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October 9, 2009

**VIA HAND DELIVERY**

Jeff DeRouen  
Executive Director  
Kentucky Public Service Commission  
211 Sower Boulevard  
Frankfort, KY 40601

**RECEIVED**

OCT 09 2009

**PUBLIC SERVICE  
COMMISSION**

**RE: Application of Kentucky Utilities Company for Certificates of Public Convenience and Necessity and Approval of Its 2009 Compliance Plan for Recovery by Environmental Surcharge**  
**Case No. 2009-00197**

**Application of Louisville Gas and Electric Company for a Certificate of Public Convenience and Necessity and Approval of Its 2009 Compliance Plan for Recovery by Environmental Surcharge**  
**Case No. 2009-00198**

Dear Mr. DeRouen:

Enclosed please find and accept for filing two originals and ten copies of Kentucky Utilities Company's and Louisville Gas and Electric Company's Response and Objection to CDH Preserve, LLC's, Dennis Cunningham's and Cathy Cunningham's Motion for Leave to Intervene and for Leave to File Direct Testimony by Not Later Than November 5, 2009 in the above-referenced matters. Please confirm your receipt of this filing by placing the stamp of your Office with the date received on the enclosed additional copies and return them to me in the enclosed self-addressed stamped envelope.

Under separate cover, I am sending Staff Counsel today by email a draft of the settlement agreement between the two applicants in these cases and the Kentucky Industrial Utility Customers, Inc.

Jeff DeRouen  
October 9, 2009  
Page 2

Should you have any questions please contact me at your convenience.

Yours very truly,



Kendrick R. Riggs

KRR:ec  
Enclosures

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COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE APPLICATION OF KENTUCKY )  
UTILITIES FOR CERTIFICATES OF )  
PUBLIC CONVENIENCE AND )  
NECESSITY AND APPROVAL OF ITS ) CASE NO. 2009-00197  
2009 COMPLIANCE PLAN FOR )  
RECOVERY BY ENVIRONMENTAL )  
SURCHARGE )

and

In the Matter of:

THE APPLICATION OF LOUISVILLE )  
GAS AND ELECTRIC COMPANY FOR )  
A CERTIFICATE OF PUBLIC )  
CONVENIENCE AND NECESSITY ) CASE NO. 2009-00198  
AND APPROVAL OF ITS 2009 )  
COMPLIANCE PLAN FOR )  
RECOVERY BY ENVIRONMENTAL )  
SURCHARGE )

RESPONSE AND OBJECTION OF  
KENTUCKY UTILITIES COMPANY AND  
LOUISVILLE GAS AND ELECTRIC COMPANY TO CDH PRESERVE, LLC'S,  
DENNIS CUNNINGHAM'S AND CATHY CUNNINGHAM'S  
MOTION FOR LEAVE TO INTERVENE AND FOR LEAVE TO  
FILE DIRECT TESTIMONY BY NOT LATER THAN NOVEMBER 5, 2009

Kentucky Utilities Company ("KU") and Louisville Gas and Electric Company ("LG&E") (collectively the "Companies") respectfully request that the Commission deny the Motion for Leave to Intervene in these proceedings filed by CDH Preserve, LLC, Dennis Cunningham and Cathy Cunningham (collectively the "Cunninghams").

The Cunninghams' asserted interest in these proceedings does not meet the requirements of the pertinent Commission regulations. Pursuant to 807 KAR 5:001, Section 3(8), "any person who wishes to become a party to a proceeding before the commission may by timely motion

request that he be granted leave to intervene.” Only the Attorney General has an absolute right to intervene in proceedings before the Commission.<sup>1</sup> Intervention of all other parties is in the Commission’s discretion and is governed by 807 KAR 5:001 Section 3(8)(b), which provides in pertinent part:

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 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.

The “special interest” justifying intervention must relate to a utility’s rates or service.<sup>2</sup>

The Cunninghams’ Motion for Leave to Intervene, apparently sought for the purpose of raising environmental and other concerns that are not relevant to this case, should be denied for two reasons. First, the Cunninghams’ Motion is untimely because it was filed more than one hundred days after the Companies’ petitions were filed with the Commission. Second, the Cunninghams have not stated any legally cognizable grounds for intervention under 807 KAR 5:001 Section 3(8).

**I. The Cunninghams’ motion to intervene should be denied because it was not timely filed.**

Motions to intervene in proceedings before the Commission must be made timely.<sup>3</sup> On May 29, 2009, the Companies filed with the Commission their Notices of Intent to file the applications in these proceedings. The Companies’ applications in these proceedings were filed on June 26, 2009. Prior to filing their applications, the Companies caused to be published in newspapers in their respective service areas notices of the filing of their applications.<sup>4</sup> In

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<sup>1</sup> See KRS 367.150(8).

