

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

DR. JOHN PATTERSON, FR. JOHN RAUSCH,)	
WENDELL BERRY, SIERRA CLUB, KENTUCKY)	
ENVIRONMENTAL FOUNDATION AND)	
KENTUCKIANS FOR THE COMMONWEALTH)	
)	CASE NO.
PLAINTIFFS)	2009-00426
)	
V.)	
)	
EAST KENTUCKY POWER COOPERATIVE,)	
INC.)	
)	
DEFENDANT)	

O R D E R

On October 28, 2009, Plaintiffs, John Patterson, John Rausch, Wendell Berry, Sierra Club, Kentucky Environmental Foundation, and Kentuckians for the Commonwealth, filed a formal complaint against Defendant, East Kentucky Power Cooperative, Inc. ("EKPC"). Plaintiffs seek a revocation of the Certificate of Public Convenience and Necessity ("CPCN") issued by the Commission for the construction of Smith Unit 1, a 278 MW circulating fluidized bed ("CFB") coal-fired unit to be located in Clark County, Kentucky.

The Commission initially granted EKPC a CPCN to construct Smith Unit 1 on

August 29, 2006.¹ Part of the justification for the need was to meet the load of a new member cooperative, Warren Rural Electric Cooperative Corporation (“Warren”). Warren had been purchasing its power supply from the Tennessee Valley Authority (“TVA”). On January 7, 2007, the Commission subsequently opened an investigation into the continued need of EKPC for certificated generation in light of the decision of Warren to terminate a power supply agreement with EKPC and remain with TVA. The Commission ultimately found that Smith Unit 1 was still needed to serve EKPC’s growing native load.²

The Complaint makes the following claims:

1. The CPCN was granted with the understanding that EKPC would finance the construction of Smith Unit 1 through Rural Utility Services (“RUS”) loans. However, EKPC will now have to obtain financing from private entities. Thus, the CPCN is no longer valid based on this change in circumstance.

2. EKPC’s forecast for its energy requirements in 2020 decreased between its 2004 prediction and its 2008 prediction by 2,273,489 MWH per year, or almost 12 percent. This is approximately how much energy Smith Unit 1 will produce annually.

3. The capital cost of Smith Unit 1 has increased 44 percent from an initial estimate of \$553 million to a current estimate of \$767 million.

4. Renewable portfolio standards in states such as Ohio, Missouri, Illinois, and Virginia, as well as an impending national renewable portfolio standard, will make off-system sales much more difficult. Thus, there is an increased risk of EKPC having excess generation capacity.

¹ Case No. 2005-00053, 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 (Ky. PSC, August 29, 2006).

² Case No. 2006-00564, An Investigation into East Kentucky Power Cooperative, Inc.’s Continued Need for Certificated Generation (Ky. PSC May 11, 2007).

5. Environmental regulations have become more stringent causing Smith Unit 1 to be more expensive to operate.

6. The capital cost of base load natural gas-fired power plants is much less than the capital cost of a coal-fired CFB power plant particularly given the recent decreases in the price of natural gas.

7. EKPC can meet its future energy needs through demand side management programs and renewable energy sources. The cost, availability, and regional experience with renewable energy have changed dramatically since 2007.

8. More efficient and proven CFB technology is now commercially available.

9. The CPCN is void because EKPC has failed to commence construction of Smith Unit 1 within the one-year period as required by KRS 278.020(1).

Upon the filing of a formal complaint, 807 KAR 5:001, Section 12(4)(a) requires the Commission to examine and determine whether the complaint establishes a prima facie case. A complaint establishes a prima facie case when, on its face, it states sufficient allegations that, if not contradicted by other evidence, would entitle the plaintiff to the requested relief.³

With respect to Claim 1, the Commission finds that Plaintiffs have failed to establish a prima facie case. The CPCN granted to EKPC for Smith Unit 1 was not conditioned upon financing alternatives. By statute, the factors to be considered in reviewing an application for a CPCN under KRS 278.020(1) are whether there is a need for the proposed facilities and an absence of wasteful duplication. Consistent with the statutory requirements, the Commission issued a CPCN for Smith Unit 1 based upon

