commission should grant Movants intervention in full because they are “likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings.” 807 K.A.R. 5:001 § 3(8). As explained in Movants’ Petition, NRDC and Sierra Club regularly offer testimony and expert analysis before public utility commissions, state legislatures, and Congress regarding issues such as resource planning, energy efficiency, demand side management, renewable energy, and regulatory costs facing various energy sources. (Petition at 5-6). Movants can and will bring such expertise to the table in this proceeding which, as the Commission has found previously with respect to Sierra Club, is a sufficient basis to grant Movants’ intervention in full.⁴

In response, the Companies return to their straw man and contend that Movants’ expertise is focused on “the environmental consequences of energy generated by coal” and, therefore, not relevant to this proceeding. (Companies Resp. at 12-13). As explained in Section I above, and made clear in both Movants’ Petition and their first set of discovery requests, however, Movants and their consultants have expertise in exactly the kind of resource planning issues – such as energy efficiency, demand side management, renewable energy, and costs of various energy

⁴ *In the Matter of 2009 Integrated Resource Plan of East Kentucky Power Cooperative, Inc.* (Case No. 2009-00 106) Order, July 13, 2009 at 9.

sources – that are at issue in this IRP. The Companies’ claim to the contrary simply has no connection to the reality of Movants’ pending Petition.

The Companies also attempt to undermine the Movants’ expertise by noting that the Commission Staff rejected some of the arguments that Sierra Club and other public interest intervenors raised in the 2009 Eastern Kentucky Power Cooperative (“EKPC”) IRP proceeding. (Companies’ Resp. at p. 14 and n. 46). But the Companies have cherry picked from the Staff report and ignored areas where the Staff agreed with comments raised by the Sierra Club. For example, the Staff in the EKPC IRP proceeding agreed with Sierra Club that the company needed to “provide a more detailed analysis of its consideration of the use of renewable energy alternatives in future IRPs.”⁵ Similarly, while the Staff rejected Sierra Club’s contention that EKPC’s DSM analysis was not aggressive enough, the Staff agreed that “EKPC should attempt to take a more aggressive approach in moving new programs . . . from the analysis phase to implementation.”⁶ In short, rather than the wholesale rejection of Sierra Club’s arguments that the Companies pretend occur, the Staff Order in the EKPC IRP proceeding provides no evidence that Movants’ lack the requisite expertise to intervene in the present proceeding and, instead reveals only that the Staff agreed with Sierra Club on some issues and disagreed on others.

III. Movants’ Intervention Will Not Unduly Complicate or Disrupt the Proceeding.

The Companies’ final effort to exclude Movants is to raise the specter of complication and disruption of the proceeding arising from intervention. (Companies Resp. at 14-17). But once again the Companies offer only a straw man and unsupported conjecture as the basis for their concerns.

⁵ *Id.* at 45.

⁶ *Id.* at 31.

For example, the Companies suggest that “arguments on the inadequacy of the Commission’s long-standing and well-established sound principals of regulation such as least-cost resource planning” will unduly complicate and disrupt the proceeding. (Companies Resp. at 15). But the Companies fail to identify any basis for contending that Movants seek to challenge such regulatory principles and, in fact, Movants do not intend to do so. Instead, Movants intend to evaluate and comment on the adequacy of the Companies’ proposals regarding energy efficiency, demand side management, renewable energy and other energy sources, and retirement or retrofit of existing coal generating units in order to determine whether an IRP focused on more energy efficiency, renewable energy, coal retirements, and other options would better achieve the Commission’s least-cost resource planning goal.

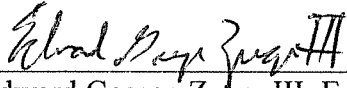
The Companies also cite to Movants’ first set of discovery requests as purported evidence that intervention would unduly complicate or disrupt the proceeding because the Companies would need to put in “significant effort and time” to respond. (Companies Resp. at 16). But the Movants’ discovery is wholly appropriate, as it seeks further information about specific points in the Companies’ IRP filing, documents referenced in that filing, descriptions about how various analyses in the IRP were carried out, modeling and assumptions underlying the IRP, and data regarding power generation costs and energy efficiency program impacts for the Companies. It is hard to see how reasonable discovery requests focused on the Companies’ IRP could disrupt the IRP proceeding, and the only potential complication arises from the fact that the Companies have decided to “not begin working on responses” to Movants’ timely filed discovery until Movants are granted intervention, even though the deadline for responses was June 13 and supplemental discovery requests must be filed by June 29. The Commission should, therefore,

reject the Companies' arguments, grant intervention in full to the Movants, and require the Companies to respond to Movants' May 26, 2011 discovery requests expeditiously.

IV. CONCLUSION

For the reasons identified herein and in Movants' Petition, the Movants respectfully request full intervention in this matter.

Respectfully submitted,



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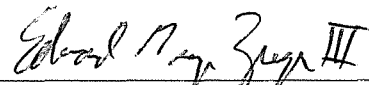
CERTIFICATE OF SERVICE

I certify that I served a copy of this Reply in Support of Petition for Full Intervention Motion via first class mail on June 15, 2011, to the following:

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