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June 24, 2011

RECEIVED

JUN 24 2011

PUBLIC SERVICE
COMMISSION

VIA HAND DELIVERY

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

RE: The Application of Kentucky Utilities Company for Certificates of Public Convenience and Necessity and Approval of Its 2011 Compliance Plan for Recovery by Environmental Surcharge
Case No. 2011-00161

The Application of Louisville Gas and Electric Company for Certificates of Public Convenience and Necessity and Approval of Its 2011 Compliance Plan for Recovery by Environmental Surcharge
Case No. 2011-00162

Dear Mr. DeRouen:

Enclosed please find and accept for filing two originals and ten copies of the Joint Response of Kentucky Utilities Company and Louisville Gas and Electric Company to the Petitions of Drew Foley, Janet Overman, Gregg Wagner, Rick Clewett, Raymond Barry, Sierra Club, and the Natural Resources Defense Council for Full Intervention in the above-referenced cases. Please confirm your receipt of this filing by placing the stamp of your Office with the date received on the enclosed additional copies of this letter and return them to me via our runner.

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

Yours very truly,


Kendrick R. Riggs

KRR:ec

Enclosures

cc: Parties of Record
Edward George Zuger III

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

JUN 24 2011

In the Matter of:

PUBLIC SERVICE
COMMISSION

APPLICATION OF KENTUCKY UTILITIES)
COMPANY FOR CERTIFICATES OF)
PUBLIC CONVENIENCE AND NECESSITY) CASE NO. 2011-00161
AND APPROVAL OF ITS 2011 COMPLIANCE)
PLAN FOR RECOVERY BY)
ENVIRONMENTAL SURCHARGE)

In the Matter of:

THE APPLICATION OF LOUISVILLE GAS AND)
ELECTRIC COMPANY FOR CERTIFICATES)
OF PUBLIC CONVENIENCE AND NECESSITY) CASE NO. 2011-00162
AND APPROVAL OF ITS 2011 COMPLIANCE)
PLAN FOR RECOVERY BY ENVIRONMENTAL)
SURCHARGE)

**JOINT RESPONSE OF KENTUCKY UTILITIES COMPANY AND
LOUISVILLE GAS AND ELECTRIC COMPANY TO THE PETITIONS OF
DREW FOLEY, JANET OVERMAN, GREGG WAGNER, RICK CLEWETT,
RAYMOND BARRY, SIERRA CLUB, AND THE NATURAL RESOURCES
DEFENSE COUNCIL FOR FULL INTERVENTION**

Louisville Gas and Electric Company (“LG&E”) and Kentucky Utilities Company (“KU”) (collectively, the “Companies”) respectfully request that the Commission deny the Petitions of Drew Foley, Janet Overman, Gregg Wagner, Rick Clewett, Raymond Barry, (collectively, the “Individuals”) and the Sierra Club and the Natural Resources Defense Council (collectively, the “Environmental Groups”) for full intervention. Neither the Individuals’ nor the Environmental Groups’ Petitions should be granted for three principal reasons: (1) the Petitions do not demonstrate a special interest in the proceedings because the stated interests are either not within the Commission’s jurisdiction or are adequately represented by other parties; (2) the Petitions fail to identify any relevant issues or development of relevant facts that will assist the Commission in the resolution of this matter; and (3) the Individuals’ and Environmental Groups’

intervention would unduly complicate and disrupt the proceedings. Because neither the Individuals nor the Environmental Groups have satisfied any of the requirements for intervention under 807 KAR 5:001 § 3(8), LG&E and KU respectfully request that the Commission deny the Petitions of Drew Foley, Janet Overman, Gregg Wagner, Rick Clewett, Raymond Barry, the Sierra Club and the Natural Resources Defense Council for Full Intervention.

