

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matters of:

ELECTRONIC APPLICATION OF LOUISVILLE)	
GAS AND ELECTRIC COMPANY AND)	CASE NO.
KENTUCKY UTILITIES COMPANY FOR THE)	2021-00393
JOINT INTEGRATED RESOURCE PLAN)	

**SOUTHERN RENEWABLE ENERGY ASSOCIATION
REPLY TO LOUISVILLE GAS AND ELECTRIC COMPANY’S
AND KENTUCKY UTILITIES COMPANYS’ OBJECTION TO
SREA’S MOTION TO INTERVENE**

Comes now the Southern Renewable Energy Association (also “SREA”), by and through counsel, and, under 807 KAR 5:001 Section 5(3), and submits its Reply to Louisville Gas and Electric Company’s (“LG&E”) and Kentucky Utilities Company’s (“KU” collectively “Companies”) *Objection* to SREA’s *Motion to Intervene*. SREA states the following.

SREA’s request for intervention is wholly consistent with the Commission’s intent for 807 KAR 5:058, a non-adjudicatory reporting requirement mechanism. The Companies’ *Objection* is based upon the Commission’s framework for adjudicatory proceedings, applications or investigations through which the Commission exercises its quasi-judicial or ratemaking authorities. The Companies fail to fully-recognize one of the Commission’s paramount objectives, conducting proceedings in a manner to permit the presentation of issues and development of facts that will assist the Commission. The Companies fail to acknowledge Commission precedent concerning participation of non-customers in other Commission proceedings. Finally, SREA’s

participation in the Companies' most recent integrated resource plan filing¹ demonstrates that SREA has and stands ready to continue presenting issues and developing facts that will assist the Commission in fully considering the matter without unduly complicating or disrupting the review proceedings.

1. SREA's Motion to Intervene is Wholly Consistent with the Commission's Intent for 807 KAR 5:058, an Administrative Regulation through which an Integrated Resource Plan of an Electric Utility is Reviewed in a Non-Adjudicatory Proceeding Expressly Designed to be Informal and Less Adversarial.

Integrated resource planning (or "IRP") by electric utilities is not mandated by statute; therefore, there are no specific, express, legislative instructions for the IRP information gathering and review process. Integrated resource planning is an exercise of the Commission's plenary authority to implement KRS Chapter 278. The intent of the Commission, therefore, is of primary importance.

A review of 807 KAR 5:058, the Commission's administrative regulation establishing the IRP process, identifies KRS 278.040(3) and KRS 278.230(3) as the statutory authority for the regulation. KRS 278.040(3) provides statutory authority for the Commission to adopt administrative regulations (and therefore supplies statutory authority for each of the Commission's regulations). KRS 278.040(3) confirms the power to promulgate 807 KAR 5:058 but does not address the intent of the Commission for the regulation.

KRS 278.230(3) is far more instructive for understanding the intent for 807 KAR 5:058. Specifically, KRS 278.230(3) states:

Every utility, when required by the commission, shall file with it any reports, schedules, classifications or other information that the commission reasonably requires. The commission shall prepare and

¹ Case No. 2018-00348, *Electronic 2018 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company*, (filed Oct. 19, 2018).

distribute to the utilities blank forms for any information required under this chapter. All such reports shall be under oath when required by the commission

Through 807 KAR 5:058, the Commission is not investigating, among other things, an application for a change in control or a certificate of public convenience and necessity (KRS 278.020), a new schedule of rates (KRS 278.180 and KRS 278.190), the condition of a utility (KRS 278.250), a complaint concerning rates or service (KRS 278.260), the issuance or assumption of securities by a utility (KRS 278.300), or a potential violation (KRS 278.990). All the foregoing are examples of the Commission's exercise of adjudicatory authority (quasi-judicial or ratemaking authority). The gathering and review of information in formal adjudicatory proceedings, quasi-judicial activity, differs legally and qualitatively from the review of an IRP report.

An IRP is a report required pursuant to KRS 278.040(3). An IRP is not an application by a utility requesting relief nor is it an adjudicatory investigation by the Commission on the condition of a utility or its rates or service. An IRP is akin to the numerous other reports and information required by the Commission that do not require, in any manner, a formal adjudicatory proceeding for the Commission to review and invite comment upon them.