<sup>2</sup> *EnviroPower, LLC v. Public Service Commission of Kentucky*, 2007 WL 289328 at \*3 (Ky. Ct. App. 2007).

<sup>3</sup> 807 KAR 5:001 Section 3(8).

<sup>4</sup> See Certificates of Completed Notice (Aug. 28, 2009).

addition, the Companies included in customers' bills in the June 29, 2009, billing cycle general statements explaining the applications.<sup>5</sup> Both notices stated that: "Any corporation, association, body politic or person may, **by motion within thirty days after publication**, request leave to intervene...."<sup>6</sup>

Without offering any explanation for their delay, the Cunninghams filed their motion for leave to intervene in these proceedings **130 days** after the Companies' notices of intent were filed. The Companies and Kentucky Industrial Utility Customers, Inc. ("KIUC") complied with the procedural schedules set by the Commission in these matters. Moreover, the Companies and KIUC have reached a settlement agreement and anticipate providing the draft settlement agreement with the Staff in these matters on October 9, 2009, and filing the final agreement in this record with the Commission on October 16, 2009. Allowing the Cunninghams to intervene would prejudice the parties by requiring extensions of the remaining deadlines herein<sup>7</sup> and rendering meaningless the Companies' and KIUC's good-faith efforts to compromise. The Commission has consistently denied untimely motions to intervene<sup>8</sup> and the Cunninghams' motion should likewise be denied.

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<sup>5</sup> See *id.* The Companies also posted notices at their offices and posted copies of their applications on their websites. *Id.*

<sup>6</sup> See Exhibits A and B to Certificates of Completed Notice (Aug. 28, 2009) (emphasis added).

<sup>7</sup> Although the Cunninghams specifically request an extension of the deadline for the submission of intervenors' testimony, they fail to mention that such an extension would likewise require extensions of the deadlines for requests for information to intervenors, intervenors' responses to requests for information, the filing of rebuttal testimony by the Companies, and the public hearings in these matters.

<sup>8</sup> *In re Adjustment of Gas Rates of the Union Light, Heat and Power Company*, Case No. 2001-00092, Order (Sept. 13, 2001) (motion to intervene by Stand Energy denied when it was filed 80 days after notice and application was filed); *In the Matter of: Application of Kentucky Frontier Gas, LLC for Approval of Financing and Transfer of Control*, Case No. 2008-00394, Order of February 13, 2009 (denying joint motion to intervene filed by B&H Gas Company and Johnson County Gas fifteen days after final order was issued); *In the Matter of: The Petition of Kentucky-Ohio Gas Company for Approval of a Certificate of Convenience and Necessity to Construct Pipeline Facilities, Approval of Financing and Approval of Special Contract*, Case No. 93-144, Order of September 3, 1993 (denying intervention to Columbia Gas of Kentucky when motion to intervene was filed over four months after the case was established); *In the Matter of: Application of Clark Energy Cooperative, Inc. for Routine Revision of Existing CATV Pole Attachments*, Case No. 2004-00442, Order of March 29, 2005 (denying motion for intervention by Kentucky Cable Telecommunications Association one day before final order entered); *In the Matter of: The Joint Application of Sandy Valley Water District, Southern Water and Sewer District and the City of Pikeville for*

**II. The Cunninghams do not satisfy the criteria for intervention set forth in 807 KAR 5:001 Section 3(8)(b).**

Even if the Commission excuses the Cunninghams' untimely filing of their Motion for Leave to Intervene, it should nonetheless deny the motion because there is no basis on which the Cunninghams can intervene in these proceedings under 807 KAR 5:001 Section 3(8)(b).

**A. The Cunninghams do not have a special interest in the proceedings that is not otherwise adequately represented.**

Because the Cunninghams are not LG&E customers, they cannot intervene in the proceedings on LG&E's application.<sup>9</sup> A 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."<sup>10</sup> The Cunninghams have not stated any Commission-jurisdictional interest in the rates or service of LG&E. The Commission should therefore deny them intervention in the LG&E proceeding.

Although the Cunninghams are customers of KU, the Commission routinely denies the intervention petitions of individual customers who cannot, or do not attempt to, demonstrate that they fulfill at least one of the requirements of 807 KAR 5:001 Section 3(8)(b). For example, the Commission recently denied State Representative Jim Stewart's Motion to Intervene in Case No.