I. THE INDIVIDUALS

A. *The Commission Should Deny the Individuals' Petitions to Intervene Because They Do Not Have a Special Interest in the Proceedings.*

The Commission will grant requests for permissive intervention “only upon a determination that the criteria set forth in 807 KAR 5:001, Section 3(8), have been satisfied.”¹ Under the regulation, permissive intervention will only be granted if the person “has a special interest in the proceeding which is not otherwise adequately represented” or that granting full 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 proceeding.”²

Cumulatively, three individual customers of LG&E and two customers of KU have sought to intervene in these proceedings. Their intervention should not be permitted because none of the customers have a special interest in these proceedings. The Petitions state that the Individuals are “long time Sierra Club members, and have a deep interest in seeing [the Companies] transform to meet the new reality that is both low cost and cleaner.”³ The Individuals later assert that they are “customers and ratepayers” that “help fund [the Companies’] operations” and the Commission’s decision whether to grant Certificates of Convenience and

¹ *In the Matter: The 2008 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company* (Case No. 2008-00148) Order, July 18, 2008.

² 807 KAR 5:001, § 3(8).

³ KU Petition at 4; LG&E Petition at 4.

Necessity will “directly impact their bills.”⁴ Moreover, the Individuals allege that because they reside within the Companies’ service territories, they are “impacted by the economic, public health, and environmental effects of the resource decisions” the Companies make.⁵

The Individuals have thus alleged two interests in these proceedings: (1) their status as customers and (2) the public health and environmental effects of the Companies decisions. Neither of these interests constitutes a special interest warranting intervention in the Companies’ ECR proceedings. Beginning with the first interest, the Commission has repeatedly held that a customer’s interest as a ratepayer is not a special interest warranting intervention.⁶ The status of “customer” does not confer the ratepayer with a special interest because the Attorney General represents the interests of all customers in proceedings such as this one, pursuant to KRS 367.150(8)(b). The Attorney General moved to intervene in these proceedings on May 25, 2011. The Commission granted the motion to intervene on June 3, 2011. The Attorney General has significant experience in representing ratepayers’ interests in ECR proceedings, including prior KU and LG&E cases.⁷

⁴ KU Petition at 10-11; LG&E Petition at 11.

⁵ KU Petition at 11; LG&E Petition at 11.

⁶ *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: Application of Kentucky Utilities Company to Amortize, by Means of Temporary Decreases in Rates, Net Fuel Cost Savings Recovered in Coal Contract Litigation* (Case No. 93-113) Order, December 7, 1993; *In the Matter of: Application of Water Service Corporation of Kentucky for an Adjustment of Rates* (Case No. 2008-563) Order, May 6, 2009; *In the Matter of: An Examination by the Kentucky Public Service Commission of the Environmental Surcharge Mechanism of Louisville Gas and Electric Company for the Two-Year Billing Period Ending April 30, 2003* (Case No. 2003-00236) Order, October 8, 2003.

⁷ *See e.g., In the Matter of: The Application of Kentucky Utilities Company for a Certificate of Public Convenience and Necessity to Construct a Selective Catalytic Reduction System and Approval of Its 2006 Compliance Plan for Recovery by Environmental Surcharge* (Case No. 2006-00206); *In the Matter of: The Application of Kentucky Utilities Company for a Certificate of Public Convenience and Necessity to Construct Flue Gas Desulfurization Systems and Approval of its 2004 Compliance Plan for Recovery by Environmental Surcharge* (Case No. 2004-00426); *In the Matter of: The Application of Louisville Gas and Electric Company for Approval of Its 2002 Compliance Plan for Recovery by Environmental Surcharge* (Case No. 2002-00147); *In the Matter of: The Application of Louisville Gas and Electric Company for Approval of Its 2006 Compliance Plan for Recovery by Environmental Surcharge* (Case No. 2006-00208).

The Individuals concede that the Attorney General has the task of “representing all consumers.”⁸ Despite this acknowledgement, the Individuals assert that the Attorney General cannot adequately represent their interests because the Attorney General cannot represent all customers’ “diverse interests” because some of those interests are “diametrically opposed to each other.”⁹ The Individuals’ Petitions concede that their interest as customers, however, is limited to the financial impact of the ECR proceedings on their monthly bills.¹⁰ Thus, the Individuals have expressed no special interest in these proceedings that is in any way different than any other customer of KU and LG&E. Any increase in the surcharge as a result of these proceedings will be applied uniformly among all customers, including those seeking to intervene. While the Petitions speak of “diametrically opposed” interests, *all* electric customers could be financially impacted by these proceedings. The Commission has previously denied customers’ attempts to intervene in ECR proceedings when their alleged special interest is their status as ratepayers, holding, “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.”¹¹ As such, the Attorney General can more than sufficiently represent customers’ interests by evaluating whether the Companies’ plans contain reasonable and cost-effective projects to comply with the applicable regulations. The same is true for the Certificates of Public Convenience and Necessity, as well. If the Commission approves the projects for which Certificates of Public Convenience and Necessity are sought, all

