



Code to regulate the electric utilities in the state. K.R.S. § 278.020(1), K.R.S. § 278.183, and 807 K.A.R. 5:001, Sections 14 and 15. Duke seeks approval for the retrofit because quicklime costs are escalating and making East Bend less competitive in the PJM energy markets, to the point that without a new and more affordable quicklime source, Duke “would likely be forced to retire the plant prematurely.”<sup>1</sup>

Duke claims that it has evaluated alternatives and determined that retrofitting East Bend is “economic in most future scenarios[.]”<sup>2</sup> The Company considered two alternatives to the proposed project: entering into a multi-year contract with a quicklime supplier (which it refers to as the status quo) and a process where a standard high calcium quicklime product was procured and mixed on-site with a magnesium hydroxide slurry to derive the correct chemical composition necessary to continue operating the existing wet flue gas desulfurization process.<sup>3</sup> The Company never evaluated other alternatives, such as converting the plant to burn gas instead of coal.

This proceeding comes at a critical juncture for Duke. Existing or expected federal Clean Air Act and Clean Water Act regulations will require Duke to modify its use of coal as a fuel source at East Bend, install pollution controls on coal-fired units, and/or to retire such units. Most notable is the U.S. Environmental Protection Agency’s (“EPA”) regulation of greenhouse gas emissions under Section 111(d) of the Clean Air Act. While Duke’s Application notes the promulgation of this rule,<sup>4</sup> the Company does not overlay the 111(d) compliance obligations and 111(d) compliance pathways with the proposed Limestone Conversion Project to determine how

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<sup>1</sup> Application of Duke for a Certificate of Public Convenience and Necessity to Convert its Wet Flue Gas Desulfurization System from a Quicklime Reagent Process to a Limestone Reagent Handling System at its East Bend Generating Station (July 25, 2024) (“Duke CPCN Application”) at 5-6; *see also* Direct Testimony of John A. Verderame on Behalf of Duke (“Verderame Direct”) at 6 (“making East Bend less and less economic to run”).

<sup>2</sup> Duke CPCN Application at 8; *see also* Verderame Direct at 14.

<sup>3</sup> Verderame Direct at 14-15.

<sup>4</sup> Direct Testimony of J. Michael Geers, P.E. on Behalf of Duke (“Geers Direct”) at 16.

they would impact each other.<sup>5</sup> Such a piecemealed approach can lead to stranded assets and wasteful duplication, committing ratepayers to a compliance pathway that does not represent the least-cost option to meet all compliance obligations. Sierra Club has gained significant expertise on the issues in proceedings (especially ensuring that analyses aren't piecemealed) throughout the country, and seeks to bring such expertise to this proceeding.

**II. Sierra Club Will Present Issues and Develop Facts That Will Assist the Commission in Fully Considering the Matter Without Unduly Complicating or Disrupting the Proceedings.**

The Commission should grant Sierra Club full intervention because they are “likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings.”<sup>6</sup> This proceeding involves complex questions regarding whether converting pollution control equipment on an existing coal-fired power plant is a public convenience and necessity. According to Duke, converting its wet flue gas desulfurization system is economic in most scenarios,<sup>7</sup> but not all, and it is not clear which scenarios are economic or uneconomic. However, Duke’s application and supporting testimony does make clear that the only alternatives considered were the “status quo and the possibility of mixing standard high calcium quicklime and magnesium hydroxide onsite to deliver the desired chemistry for proper WFGD operation.”<sup>8</sup> Duke found neither alternative was a feasible solution.<sup>9</sup> As a party to this proceeding, Sierra Club will ensure that the appropriate suite of alternatives are

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<sup>5</sup> See generally Duke CPCN Application and Geers and Verderame Direct.

<sup>6</sup> 807 K.A.R. 5:001, Section 4(11).

<sup>7</sup> Duke CPCN Application at 8; see also Verderame Direct at 14.

<sup>8</sup> Direct Testimony of Chad M. Donner on Behalf of Duke (“Donner Direct”) at 8.

