SPALDING & THOMASON

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JUN 13 2011
PUBLIC SERVICE
COMMISSION

KENTUCKY PUBLIC SERVICE COMMISSION
211 Sower Blvd.
P.O. Box 615
Frankfort, KY 40602

Re: IMO the Applications of LG&E Co. for Certificates of Public Convenience and Necessity and Approval of its 2011 Compliance Plan for Recovery by Environmental Surcharge.
Case No. 2011-0162 (connected to -0161)

Dear Director of the Commission,

Accept this letter in lieu of a more formal request for leave to intervene in the matter referenced above.

The request is made on behalf of the undersigned, who is a rate paying customer of LG&E, and who can be reached at the address on this letter as well as via e-mail to *thomason@spatlaw*[dot]*com.*

Leave to intervene is sought to assure that the interests of a ratepayer, in respect to the issues set out below, are represented in the record before the Commission.

Points of Objection to the Applications.

1. The desired 10.63% "rate of return" requested by the applicant is too great. In the application, little was said to justify it, rather a partial stipulation from prior proceedings were adopted by reference. On behalf of this ratepayer, the reasons expressed there by the Attorney General in declining to sign onto that stipulation, are adopted by reference.

In addition, the requested 10.63% is above the national average for utilities rates of return on equity. That national average being composed of figures higher than the average, as well as figures *below* it.[1] There being rates below the national average leads this ratepayer to the suggest that the rate of return for this applicant's cost of merely complying with the law should be on the lower end of the range for electric utilities rate of return on equity currently. Indeed, applicant's rate of return has been increasing over the past decade, but current economic conditions cannot support continuing increases.

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[1] A 9.6% for Western Massachusetts Elec. Co. was approved Feb. 2, 2011. In Oklahoma, AEP-PSO's guaranteed rate of return on equity was cut to 10.15% in Jan. 2011. In 2010, the Texas PUC approved a 10.25% return on equity for Oncor Electric.

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Also, the "rate of return" and the "costs" recoverable under the "environmental" surcharge statute should not include the costs of demolition of facilities and the like. In the testimony of Voyles, submitted by applicant and elsewhere in the application, there was specific mention of costs to demolish, rather than leave *in situ* various structures and facilities (see, e.g., pgs, 12 & 14, Voyles). Nothing in the application indicates that demolition is among the "costs of complying with ...environmental requirements which apply to coal combustion wastes" that may be recoverable under the statute. The statute limits the surcharge to "compliance-related capital expenditures," not any expenditures. All the *non*-compliance-related expenditures need to be taken out of the equation.

The applicant's requested "rate of return" should reflect compliance with law, not added or advanced service to ratepayers, and should not include costs such as demolition that are not directly tied to compliance with law or the use of coal, and the rate should be on the lower end of the figures comprising the current, declining, national average rates.

2. Applicant overextends the intended scope of the surcharge statute. The express finding in the legislative text supporting K.R.S. 278.183 was that "electric utilities should have incentive to use Kentucky coal." Quoted in, *Kentucky Indus. Utility Customers, Inc. v. Kentucky Utilities Co.*, 983 S.W.2d 493 (Ky. 1998). Were a utility to obtain the "incentive" provided by the surcharge statute, but then use *non*-Kentucky coal for power generation, would be contrary to the express legislative intent. The legislative *quid pro quo* should be enforced by the Commission.

The record of this proceeding should include the applicant's filings with the PSC that document its purchases, and uses, of non-Kentucky mined coal at its Mill Creek and Wises Landing generation facilities. To the extent that a measurable percentage of non-Kentucky coal is being used, then that should be factored out of the recoverable costs, *e.g.*, if 80% of the coal used is Kentucky coal, then the surcharge should be computed on only 80% of the applicant's "compliance-related" capital expenditures.[2]

3. The application states that electric service is provided to certain counties in Kentucky "primarily," however, it is believed that these facilities also generate power that ends up going to purchasers outside of Kentucky. That combined with applicant using some percentage of non-Kentucky coal at these facilities provokes the issue of whether the matter implicates broader concerns under the Commerce Clause.

The surcharge, if granted, may enable Kentucky ratepayers to pick up the costs for using non-Kentucky coal to generate electricity for users outside of Kentucky. To mitigate that result, the equation should take all or most of the cost off ratepayers in the Commonwealth, and place it more upon those in other states using power generated here.

To ignore the interstate effects of the application could exceed the authority of the Commission, could cause a not "incidental effect on interstate commerce," and could extend the reach of the surcharge statute beyond intrastate commerce.[3]

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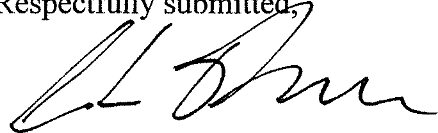
[2] Note too that the Certificate of Public Convenience statute suggests that the PSC "consider the policy of the General Assembly to foster and encourage use of Kentucky coal by electric utilities serving the Commonwealth." K.R.S. § 278.020(1).

[3] See, generally, *Public Service Com'n Arkansas Elec. Co-op. Corp. v. Arkansas Public Service Com'n*, 461 U.S. 375 (1983), and *New York v. F.E.R.C.*, 535 U.S. 1 (2002)(the Enron petition).

4. In the computation, it should be ascertained how the environmental surcharge will have a 'downstream' impact on local rates. When the applicant increases rates to cities, counties and schools in Kentucky, that impacts their budgets. To meet their budgets, cities, counties and schools must increase their taxes. The 'downstream' impact is that a ratepayer will pay a surcharge on its own bill, plus pay added city, county and school taxes to enable those local budgets to make up their surcharges.

The undersigned ratepayer respectfully requests leave for the foregoing points to be considered in the record of the proceedings on the application.

Respectfully submitted,



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