⁸ KU Petition at 11; LG&E Petition at 12.

⁹ *Id.*

¹⁰ KU Petition at 10-11; LG&E Petition at 11.

¹¹ *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.

customers will equally be apportioned the costs associated with completing the projects. As with the Companies' environmental compliance plans and surcharges, because the interest of the Individuals is no different from that of any other customer of KU or LG&E, the Individuals do not have a special interest in the proceeding. The Petitions should be denied because the Individuals do not have a special interest in these proceedings simply because they are customers that could be financially impacted by the outcome of these actions.

The second stated interest the Individuals allege is in the public health and environmental effects of the Companies' decisions.¹² This interest cannot constitute a special interest warranting intervention because neither public health nor the environmental effects of the Companies' pollution-control projects are within the scope of these proceedings and, in fact, are beyond the scope of the Commission's jurisdiction. Both the Kentucky Court of Appeals and the Commission have made clear that a person seeking intervention must have "an interest in the 'rates' or 'service' of a utility, since those are the only two subjects under the jurisdiction of the PSC."¹³ The Commission has held:

Notably absent from the Commission's jurisdiction are environmental concerns, which are the responsibility of other agencies within Kentucky state government... To the extent that [the proposed intervenor] seeks to address issues in this proceeding that deal with the impact of air emissions on **human health** and the **environment**, this is not the proper venue for those issues to be considered.¹⁴

The Commission has thus expressly stated that public health and the impact on the environment from air emissions is not within its jurisdiction. These interests are not related to rates and

¹² KU Petition at 11; LG&E Petition at 11.

¹³ *EnviroPower, LLC v. Public Service Commission of Kentucky*, 2007 WL 289328 at *4 (Ky. App. 2007) (not to be published; pursuant to C.R. 76.28(4), a copy is attached to the Response); *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.

¹⁴ *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 (emphasis added).

service of a utility and cannot constitute a special interest that warrants intervention in these proceedings.

The Individuals' Petitions allege two interests in these proceedings. The first is their status as customers. This interest is sufficiently represented by the Attorney General. The second stated interest is the impact of the Companies' decisions on public health and the environment. This interest is well beyond the scope of the Commission's jurisdiction. As such, the Petitions to intervene should be denied.

B. The Commission Should Deny the Individuals' Petitions to Intervene Because the Individuals Have Not Demonstrated that They Will Present Issues or Develop Facts that Would Assist the Commission.

The Individuals' Petitions to intervene fail to demonstrate that they will present issues or develop facts that would assist the Commission in fully considering this matter without unduly complicating or disrupting the proceedings.¹⁵ The Petitions do not attempt to explain how the Individuals will present issues or develop facts, instead relying solely on the experience of the other movants in the Petitions, the Environmental Groups, as evidence of their abilities. The Petitions state that the Environmental Groups, "on behalf of their members **including the individual Movants**, will use their expertise and consultants..."¹⁶ While the Petitions allege that the Individuals should be granted full intervention on their own merit, a careful examination of the Petitions demonstrate that the Individuals have not even alleged that they can present issues or develop facts, but instead seek to rely on the purported abilities of the Environmental Groups in order to satisfy the statutory standard for intervention. This is entirely insufficient.

¹⁵ 807 KAR 5:001 § 3(8)(b).

¹⁶ KU Petition at 10; LG&E Petition at 10 (emphasis added).

