

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN INVESTIGATION OF THE FINANCIAL)
CONDITION OF EAST KENTUCKY) CASE NO. 2006-00455
POWER COOPERATIVE, INC.)

O R D E R

This matter is before the Commission on the petition of EnviroPower, Inc. (“EnviroPower”) seeking status as a full intervenor in this proceeding. East Kentucky Power Cooperative, Inc. (“EKPC”) has filed a response in opposition to the petition and the matter is now ripe for review. For the reasons set forth herein, EnviroPower’s petition will be denied.

BACKGROUND

On October 27, 2006, the Commission established this proceeding “to review the financial condition of [EKPC].”¹ The investigation was based upon a review of data from EKPC indicating that the utility’s “operations are producing negative net income since the last quarter of 2004.”² The Commission’s first set of data requests was attached to the October 27, 2006 Order with an instruction that EKPC file its responses no later than November 6, 2006. EKPC timely filed its response to the first set of data requests, and a second set of data requests was issued on November 9, 2006. EKPC’s

¹ Commission’s Order dated October 27, 2006 at 1.

² Id.

responses to the second set of data requests were filed on November 20, 2006. In the meantime, both the Attorney General and Gallatin Steel – a large customer of EKPC – were granted full intervention. Following an informal conference on December 15, 2006, a third set of data requests was issued to EKPC on January 3, 2007. EKPC's responses were filed on January 24, 2007.

In its petition, EnviroPower describes itself as “a legitimate merchant power plant developer” and that, “by virtue of having been the sole final bidder on two 278 MW power plants which were awarded by [EKPC] to itself,” EnviroPower claims to have “direct knowledge and unique expertise which has a direct and material bearing on the investigation of [this case].”³ EnviroPower further claims that it: (1) has a “unique and legitimate pecuniary interest in the viability of the transmission lines owned and operated by EKPC”; (2) would “illustrate how the EKPC self-build awards will cost the rate payers of the Commonwealth well in excess of \$350 Million in overcharges for electricity and will necessarily result in the waste of tens, if not hundreds, of megawatts of generating capacity”; and (3) “will illustrate...the potential injury to the transmission system owned, operated and maintained by EKPC, to the detriment of the electric power generating community and ultimately to the ratepayers of the Commonwealth.”⁴

EKPC opposes the petition by pointing out that EnviroPower lacks a statutory right of intervention and arguing that EnviroPower lacks any special interest justifying a grant of discretionary intervention. EKPC further points out that the Commission's

³ EnviroPower Petition at 1-2.

⁴ Id. at 1-2.

denial of previous petitions by EnviroPower to intervene in other cases involving EKPC have been affirmed by reviewing courts.⁵ EKPC further argues that EnviroPower's petition is barred by the doctrine of res judicata and that the "pecuniary interest" upon which EnviroPower relies is in fact a self-interest unique to EnviroPower and is not aligned with the interest of EKPC's ratepayers. Finally, EKPC states that the interests of ratepayers are protected in this proceeding through the interventions of the Attorney General and Gallatin Steel.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

EnviroPower does not have a statutory right of intervention in Commission proceedings. Accordingly, EnviroPower may be permitted to intervene only upon a showing that it satisfies the Commission's standards for permissive intervention as set forth in 807 KAR 5:001, Rules of Procedure, Section 3(8)(b), which states as follows:

If the commission determines that a person has a special interest in the proceeding which is not otherwise adequately represented or that full intervention by [the] party is likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings, such person shall be granted full intervention.