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*Approval of the Transfer of Facilities and for the Assumption of Debt by Southern Water and Sewer District*, Case No. 2006-00327, Order of January 29, 2008 (denying as untimely motion to intervene filed by the City of Prestonsburg 85 days following entry of final order); *In the Matter of: Application of Sprintcom, Inc. for Issuance of a Certificate of Public Convenience and Necessity to Construct a Personal Communications Services Facility in the Cincinnati Basic Trading Area [Crittenden Facility]*, Case No. 99-103-UAC, Order of November 4, 1999 (denying motion to intervene filed by the Grant County Planning Commission six months after case was docketed); and *In the Matter of: the Petition of Kentucky-Ohio Gas Company for Approval of Special Contract and Certificate of Convenience and Necessity*, Case No. 92-317, Order of September 21, 1992 (denying motion for intervention filed by Columbia Gas 56 days after filing of petition).

<sup>9</sup> See *In re Application of Columbia Gas of Kentucky, Inc., for an Adjustment in Rates*, Case No. 2009-00141, Order at 4 (July 15, 2009) (denying non-customer's motion to intervene); *In the Matter of: Filing of East Kentucky Power Cooperative, Inc. to Request Approval of Proposed Changes To Its Qualified Cogeneration and Small Power Production Facilities Tariff*, Case No. 2008-00128 Order at 4 (April 28, 2008) (denying Geoffrey Young's petition for full intervenor status because he is not a customer of EKPC).

<sup>10</sup> *EnviroPower, LLC v. Public Service Commission of Kentucky*, 2007 WL 289328 at \*3 (Ky. Ct. App. 2007) (not to be published).

2009-00174 on the ground that he neither had a special interest in the proceeding nor was likely to assist the Commission to render a decision.<sup>11</sup> Likewise, the Commission denied the intervention petition of Robert L. Madison in Case No. 2007-00337. The Commission held that Mr. Madison had neither a special interest in the proceeding nor the requisite training or expertise to assist the Commission in developing facts or issues, and the Commission established that “hold[ing] a particular position on issues pending in ... [a] case does not create the requisite ‘special interest’ to justify full intervention under 807 KAR 5:001, Section 3(8)(b).”<sup>12</sup> And in the LG&E proceedings herein, the Commission denied the petition to intervene of Tammy Stewart, explaining that Ms. Stewart “has offered no factual basis to justify her request, since she has not demonstrated that she is likely to assist the Commission in rendering its decision.”<sup>13</sup>

Moreover, the interests of the Cunninghams are adequately protected because this Commission represents the public interest, which includes the interests of the Cunninghams. “The Commission, in its role as the enforcer of KRS Chapter 278 and all regulations promulgated pursuant to that chapter, represents the public interest. See KRS 278.040(1) and (3).”<sup>14</sup>

The fact that the Cunninghams have been granted intervention in previous proceedings does not establish a right to intervene in these proceedings. Instead, “[f]or each proceeding all

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<sup>11</sup> *In re Application of Kentucky Utilities Company for an Order Approving the Establishment of a Regulatory Asset*, Case No. 2009-0174, Order (June 26, 2009).

<sup>12</sup> *In re Joint Application of Louisville Gas and Electric Company, Association of Community Ministries, Inc., People Organized and Working for Energy Reform, and Kentucky Association for Community Action, Inc. for the Establishment of a Home Energy Assistance Program*, Case No. 2007-00337, Order at 6 (Sept. 14, 2007).

<sup>13</sup> *In re Application of Louisville Gas and Electric Company for a Certificate of Public Convenience and Necessity and Approval of its 2009 Compliance Plan for Recovery by Environmental Surcharge*, Case No. 2009-00198, Order at 2 (Aug. 28, 2009).

<sup>14</sup> *In re Louisville Gas and Electric Company and BellSouth Telecommunications, Inc.: Alleged Violation of Commission Regulations 807 KAR 5:041, Section 3 and 807 KAR 5:061, Section 3*, Case No. 96-246, Order at 3 (Oct. 15, 1996), citing Philipps, Ky. *Prac.*, 5th ed., Civil Rule 24.01 at 422.

Movants must show that they meet the regulatory prerequisites for such status.”<sup>15</sup> The Cunninghams’ generic statement that they “are customers and consumers of electrical power of KU and will be impacted by the KRS 278.183 surcharge if it is approved” is not sufficient to make that showing. Nor does their particular position with respect to the proposed landfill at the Trimble County Generating Station and surcharges associated with the Trimble County facilities constitute a “special interest” in the proceedings. The Cunninghams therefore cannot intervene on the basis of a special interest in these proceedings.