The Commission, in evaluating petitions to intervene, has closely examined whether the petition discloses any expertise in the issue involved in the proceedings.¹⁷ The Individuals' Petitions fail to demonstrate that *any* of the Individuals have experience in Commission proceedings, cost recovery, environmental regulations, or any other of the complex issues that may be involved in these proceedings. Instead, the Petitions simply acknowledge that the Individuals are customers that are also members of the Sierra Club.¹⁸ Membership in the Sierra Club does not consequentially confer upon each of its members the expertise necessary to develop facts or present issues that will assist the Commission in environmental compliance proceedings. As the Petitions fail to demonstrate how the Individuals are inimitably qualified to satisfy this prerequisite for intervention, their Petitions should be denied.

C. The Commission Should Deny the Individuals' Petitions to Intervene Because Their Intervention Will Unduly Complicate and Disrupt the Proceedings.

Even if the Individuals could demonstrate a special interest in these proceedings or that their involvement would assist in developing facts or issues, their intervention would unduly complicate and disrupt the proceedings. As explained, the Individuals have two stated interests in these proceedings, the first of which is their status as customers that is represented by the Attorney General. The second interest the Individuals have advanced is in the public health and environmental effects of the Companies' decision making. As set forth more fully above, the

¹⁷ *In the Matter of: Application of Louisville Gas and Electric Company for Approval of a Revised Collection Cycle for Payment of Bills* (Case No. 2007-00410) Order, November 29, 2007 at 3; *In the Matter of: Joint Application of Louisville Gas and Electric Company, Metro Human Needs Alliance, Inc., People Organized and Working for Energy Reform, and Kentucky Association for Community Action, Inc. for the Establishment of a Home Energy Assistance Program* (Case No. 2004-00304) Order, August 25, 2004 at 2; *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 at 5-6; *In the Matter of: Application of Water Service Corporation of Kentucky for an Adjustment of Rates* (Case No. 2008-563) Order, May 5, 2009 at 2.

¹⁸ KU Petition at 4; LG&E Petition at 4.

Commission has expressly held that both of these issues are not within its jurisdiction in *any* Commission proceeding.

Permitting the Individuals to expand the scope of these proceedings to encompass public health and environmental concerns that are not within the Commission's jurisdiction would inevitably unduly complicate and disrupt the Companies' ECR actions. 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.¹⁹ The proper means for the Individuals to participate in these proceedings is through filing public comments and communicating with the Attorney General, who will represent the Individuals' interests as ratepayers. The Individuals may also attend and provide oral comments at the hearing regarding these matters. These mechanisms ensure that the Individuals are given the opportunity to present their positions on jurisdictional issues without unduly complicating the pending action. The Companies respectfully request that the Commission deny the Individuals' Petitions to intervene as their involvement would unduly complicate and disrupt these proceedings.

II. THE ENVIRONMENTAL GROUPS

A. The Commission Should Deny the Environmental Groups' Petitions to Intervene Because They Do Not Have a Special Interest in the Proceedings.

In addition to the Individuals' Petitions for Intervention, two Environmental Groups, the Sierra Club and the Natural Resources Defense Council have moved to intervene in these proceedings. As explained above, permissive intervention may only be granted if the

¹⁹ *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.

prerequisites set forth in 807 KAR 5:001 § 3(8) are satisfied. The Environmental Groups cannot satisfy the first basis for permissive intervention, which requires the movant to demonstrate a special interest in the proceeding that is not already represented by another party to the action.²⁰

The Petitions do not clearly articulate what special interest the Environmental Groups purport to have in these proceedings. The Environmental Groups first allege that because they have members who are customers and ratepayers of the Companies, they “have the same interests as the individual Movants.”²¹ As set forth more fully above, the Individuals’ status as customers does not constitute a special interest warranting intervention in these proceedings because their interests are represented by the Attorney General. As such, the Environmental Groups’ attempt to rely on certain of its members’ status as ratepayers is insufficient.

