STOLL·KEENON·OGDEN

PLLC

300 West Vine Street
Suite 2100
Lexington, KY 40507-1801
Main: (859) 231-3000
Fax: (859) 253-1093
www.skofirm.com

Molly Stephens
Direct Dial: (859) 231-3959
Direct Fax: (859) 253-1093
molly.stephens@skofirm.com

July 1, 2011

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PUBLIC SERVICE
COMMISSION

VIA HAND DELIVERY

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

RE: ***The 2011 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company***
Case No. 2011-00140

Dear Mr. DeRouen:

Enclosed please find and accept for filing the original and ten copies of the Joint Response of Louisville Gas and Electric Company and Kentucky Utilities to the Application for Rehearing of Petition to Intervene of Geoffrey M. Young in the above-referenced matter.

Thank you in advance for your assistance. If you should have any questions, please do not hesitate to contact me.

Sincerely,

Molly M. Stephens
Paralegal

Enclosures
cc: Parties of Record

400001.140620/3975359.1

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JUL 01 2011
PUBLIC SERVICE COMMISSION

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

JOINT RESPONSE OF LOUISVILLE GAS AND ELECTRIC COMPANY AND KENTUCKY UTILITIES TO THE APPLICATION FOR REHEARING OF PETITION TO INTERVENE OF GEOFFREY M. YOUNG

Louisville Gas and Electric Company ("LG&E") Kentucky Utilities Company ("KU") (collectively, the "Companies") hereby respond to the Application for Rehearing of Petition to Intervene of Geoffrey M. Young and respectfully asks the Commission to deny Mr. Young's Application. Mr. Young's Application provides no grounds under 807 KAR 5:001 § 3(8)(b) for altering the Commission's June 10, 2011 Order denying his Petition for Full Intervention,[1] stating neither a jurisdictional special interest of Mr. Young's, nor does it demonstrate that Mr. Young could assist the Commission in fully considering the matter by presenting issues or developing facts without unduly complicating or disrupting the proceedings.[2]

I. Mr. Young's Petition for Full Intervention and Application for Rehearing States No Interest in this Proceeding that is Within the Commission's Jurisdiction that Is Not Represented by the Attorney General.

The Commission correctly held in its June 10, 2011 Order denying full intervention to Mr. Young that he does not have a special interest in this proceeding warranting intervention because "the issues that Mr. Young seeks to pursue as an intervenor are either already well

[1] *In the Matter of: The 2011 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company* (Case No. 2011-00140) Order, June 10, 2011.
[2] 807 KAR 5:001 § 3(8)(b) states in relevant 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."

represented by the AG or are beyond the scope of the Commission's jurisdiction."[3] Mr. Young's Application for Rehearing utterly misconstrues the special interest requirement set forth in 807 KAR 5:001 § 3(8), but Mr. Young's statements therein, however erroneous, further makes clear that to the extent Mr. Young has an interest in this proceeding that is within the Commission's jurisdiction, it is represented by the Attorney General.

The thrust of Mr. Young's Application for Rehearing erroneously argues that because he has an interest in "[e]nergy efficiency and DSM programs," he must be permitted to intervene so that he can ask the Commission to "assess the environment-related considerations on KU's rates and services."[4] This premise is erroneous. As made clear in the Commission's Order denying full intervention, while Mr. Young has claimed an interest in the Companies' demand-side management and energy efficiency programs, that "interest is adequately represented by the AG."[5] Mr. Young's interest is no different than that of any other KU customer. The Commission has expressly so held in previous cases, holding denying intervention that "the motion does not show how the impact on [the proposed intervenors] will differ from the impact on the rest of KU's 536,000 ratepayers. The Commission finds that the interest of [the proposed intervenors] in the KU proceeding is the same general interest that is held by every one of KU's 536,000 customers."[6]

Mr. Young attempts to obfuscate this issue by arguing that the Attorney General cannot represent his interests, because the "interests of an individual environmentalist and energy