B. The Cunninghams are not likely to present issues or develop facts that will assist the Commission in fully considering the matter, and their intervention would unduly complicate and disrupt these proceedings.

Only two issues are relevant to the Companies’ applications – (1) whether the proposed new facilities are needed and will not create wasteful duplication,<sup>16</sup> and (2) whether the Companies’ proposed plans and surcharges “are reasonable and cost-effective for compliance with the applicable environmental requirements.”<sup>17</sup> In support of their Motion for Leave to Intervene, the Cunninghams appear to argue that the Companies may be able to satisfy their anticipated increased demand through demand-side management, rendering TC2 – and the proposed landfill and surcharge associated with TC2<sup>18</sup> – unnecessary. The Cunninghams’ position does not justify intervention.

First, the Cunninghams’ argument that TC2 may be rendered unnecessary or may ultimately not come to fruition is merely a collateral attack on the CPCNs this Commission

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<sup>15</sup> *In re Application of Mallard Point Disposal Systems, Inc. for an Adjustment of Rates Pursuant to the Alternative Rate Filing Procedure for Small Utilities*, Case No. 2005-00235, Order at 3 (Sept. 2, 2005) (denying petition for full intervention but granting limited intervention).

<sup>16</sup> *Kentucky Utilities Company v. Public Service Commission of Kentucky*, 252 S.W.2d 885, 890 (Ky. 1952).

<sup>17</sup> KRS 278.183(2)(a).

<sup>18</sup> The Cunninghams do not appear to be challenging KU’s application for CPCNs for SCR NO<sub>x</sub> emission control technology at Brown Unit 3 and the landfill at the Ghent Generating Station, or the surcharges associated with those proposed improvements.



previously granted for TC2 and the associated 345 kV transmission line.<sup>19</sup> As indicated in their motion, the Cunninghams have pursued and continue to wage their campaign against the construction of the transmission line in a number of proceedings and forums.<sup>20</sup> They appealed this Commission's grant of the CPCN for the transmission line, and that appeal is currently pending in the Kentucky Supreme Court.<sup>21</sup> In addition, the Cunninghams and others have sued the United States Department of the Army, the Fort Knox Garrison Commander, and the Companies in the United States District Court for the Western District of Kentucky alleging violations of the National Historic Preservation Act in connection with the same 345 kV transmission line.<sup>22</sup>

As the Commission has previously ruled in *In the Matter of: the 2008 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company*, the Cunninghams' opposition to the construction of the transmission line is not a proper basis for intervention in other proceedings.<sup>23</sup> The circumstances of the Cunninghams' attempted intervention in the IRP case are strikingly similar to the circumstances here. There, the Cunninghams, their witness, Geoffrey Young, and their lawyer, Elizabeth Bennett, all attempted

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<sup>19</sup> *In re Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company for a Certificate of Public Convenience and Necessity, and a Site Compatibility Certificate, for the Expansion of the Trimble County Generating Station*, Case No. 2004-00507, Order at 7 (Nov. 1, 2005) (granting CPCN for TC2); *In re Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company for the Construction of Transmission Facilities in Jefferson, Bullitt, Meade and Hardin Counties, Kentucky*, Case Nos. 2005-00467 and 2005-00472, Order at 23 (May 26, 2006) (granting CPCN to construct proposed 345 kV transmission line).

<sup>20</sup> *In re Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company for the Construction of Transmission Facilities in Jefferson, Bullitt, Meade and Hardin Counties, Kentucky*, Case No. 2005-00142; *In re Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company for the Construction of Transmission Facilities in Jefferson, Bullitt, Meade and Hardin Counties, Kentucky*, Case Nos. 2005-00467 and 2005-00472; *Kentucky Utilities Company v. CDH Preserve, LLC, et al.*, Hardin Circuit Court, Civil Action No. 07-CI-01875, on appeal *CDH Preserve, LLC v. Kentucky Utilities Co.*, Kentucky Court of Appeals, Case No. 2008-CA-001566.

<sup>21</sup> *Kentucky Public Service Commission v. Hardin and Meade County Property Owners for Co-Location, et al.*, Kentucky Supreme Court, Case No. 2008-SC-00354.

<sup>22</sup> *Harrison, et al. v. United States Department of the Army, et al.*, Civil Action No. 3:08cv-105-H.