The development of the Commission's IRP reporting requirement for jurisdictional electric utilities traces its origin to Administrative Case No. 308² which, in turn, traces its origin to Case No. 9243, the Commission's investigation into LG&E's capacity expansion study and the need for Trimble County Unit No.1.³ As stated by the Commission in Adm. Case No. 308, the intent for the regulation is to provide "a solid foundation for a forward-looking, cooperative resource

² *An Inquiry Into Kentucky's Present and Future Electric Needs and the Alternatives for Meeting Those Needs*, Order (Ky. P.S.C. Oct. 9, 1986), page 1 (Order opening inquiry).

³ *An Investigation and Review of Louisville Gas and Electric Company's Capacity Expansion Study and the Need for Trimble County Unit No. 1*, Order (Ky. P.S.C. Oct. 14, 1985), page 23.

planning process.”⁴ 807 KAR 5:058 calls for the *cooperative review* of a planning report. It is a policy mechanism rather than an adjudicative mechanism. The Commission stated in Adm. Case No. 308:

The Commission believes an informal proceeding, where parties may exchange information and ideas in a less adversarial manner, may better serve the interests of the parties and the resource planning process.⁵

807 KAR 5:058 is grounded, in pertinent part, in the Commission’s power to require and review reports and information rather than for furthering the Commission’s quasi-judicial power to adjudicate applications and investigations. In fact, while the Commission opens a formal proceeding into an IRP filing, the intent is not to adjudicate. The Commission does not, through 807 KAR 5:058, make findings of fact or conclusions of law on any rate or service. Instead, Commission Staff issues “a report summarizing its review” and “offering suggestions and recommendations to the utility for subsequent filings.”⁶ The Companies, thereafter, respond to Staff’s comments and recommendations in their next IRP.⁷

The Companies completely miss the mark in discussing the nature of a proceeding under 807 KAR 5:058 because they want to depict an informal and cooperative (less adversarial) review process as an adjudicatory process. They seek to impose upon SREA the more stringent framework for the adjudication of applications and investigations, which is clearly at odds with the purpose of the Commission’s promulgation of 807 KAR 5:058. SREA’s request for intervention into an informal proceeding for the express purpose of exchanging information and ideas in a less adversarial manner is wholly consistent with the Commission’s intent for an IRP review.

⁴ Adm. Case No. 308, Order (Ky. P.S.C. Aug. 8, 1990), page 11.

⁵ *Id.*, at page 13.

⁶ 807 KAR 5:058, Section 11(3).

⁷ 807 KAR 5:058, Section 11(4).

2. The Companies' *Objection* is Based Almost Entirely Upon the Commission's Framework for Adjudicatory Proceedings and Fails to Fully-Recognize a Paramount Objective of the Commission, the Presentation of Issues and Development of Facts that Will Assist the Commission. The Companies fail to Acknowledge Commission Precedent Concerning Participation of Non-Customers in Commission Proceedings.

The Companies rely principally upon the framework for permissive intervention into a formal adjudicatory proceeding in discussing permissive intervention into an informal cooperative review process. SREA's request for intervention into the instant review of the Companies' IRP report is not a request for the Commission to rethink its authority and policy concerning intervention into adjudicatory proceedings (quasi-judicial or ratemaking matters). The Commission's approach for determining permissive intervention (intervention by any person other than the Attorney General of Kentucky) into formal adjudicatory proceedings is clear, well-reasoned, and lawful. SREA has not stated otherwise.

SREA declines to accept the Companies' invitation to discuss permissive intervention into an IRP "as if" this proceeding was a formal adjudicatory proceeding. It is not. The submission of an integrated resource plan pursuant to 807 KAR 5:058, unlike the foregoing identified applications and investigations, is not a formal adjudicatory proceeding. It is simply the submission of a report under KRS 278.230(3). Therefore, discussion of permissive intervention into adjudicatory proceedings does not reasonably lend itself to implementing the Commission's intent for an IRP. The Commission's Orders leading up to its promulgation of 807 KAR 5:058 are remarkably instructive on this point (and omitted by the Companies in their discussion).

