

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE
COMMISSION

IN THE MATTER OF:

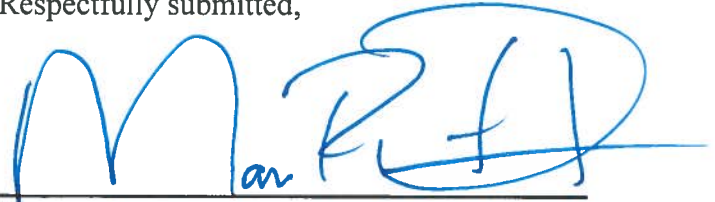
APPLICATION OF KENTUCKY POWER COMPANY FOR (1) A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY AUTHORIZING THE TRANSFER TO THE COMPANY OF AN UNDIVIDED FIFTY PERCENT INTEREST IN THE MITCHELL GENERATING STATION AND ASSOCIATED ASSETS; (2) APPROVAL OF THE ASSUMPTION BY KENTUCKY POWER COMPANY OF CERTAIN LIABILITIES IN CONNECTION WITH THE TRANSFER OF THE MITCHELL GENERATING STATION; (3) DECLARATORY RULINGS; (4) DEFERRAL OF COSTS INCURRED IN CONNECTION WITH THE COMPANY'S EFFORTS TO MEET FEDERAL CLEAN AIR ACT AND RELATED REQUIREMENTS; AND (5) ALL OTHER REQUIRED APPROVALS AND RELIEF

Case No. 2012-00578

Notice of Filing of Exhibits To
Kentucky Power Company's Response In Opposition To
EnerNOC, Inc.'s Motion To Intervene

Kentucky Power Company files the attached exhibits to the Company's June 27, 2013 Response in Opposition to EnerNoc, Inc.'s motion to intervene. The exhibits to the response were omitted by error.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by first class mail, postage prepaid, upon the following parties of record, this 28th day of June, 2013.

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1 of 3 DOCUMENTS

**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

COURT OF APPEALS OF KENTUCKY

2007 Ky. App. Unpub. LEXIS 121

February 2, 2007, Rendered

NOTICE: THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, *CR 76.28(4)(C)*, THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

PRIOR HISTORY: [*1]

APPEAL FROM FRANKLIN CIRCUIT COURT. HONORABLE ROGER L. CRITTENDEN, JUDGE. ACTION NO. 05-CI-00553.

COUNSEL: BRIEF FOR APPELLANT: Stephen M.

Soble, Washington, DC; Frederic J. Cowan, Louisville, KY.

BRIEF AND ORAL ARGUMENT FOR APPELLEE, PUBLIC SERVICE COMMISSION OF KENTUCKY: David S. Samford, Richard G. Raff, Frankfort, KY.

BRIEF AND ORAL ARGUMENT FOR APPELLEE, EAST KENTUCKY POWER COOPERATIVE, INC.: Charles Lile, Dale Henley, East Kentucky Power Cooperative, Inc., Winchester, KY.

BRIEF AND ORAL ARGUMENT FOR APPELLEE, GREGORY D. STUMBO, ATTORNEY GENERAL OF KENTUCKY: Dennis Howard, Elizabeth Blackford, Office of the Attorney General, Frankfort, KY.

BRIEF AND ORAL ARGUMENT FOR APPELLEE, GALLATIN STEEL COMPANY: Michael L. Kurtz, Cincinnati, OH.

JUDGES: BEFORE: BARBER¹ AND DIXON, JUDGES; PAISLEY, SENIOR JUDGE.² All concur.

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.

OPINION BY: DIXON

OPINION

AFFIRMING

DIXON, JUDGE: EnviroPower, LLC, appeals [*2] 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 [*3] 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 [*4] 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:

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 [*5] 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 [*6] 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 [*7] 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.

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 [*8] 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 [*9] of Intervention as Arbitrary

EnviroPower argues it had a right to intervene in this action under *KRS 278.020(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)*.

The PSC's exercise [*10] 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 [*11] 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 [*12] 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.

"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, 45 14 Ky. L. Summary 29 (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). [*13] 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 [*14] 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, [*15] no constitutional violation occurred.

For these reasons, we respectfully affirm the decision of the Franklin Circuit Court.

ALL CONCUR.