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[3] *In the Matter of: The 2011 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company* (Case No. 2011-00140) Order, June 10, 2011 at 5-6.
[4] Young Application, p. 3, 6.
[5] *In the Matter of: The 2011 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company* (Case No. 2011-00140) Order, June 10, 2011 at 5.
[6] *In the Matter of: The Application of Kentucky Utilities Company for a Certificate of Public Convenience and Necessity and Approval of its 2009 Environmental Compliance Plan for Recovery by Environmental Surcharge* (Case No. 2009-00197) and *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 Environmental Compliance Plan for Recovery by Environmental Surcharge* (Case No. 2009-00197) Order, October 30, 2009.

efficiency specialist such as myself are simply not identical to the interests of the AG."[7] This statement demonstrates Mr. Young's lack of understanding regarding the Commission's jurisdiction. As noted in the Commission's June 10, 2011 Order, other than his interest in demand-side management and energy efficiency, Mr. Young's stated interests are beyond the scope of the Commission's jurisdiction.[8] Despite the Commission's repeated decisions that make clear that the environmental issues Mr. Young seeks to assert are not within its jurisdiction,[9] Mr. Young attempts to circumvent these clear principles by asserting that because demand-side management and energy efficiency are within the Commission's jurisdiction, so too are the environmental externalities, including the impacts of air and water pollution, of generating electricity through mining fuel. This argument is entirely devoid of support and does not provide a basis to alter the Commission's June 10, 2011 Order.

The Commission's Order was cogent and clear: Mr. Young's interests that are within the Commission's jurisdiction are represented by the Attorney General. His interests regarding environmental externalities are not within the Commission's jurisdiction.[10] As such, Mr. Young

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[7] Young Application, p. 7.

[8] *In the Matter of: The 2011 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company* (Case No. 2011-00140) Order, June 10, 2011 at 6-7.

[9] *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, April 28, 2008; *In the Matter of: Application of Louisville Gas and Electric Company to File Depreciation Study* (Case No. 2007-00564) and *In the Matter of: Application of Louisville Gas and Electric Company for an Adjustment of Its Electric and Gas Base Rates* (Case No. 2008-00252) Order, October 10, 2008; *In the Matter of: Application of Kentucky Utilities Company to File Depreciation Study* (Case No. 2007-00565) and *In the Matter of: Application of Kentucky Utilities Company for an Adjustment of Electric Base Rates* (Case No. 2008-00251) Order, December 5, 2008; *In the Matter of: The Joint Application Pursuant to 1994 House Bill No. 501 for the Approval of Kentucky Power Company Collaborative Demand-Side Management Programs and Authority to Implement a Tariff to Recover Costs, Net Lost Revenues and Receive Incentives Associated with the Implementation of the Kentucky Power Company Collaborative Demand-Side Management Programs* (Case No. 2008-00350) Order, October 13, 2008; *In the Matter of: An Investigation of the Energy and Regulatory Issues in Section 50 of Kentucky's 2007 Energy Act*, (Administrative Case No. 2007-00477) Order, December 27, 2007; *In the Matter of: Application of Kentucky Utilities Company for an Adjustment of Base Rates* (Case No. 2009-00548) Order, June 2, 2010.

[10] *In Re: An Assessment of Kentucky's Electric Generation, Transmission and Distribution Needs* (Administrative Case No. 2005-00090) Order Appendix A at 50, September 15, 2005; see also, *In Re: An Investigation of the Energy and Regulatory Issues in Section 50 of Kentucky's 2007 Energy Act* (Administrative Case No. 2007-00477) Report to the General Assembly, at 46.

does not have a special interest in this proceeding that is not adequately represented by another party to this proceeding. The Commission's June 10, 2011 Order was correct and should not be modified.

II. Mr. Young's Petition for Full Intervention and Application for Rehearing Fail to Demonstrate that Mr. Young Could Present Issues or Develop Facts to Aid the Commission in Fully Considering Matters Relevant and Jurisdictional to these Proceedings.