<sup>23</sup> *In re The 2008 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company*, Case No. 2008-00148, Order at 11 (July 18, 2008).

to intervene and raise many of the same issues the Cunninghams seek to raise here. For example, they questioned the need for TC2 and the 345 kV transmission line, they argued about demand-side management issues and they expressed environmental concerns. In the order of July 18, 2008, the Commission found that neither the Cunninghams, their witness nor their lawyer had a special interest not otherwise adequately represented. It found that it had no jurisdiction to consider their environmental concerns. It made the following additional finding:

The CDH/Cunningham/Bennett petitioners argue that if LG&E/KU were able to meet their anticipated growth in demand through demand-side management and electric generation other than coal-burning facilities, the transmission facilities that were approved by the Commission in Case Nos. 2005-00467 and 2005-00472 would not be needed. LG&E/KU allege in their response that this argument is merely a collateral attack on the CPCN. The Commission agrees with LG&E/KU that such grounds are not proper for intervention pursuant to 807 KAR 5:001, Section 3(8)(b), and, therefore, the Commission denies the CDH/Cunningham/Bennett petition on those grounds.<sup>24</sup>

The Cunninghams and Mr. Young sought rehearing of the July 18, 2008, order denying their requests for full intervention. By order dated August 25, 2008, the Commission denied rehearing and reiterated its determination that they should not be granted full intervenor status.<sup>25</sup> The Commission properly denied full intervention in the IRP case and the same reasoning compels denial of the Cunninghams' Motion for Leave to Intervene here.

Furthermore, the Cunninghams have not indicated they have any particular knowledge, qualifications, experience, or background that could assist the Commission in considering fully the limited facts and issues that are relevant and jurisdictional to the Commission in these proceedings. The resources cited by the Cunninghams in support of their position that the Commission should re-evaluate the scheduled start-up and operation of TC2 are available to the

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<sup>24</sup> *Id.*

<sup>25</sup> *In re the 2008 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company*, Case No. 2008-00148, Order at 2-6 (August 25, 2008).

parties and the Commission, all of whom may use those resources without the Commission's granting intervention to the Cunninghams.<sup>26</sup>

The Commission consistently denies requests for full intervention when the proposed intervenor has not demonstrated that he/she is likely to present issues or develop facts that will assist the Commission in fully considering the matter.<sup>27</sup> The Cunninghams have not made such a demonstration here.

Finally, the Cunninghams fail to recognize that, as required by statute, the Commission will review the operations of the Companies' environmental surcharges at six-month and again at

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<sup>26</sup> See *In re the Joint Petition of Kentucky-American Water Company, Thames Water Aqua Holdings GmbH, RWE Aktiengesellschaft, Thames Water Aqua US Holdings, Inc., Apollo Acquisition Company and American Water Works Company, Inc. for Approval of a Change of Control of Kentucky-American Water Company*, Case No. 2002-00317, Order at 3 (Oct. 3, 2002) (denying intervention where proposed intervenor's website with large number of resources was publicly accessible).

<sup>27</sup> *In re the 2008 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company*, Case No. 2008-00148, Order (July 18, 2008); *In re Joint Application of Louisville Gas and Electric Company, Association of Community Ministries, Inc., People Organized and Working for Energy Reform, and Kentucky Association for Community Action, Inc. for the Establishment of a Home Energy Assistance Program*, Case No. 2007-0037, Order at 7 (Sept. 14, 2007) (denying intervention where individual had not demonstrated educational and professional background to intervene as expert witness); *In re An Investigation into East Kentucky Power Cooperative, Inc.'s Continued Need for Certificated Generation*, Case No. 2006-00564, Order at 4 (March 22, 2007) (expertise in alternative energy strategies would not assist Commission in proceeding involving utility's expected power requirements); *In re 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 and Five 90 MW (Nominal) Combustion Turbines in Clark County, Kentucky*, Case No. 2005-00053, Order at 2 (April 18, 2005) (denying intervention where issues raised were subject of ongoing investigation "and it would be inefficient and duplicative to conduct a second investigation of those same issues in this case"); *In re Application of Louisville Gas and Electric Company and Kentucky Utilities Company for a Certificate of Public Convenience and Necessity for the Acquisition of Four Combustion Turbines and a Site Compatibility Certificate for the Facility*, Case No. 2002-00381, Order at 2 (Feb. 20, 2003) (denying intervention where sole interest was a matter not at issue in proceeding); *In re The Joint Petition of Kentucky-American Water Company, Thames Water Aqua Holdings GmbH, RWE Aktiengesellschaft, Thames Water Acquisition Company and American Water Works Company, Inc. for Approval of a Change of Control of Kentucky-American Water Company*, Case No. 2002-00317, Order at 2-3 (Oct. 3, 2002) (denying intervention to group that operated internet site with resources on globalization of water sources and international multi-utility ownership where site was accessible to general public); *In re the Joint Application of Kentucky Power Company, American Electric Power Company, Inc. and Central and South West Corporation Regarding a Proposed Merger*, Case No. 99-149, Order at 2 (May 20, 1999) (denying intervention where proposed interest was already under investigation by the Commission in another matter); *In re The Proposed Tariff of South Central Bell Telephone Company for Proposed Area Calling Service Expansion*, Case No. 93-114, Order at 3-4 (June 11, 1993) (denying motion to intervene where issues raised were resolved in prior proceeding to which proposed intervenor was a party and all relevant facts and issues had been fully developed in that proceeding).

