

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC TARIFF FILING OF EAST)	
KENTUCKY POWER COOPERATIVE, INC.)	CASE NO.
TO ESTABLISH A NEW TARIFF FOR DATA)	2025-00140
CENTER POWER)	

EAST KENTUCKY POWER COOPERATIVE INC.’S
SUR-REPLY IN OPPOSITION TO MOTION TO INTERVENE

Comes now East Kentucky Power Cooperative, Inc. (“EKPC”), by counsel, and does hereby tender its sur-reply in further opposition to the motion to intervene filed by the Retail Energy Supply Association (“RESA”), respectfully stating as follows:

As anticipated, RESA’s reply is nearly twice the length of its original motion to intervene, however, there is nothing new of consequence in the reply – which generally rehashes vague notions of a special interest that is inconsistent with Kentucky law and the scope of the Commission’s jurisdiction under KRS 278.040. Moreover, RESA’s reply makes no serious effort to distinguish the abundant examples of Commission precedent cited by EKPC which demonstrate why the motion to intervene is inconsistent with the Commission’s consistent interpretation of 807 KAR 5:001, Section 4(11). Instead, RESA seeks to downplay the significance of Commission precedent by generally dismissing it. Accordingly, the motion remains unsustainable and should be denied.

RESA’s reply demonstrates a fundamental misunderstanding of how the Commission’s intervention regulation works. The only judicial case cited by RESA is *Shockey Tours, Inc. v.*

Miller Transport, Inc., 984 S.W.2d 94 (Ky. 1998), which considered a question of whether standing was expressly conferred under a statute (KRS 281.625(1)(b)) to licensees of the Kentucky Department of Vehicle Regulation. That case – and the authority which it construes – is self-evidently distinguishable from *Inter-County Rural Electric Coop. Corp. v. Public Service Comm’n*, 407 S.W.2d 127 (Ky. 1966), cited by EKPC in its response, that finds the Commission’s intervention regulation “reposes in the Commission the responsibility for the exercise of *sound discretion* in the matter of affording permission to intervene.”¹ RESA’s reliance upon a case construing a different statute relating to a different agency is wholly unpersuasive.

But the incongruence of RESA’s legal analysis does not end there. RESA’s very next statement is that the Commission’s “regulatory framework is liberal and favors intervention when a party demonstrates its interest in the proceeding.”² Conspicuously absent from this sweeping interpretation of the Commission’s regulation is any actual precedent or textual language to support it. RESA seeks to create a presumption that intervention should be allowed, when the Commission’s own precedent – cited extensively by EKPC and largely ignored by RESA – holds that intervention is a privilege and not a right. The only exception to this, of course, is the Attorney General whose ability to intervene is a right conferred by statute.

As also expected, RESA concedes that neither it nor any of its members have any of the normal ties to Kentucky or the applicant utility that are *always* associated with intervenors in Commission proceedings.³ Dismissing this as a factor in considering whether to grant intervention

¹ *Inter-County*, p. 130 (emphasis added).

² RESA Reply, p. 2.

³ See RESA Reply, p. 7. EKPC’s Response demonstrates that Commission precedent always requires some tie between the intervenor and the applicant, typically as a customer given the Commission’s limited jurisdiction to the retail rates and services of a utility.

would fundamentally change the nature of interventions in cases before the Commission. It must be pointed out that the Affidavit attached to RESA's reply offers nothing to substantiate any ties to Kentucky between either Vistra or RESA.

With regard to RESA's prior failure to demonstrate that it was incorporated and, therefore, could even attempt to assert associational standing, it is noteworthy that RESA still fails to produce any articles of incorporation from any jurisdiction. It never refers to itself as an "Inc." or similar corporate designation. Nor does the affidavit from one of its members tendered on its behalf identify RESA as an incorporated entity. RESA claims that the Commission's prohibition on unincorporated associational standing set forth in *Columbia Gas*,⁴ does not apply here, but it fails to provide a definitive factual basis for why it does not apply. What is so difficult about attaching a certified copy of the articles of incorporation? Moreover, RESA's citation to *Bluegrass Water Utility Operating Company, LLC* is equally unavailing. In that case,⁵ each of the members of the homeowners association granted leave to intervene in the case were *actual customers* of the water utility – which RESA acknowledges is not the case here.⁶

RESA's stated purpose is to represent the "the interests of power plant owners and suppliers of electric power"⁷ because they "serve entities through bilateral power agreements."⁸ The only actual example of this in Kentucky, of course, is the Customer Choice program administered by Columbia Gas of Kentucky – a natural gas utility that does not fall under the

⁴ See *In the Matter of the Application of Columbia Gas of Kentucky, Inc. for an Adjustment in Rates*, Order, Case No. 2009-00141, p. 4 (Ky. P.S.C. July 15, 2009).

⁵ See *In the Matter of Electronic Application of Bluegrass Water Utility Operating Company, LLC for an Adjustment of Rates and Approval of Construction*, Order, Case No. 2020-00290 (Feb. 8, 2021).

⁶ See RESA Reply, p. 7.

⁷ RESA Reply, p. 1.

⁸ RESA Reply, p. 3; *id.*, p. 8.

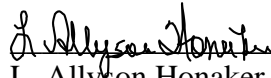
coverage of the Kentucky Territories Act. By law, none of RESA's members can serve an electric customer in Kentucky.⁹ Only retail electric suppliers with certified service territories may do so. Accordingly, RESA's stated interest and expertise lies exclusively in a context that is expressly prohibited under Kentucky law. Allowing it to assert an interest that the Kentucky General Assembly has expressly prohibited is an anathema to the rule of law and sound administrative practice. It would be highly disruptive to this process to be required to deal in hypotheticals and analogies to other states who have chosen a different public policy process. The ground truth is that RESA's stated interest and expertise is not so much about working within Kentucky's existing laws as much as it is in advocating for them to be changed. That question lies with the legislature and not the Commission.

The Commission has granted intervention to thousands of individuals and entities over the long arc of its history, which is appropriate. However, 807 KAR 5:001, Section 4(11) places equally appropriate guardrails on the exercise of this sound discretion. RESA has not satisfied its burden of proof here, and its motion must be overruled.

This 17th day of June, 2025.

⁹ The Affidavit attached to RESA's Reply indicates that Vistra Corp., a RESA member, sells power directly to data centers that are located on cooperative systems, however, it does tellingly not indicate that it does so in jurisdictions where retail choice is prohibited as a matter of law – like in Kentucky.

Respectfully submitted,



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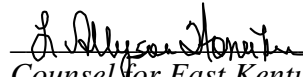
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CERTIFICATE OF SERVICE

This is to certify that the foregoing electronic filing was transmitted to the Commission on June 17, 2025, and that there are no parties that the Commission has excused from participation by electronic means in this proceeding. Pursuant to prior Commission Orders, no paper copies of this filing will be made.



Counsel for East Kentucky Power Cooperative, Inc.