Mr. Young's Application for Rehearing states no qualifications, experience, or background that could assist the Commission to consider fully facts and issues that are relevant and jurisdictional, giving no basis upon which the Commission should alter its determination to deny intervention to Mr. Young. Mr. Young's Application contains no factual assertions beyond those already found insufficient in the Commission's June 10, 2011 Order. Indeed, as if to underline the point that he will not be helpful to the Commission in fairly and accurately deliberating upon the issues in these proceedings, Mr. Young misconstrues the Kentucky Constitution by asserting that the Commission's denial of his intervention violated Section 2 of the Kentucky Constitution regarding absolute and arbitrary power.[11]

This misconstruing of law demonstrates that Mr. Young's input will not assist the Commission in fully, fairly and accurately considering this matter. Because he has provided no additional assertions regarding his qualifications, experience, or background that demonstrate his ability to consider fully the facts and issues relevant to proceeding, the Commission's June 10, 2011 Order should remain undisturbed.

[11] Young Application, p. 11.

III. Mr. Young's Conduct Since Filing His Application for Rehearing Demonstrates that He Will Unduly Complicate and Disrupt these Proceedings.

As noted in the Companies' Joint Response, the Commission has repeatedly held that allowing an intervenor to raise issues that are beyond the scope of the Commission's jurisdiction would unduly complicate and disrupt the proceeding.[12] As set forth above, Mr. Young is attempting to expand the scope of this proceeding to encompass environmental externalities that are within the purview of state and federal agencies *other* than the Commission.

The Companies likewise noted that in their last IRP proceeding, after being denied intervention, Mr. Young sent multiple letters to Chairman Armstrong, despite being informed by the Commission that such communications were considered *ex parte* communications. In this proceeding, after being denied intervention, Mr. Young emailed Andrew Melnykovych, PSC Public Information Officer, requesting that he print out one of the Commission's press releases regarding environmental surcharges (notably, these proceedings are not about environmental surcharges) and attach it as an exhibit to his Application for Rehearing. Jeff Derouen, PSC Executive Director, mailed Mr. Young a letter stating that the "actions you request Mr. Melnykovych to take on your behalf are improper and violate the Commission's Rules of Procedure...." Mr. Young's conduct in the Companies' last proceeding and in this proceeding demonstrate that, if granted intervention, he will unduly complicate and disrupt these proceedings in contravention of 807 KAR 5:001 § 3(8). For these reasons, the Commission should not alter its June 10, 2011 Order.

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[12] *In the Matter of: Application of Louisville Gas and Electric Company to File Depreciation Study*, Case No. 2007-00564 and *In the Matter of: Application of Louisville Gas and Electric Company for an Adjustment of Its Electric and Gas Base Rates*, (Case No. 2008-00252) Order, October 10, 2008; *In the Matter of: The Joint Application Pursuant to 1994 House Bill No. 501 for the Approval of Kentucky Power Company Collaborative Demand-Side Management Programs and Authority to Implement a Tariff to Recover Costs, Net Lost Revenues and Receive Incentives Associated with the Implementation of the Kentucky Power Company Collaborative Demand- Side Management Programs* (Case No. 2008-00350) Order, October 13, 2008.

IV. Mr. Young's Application for Rehearing Misstates the Commission's Authority.

Much of Mr. Young's Application for Rehearing focuses upon the authority and limitations on the Commission's discretion to grant or deny motions for intervention. While these arguments do not address whether Mr. Young has satisfied the regulatory standards for intervention, the arguments create a straw man by which Mr. Young attempts to conclude, that in denying his petition to intervene, the Commission has exceeded its discretion and acted in an arbitrary manner.[13] This is simply inaccurate.

In 2010, the Kentucky Court of Appeals – in a case involving Mr. Young – reiterated that "reposes in the Commission the responsibility for the exercise of a sound discretion in the matter of affording permission to intervene."[14] Moreover, the *EnviroPower* decision that Mr. Young erroneously describes as dictum is equally clear: "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."[15] In fact, in *EnviroPower*, the Court of Appeals held that it would be an abuse of discretion for the Commission to permit intervention when an intervenor does not have an interest in the rates or service of a utility.[16] These decisions demonstrate that the Commission is afforded significant discretion to grant or deny petitions to intervene.[17] Counter to Mr. Young's arguments in his Application for Rehearing, to permit his intervention based upon issues that are decidedly not within the Commission's jurisdiction would constitute an abuse of discretion.

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[13] Young Application, p. 5.