<sup>9</sup> *Id.*

examined and that the Limestone Conversion Project is truly the most reasonable and cost-effective alternative.<sup>10</sup>

Kentucky law requires that a utility obtain a CPCN for “the construction of any plant, equipment, property, or facility” with limited exceptions.<sup>11</sup> To receive a CPCN, a utility must show (1) a need for the construction and (2) an absence of wasteful duplication.<sup>12</sup> Need requires “a showing of substantial inadequacy of existing service.”<sup>13</sup> Wasteful duplication means “an excess of capacity over need” and “an excessive investment in relation to productivity or efficiency, and an unnecessary multiplicity of physical properties.”<sup>14</sup> Demonstrating an absence of wasteful duplication requires showing that “a thorough review of all reasonable alternatives has been performed.”<sup>15</sup> The proposal selected need not be the absolute least cost, but “[t]he fundamental principle of reasonable least-cost alternative is embedded in [the] analysis.”<sup>16</sup>

Sierra Club is seeking to present testimony regarding whether the Limestone Conversion Project proposed by Duke might be wasteful duplication in light of the full range of regulatory, capital, operating, and fuel costs that East Bend faces. The Commission cannot reach a logical

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<sup>10</sup> “[A]s more constraints are . . . placed on utilities that rely significantly on coal-fired generation,” this is an important issue for the Commission to consider. *See, e.g., In re: Joint Application of PPL Corp., E.ON AG, E.ON US Investments Corp., E.ON U.S. LLC, Louisville Gas and Electric Co., and Kentucky Utilities Co. for Approval of an Acquisition of Ownership and Control of Utilities*, Case No. 2010-00204, Order (Sept. 30, 2010) at 14 (noting that the Commission stated its support for energy-efficiency programs in a report “to the Kentucky General Assembly in July 2008 pursuant to Section 50 of the 2007 Energy Act”), [https://psc.ky.gov/pscscf/2010%20cases/2010-00204//20100930\\_PSC\\_ORDER.PDF](https://psc.ky.gov/pscscf/2010%20cases/2010-00204//20100930_PSC_ORDER.PDF).

<sup>11</sup> K.R.S. § 278.020(1)(a).

<sup>12</sup> *Ky. Utils. Co. v. Pub. Serv. Comm’n*, 252 S.W. 2d 885, 890 (Ky. 1952); *In re: Elec. Application of Kentucky Power Co. for a CPCN to Rebuild the Wootton-Stinnett Portion of the Hazard-Pineville 161 KV Line in Leslie County*, Case No. 2022-00118, Final Order (Ky. P.S.C. Sept. 22, 2022) at 16-17, [https://psc.ky.gov/pscscf/2022%20Cases/2022-00118//20220922\\_PSC\\_ORDER.pdf](https://psc.ky.gov/pscscf/2022%20Cases/2022-00118//20220922_PSC_ORDER.pdf).

<sup>13</sup> Case No. 2022-00118, Final Order (Ky. P.S.C. Sept. 22, 2022) at 16 (quoting *Ky. Utils. Co.*, 252 S.W. 2d at 890).

<sup>14</sup> *Id.*

<sup>15</sup> Case No. 2022-00118, Final Order (Ky. P.S.C. Sept. 22, 2022) at 16.

<sup>16</sup> *Id.* at 16-17.

determination on the reasonableness of the proposed capital investment without evaluating each of those issues.

The Commission must examine the entire suite of emerging federal regulations in order to accurately determine what is the least cost option and to prevent wasteful duplication. In its application, Duke insists that it must address increasing costs of quicklime. However, it has completely failed to consider a number of emerging federal requirements that will require additional expenditures on control technology (emerging retrofits) or may lead to East Bend being repowered with a different fuel supply or retired. In this way, Duke is asking ratepayers to fund piecemeal work that could become unnecessary or an excessive investment once Duke evaluates the quicklime cost issue in conjunction with the full suite of federal requirements. While Duke offers that retrofitting East Bend is “economic in most future scenarios,”<sup>17</sup> that conclusion is doubtful given Duke’s failure to consider how to address quicklime costs in light of all expected regulatory obligations. Sierra Club wants to ensure that the Commission evaluates the full regulatory and capital costs facing East Bend, including the expected Section 111(d) of the Clean Air Act,<sup>18</sup> so it can accurately determine the least cost option for moving forward and prevent wasteful duplication. Sierra Club is not advocating any particular resource mix or alternative at this time, and instead seeks to contribute to a robust examination of the

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<sup>17</sup> Duke CPCN Application at 8; *see also* Verderame Direct at 14.