⁵ See EnviroPower, LLC v. Public Service Commission of Kentucky, et al., Franklin Circuit Court, Civil Action No. 05-CI-553, Order dated May 6, 2005; EnviroPower, LLC v. Public Service Commission of Kentucky, et al., Kentucky Court of Appeals, Case No. 05-CA-964-I, Order dated May 31, 2005; EnviroPower, LLC v. Public Service Commission of Kentucky, Kentucky Supreme Court, Case No. 2005-SC-437-I, Order dated June 7, 2005; EnviroPower, LLC v. Public Service Commission of Kentucky, et al., Franklin Circuit Court, Civil Action No. 05-CI-553, Order dated July 27, 2005; See EnviroPower, LLC v. Public Service Commission of Kentucky, et al., Franklin Circuit Court, Civil Action No. 05-CI-675, Order dated November 21, 2005; See EnviroPower, LLC v. Public Service Commission of Kentucky, et al., Franklin Circuit Court, Civil Action No. 05-CI-1449, Amended Order dated August 23, 2006.

EnviroPower believes that its “special interest in the proceeding” arises from its relationship to EKPC as well as its position in the electric power generating community. The Commission does not agree that either of these asserted interests qualifies under the standards set forth in the regulation.

With regard to the relationship between EnviroPower and EKPC, the Commission finds that: EnviroPower is not a customer of EKPC;⁶ EnviroPower is not a supplier of EKPC;⁷ EnviroPower is neither a debtor nor a creditor of EKPC;⁸ EnviroPower does not have any contractual relationship with EKPC;⁹ and EnviroPower is merely a disappointed bidder and, hence, a competitor of EKPC.¹⁰ The purpose of this proceeding is to examine the financial condition of a jurisdictional utility. While owners, creditors, debtors and ratepayers of a jurisdictional utility may have a special interest in an investigation of the financial condition of that utility, a competitor has no such interest. If anything, the competitor’s interest in the financial condition of a utility is diametrically opposed to the interest of those having a direct financial interest in the subject utility. Intervention by EnviroPower would serve only to unduly complicate and disrupt the proceedings.

⁶ See EKPC Response at 1.

⁷ See EnviroPower Petition at 1; EKPC Response at 1-2.

⁸ See EKPC Response to Commission Staff’s Second Data Request, Vol. 1, Request No. 10, filed Nov. 20, 2006.

⁹ See EKPC Response at 1.

¹⁰ See EnviroPower Petition at 1; EKPC Response at 2.

EnviroPower's claim that it should be allowed to intervene due to its "pecuniary interest in the viability of the transmission lines owned and operated by EKPC" is likewise not persuasive. EnviroPower cites no authority to suggest that a merchant electric power generator has an inherent pecuniary interest in the transmission lines of another electric supplier. Moreover, even if such an interest existed in the law, any such interest on the part of EnviroPower at this point is speculative, contingent, and uncertain. EnviroPower describes itself as "a legitimate merchant power plant developer" in part because it has no electric power generation assets in Kentucky. Thus, even if third-parties with legitimate transmission concerns could assert a special interest in this proceeding, EnviroPower still would not be able to adequately represent that interest.

In our prior consideration of the Certificate of Public Convenience and Necessity relating to EKPC's Spurlock No. 4 project, we fully considered the information provided by EnviroPower.¹¹ Although EnviroPower holds no interest in this proceeding which mandates that it be granted status as a full intervenor, the Commission continues to welcome any public comments that EnviroPower may be willing to submit.

IT IS THEREFORE ORDERED that:

1. EnviroPower's petition for full intervention is denied.
2. Within 10 days of the date of this Order, EnviroPower may submit any information it deems appropriate as a public comment.

¹¹ Case No. 2004-00423, The Application of East Kentucky Power Cooperative, Inc. For a Certificate of Public Convenience and Necessity, and a Site Compatibility Certificate, For the Construction of a 278 MW (Nominal) Circulating Fluidized Bed Coal Fired Unit in Mason County, Kentucky (Order dated Sept. 13, 2005).

Done at Frankfort, Kentucky, this 30th day of January, 2007.

By the Commission

ATTEST:

A handwritten signature in black ink, consisting of several overlapping loops and flourishes, positioned above a horizontal line.

Executive Director