[14] *Young v. Public Service Commission*, 2010 WL 4739964 (Ky. App. 2010) (not to be published) (citing *Inter-County Rural Elec. Co-op. Corp. v. Public Service Commission*, 407 S.W.2d 127, 130 (Ky. 1966)). A copy of this decision has been attached to this Response.

[15] *EnviroPower, LLC v. Public Service Commission of Kentucky*, 2007 WL 289328 at *4 (Ky. App. 2007) (not to be published). A copy of this decision has been attached to this Response.

[16] *Id.* at 4.

[17] *See also, Inter-County Rural Elec. Co-op. Corp. v. Public Service Commission*, 407 S.W.2d 127, 130 (Ky. 1966)

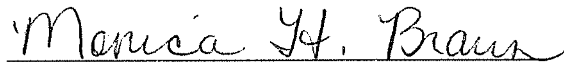
The Commission acted in its discretion in denying Mr. Young's petition to intervene and his constitutional arguments are inapposite because the Commission simply applied the plain meaning of 807 KAR 5:001, Section 3(8) and adhered to long-standing precedent in denying Mr. Young's petition.

V. Conclusion

Because Mr. Young's Application for Rehearing presents no ground upon which the Commission can grant him intervention, and therefore no ground upon which to reconsider its June 10, 2011 Order denying him intervention in these proceedings, the Commission should deny the Application for Rehearing.

Dated: July 1, 2011

Respectfully submitted,



Kendrick R. Riggs
Monica H. Braun
Stoll Keenon Ogden PLLC
2000 PNC Plaza
500 West Jefferson Street
Louisville, Kentucky 40202-2828
Telephone: (502) 333-6000

Allyson K. Sturgeon
Senior Corporate Attorney
LG&E and KU Services Company
220 West Main Street
Louisville, Kentucky 40202
Telephone: (502) 627-2088

Counsel for Kentucky Utilities Company and
Louisville Gas and Electric Company

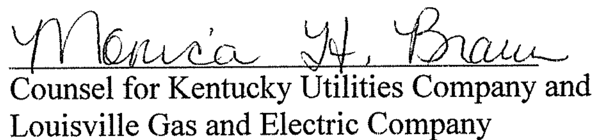
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Response was served via U.S. mail, first-class, postage prepaid, this 1st day of July 2011 upon the following persons:

Michael L. Kurtz
David F. Boehm
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202

Dennis G. Howard II
Lawrence W. Cook
Assistant Attorneys General
Office of the Kentucky Attorney General
Office of Rate Intervention
1024 Capital Center Drive, Suite 200
Frankfort, KY 40601-8204

Geoffrey M. Young
454 Kimberly Place
Lexington, KY 40503



Counsel for Kentucky Utilities Company and
Louisville Gas and Electric Company

Westlaw.

Not Reported in S.W.3d, 2010 WL 4739964 (Ky.App.)
(Cite as: 2010 WL 4739964 (Ky.App.))

Only the Westlaw citation is currently available.

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

NOT TO BE PUBLISHED

Court of Appeals of Kentucky.
Geoffrey M. YOUNG, Appellant
v.
PUBLIC SERVICE COMMISSION OF KENTUCKY, Kentucky Utilities Company, Louisville Gas and Electric Company, The Attorney General Of Kentucky, Kentucky Industrial Utilities Customers, The Kroger Company, The Lexington-Fayette Urban County Government, Community Action Kentucky, Inc./Community Action Council for Lexington-Fayette, Bourbon, Harrison and Nicholas Counties, Inc., Association of Community Ministries/People Organized and Working for Energy Reform, The Kentucky Power Company, Duke Energy Kentucky, Inc ., and East Kentucky Power Cooperative, Inc., Appellees.

No. 2009-CA-000292-MR.
Nov. 24, 2010.

West KeySummary**Public Utilities 317A 190**

317A Public Utilities
317AIII Public Service Commissions or Boards
317AIII(C) Judicial Review or Intervention
317Ak188 Appeal from Orders of Commission
317Ak190 k. Decisions Reviewable. Most Cited Cases

Trial court did not err in determining that intervenor's appeals resulting from denial of his motion to intervene in underlying cases regarding utility company's application for an adjustment of its rates were interlocutory. Trial court correctly concluded that motion to intervene was interlocutory and that any appeal of the denial had to occur after final adjudication in the underlying case. KRS 278.310.