two-year intervals.<sup>28</sup> If necessary, the Commission may temporarily adjust the surcharges to “disallow any surcharge amounts found not just and reasonable and reconcile past surcharges with actual costs recoverable....”<sup>29</sup> Permanent adjustment – either disallowing improper expenses or incorporating just and reasonable expenses into the Companies’ base rates – may be made after a biannual review.<sup>30</sup> In other words, if the Commission needs to take action in the future for the costs associated with the pollution control facilities for TC2 that are approved for recovery<sup>31</sup> or are requested for recovery in this proceeding<sup>32</sup> for some reason, as the Cunninghams suggest, proper adjustments can and will be made. There is thus no need to allow the Cunninghams to intervene and submit testimony in which they speculate as to why that unlikely possibility might occur.

Notwithstanding the Cunninghams’ speculations, their assertions in their motion about certain permits are not correct. The EPA orders and letter cited in the Cunningham’s motion as evidencing EPA’s “disapproval” of the air permit are merely the mechanism by which EPA notifies the Kentucky Division for Air Quality of permit deficiencies which must be corrected in the course of the permitting process. The Companies are working with the Division on permit revisions which address EPA’s comments. Nothing in the EPA determinations changes legal status of the air permit: it is and remains in full force and effect. The Companies expect to be able to operate the plant with no changes to its emission controls. The Trimble County Station

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<sup>28</sup> KRS 278.183(3).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Application of Louisville Gas and Electric Company for Approval of Its 2006 Compliance Plan for Recovery by Environmental Surcharge*, Case No. 2006-00208, Order, p. 8 (December 21, 2006); *Application of Kentucky Utilities Company for Approval of Its 2006 Compliance Plan for Recovery by Environmental Surcharge*, Case No. 2006-00206, Order, p. 10 (December 21, 2006)(approving environmental surcharge recovery of LG&E’s and KU’s respective share of the Air Quality Control System to be installed at Trimble Unit 2, except for the operating expenses).

<sup>32</sup> *Application of Louisville Gas and Electric Company for Approval of Its 2009 Compliance Plan for Recovery by Environmental Surcharge*, Case No. 2009-00198, Application, p 5; *Application of Kentucky Utilities Company for Approval of Its 2009 Compliance Plan for Recovery by Environmental Surcharge*, Case No. 2009-00197, Application, p. 10.

currently has a KPDES permit for water discharges. The Companies are currently seeking a renewal of that existing permit which includes various changes to address the operational requirements of the Trimble County Generation Station generally, and not just for TC2. It is, therefore, inaccurate to assert that LG&E and KU lack all the permits necessary to operate TC2, and these arguments are simply a red herring asserted by the Cunninghams for the purpose of seeking to delay these proceedings.

Indeed, rather than assisting the Commission in fully, fairly and accurately considering this matter, all indications are that the Cunninghams will instead introduce confusion into these proceedings by attempting to improperly re-argue the previously granted CPCNs for TC2 and the 345 kV transmission line while raising environmental issues over which the Commission lacks jurisdiction. This distraction from the relevant issues in this matter, *i.e.*, (1) whether the proposed new facilities are needed and will not create wasteful duplication, and (2) whether the Companies' proposed plans and surcharges are reasonable and cost-effective, would complicate and disrupt these proceedings, which are otherwise nearly concluded. To the extent the Cunninghams wish to express their concerns, they can do so either through written comment or at the public portion of the hearing.