SREA, therefore, respectfully submits that the framework for reviewing its *Motion to Intervene* into the instant review is by reference to the Commission's express intent for 807 KAR 5:058 and the statutory basis for requiring integrated resource planning reports. An IRP docket, while a formal proceeding in one sense, is not an adjudicatory proceeding. The Commission's

intent was that the process should be informal in nature and less adversarial than other Commission proceedings. For these reasons, the logic underpinning the Companies' *Objection* does not apply to this type of review.

The Companies' argument concerning direct interest or special interests is far from a complete discussion of circumstances that support permissive intervention into Commission proceedings. Even a cursory examination of the plethora of dockets offered by the Companies, particularly in Footnote 15 of the *Objection*,⁸ readily attests to this fact.

For example: The Commission's investigation into the financial condition of East Kentucky Power Cooperative, Inc., in Case No. 2006-00455, was an adjudicatory (quasi-judicial) proceeding expressly initiated through its exercise of authority pursuant to KRS 278.250 to "investigate and examine the condition of any utility subject to its jurisdiction."⁹ The review of the Companies' IRP is not an investigation through KRS 278.250. Instead, it is the review of a report required by the Commission through KRS 278.230(3), a significantly different exercise of authority. The statutory and qualitative differences between the Commission's investigation and evaluation of East Kentucky Power's then-financial condition and the Commission Staff's review of an integrated resource plan, in a cooperative review, are unmistakable and significant.¹⁰

For similar reasons, the Commission's review of East Kentucky Power Cooperative's application for a certificate of public convenience and necessity and site compatibility certificate

⁸ LG&E and KU *Objection* at page 6.

⁹ Case No. 2006-00455, *Investigation of the Financial Condition of East Kentucky Power Cooperative, Inc.*, (Ky. P.S.C. Oct. 27, 2006), page 1 (citing and quoting KRS 278.250 as the source of the Commission's exercise of authority to conduct the investigation).

¹⁰ Case No. 2006-00455 (Ky. P.S.C. Jun. 19, 2007) (Order closing the investigation upon finding that then-pending general rate case was more suitable proceeding for evaluating East Kentucky Power Cooperative's financial challenges).

in Case No. 2004-00423¹¹ does not offer meaningful guidance. Further, nearly a treatise could be written based upon EnviroPower and the Orders and judicial opinions pertaining to EnviroPower and its interaction with the Commission.

Only two points, though, concerning EnviroPower are particularly instructive to the instant matter. First, EnviroPower was attempting intervention into an adjudicatory proceeding under a claim of right. The review of an IRP is not an adjudicatory proceeding. Second, EnviroPower was a disappointed bidder that was, for all intents and purposes, seeking to use intervention into Commission adjudicatory proceedings as a means to advance or vindicate rights that were unnecessary for proper consideration of the matters then-pending if not also clearly outside the scope of the Commission's jurisdiction. It is unremarkable that the Commission made a finding that the matters of importance to EnviroPower did not support intervention into formal adjudicatory dockets. Adjudicatory dockets simply do not serve as the best guidance for determining permissive intervention into an IRP proceeding.

Still, though, if the Companies seek to rely upon precedent concerning permissive intervention into adjudicatory dockets for discussing an IRP review, they should discuss the full range of the Commission's Orders. The Companies fail to discuss the instances in which the Commission has granted intervention to non-customers in adjudicatory dockets, applications for relief or Commission investigations. Orders from these proceedings refute the Companies' claim that customer status is required of a movant for intervention.

¹¹ Case No 2004-00423, *Application of East Kentucky Power Cooperative, Inc., for a Certificate of Public Convenience and Necessity and Site Compatibility Certificate for the Construction of a 278 MW (Nominal) Circulating Fluidized Bed Coal-Fired Unit in Mason County, Kentucky*, (filed Oct. 28, 2004).

In Case No. 2007-00134, the Commission granted the Bluegrass Water Supply Commission (“BWSC”) full intervention into a certificate of public convenience and necessity application filed by the Kentucky-American Water Company (“KAWC”).¹² BWSC was not a rate customer of KAWC; in fact, its interest concerned the *potential* co-ownership of certain facilities.¹³ BWSC did not have an interest in a rate or service of KAWC. Moreover, BWSC, as a water supply commission created pursuant to KRS 74.420 to 74.520,¹⁴ was statutorily exempt from the Public Service Commission’s jurisdiction.¹⁵ The PSC, therefore, had no authority over BWSC’s interest in the facilities. Nonetheless, intervention into a formal adjudicatory proceeding to a non-customer was granted because the Commission determined that BWSC was “likely to present issues and develop facts that will assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings.”¹⁶