Appeal from Franklin Circuit Court, Action No. 08-CI-01812; Thomas D. Wingate, Judge.
Geoffrey M. Young, Lexington, KY, for appellant.

David S. Samford, Helen C. Helton, Richard W. Bertelson, III, Frankfort, KY, for appellee Kentucky Public Service Commission.

Robert M. Watt, III, David T. Royse, Lynn Sowards Zellen, Lexington, KY, for appellees Kentucky Utilities Company And Louisville Gas and Electric Company.

No Brief Filed for Appellees The Attorney General of Kentucky, Kentucky Industrialutilities Customers, The Kroger Company, The Lexington-Fayette Urban County Government, Community Action Kentucky, Inc./Community Action Council for Lexington-Fayette, Bourbon, Harrison and Nicholas Counties, Inc., Association of Community Ministries/People Organized and Working for Energy Reform, The Kentucky Power Company, Duke Energy Kentucky, Inc., and East Kentucky Power Cooperative, Inc.

Before CLAYTON and LAMBERT, Judges; HENRY,[FN1] Senior Judge.

FN1. Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

OPINION

CLAYTON, Judge.

*1 This is an appeal of a decision of the Franklin Circuit Court which held that the appellant, Geoffrey M. Young's, denial of his request for intervention was interlocutory and, therefore, not ripe for appeal. For the reasons that follow, we affirm the decision of the Franklin Circuit Court.

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BACKGROUND INFORMATION

Appellee Kentucky Utilities ("KU") filed a notice of intent to file Public Service Commission ("PSC") Case NO.2008-33251 on July 1, 2008. It later filed that case on July 29, 2008. Young filed a petition for full intervention pursuant to KRS 278.310 and 807 Kentucky Administrative Regulations (KAR) 5:001 Section 3(8). Young was informed by letter, that due to ethical obligations of the PSC's Chairman and Vice-Chairman, the agency could not rule upon the petition until after December 1, 2008. On December 5, 2008, in dismissing Young's action, the PSC denied Young's motion for intervention in the KU case.

Appellee, Louisville Gas & Electric ("L G & E") filed an application for an adjustment of its rates on July 29, 2008. Young also moved to intervene in this action. On October 10, 2008, Young's motion to intervene in LG & E's case was denied by the PSC.

On October 31, 2008, Young filed a "Complaint for Review of Determinations of the Kentucky Public Service Commission and for Declaratory and Injunctive Relief" with the Franklin Circuit Court. The circuit court found as follows:

> ... Mr. Young's appeal of the PSC's ruling on his petition for intervention is not ripe for adjudication because it is interlocutory. Though appeals of PSC decisions are not governed by the Civil Rules until the appeal is perfected [*See Board of Adjustments of City of Richmond v. Flood,* 581 S.W.2d 1, 2 (Ky.1978)], the interests at stake here are identical to those contemplated by the drafters of CR 24.02. Allowing every party who desires permissive intervention in a PSC rate case to file an interlocutory appeal to the Franklin County Circuit Court is unworkable. Halting adjudication of every case before the PSC to await a ruling as to the propriety of each denial of permissive intervention would render most rate cases interminable. The overwhelming time and expense such a ruling would incur are unjustifiable, especially given the right to appeal a denial of permissive intervention upon a final ruling of the PSC. Furthermore, no statute or regulation provides for such appeal.

Young now appeals the dismissal of his case by the circuit court.

STANDARD OF REVIEW

When reviewing the granting of a motion to dismiss, we must determine whether it appeared that the pleading party would be entitled to relief under any set of facts that could be proven in support of his claim. *Pari-Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club,* 551 S.W.2d 801, 803 (Ky.1977). With this standard in mind, we examine the circuit court's ruling.