<sup>18</sup> Sierra Club intends to also examine compliance obligations and associated costs that East Bend faces under at least the following federal rules: (1) the Good Neighbor Plan for the 2015 Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 36,654 (June 5, 2023); (2) the mercury and air toxics standards (“MATS”), National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units Review of the Residual Risk and Technology Review, 89 Fed. Reg. 38,508 (May 7, 2024); (3) the effluent limitation guidelines (“ELG”) rule, Supplemental Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 89 Fed. Reg. 40,198 (May 9, 2024); and (4) the coal combustion residuals (“CCR”), Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Legacy CCR Surface Impoundments, 89 Fed. Reg. 38,950 (May 8, 2024).

comparative costs and benefits of viable options, in light of all existing and emerging federal requirements and relevant state law, and each alternative’s full costs.

Of paramount concern is Section 111(d) of the Clean Air Act and Duke’s stated preferred plan to comply with this new law. On May 9, 2024, EPA finalized greenhouse gas standards pursuant to section 111(d) of the Clean Air Act, which require coal-fired power plants to install equipment to reduce greenhouse gas emissions if they plan to retire after 2032.<sup>19</sup> Under the rule, existing coal-fired power plants that plan to operate until 2039 or later must install a carbon capture sequestration system that captures 90% of carbon emissions by 2032.<sup>20</sup> Coal-fired power plants that commit to retire before 2039 (but after 2032) must meet an emission rate consistent with 40% gas co-firing by 2030.<sup>21</sup> Coal-fired power plants that commit to retire by 2032 are not subject to the rule and need not take any action.<sup>22</sup>

In its 2024 Integrated Resource Plan (“IRP”), Duke stated that its Preferred Portfolio for compliance with 111(d) is to 40% gas co-fire the East Bend Station by January 1, 2030 and retire the plant by 2039.<sup>23</sup> Gas-fired power plants emit significantly less sulfur dioxide emissions—the pollutant that the quicklime in the wet flue gas desulfurization system reduces—than coal-fired

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<sup>19</sup> New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units, 89 Fed. Reg. 39,798 (May 9, 2024).

<sup>20</sup> *Id.* at 39,838; see U.S. EPA, *Final Carbon Pollution Standards to Reduce Greenhouse Gas Emissions from Power Plants* at 6 (Apr. 25, 2024), <https://www.epa.gov/system/files/documents/2024-04/cps-presentation-final-rule-4-24-2024.pdf>.

<sup>21</sup> See *Final Carbon Pollution Standards to Reduce Greenhouse Gas Emissions from Power Plants* at 6.

<sup>22</sup> *Id.*

<sup>23</sup> Duke Energy Kentucky, Inc.’s 2024 Integrated Resource Plan, Case No. 2024-00197, at 61 (“Converting East Bend to DFO [dual-fuel option] by 2030 enables Duke Energy Kentucky to reliably serve its customers under the EPA CAA Section 111 Update while providing for a measured transition out of coal generation. While the plan ultimately calls for a combined cycle to replace East Bend, this plan allows East Bend to remain in service until 2039.”), [https://psc.ky.gov/pscecf/2024-00197/debbie.gates%40duke-energy.com/06212024125232/2024\\_DEK\\_IRP\\_PUBLIC\\_%281%29.pdf](https://psc.ky.gov/pscecf/2024-00197/debbie.gates%40duke-energy.com/06212024125232/2024_DEK_IRP_PUBLIC_%281%29.pdf).

power plants.<sup>24</sup> When East Bend is converted to co-fire with gas its sulfur dioxide emissions would presumably decrease, as would the amount of quicklime required. It is unclear from the Application and the supporting testimony whether Duke’s analysis that found the proposed project was economic “in most future scenarios” accounted for this reduced limestone requirement starting in 2030 or did it assume the same amount of limestone usage for twelve years when it would only use that amount for three years.<sup>25</sup>

Moreover, Duke did not evaluate the full suite of alternatives. For instance, Duke never evaluated other 111(d) compliance pathways in the context of the quicklime costs. Duke should have considered converting East Bend to a gas-fired plant by 2030 (which would allow the plant to operate beyond 2039) and analyzed whether the net present value revenue requirement for a full conversion was a lower-cost option for ratepayers than the Limestone Conversion Project. Duke should have also considered co-firing East Bend with gas before 2030 as an alternative and should have analyzed what was the optimal amount of co-firing given the 111(d) compliance obligations and the quicklime costs.

