

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE
COMMISSION

In the Matter of:

APPLICATION OF KENTUCKY POWER)
COMPANY FOR APPROVAL OF ITS 2011)
ENVIRONMENTAL COMPLIANCE PLAN,)
FOR APPROVAL OF ITS AMENDED)
ENVIRONMENTAL COST RECOVERY)
SURCHARGE TARIFF, AND FOR THE)
GRANT OF A CERTIFICATE OF PUBLIC)
CONVENIENCE AND NECESSITY FOR THE)
CONSTRUCTION AND ACQUISITION OF)
RELATED FACILITIES)

CASE NO. 2011-00401

**KENTUCKY POWER COMPANY'S RESPONSE TO RIVERSIDE GENERATING
COMPANY'S MOTION FOR REHEARING**

Riverside Generating Company ("Riverside") moved to intervene in this action on the basis of its operation of electric generating facilities located in proximity to Kentucky Power Company's ("Kentucky Power") service area, which Riverside claims could have been included in Kentucky Power's Environmental Compliance Plan. The Commission properly denied Riverside's motion on the finding that Riverside "offered no evidence that it has a special interest in the proceeding" and that Riverside "failed to show that it is likely to present issues or develop facts that would assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings."¹

Riverside now requests that the Commission reconsider its decision to deny the motion to intervene. Riverside argues that the denial of its motion to intervene leaves it "without any control over the disclosure of confidential business information and without

¹ Order, pp. 2 and 3 (January 26, 2012).

any remedy to protect itself from inappropriate disclosure.”² Riverside’s motion should be rejected by the Commission for a number of reasons.

A. Riverside Does Not Contest the Basis of the Commission’s Order Denying Intervention or Allege that the Commission Abused Its Discretion.

Riverside purports to seek rehearing pursuant to KRS 278.400 of the Commission’s January 6, 2011 Order denying intervention (“Order”).³ However, Riverside’s motion does not contest the basis of the Commission’s determinations or otherwise challenge any of the findings made by the Commission in the Order. Nor does Riverside argue that the Commission abused its discretion by denying the motion to intervene.⁴ Rather than identify any specific findings with which it disagrees, Riverside asks the Commission to reconsider the Order on the basis of an argument it elected not to make in its intervention motion—*i.e.*, that it has a special interest in this proceeding requiring intervention because of the potential disclosure of confidential business information. Riverside isn’t requesting the Commission to reconsider its prior Order so much as it is using this rehearing motion to introduce additional arguments.

Riverside’s motion is inconsistent with the plain language of KRS 278.400, which authorizes rehearing requests “with respect to any of the matters determined” in a Commission Order. The statute requires that the only issues that may be brought before the Commission on a request for rehearing are that that were introduced and addressed in the underlying proceeding. The statute does not authorize attempts like the one made by Riverside in this proceeding to raise new issues on rehearing. If

² Motion for Rehearing of Riverside Generating Company (“Riverside Motion”), p. 2.

³ *Id.*, p. 1.

⁴ See *EnviroPower, LLC v. Public Service Commission of Kentucky*, Ky. App. No. 2005-CA-001792, 2007 WL 289328 (February 2, 2007) (Recognizing that the authority to grant or deny intervention motions lies in the Commission’s discretion).

Riverside wished to raise its perceived need to protect confidential information as a basis for being granted intervention, it should have done so in its original motion.

B. Riverside's Concern Over the Disclosure of Confidential Information is Unfounded.

Riverside maintains that it must be allowed to intervene in this proceeding to protect certain confidential information. However, Riverside has failed to establish any genuine risk of confidential information being disclosed. The information at issue was filed by Kentucky Power under seal pursuant to a confidentiality petition, and it has been shared only with the Commission and parties to this proceeding that have executed a Non-Disclosure Agreement. Riverside maintains that it will suffer competitive injuries if the confidential information is disclosed publicly,⁵ but it has failed to offer any evidence that such a disclosure is likely in the light of Kentucky Power's actions to date.

Riverside contends that the confidential information could be disclosed in this case if the Commission determines that Kentucky Power is not the proper party to assert the confidentiality claim.⁶ Riverside's concern appears to arise from two earlier decisions made by the Commission – *Rate Adjustment of Western Kentucky Gas*⁷ and *An Investigation into the Diversification of Rural Electric Cooperative Corporations into the Satellite-Delivered Television Programming Services*.⁸ Riverside claims that these cases support the notion that a party to a proceeding has no basis to seek confidential treatment of information of a third party, and that the third party should be permitted to

⁵ Riverside Motion, p. 2.