COMMONWEALTH OF KENTUCKY
BEFORE THE 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 |) | CASE NO. |
| SURCHARGE TARIFF, AND FOR THE GRANT |) | 2011-00401 |
| OF A CERTIFICATE OF PUBLIC |) | |
| CONVENIENCE AND NECESSITY FOR THE |) | |
| CONSTRUCTION AND ACQUISITION OF |) | |
| RELATED FACILITIES |) | |

O R D E R

On January 5, 2012, Riverside Generating Company, L.L.C. ("Riverside") filed a motion to intervene in the above-referenced case. Riverside states that it operates a natural gas-fired 836 MW electric generating facility in Zelda, Kentucky, which is connected to the American Electric Power ("AEP") Baker substation. As an operator of electric generating facilities in the proximity of Kentucky Power Company's ("Kentucky Power") service area, Riverside contends that it has a special interest in the proceeding which is not otherwise represented by any other party.

Riverside also argues that its intervention would allow it to present issues and develop facts that will assist the Commission in its review of Kentucky Power's application. Riverside notes that "[t]he facilities that Riverside has available for inclusion in Kentucky Power's Compliance Plan have not been referenced in the application submitted by Kentucky Power and have not been presented as a viable alternative to the proposal by Kentucky Power." Riverside further notes that inclusion of its natural

gas-fired facilities in Kentucky Power's proposed environmental compliance plan "may help avoid unnecessarily high rate adjustments" given the relatively lower cost of natural gas as compared to coal in terms of fuel and environmental compliance.

Based on the motion to intervene, and being otherwise sufficiently advised, the Commission finds that the only person that has a statutory right to intervene is the Attorney General, pursuant to KRS 367.150(8)(b). Intervention by all others is permissive and is within the sound discretion of the Commission. In the recent unreported case of *EnviroPower, LLC v. Public Service Commission of Kentucky*, No. 2005-CA-001792-MR, 2007 WL 289328 (Ky. App. Feb. 2, 2007), the Court of Appeals ruled that this Commission retains power in its discretion to grant or deny a motion for intervention but that discretion is not unlimited. The Court then enumerated the statutory and regulatory limits on the Commission's discretion in ruling on motions for intervention. The statutory limitation, KRS 278.040(2), requires that the person seeking intervention have an interest in the rates or service of a utility as those are the only two subjects under the jurisdiction of the Commission. The regulatory limitation of 807 KAR 5:001, Section 3(8) requires that a person demonstrate a special interest in the proceeding which is not otherwise adequately represented or that intervention is likely to present issues or develop facts that assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings.

Having reviewed Riverside's motion and being otherwise sufficiently advised, the Commission finds that Riverside has offered no evidence that it has a special interest in the proceeding. Other than an ambiguous statement that it has facilities that provide electricity to AEP "and which are available to continue to provide that power to Kentucky

Power,” the Commission notes that Riverside has not established in its petition that it is a retail customer of Kentucky Power. The Commission’s jurisdiction is limited to regulating the retail rates and service of Kentucky Power. Only retail customers of Kentucky Power pay its rates and receive its service. Thus, only retail customers of Kentucky Power have an interest in its rates or its service.

The Commission further finds that Riverside has 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. To the extent that Riverside seeks to “offer the sale of its facilities” pursuant to a contract for long-term generation capacity to Kentucky Power to be included as part of Kentucky Power’s environmental compliance plan, Riverside is acting in the capacity of a wholesale supplier or competitor to Kentucky Power. Consequently, Riverside is similarly situated as was EnviroPower, LLC in the above-referenced Court of Appeals decision. As the Court held in that case, the interest of a competitor seeking to supply power to a utility is not sufficient to support intervention at the Commission. Accordingly, we find that Riverside’s motion filed January 5, 2012 should be denied.

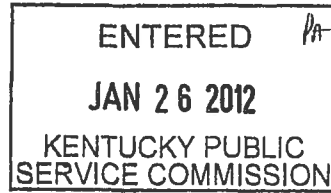
Riverside will have ample opportunity to participate in this proceeding even though it is not granted intervenor status. Riverside can review all documents filed in this case and monitor the proceedings via the Commission’s website at the following web address:

<http://psc.ky.gov/Home/Library?type=Cases&folder=2011 cases/2011-00401>.

Riverside may also file comments as frequently as it chooses, and those comments will be entered into the record of this case. Finally, it may also attend and present public comment at the public hearing to be held at our offices in Frankfort, Kentucky. The date for that hearing will be scheduled in the near future.

IT IS THEREFORE ORDERED that Riverside's motion for intervention is denied.

By the Commission



ATTEST:



Executive Director

Case No. 2011-00401

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