Through full intervention, Sierra Club will use its expertise and consultants<sup>26</sup> to provide current data and analysis to investigate the adequacy of Duke’s proposed plan, explore additional

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<sup>24</sup> See, e.g., U.S. EPA Data Explorer, <https://www.epa.gov/egrid/data-explorer>. The fact that gas plant sulfur dioxide emissions are lower is shown by selecting SO<sub>2</sub> by state (such as Kentucky) for gas (0.038 lb/MWh national average) and then coal (1.95 lb/MWh national average).

<sup>25</sup> Duke will not complete the Limestone Conversion Project until December 2026. See Donner Direct at 5. Since Duke is planning to co-fire East Bend with gas by January 1, 2030 (see Duke’s 2024 Integrated Resource Plan, Case No. 2024-00197, at 61), the Limestone Conversion Project would only be operating for three years with that higher amount of quicklime usage.

<sup>26</sup> Sierra Club has already retained Chelsea Hotaling of Energy Futures Group as an expert for this proceeding. Ms. Hotaling regularly evaluates utility Integrated Resource Plans and related filings and has written testimony and comments on a variety of issues including utility resource planning, power plant economics, and load forecasting. Ms. Hotaling has performed analyses using the EnCompass, Strategic Energy Risk Valuation Model (“SERVM”), PLEXOS, and Aurora models. <https://energyfuturesgroup.com/team/chelsea-hotaling/>.

alternatives, investigate the adequacy of Duke's cost analyses, and present evidence and argument in support of other alternatives (such as full conversion or co-firing with gas) if they represent reasonable and prudent alternatives for Duke to pursue.<sup>27</sup>

Duke's application deals with complicated topics. However, Sierra Club helping the Commission to explore many of the assumptions and inputs will not unduly complicate the matter. Rather, it will allow for a more complete record for the Commission's decision. Sierra Club is represented by experienced counsel and will comply with all subsequent deadlines in the proceeding. Sierra Club acted expeditiously—within hours of becoming aware of the proceeding—to tender its first set of information requests by the deadline in the procedural order. While some of those requests duplicate information requested in the IRP docket, it will not be burdensome for Duke to also provide the information in this docket. Moreover, requests seeking information relevant to Duke's resource planning are relevant to this proceeding, especially Duke's burden to show that the Limestone Conversion Project does not become a stranded asset or reflect wasteful duplication.

In sum, if granted intervention, Sierra Club will develop facts and present issues (developed through requests for information and other available data) to assist the Commission in fully considering Duke's proposal, without unduly complicating or disrupting the proceeding.

### **III. Sierra Club has Special Interests in This Proceeding Which Are Not Adequately Represented.**

As noted above, 807 K.A.R. 5:001, Section 4(11) provides two alternative bases for granting full intervention. Parties either need to have a special interest not adequately represented or present issues and facts that will help the Commission fully consider the matter. As explained

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<sup>27</sup> Sierra Club would not advocate for the retirement of East Bend without replacement generation that meets the standards of K.R.S. § 278.264.



in Section II., above, Sierra Club will present issues and facts that will help the Commission fully consider the matter. Therefore, the Commission can grant full intervention on that basis alone and need not consider Sierra Club's special interest. Nevertheless, as explained below, Sierra Club also has special interests that are not adequately represented.

Sierra Club has members<sup>28</sup> who are customers and ratepayers of Duke, who fund Duke's operations, and the Commission's decision about whether to grant the CPCN for installation of pollution control equipment and subsequent surcharges will directly impact their bills. In addition, Sierra Club members live within the Duke service territory and, therefore, are impacted by the economic, public health, and environmental effects of the resource decisions that Duke makes. In addition, Sierra Club's desire to ensure that utilities in Kentucky do not imprudently invest in coal-fired generation when other less-carbon intensive and less expensive alternatives are available is directly related to the issues of this proceeding.