⁶ *Id.*, p. 3.

⁷ Case No. 90-013 (Order entered August 14, 1990).

⁸ Administrative Case No. 326 (Order entered September 17, 1990).

intervene for the purpose of protecting the information from disclosure.⁹

These cases are fundamentally different from the present case. In neither of these cases did the party seeking confidential treatment of the third party's information allege that *it* (as opposed to the third party) would suffer a competitive injury from public disclosure of the information. The party seeking confidential treatment was taking such action solely on behalf of the third party. In this case, Kentucky Power has alleged that it will be harmed if the information pertaining to Riverside is disclosed publicly. Kentucky Power has a genuine interest in preserving the confidentiality of the information at issue. Accordingly, the authority cited by Riverside, which in an event did not hold that the third party had the right to intervene, is simply inapposite

Moreover, Riverside's expressed concern that it has no "opportunity to know what documents are included in the [Kentucky Power] filing" is without merit.¹⁰ It simply had to ask Kentucky Power, which in any event notified Riverside of the requests and its intent to file the information under seal prior to doing so.

C. If the Commission Nevertheless Permits Riverside to Intervene in this Proceeding Intervention Should be Limited to the Sole Purpose of Protecting Its Confidential Information.

The Commission properly denied Riverside's motion to intervene, and should deny its motion for rehearing. If the Commission nevertheless concludes that intervention is appropriate, Riverside's intervention should be limited to the only basis for intervention identified in its motion: the purported need to protect Riverside's confidential information from public disclosure. In particular, any Commission Order granting Riverside intervention should specify that Riverside is not a party to the

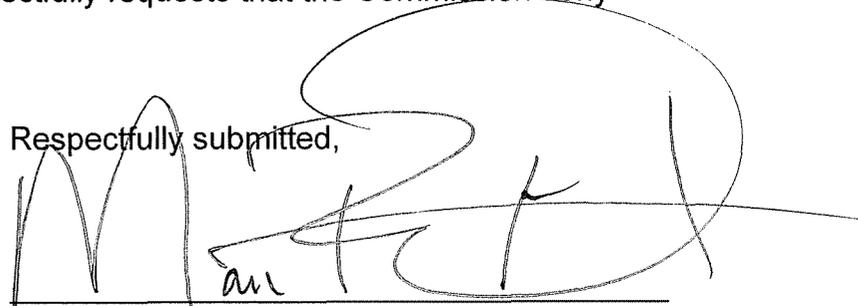
⁹ See Riverside Motion, p. 3.

¹⁰ *Id.*, p. 1.

proceeding, and that its intervention shall be limited to the sole purpose of objecting to the public disclosure of any of its information it deems confidential. The order should further provide that Riverside has no right to take discovery of the parties, file testimony, introduce evidence, cross-examine witnesses, or in any way address the merits of Kentucky Power's application. Finally, the Order should further provide that because Riverside is not a party to this proceeding, its consent will not be required for any settlement reached by the parties.¹¹

Wherefore, Kentucky Power respectfully requests that the Commission deny Riverside's rehearing petition

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark R. Overstreet', is written over a horizontal line. The signature is stylized and somewhat cursive.

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¹¹ Cf. *Kentucky American Water Co. v. Com. Ex. Rel. Cowan*, 847 S.W.2d 737, 741 (Ky. 1993).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by first class mail, postage prepaid, upon the following parties on this 9th day of February, 2012:

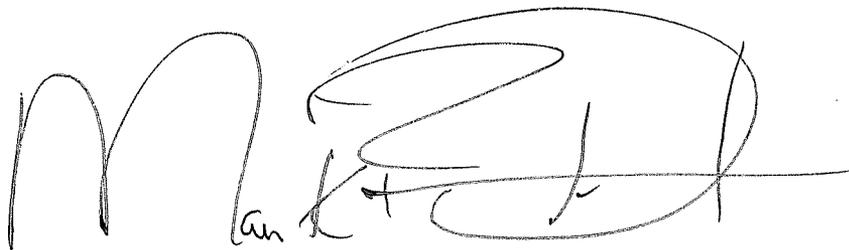
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