The Commission denies full intervention to those who will unduly complicate or disrupt the proceedings.<sup>33</sup> The extraneous issues identified by the Cunninghams in their motion and the

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<sup>33</sup> *In re the 2008 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company*, Case No. 2008-00148, Order (July 18, 2008) (denying intervention on basis of issues not relevant or jurisdictional to proceeding and/or within Commission's jurisdiction; *In re An Investigation into East Kentucky Power Cooperative, Inc.'s Continued Need for Certificated Generation*, Case No. 2006-00564, Order at 4, 6 (April 19, 2007) (injecting issues outside Commission's jurisdiction would unduly complicate and disrupt the proceeding); *In re An Adjustment of the Electric Rates, Terms, and Conditions of Louisville Gas and Electric Company*, Case No. 2003-00433, Order at 3 (Jan. 21, 2004) ("The filing of what purports to be expert testimony by one who is not an expert tends to complicate and disrupt the proceedings, rather than presenting issues or developing facts that will assist the Commission."); *In re Louisville Gas and Electric Company: Alleged Failure Pursuant to 807 KAR 5:041, Section 3, to Comply with National Electric Safety Code ("NESC"), 1990 Edition, Section 23, Clearances, Rule 234 B, 1&2*, Case No. 98-592, Order at 2 (Jan. 25, 1999) (intervention to assert interest outside scope of proceeding with

request to alter the procedural schedule are clear indications that the Cunninghams will unduly disrupt and complicate these proceedings.

**III. Recent Commission and unpublished Kentucky Court of Appeals precedents state that environmental concerns, such as those cited by the Cunninghams, are not within the Commission’s jurisdiction.**

To the extent the Cunninghams intend to raise environmental impact issues if they are granted full intervention in these proceedings, their motion should be denied because those issues are outside the Commission’s jurisdiction. As the Commission stated in a recent order denying the Cunninghams’ petition to intervene in the Companies’ IRP proceeding, “Notably absent from the Commission’s jurisdiction are environmental concerns, which are the responsibility of other agencies within Kentucky state government ....”<sup>34</sup> This is consistent with KRS 278.040(2), which grants the Commission jurisdiction with respect to “the regulation of rates and service of utilities,” and the Kentucky Court of Appeals’ statement, in an unpublished decision, that:

The PSC’s exercise 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.**<sup>35</sup>

Thus, to the extent the Cunninghams seek to intervene to express their views on the environmental impact of the Companies’ facilities, the Commission and the Court of Appeals have clearly stated that the Commission’s jurisdiction simply does not extend to such issues.

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unduly complicate proceeding in which no material facts remained in dispute); *In re Ronald and Kimberly Woods v. Louisville Gas and Electric Company and Salt River Electric Cooperative Corporation*, Case No. 97-098, Order at 3 (July 14, 1997) (where issues raised by proposed intervenors were better addressed by other forums, intervention was “likely to unduly complicate and delay” proceedings).

<sup>34</sup> *In re The 2008 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company*, Case No. 2008-00148, Order at 5 (July 18, 2008).

<sup>35</sup> *EnviroPower, LLC v. Public Service Commission of Kentucky*, 2007 WL 289328 at \*3 (Ky. Ct. App. 2007) (not to be published) (emphasis added).

Those concerns are consequently irrelevant to the Commission's ruling on the Companies' applications, and the Cunninghams cannot intervene on those grounds.<sup>36</sup>

The Commission has, in case after case, successfully discharged its responsibility under KRS Chapter 278 to act on cases before it in a timely manner, without waiting on the resolution of parallel issues or the actions of other agencies. Commission orders dealing with issues across the spectrum of utility regulation demonstrate that the Commission has routinely issued final orders conditioned upon the *future* occurrence of certain necessary events, or the issuance of other agency approvals or permits.<sup>37</sup> Early this year, the Commission observed:

The Commission frequently reviews transactions before the requisite approvals from other entities have been obtained and before all conditions precedent have been satisfied. In these situations, if the Commission finds that the transaction should be approved and that there are conditions precedent which are of critical importance, the transaction can be approved with appropriate conditions to insure that the conditions precedent are satisfied.<sup>38</sup>

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<sup>36</sup> State agencies other than the Kentucky Public Service Commission are statutorily tasked with addressing environmental concerns. In the Commonwealth, the Energy and Environment Cabinet ("EEC") has the statutory responsibility to "[p]repare and develop a comprehensive plan or plans related to the environment of the Commonwealth." KRS 224-10.100(2). And the Kentucky Division for Air Quality, a division of the EEC, has jurisdiction over air emissions issues. See 401 KAR 50:012.