Sierra Club's interests are not adequately represented by any of the parties in the proceeding, as none of the other parties can adequately represent Sierra Club's interests as an organization that is interested in ensuring that uneconomic coal plants are not needlessly kept

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<sup>28</sup> Duke faults Sierra Club for not naming individual members in its motion. See Duke's Objection to Sierra Club's Motion to Intervene Out-of-Time ("Duke Objection") at 8-9, n.27. When Sierra Club initially started intervening in dockets before the Commission, it regularly listed individual members along with Sierra Club on intervention papers. After years of engagement before the Commission, Sierra Club stopped listing individual members in its intervention papers and this practice has been acceptable to the Commission for years. See, e.g., *In re: Elec. Application of Duke Energy Kentucky, Inc., for (1) an Adjustment of Electric Rates; (2) Approval of New Tariffs; (3) Approval of Accounting Practices to Establish Regulatory Assets and Liabilities*, Case No. 2022-00372, Order (Jan. 6, 2023), [https://psc.ky.gov/pscscf/2022%20Cases/2022-00372//20230106\\_PSC\\_ORDER.pdf](https://psc.ky.gov/pscscf/2022%20Cases/2022-00372//20230106_PSC_ORDER.pdf); *In re: Joint Application of Kentucky Utilities Co. and Louisville Gas and Electric Co. for Certificates of Public Convenience and Necessity and Site Compatibility Certificates, Approval of a Demand-Side Management Plan, and Approval of Fossil Fuel-Fired Generating Unit Retirements*, Case No. 2022-00402, Order (Feb. 9, 2023), [https://psc.ky.gov/pscscf/2022%20Cases/2022-00402//20230209\\_PSC\\_ORDER.pdf](https://psc.ky.gov/pscscf/2022%20Cases/2022-00402//20230209_PSC_ORDER.pdf); *In re: Elec. 2024 Integrated Resource Plan of Duke Energy Kentucky, Inc.*, Case No. 2024-00197, Order (Aug. 6, 2024), [https://psc.ky.gov/pscscf/2024%20Cases/2024-00197//20240806\\_PSC\\_ORDER.pdf](https://psc.ky.gov/pscscf/2024%20Cases/2024-00197//20240806_PSC_ORDER.pdf). Sierra Club is happy to supplement its motion by including the name of a member if the Commission deems that necessary.

online when lower carbon generation sources represent the most reasonable and cost-effective way for Duke to maintain essential electric services, meet emerging federal regulatory requirements, and address the escalation in quicklime costs.

The Attorney General cannot adequately represent Sierra Club’s interest.<sup>29</sup> The Attorney General has the unenviable task of representing all consumers and all of their diverse interests, even if some of the interests are diametrically opposed to each other. In fact, courts have “repeatedly held that private companies can intervene on the side of the government, even if some of their interests converge.”<sup>30</sup> That is because “government entities are usually charged with representing the interests of the American people, whereas aspiring intervenors, like the [Sierra Club] here, are dedicated to representing their personal interests or the interests of their members or members’ businesses.”<sup>31</sup> While the Attorney General is tasked with representing the overall, and sometimes conflicting, public interest(s) in this proceeding, Sierra Club has a

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<sup>29</sup> The Commission allowed Sierra Club and other environmental organizations to recently intervene in three dockets in which the Attorney General had already intervened. *See, e.g., In re: Application of Duke Energy Kentucky, Inc., for (1) an Adjustment of Electric Rates; (2) Approval of New Tariffs; (3) Approval of Accounting Practices to Establish Regulatory Assets and Liabilities*, Case No. 2022-00372, Order (Jan. 6, 2023), [https://psc.ky.gov/pscscf/2022%20Cases/2022-00372//20230106\\_PSC\\_ORDER.pdf](https://psc.ky.gov/pscscf/2022%20Cases/2022-00372//20230106_PSC_ORDER.pdf); *In re: Joint Application of Kentucky Utilities Co. and Louisville Gas and Electric Co. for Certificates of Public Convenience and Necessity and Site Compatibility Certificates, Approval of a Demand-Side Management Plan, and Approval of Fossil Fuel-Fired Generating Unit Retirements*, Case No. 2022-00402, Order (Feb. 9, 2023), [https://psc.ky.gov/pscscf/2022%20Cases/2022-00402//20230209\\_PSC\\_ORDER.pdf](https://psc.ky.gov/pscscf/2022%20Cases/2022-00402//20230209_PSC_ORDER.pdf); *In re: Elec. 2024 Integrated Resource Plan of Duke Energy Kentucky*, Case No. 2024-00197, Order (Aug. 6, 2024), [https://psc.ky.gov/pscscf/2024%20Cases/2024-00197//20240806\\_PSC\\_ORDER.pdf](https://psc.ky.gov/pscscf/2024%20Cases/2024-00197//20240806_PSC_ORDER.pdf).