Similarly, in Case No. 2007-00134, the Commission granted the Louisville Water Company (“LWC”) full intervention into the same proceeding.¹⁷ LWC was not a rate customer of KAWC¹⁸ and, therefore, had no interest in the rates or service of KAWC. Still, the PSC granted intervention into a formal adjudicatory proceeding to a non-customer because the Commission determined that LWC possessed evidence pertinent to the matter and was “likely to present issues

¹² Case No. 2007-00134, *The Application of Kentucky-American Water Company for a Certificate of Convenience and Necessity Authorizing the Construction of the Kentucky River Station II, Associated Facilities and Transmission Main*, Order (Ky. P.S.C. May 3, 2007).

¹³ Case No. 2007-00134, BWSC Motion to Intervene (filed Apr. 20, 2007), page 2.

¹⁴ *Id.*, at page 1.

¹⁵ KRS 74.510.

¹⁶ Case No. 2007-00134, Order (Ky. P.S.C. May 3, 2007) (Order granting BWSC intervention).

¹⁷ Case No. 2007-00134, Order (Ky. P.S.C. Aug. 13, 2007) (Order granting LWC intervention).

¹⁸ Case No. 2007-00134, LWC Motion to Intervene (filed Jul. 30, 2007).

and develop facts that will assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings.”¹⁹

In Case No. 2003-00266, the Commission granted the Midwest Independent Transmission System Operator, Inc. (“MISO”) full intervention into an adjudicatory investigation into the Companies’ membership in MISO.²⁰ MISO was not a rate customer of LG&E or KU.²¹ Nonetheless, finding that MISO was “likely to present issues and develop facts that will assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings,” the Commission granted intervention.²²

The common thread in all three of the foregoing Orders granting intervention is that the non-customers were likely to present issues and develop facts that would assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings. In fact, the Commission expressly recognized that LWC’s status as a failed bidder or competitor does not create a special interest.²³ On this point, the Commission’s position was completely consistent with its position concerning EnviroPower. LWC had no special interest. The information possessed by LWC, nonetheless, supported the grant of intervention to a non-customer.

SREA respectfully submits (as will be more fully described below) that it has previously presented issues and developed facts and stands ready to continue to present issues and develop facts that assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings. SREA is not EnviroPower, Stand Energy, ChargePoint, or any other

¹⁹ Case No. 2007-00134, Order (Ky. P.S.C. Aug. 13, 2007) (Order granting LWC intervention).

²⁰ Case No. 2003-00266, *Investigation Into the Membership of Louisville Gas and Electric Company and Kentucky Utilities Company in the Midwest Independent Transmission System Operator, Inc.*, (Ky. P.S.C. Aug. 22, 2003).

²¹ Case No. 2003-00266, MISO Motion to Intervene (filed Aug. 8, 2003).

²² Case No. 2003-00266, Order (Ky. P.S.C. Aug. 22, 2003) (Order granting MISO intervention).

²³ Case No. 2007-00134, Order (Ky. P.S.C. Aug. 13, 2007), page 1, footnote 1.

similar entity seeking intervention into an adjudicatory proceeding such as a rate case application or certificate proceeding, all readily distinguishable from an IRP. The Commission determines permissive intervention on a case-by-case basis.²⁴ SREA, like BWSC, LWC, and MISO, seeks to assist the Commission. A grant of permissive intervention to SREA into the instant IRP review is consistent with 807 KAR 5:058 and Commission precedent in the Companies' most recent IRP review.²⁵ The Companies do not demonstrate otherwise.

3. SREA's Participation in the Review of the Companies' Most Recent Integrated Resource Plan Demonstrates that SREA has and Stands Ready to Continue Presenting Issues and Developing Facts that Will Assist the Commission in Fully Considering the Matter Without Unduly Complicating or Disrupting the Proceedings.