The second interest ostensibly alleged is the Environmental Groups’ desire to “promote energy efficiency, peak demand reduction, renewable energy, and cost-effective low carbon energy sources in Kentucky.”²² These interests are not within the scope of an ECR proceeding, as set forth in KRS 278.183. In pertinent part, the statute states that the Commission shall conduct a hearing to:

- (a) Consider and approve the plan and rate surcharge if the commission finds the plan and rate surcharge reasonable and cost-effective for compliance with the applicable environmental requirements set forth in subsection (1) of this section;
- (b) Establish a reasonable return on compliance-related capital expenditures; and
- (c) Approve the application of the surcharge.²³

The Commission’s review of the Companies’ planned projects is focused upon whether the projects are reasonable and cost-effective. The review does not encompass considerations of

²⁰ 807 KAR 5:001, § 3(8).

²¹ KU Petition at 11; LG&E Petition at 11.

²² *Id.*

²³ KRS 278.183(2).

environmental policy concerns, including the advocacy of renewable and non-coal sources of energy. The Companies have previously sought the Commission’s approval of demand-side management and energy efficiency programs; this is not that proceeding. Instead, the ECR actions the Companies have filed is premised upon complying with environmental regulations “which apply to coal combustion wastes and by-products from facilities utilized for production of energy from coal” in a cost-effective manner.²⁴ The environmental policy concerns that the Environmental Groups admittedly “desire to promote” is not within the scope of these proceedings and therefore cannot constitute a special interest warranting intervention.

This is equally true with regard to the Certificates of Public Convenience and Necessity the Companies have requested, as well. In the Companies’ last ECR proceeding in which Certificates of Public Convenience and Necessity were sought, the Commission held that “the factors to be considered in reviewing an application for a CPCN under KRS 278.020(1) are whether there is a need for the proposed facilities and the absence of wasteful duplication.”²⁵ Neither of these factors involves the environmental policy concerns the Environmental Groups seek to advocate. Because the Environmental Groups’ concerns are beyond the scope of these proceedings, they do not constitute a special interest in the Certificates of Public Convenience and Necessity the Companies have requested.

The Environmental Groups then state that its interests are not adequately represented by any of the parties in these proceedings “as none of the other parties can adequately represent the organizational Movants’ interests as national organizations that are interested in costs associated

²⁴ KRS 278.183(1) and (2).

²⁵ *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.

with emerging federal regulations compliance....”²⁶ It is unexplained how the Environmental Groups’ status as national organizations confers any special interest in the rates or service of KU or LG&E or a superior interest in the outcome of these cases than the statutory interest under Kentucky law of the Attorney General. As such, this does not qualify as a special interest warranting intervention.

The Environmental Groups’ final argument is that the Attorney General cannot adequately represent the Environmental Groups’ interests and that private companies can intervene on the side of the government, even if some of their interests converge.²⁷ The Environmental Groups do not explain why the Attorney General cannot adequately represent their interests, instead advancing the conclusory statement that consumers have “diverse interests.” First, neither of the Environmental Groups are customers of the Companies and it is thus unclear what diverse interest they have from other customers. The Companies acknowledge that to the extent that the Environmental Groups seek to utilize these ECR proceedings to advocate for the use of non-coal generation, those interests will likely conflict with other customers, as well as the Attorney General, because the Kentucky General Assembly has encouraged the use of Kentucky coal by electric utilities, such as the Companies.²⁸ The Environmental Groups may advocate their beliefs regarding the impacts of coal-fired generation in various proceedings before other state and federal agencies, as well as to the Kentucky General Assembly; but the Commission is not the agency to hear them. The Commission has made clear that “hold[ing] a particular position on issues pending in ... [a] case does not create

²⁶ KU Petition at 11; LG&E Petition at 11.

²⁷ KU Petition at 11-12; LG&E Petition at 11-12.

²⁸ KRS 278.020(1). The advocacy for the use of non-coal generation is well-beyond the scope of KRS 278.813.

the requisite ‘special interest’ to justify full intervention under 807 KAR 5:001, Section 3(8)(b).”²⁹

Finally, the Environmental Groups cite to several federal decisions, most of which are from the District of Columbia, for the proposition that intervention is permissible even if a government entity has intervened.³⁰ These decisions are inapposite to the pending motion to intervene, as all of the cases cited construe the Federal Rule of Civil Procedure regarding intervention and do not, in any way, address the Kentucky regulatory standards for intervention in Commission proceedings such as this one. Thus, none of the cited authority is binding on the Commission and is not persuasive to the present situation because of the differences between the applicable federal rule and the regulation at issue in these proceedings.³¹ Finally, the Commission has never relied on the Federal Rule of Civil Procedure regarding intervention in any prior order.