<sup>37</sup> See, e.g., *Application of Bluegrass Wireless LLC for Issuance of a Certificate of Public Convenience and Necessity to Construct a Cell Site (Woodbine) in Rural Service Area #11 (Whitley) of the Commonwealth of Kentucky*, PSC Case No. 2008-00080 (Order dated Sept. 26, 2008) (issuing final order even though the applicant's applications with the Federal Aviation Administration and the Kentucky Airport Zoning Commission remained pending, and instructing the applicant to file copies of the final decisions of the FAA and KAZC within ten days of receiving them); *Joint Application of Class Construction, Inc. and Coolbrook Utilities, LLC for Approval of the Transfer of Wastewater Treatment Plant to Coolbrook Utilities, LLC*, PSC Case No. 2008-00257 (Order dated Oct. 21, 2008) (approving the transfer of the utility upon the condition that the buyer obtain an irrevocable letter of credit and line of credit and the necessary permits for the operation of the utility, including a Kentucky Pollutant Discharge Elimination System Permit); *Joint Application for Transfer of Louisville Gas and Electric Company and Kentucky Utilities Company in Accordance with E.ON AG's Planned Acquisition of Powergen PLC*, PSC Case No. 2001-104 (Order dated Aug. 6, 2001) (approving the transfer upon numerous conditions, including the requirement that the necessary approvals of other federal and state agencies be filed with the Commission within ten days of receipt).

<sup>38</sup> See, *The Application of Big Rivers Electric Corporation for: (i) Approval of Wholesale Tariff Additions for Big Rivers Electric Corporation, (ii) Approval of Transactions, (iii) Approval to Issue Evidences of Indebtedness, and (iv) Approval of Amendments to Contracts; and of E.ON U.S. LLC, Western Kentucky Energy Corp., and LG&E Energy Marketing, Inc. for Approval of Transactions*, PSC Case No. 2007-00455 (Order dated March 6, 2009); *Joint Application of PowerGen plc, LG&E Energy Corp., Louisville Gas and Electric Company and Kentucky Utilities Company for Approval of Merger*, PSC Case No. 2000-00095 (Order dated May 15, 2000), and *Joint Application for Transfer of Louisville Gas and Electric Company and Kentucky Utilities Company in Accordance with E.ON AG's*

## V. Conclusion

The Cunninghams' motion to intervene should be denied because it is untimely and their intervention would prejudice the parties to this proceeding. Moreover, the Cunninghams have not presented any ground upon which the Commission can grant them intervention, and their motion should alternatively be denied for that reason. Although they are customers of KU, the Cunninghams have not established that they have a special interest in the KU proceedings that is not otherwise adequately represented; and because they are not LG&E customers, they cannot possibly have any such interest with respect to those proceedings. Nor would their intervention assist the Commission in considering fully the facts and issues involved in these matters. Instead, it would unduly complicate and disrupt the proceedings herein. Finally, to the extent the Cunninghams' interest in these proceedings is based on their concerns about the environmental impact of the facilities involved, the law is clear that those issues are outside the Commission's jurisdiction.

In Inter-County R.E. Coop. Corp. v. Public Service Commission, Ky., 407 S.W.2d 127, 130 (1966), the Kentucky Court of Appeals, then the highest court of review, held that 807 KAR 5:001 Section 3(8) "reposes in the Commission the responsibility for the exercise of a sound discretion in the matter of affording permission to intervene" and the exercise of such discretion by the Commission in denying a request to intervene on the grounds that it was "just too remote" was not in error. The Commission should exercise its discretionary authority and deny the Cunninghams' request to intervene on the grounds that their interests in this proceeding are too

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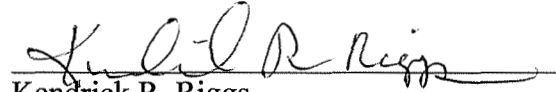
*Planned Acquisition of PowerGen plc*, PSC Case No. 2001-00104 (Order dated Aug. 6, 2001). Indeed, KRS 278.020(1), pursuant to which the Commission approves utility construction, expressly contemplates that the Commission will issue its orders without reference to matters within the jurisdiction of other agencies, providing that the year-long "shelf life" of a CPCN can be extended beyond one year if other necessary "grant[s] or consent[s]" have not yet been obtained. The statute's factual scenario presupposes that issues outside the Commission's jurisdiction can (and do) remain unresolved after the Commission issues its orders.



remote from the issues in this case. The Companies therefore respectfully request that the Commission deny the Cunninghams' motion to intervene in these proceedings.

Dated: October 9, 2009

Respectfully Submitted,



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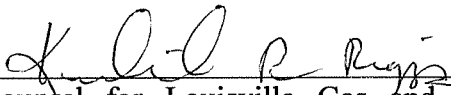
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing was served on the following persons on the 9<sup>th</sup> day of October 2009, by United States mail, postage prepaid:

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