SREA participated in the Companies' most recent integrated resource plan filing. SREA submitted written comments.²⁶ As the Staff Report readily reflects, SREA's participation did, in fact, present issues and develop facts that assisted the Commission in fully considering the matter.²⁷ Indeed, among other things, the Staff Report recommended:

For the next IRP, the Companies should incorporate SREA's modeling recommendations regarding capacity only planning, allowing renewable energy to compete directly against existing generation units, and energy storage resources into the modeling and forecast methodology. Other recommendations should be incorporated appropriately.²⁸

²⁴ See, Case No. 2018-00348, *The 2018 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company*, Order (Ky. P.S.C. Sept. 19, 2019), page 4.

²⁵ See, for comparison, Case No. 2018-00348, *The 2018 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company*, (Ky. P.S.C. Sept. 19, 2019) (threshold for intervention into satisfied upon a finding that "Sierra Club will present issues and develop facts that will assist the Commission" in IRP review).

²⁶ Case No. 2018-00348, *The 2018 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company*, (SREA written comments tendered Jan. 16, 2020).

²⁷ *Id.*, Order (Ky. P.S.C. Jul. 20, 2020) (Staff Report entered into the record).

²⁸ *Id.*, at Appendix A, Staff Report at page 42.

The Companies' adversarial denigration of SREA is not out of concern for the Commission or its Staff. They are trying to curtail if not silence the commentary of an entity seeking to exchange information and ideas, in an informal cooperative review process, that are likely to continue to assist the Commission. SREA is seeking intervention into the instant review for a proper purpose.

The Companies assert that the Kentucky Office of the Attorney General and the Commission, itself, are already quite knowledgeable concerning integrated resource planning.²⁹ SREA agrees that the Attorney General and the Commission and its Staff are quite knowledgeable.

The first problem with the Companies' argument on this point, nevertheless, is that it does not result in a meaningful test or standard for permissive intervention into an adjudicatory proceeding let alone a non-adjudicatory cooperative review. The Companies' argument is tautological, true in all circumstances. Accepting the Companies' argument as the standard would result in no party other than the Attorney General (who intervenes as a matter of statutory right) being capable of demonstrating grounds for permissive intervention.³⁰

The equally obvious problem is that the Commission's review of an IRP is for the purpose of exchanging information and ideas in a less adversarial proceeding. Through 807 KAR 5:058, the Commission did not establish a test through which a person seeking intervention must establish that they possess information unknown to the Commission and the Attorney General. Overlapping and complementary information and ideas are reasonably expected as part of the exchange and review. The Companies' opposition to SREA's efforts to simply "exchange information and ideas"

²⁹ *Objection*, pages 3 through 5.

³⁰ The Companies, oddly enough, seemingly suggest that they reserve some type of power to determine for themselves other requests for intervention. *Objection*, page 4. The suggestion seems struck from the same vein as the Companies' position that the Commission, rather than the Companies, have the burden of proof. Case No. 2020-00349 and 2020-00350, Order, (Ky. P.S.C. Nov. 4, 2021), pages 23 and 24.

in a proceeding designed by the Commission for that specific purpose and furthermore designed to be a “less adversarial” proceeding represents the antithesis of the Commission’s intent for integrated resource planning and 807 KAR 5:058.

SREA’s participation in the Companies’ most recent integrated resource plan filing³¹ demonstrates that SREA has and stands to continue presenting issues and developing facts that will assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings. SREA meets the standard for intervention into the Commission’s non-adjudicatory cooperative review process for the Companies IRP report and filing.

WHEREFORE, SREA respectfully replies to the Companies’ *Objection* and requests the Commission to grant SREA intervention into the instant review with full rights of a party to the proceeding.

Respectfully submitted,

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³¹ Case No. 2018-00348, *Electronic 2018 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company*, (filed Oct. 19, 2018).

NOTICE AND CERTIFICATION FOR FILING

Undersigned counsel provides notice that the electronic version of the paper has been submitted to the Commission by uploading it using the Commission's E-Filing System on this 8th of November, 2021. Pursuant to the Commission's March 12, 2020, March 24, 2020, and July 22, 2021 Orders in Case No. 2020-00085, *Electronic Emergency Docket Related to Novel Coronavirus Covid-19*, the paper, in paper medium, is not required to be filed.

/s/ David E. Spenard

NOTICE AND CERTIFICATION CONCERNING SERVICE

Undersigned counsel certifies that it has, by electronic mail message, served and transmitted on this 8th day of November, 2021, an electronic copy of the pleading to the following:

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