<sup>30</sup> *See, e.g., Hardin v. Jackson*, 600 F. Supp. 2d 13, 16 (D.D.C. 2009).

<sup>31</sup> *County of San Miguel v. MacDonald*, 244 F.R.D. 36, 48 (D.D.C. 2007) (internal quotation marks omitted); *see also Purnell v. City of Akron*, 925 F.2d 941, 949-950 (6th Cir. 1991) (granting intervention in a wrongful death suit when intervenors’ interests were personal and narrower than the current defendants); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 737 (D.C. Cir. 2003) (movant satisfied its burden where it sought to protect interests that were “more narrow and parochial” than the government’s interests); *Am. Horse Prot. Ass’n v. Veneman*, 200 F.R.D. 153, 159 (D.D.C. 2001) (granting intervention of right where intervenors had “more narrow interests and concerns” than the government entity); *Jansen v. City of Cincinnati*, 904 F.2d 336, 343 (6th Cir. 1990) (granting intervention when intervenors agreed with the government’s conclusion but differed in their rationale); *S. Utah Wilderness v. Norton*, 2002 WL 32617198, at \*5 (D.D.C. June 28, 2002) (concluding that government entity may not adequately represent specific interests of private entity).

narrower interest and concern in ensuring that compliance with emerging federal regulations is not piecemealed and ignored, and complete costs associated with each alternative are adequately presented to the Commission.

The Attorney General has previously encouraged the Commission to allow public interest groups to intervene when the “Attorney General is not capable of providing the same perspective and representation” as a public interest group.<sup>32</sup> Moreover, the Commission cannot interpret its regulations to provide that the mere fact that the Attorney General intervened in this case to mean that Sierra Club’s interests are adequately represented,<sup>33</sup> for that is the situation in every case. Such an interpretation would render the intervention provision for parties other than the Attorney General superfluous, which would run contrary to the rules of statutory and regulatory interpretation.<sup>34</sup>

Additionally, neither the Commission staff nor the Attorney General’s office will marshal the same level of environmental expertise as Sierra Club with regard to existing and emerging federal regulatory requirements and the different compliance pathways or pollution control upgrades utilities will need to make to meet those obligations. Sierra Club is uniquely positioned to share its expertise with the Commission to ensure that it does not authorize the proposed CPCN, with customers to pay the return on and of a roughly \$125 million spend, only to discover that the plant needs to be re-fired with a different fuel three years later or another

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<sup>32</sup> See *In re: Application of Columbia Gas of Kentucky, Inc. for an Adjustment of Rates for Gas Service*, Case No. 2009-00141, Attorney General’s Comments Regarding Motion of Stand Energy Corporation Customer Group to Intervene (June 17, 2009) at 1-2 (arguing that the Commission should grant the SEC Customer Group’s motion to intervene), [https://psc.ky.gov/PSCSCF/2009%20cases/2009-00141/20090617\\_AG\\_Comments.PDF](https://psc.ky.gov/PSCSCF/2009%20cases/2009-00141/20090617_AG_Comments.PDF).

<sup>33</sup> Duke Objection at 9.

<sup>34</sup> See *Lexington-Fayette Urban County Gov’t v. Johnson*, 280 S.W.3d 31, 34 (Ky. 2009); *Univ. of the Cumberlands v. Pennybacker*, 308 S.W.3d 668, 683-84 (Ky. 2010).

significant capital investment is required to meet additional environmental compliance obligations.

Finally, contrary to Duke's assertion, the ability to offer a public comment is not a substitute for the complete participation afforded to parties.<sup>35</sup> While a public comment is filed in the case record, public commenters are not deemed parties to the proceedings and are not named as parties to any appeal.<sup>36</sup> Only parties to the proceedings are afforded the right to review confidential information (subject to appropriate protective agreements),<sup>37</sup> to ask and answer requests for information,<sup>38</sup> to participate in conferences with Commission staff,<sup>39</sup> to offer testimony from an expert witness, and to cross-examine witnesses at a hearing, if requested.

#### **IV. Sierra Club's Late Intervention Request Adequately Shows Good Cause.**

Notwithstanding Duke's opposition, Sierra Club has adequately shown good cause for its out-of-time intervention in this matter. Duke's contrary position is inadequately supported and illogical.