Thus, while the Environmental Groups have referred to several interests it claims to have in the Companies’ ECR proceedings, none of those interests constitute a special interest warranting intervention. As such, their Petitions should be denied.

B. The Commission Should Deny the Environmental Groups’ Petitions to Intervene Because They Will Not Present Issues or Develop Facts that Will Assist the Commission in Fully Considering the ECR Proceedings.

Because the Environmental Groups do not have a special interest in these proceedings under which permissive intervention is warranted, intervention can only be granted if the Environmental Groups’ Petitions demonstrate that it will present issues or develop facts that will

²⁹ *In re Joint Application of Louisville Gas and Electric Company, Association of Community Ministries, Inc., People Organized and Working for Energy Reform, and Kentucky Association for Community Action, Inc. for the Establishment of a Home Energy Assistance Program* (Case No. 2007-00337) September 14, 2007 Order at 6.

³⁰ KU Petition at 11-12; LG&E Petition at 11-12.

³¹ For example, the Federal Rule of Civil Procedure 24(a) permits parties to intervene if they have an interest in the proceeding, while 807 KAR 5:001 § 3(8) requires the party to have a special interest.

assist the Commission in considering these proceedings.³² The Environmental Groups' Petitions fail to make the demonstration required by the Commission's regulation.

The Environmental Groups begin by addressing the Companies' application, alleging that KU and LG&E have not adequately addressed the alternatives the Companies considered before deciding to seek Commission approval for the pollution-control facilities, focusing upon natural gas.³³ The Petitions then state that the Environmental Groups can "bring to this docket their unique perspective and experience in advancing technical regulatory solutions to increase renewable and demand side energy sources."³⁴ The Petitions then state the Environmental Groups' experience in "cost effective energy efficiency" and that they have presented to various entities regarding "energy efficiency, renewable energy, and coal generation."³⁵ The Petitions further note the Environmental Groups' desire to present testimony on the "increasing availability of low cost energy efficiency and renewable energy alternatives."³⁶ These arguments are as matter of law beyond the scope of the issues that may be adjudicated under KRS 278.183 by the Commission.

While the Environmental Groups begin by addressing whether the Companies appropriately considered natural gas options, the remainder of the Petitions makes clear that the Environmental Groups' experience is limited to renewable energy and energy efficiency programs. While making conclusory allegations regarding their expertise, tellingly, the Petitions do not cite to any experience the Environmental Groups have in Kentucky or with cases similar to ECR proceedings such as this one. The Commission has previously rejected motions to intervene in ECR proceedings where the proposed intervenor fails to provide any "background,

³² 807 KAR 5:001 § 3(8).

³³ KU Petition at 6-7; LG&E Petition at 6-7.

³⁴ KU Petition at 7; LG&E Petition at 7.

³⁵ KU Petition at 7-8; LG&E Petition at 7-8.

³⁶ KU Petition at 8; LG&E Petition at 8.

knowledge, experience, or training” on the issues of: “(1) the need for, and absence of wasteful duplication, from emission control equipment and facilities; and (2) cost recovery by surcharge of utility expenses and facilities.”³⁷ The Commission examines petitions for expertise in these two factors because those factors represent the scope of the Commission’s review regarding the Certificates of Public Convenience and Necessity and the environmental compliance plans and surcharges, respectively. The Environmental Groups’ Petitions in these proceedings are equally devoid of the requisite background, knowledge, experience or training on both of these issues.