DISCUSSION

Young first asserts that "[t]he Trial Court committed reversible error by unilaterally redefining [his] complaint and memorandum nearly out of existence, by addressing only one claim, and by completely ignoring all of [his] most serious claims." Appellant's Brief at p. 4. Young filed his complaint in Franklin Circuit Court and, thereafter, amended it. Young attempted to file a second amended complaint; however, the circuit court never granted him leave to do so. Young filed yet another "amended" complaint after the hearing on the motion to dismiss by the court. Again, there was no notice of the motion to amend and such was not granted by the circuit court. We have, therefore, the original and amended complaints which were appropriately filed with the court.

***2** Kentucky Rules of Civil Procedure (CR) 6.04(1) provides that "[a] written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served a reasonable time before the time specified for the hearing[.]" The amended complaint filed with the circuit court sought relief regarding KU and LG & E rate cases. As set forth above, the trial court first had to determine whether Young's appeal was interlocutory.

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In *Ashland Public Library Bd. Of Trustees v. Scott,* 610 S.W.2d 895, 896 (Ky.1981), the Court held:

> The provisions of CR 54.02(1) do not encompass orders denying intervention. Applicants for intervention are not parties to an action and do not present claims for relief in an action unless and until they are permitted to intervene. Rather, they seek to become parties so that they may then assert a claim or defense in the action. CR 24.03. Consequently, recitation of a determination that there is no just reason for delay and that the order is final is neither a condition precedent to appellate review of a denial of intervention sought as a matter of right, nor a vehicle to authorize appellate review of a denial of permissive intervention prior to judgment disposing of the whole case.

Clearly precedent supports the trial court's conclusion that the denial of Young's motion to intervene was interlocutory and that any appeal of the denial must occur after final adjudication in the underlying case. In *Inter-County Rural Elec. Co-op. Corp. v. Public Service Commission,* 407 S.W.2d 127, 130 (Ky.1966), the Court held that 807 KAR 5:001 Section 3(8) "reposes in the Commission the responsibility for the exercise of a sound discretion in the matter of affording permission to intervene. Intervention as a matter of right is not specifically defined in the regulation."

The PSC had denied Young's motion to intervene in the KU and LG & E cases. Having determined that the appeals were interlocutory, the court then properly found it had no jurisdiction over them. We find the circuit court did not err in making this determination.

Young also contends that the trial court failed or refused to rule on any of his motions to amend his complaint and memoranda, thereby negating the intent of CR 15.01 and CR 15.04. CR 15.01 provides that "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served[.]" In this case, the trial court did just that. CR 15.01 goes on to provide that "[o]therwise a party may amend his pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

Young argues that because Complaint 4 was submitted for the purpose of making several claims for relief within the time frame specified by the governing statute, justice required the trial court to allow him to amend his pleading. In any event, he contends, the trial court addressed only Complaint 4 in its opinions and orders. Specifically, Young states that while the trial court did not set forth which version of the complaint was addressed in its opinion and order, it was clear that Complaint 4 was the one since it referred to a December 2008 decision of the PSC which was after the date of the filing of the first three complaints. Complaint 4, he asserts, included the claims arising in part from the denial of that order.

***3** As set forth above, CR 15.01 clearly provides that it is within a court's discretion as to whether a second amended complaint may be filed. We find no reason to hold that the circuit court abused its discretion in this instance.

Finally, Young contends that the jurisdiction of the Franklin Circuit Court over his complaint had attached. He argues that the trial court's opinion and order in this civil action did not include any language that would indicate that subject matter jurisdiction had not attached. Language in the court's opinion is not important in determining whether or not the court had jurisdiction. The Franklin Circuit court correctly held that it did not have jurisdiction over an interlocutory order.

Thus, the trial court was correct in holding that the denial of Young's motion to intervene was interlocutory and, consequently, not subject to appellate review. We therefore affirm the trial court's decision dismissing the action.

ALL CONCUR.

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Ky.App.,2010.
Young v. Public Service Com'n of Kentucky
Not Reported in S.W.3d, 2010 WL 4739964 (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. Release 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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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, EnvrioPower 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 had

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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 an

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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 unavailing 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 another 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 that 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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EnviroPower, LLC v. Public Service Com'n of Kentucky
Not Reported in S.W.3d, 2007 WL 289328 (Ky.App.)

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