In support of its opposition to intervenor participation, the Company relies on the Commission's decision in Case No. 2020-00350, denying the out-of-time intervention of certain McDonalds Owners, but the comparison fails. Unlike Sierra Club's request in this proceeding, the McDonalds Owners sought to intervene more than a month after the deadline, and after both the initial and supplemental information request deadlines had passed.<sup>40</sup> Indeed, the Commission

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<sup>35</sup> Duke Objection at 13.

<sup>36</sup> 807 K.A.R. 5:001, Section 4(11)(e).

<sup>37</sup> 807 K.A.R. 5:001, Section 13(6).

<sup>38</sup> 807 K.A.R. 5:001, Section 4(12).

<sup>39</sup> 807 K.A.R. 5:001, Section 9(4).

<sup>40</sup> *In re: Elec. Application of Louisville Gas & Electric Co. for an Adjustment of its Electric and Gas Rates and Other Relief*, Case No. 2020-00350, Order (March 5, 2021) at 2-3, [https://psc.ky.gov/pscscf/2020%20Cases/2020-00350//20210305\\_PSC\\_ORDER.pdf](https://psc.ky.gov/pscscf/2020%20Cases/2020-00350//20210305_PSC_ORDER.pdf).

was only able to rule on the motion on the same date that intervenor testimony was due.<sup>41</sup> These details made a difference:

The Commission finds that a delay of 49 days after the intervention deadline coupled with the fact that discovery upon LG&E is now complete and the need to process this matter within tight time constraints is significant and cannot be justified by general averments to the holidays and COVID-19 pandemic.<sup>42</sup>

As in other Commission decisions, the length of time between the intervention deadline and an out-of-time intervention request, as well as the status of other deadlines in the case, is material to determining good cause.<sup>43</sup>

Here, Sierra Club's intervention request was made just five business days after the deadline, and because Sierra Club tendered initial information requests immediately, no other deadlines in the current procedural schedule need be missed.

The Commission has previously found good cause for out-of-time intervention when a prospective intervenor overlooked a deadline.<sup>44</sup> In Case No. 2017-00376, the Commission found good cause for the Attorney General's<sup>45</sup> out-of-time intervention based only on involvement in

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<sup>41</sup> *Id.*; see also Case No. 2020-00350, Order (Dec. 9, 2020) at 7 (establishing procedural schedule), [https://psc.ky.gov/pscscf/2020%20Cases/2020-00350//20201209\\_PSC\\_ORDER.pdf](https://psc.ky.gov/pscscf/2020%20Cases/2020-00350//20201209_PSC_ORDER.pdf).

<sup>42</sup> *In re: Elec. Application of Louisville Gas & Electric Co. for an Adjustment of its Electric and Gas Rates and Other Relief*, Case No. 2020-00350, Order (March 5, 2021) at 3-4, [https://psc.ky.gov/pscscf/2020%20Cases/2020-00350//20210305\\_PSC\\_ORDER.pdf](https://psc.ky.gov/pscscf/2020%20Cases/2020-00350//20210305_PSC_ORDER.pdf).

<sup>43</sup> *In re: Application of Louisville Gas and Electric Co. and Kentucky Utilities Co. to Install and Operate Electric Charging Stations in their Certified Territories, for Approval of an Electric Vehicle Supply Equipment Rider, an Electric Vehicle Supply Equipment Rate, an Electric Vehicle Charging Rate, Depreciation Rate, and for a Deviation from the Requirements of Certain Commission Regulations*, Case No. 2015-00355, Order (March 11, 2016) at 5 (denying Sierra Club's out-of-time intervention where it was two months late and provided insufficient detail), [https://psc.ky.gov/pscscf/2015%20Cases/2015-00355//20160311\\_PSC\\_ORDER.pdf](https://psc.ky.gov/pscscf/2015%20Cases/2015-00355//20160311_PSC_ORDER.pdf).

<sup>44</sup> *In re: Application of EKPC for approval to Amend its Environmental Compliance Plan and Recover Costs Pursuant to its Environmental Surcharge, and other Relief*, Case No. 2017-00376, Order (Jan. 26, 2018) at 1-2, [https://psc.ky.gov/pscscf/2017%20Cases/2017-00376/20180126\\_PSC\\_ORDER.pdf](https://psc.ky.gov/pscscf/2017%20Cases/2017-00376/20180126_PSC_ORDER.pdf).