Cumulatively, the allegations in the Petitions demonstrate two important concepts that render the Petitions fatally deficient: (1) that the Environmental Groups have failed to demonstrate the required expertise in ECR proceedings regarding the proposed Certificates of Public Convenience and Necessity, environmental compliance plans, and surcharges; and (2) if granted intervention, the Environmental Groups will simply advocate for their admitted interests in renewable energy and low-carbon generation sources. The Environmental Groups will thus be unable to present issues or develop facts that will assist the Commission in the resolution of these proceedings. As set forth more fully above, the Commission’s review of the Companies’ ECR plans is to determine whether they are cost-effective and reasonable. The Environmental Groups instead seek to advocate for renewable energy and low carbon generation sources, topics that are simply beyond the scope of these proceedings. The Environmental Groups have attempted to avoid this outcome by alleging, incorrectly, that because the Companies did not consider all available alternatives, the Environmental Groups should be permitted to advocate for certain

³⁷ *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.

alternative energy sources befitting their stated environmental policy interests. This is not the regulatory standard for intervention. Because the Environmental Groups have not demonstrated that they will present issues or develop facts that will assist the Commission the resolution of the Companies' ECR proceedings, their Petitions should be denied.

C. The Commission Should Deny the Environmental Groups' Petitions to Intervene Because the Environmental Groups' Intervention Will Unduly Complicate and Disrupt the Proceedings.

Assuming, for the sake of argument, that if the Environmental Groups could demonstrate that they would present issues or develop facts that would assist the Commission in these proceedings, their intervention would unduly complicate and disrupt these proceedings in contravention of 807 KAR 5:001 § 3(8). The Environmental Groups seek to utilize these proceedings to advance their environmental policy positions; specifically, their preference for renewable energy, energy efficiency programs and non-coal generation. The Commission has repeatedly held that permitting an intervenor to address issues beyond the scope of the proceeding will unduly complicate and disrupt the proceeding.³⁸ Permitting the Environmental Groups' intervention will lead to testimony and discovery that is not limited to determining whether the Companies' ECR plans are cost-effective and reasonable under the requirements of KRS 278.183. The Commission has no jurisdiction to impose environmental requirements that are more restrictive than the requirements already established by federal, state, and local environmental agencies. And, the Commission has previously held that it does not have

³⁸ *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).

jurisdiction under KRS Chapter 278 to explicitly allow for consideration of “externalities.”³⁹ Granting intervention to permit arguments on the inadequacy of the Commission’s long-standing and well-established sound principals of regulation such as least-cost resource planning and cost-based regulation will only cause the proceedings to become unduly complicated and disruptive, contrary to the standards in 807 KAR 5:001 § 3(8).

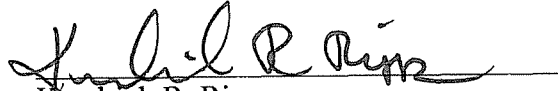
III. CONCLUSION

Neither the Individuals nor the Environmental Groups have satisfied either of the bases for permissive intervention set forth in 807 KAR 5:001 § 3(8). Neither has articulated any special interest that is within the scope of these proceedings that is not already adequately represented by the Attorney General. Nor have they shown an ability to present issues or develop facts that will assist the Commission in considering the Companies’ ECR plans, surcharges or the proposed Certificates of Public Convenience and Necessity. Finally, the Individuals and Environmental Groups will, if permitted to intervene, unduly complicate and disrupt these proceedings. To the extent the Individuals or the Environmental Groups wish to express their views, they, like other members of the public, can submit written public comments in the record. For these reasons, the Companies respectfully request that the Commission deny their Petitions to intervene.

³⁹ Administrative Case No. 2005-00090, *In Re: An Assessment of Kentucky’s Electric Generation, Transmission and Distribution Needs*, Order Appendix A at 50 (September 15, 2005), *See also* Administrative Case No. 2007-00477, *In Re: An Investigation of the Energy and Regulatory Issues in Section 50 of Kentucky’s 2007 Energy Act, Report to the General Assembly*, at 46.

Dated: June 24, 2011

Respectfully submitted,



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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 24th day of June 2011 upon the following persons:

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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.

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Before BARBER¹ and DIXON, Judges; PAISLEY, Senior
Judge.²

Opinion

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 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 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 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 EnviroPower was neither unlawful nor unreasonable.

II. Allegations of Fraud

EnviroPower 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 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 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.

Footnotes

- 1 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.
- 2 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.