<sup>45</sup> While the Attorney General enjoys a statutory right to intervention, the Commission has long held that the Attorney General is not entitled to ignore procedural schedules, and must show good cause for out-of-time intervention just as any other party. See, e.g., *In re: Application of Caldwell County Water District for Rate Adjustment Pursuant to 807 KAR 5:076*, Case No. 2016-0054, Order (May 11, 2016) at 4, [https://psc.ky.gov/pscscf/2016%20Cases/2016-00054//20160511\\_PSC\\_ORDER.pdf](https://psc.ky.gov/pscscf/2016%20Cases/2016-00054//20160511_PSC_ORDER.pdf).

other matters before the Commission, which “caused counsel to miss the deadline for intervention[.]”<sup>46</sup> In another example, the Commission found good cause for an out-of-time intervention where a change in administration and a loss of personnel prevented the Attorney General from making a timely motion.<sup>47</sup>

Respectfully, Sierra Club’s resources are not as robust as Duke speculates, and Sierra Club’s motion truthfully represents the circumstances behind seeking intervention five business days after the deadline. In May 2024, Sierra Club experienced another round of layoffs—the second round in a year.<sup>48</sup> As part of this layoff process, Sierra Club no longer had an individual attorney assigned to work in Kentucky. In fact, six states in the Central Region (the region in which Kentucky is situated for the Sierra Club Environmental Law Program) lost their on-point attorney, which primarily left the managing attorney, who runs the entire seventeen-state region and litigates cases, to also monitor dockets. Unfortunately, given this increased workload, this docket was initially overlooked. Although the Company speculates that engagement in one proceeding implies awareness of all proceedings,<sup>49</sup> that was not the case here for good reason.

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<sup>46</sup> *In re: Application of EKPC for approval to Amend its Environmental Compliance Plan and Recover Costs Pursuant to its Environmental Surcharge, and other Relief*, Case No. 2017-00376, Attorney General’s Memorandum in Support of Motion for Intervention Out-of-Time (Jan. 18, 2018) at 1, [https://psc.ky.gov/pscscf/2017%20cases/2017-00376/20180118\\_Atorney%20Generals%20Memorandum%20in%20Support%20of%20Motion%20for%20Intervention%20Out-of-Time.pdf](https://psc.ky.gov/pscscf/2017%20cases/2017-00376/20180118_Atorney%20Generals%20Memorandum%20in%20Support%20of%20Motion%20for%20Intervention%20Out-of-Time.pdf)

<sup>47</sup> *In re: Application of Caldwell County Water District for Rate Adjustment Pursuant to 807 KAR 5:076*, Case No. 2016-0054, Order (May 11, 2016) at 2, 5, [https://psc.ky.gov/pscscf/2016%20Cases/2016-00054/20160511\\_PSC\\_ORDER.pdf](https://psc.ky.gov/pscscf/2016%20Cases/2016-00054/20160511_PSC_ORDER.pdf).

<sup>48</sup> *See, e.g.*, Robin Bravender, *More Layoffs at Sierra Club*, E&E NEWS (May 20, 2024), <https://www.eenews.net/articles/more-layoffs-at-sierra-club/>.

<sup>49</sup> Duke Objection at 7.

**V. CONCLUSION**

Sierra Club respectfully requests that the Commission permit Sierra Club to fully intervene in these proceedings, as it has in other recent proceedings, and not strike its First Set of Requests for Information.

Dated: August 30, 2024

Respectfully submitted,

/s/ Joe F. Childers  
Joe F. Childers  
Childers & Baxter, PLLC  
The Lexington Building  
201 West Short Street, Suite 300  
Lexington, KY 40507  
(859) 253-9824  
[joe@jchilderslaw.com](mailto:joe@jchilderslaw.com)

*Of counsel*  
(not licensed in Kentucky)

Kristin A. Henry  
Sierra Club  
2101 Webster Street, Suite 1300  
Oakland, CA 94612  
[kristin.henry@sierraclub.org](mailto:kristin.henry@sierraclub.org)

**CERTIFICATE OF SERVICE**

This is to certify that the foregoing copy of Sierra Club’s Reply in Support of Motion to Intervene Out-of-Time and Sierra Club’s Objection to Duke’s Motion to strike Sierra Club’s First Set of Requests for Information in this action is being electronically transmitted to the Commission on August 30, 2024, and that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding.

/s/ Joe F. Childers  
JOE F. CHILDERS