³ See, Case No. 2005-00451, Raynanza Duke v. Louisville Gas and Electric Company (Ky. PSC, February 6, 2006).

finding that EKPC needs additional generating capacity, that constructing Smith 1 was the most reasonable option to meet that need, and that constructing Smith 1 will not result in wasteful duplication of facilities. Because the allegation contained in Claim 1 would not entitle Plaintiffs to the requested relief, the Commission will dismiss this claim for failure to establish a prima facie case. The Commission notes that EKPC has recently filed an application, as required pursuant to KRS 278.300, seeking approval to finance Smith Unit 1 through private lenders.⁴

Claims 2 through 8 challenge whether Smith Unit 1 is needed or is a wasteful duplication of facilities in light of certain alleged changes in circumstance. The Commission finds that these claims, viewed as a whole, appear to constitute a prima facie case and will require EKPC to answer or satisfy these claims.

Claim 9 alleges that EKPC has failed to commence construction of Smith Unit 1 within the one-year period as required by KRS 278.020(1). The CPCN statute, KRS 278.020(1), provides, in relevant part, as follows:

Unless the CPCN is exercised within one (1) year from the grant thereof, exclusive of any delay due to the order of any court or failure to obtain any necessary grant or consent, the authority conferred by the issuance of the certificate of convenience and necessity shall be void.

Claim 9, however, fails to point out whether EKPC's failure to commence construction of Smith Unit 1 is as a result of a delay due to any judicially imposed order or any failure by EKPC to obtain a necessary grant or consent. The Commission will take notice of EKPC's March 9, 2009 filing in Case No. 2009-00106, which states that,

⁴ Case No. 2009-00476, Application for Approval of the Issuance of \$900,000,000 of Secured Private Placement Debt and up to \$21,435,000 of Unsecured Debt.

"EKPC currently has outstanding air permit requests for both Smith Unit 1 and 2 which should be ruled upon by the appropriate permitting agencies in the coming months."⁵ Thus, even if EKPC has been granted an air permit for Smith Unit 1 subsequent to its March 9, 2009 filing—which is uncertain—it is still within the one-year statutory period for exercising the certificate. The Commission, therefore, finds that Claim 9 has failed to establish a prima face case.

The Commission further finds that the complaint has been filed on behalf of three individuals and three organizations. Although the individuals state that they are each customers who receive power from EKPC, none of the organizations make that statement. The Sierra Club, the Kentucky Environmental Foundation, and Kentuckians for the Commonwealth have standing to file a complaint under KRS 278.260 on behalf of their members only to the extent that they have been authorized to do so by their respective members who ultimately are customers of EKPC.⁶ Other than a general statement in the complaint that many of the members of the three organizations are EKPC customers, the complaint does not set forth specific, named members of the Sierra Club, the Kentucky Environmental Foundation, or Kentuckians for the Commonwealth who have authorized these organizations to file the instant complaint on their behalf. Accordingly, the Commission finds that the Sierra Club, the Kentucky

⁵ Case No. 2009-00106, 2009 Integrated Resource Plan of East Kentucky Power Cooperative, Inc., 2009 Motion, page 1. This matter is currently pending before the Commission.

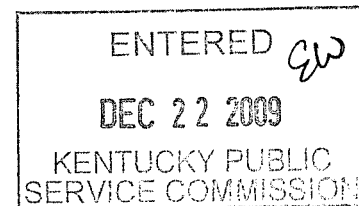
⁶ See, Case No. 1999-00082, Kentucky Industrial Utility Customers, Inc. v. Louisville Gas and Electric Company (Ky. PSC, April 13, 1999) and Case No. 1999-00083, Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Company (Ky. PSC, April 13, 1999).

Environmental Foundation, and Kentuckians for the Commonwealth lack standing to bring the instant complaint challenging the CPCN issued to EKPC for the construction of Smith Unit 1.

IT IS THEREFORE ORDERED that:

1. Claims 1 and 9 of the Complaint are dismissed for failure to state a prima facie case.
2. EKPC shall file a written answer to Claims 2–8 of the Complaint within 10 days of the date of service of this Order.
3. The Sierra Club, the Kentucky Environmental Foundation, and Kentuckians for the Commonwealth are dismissed without prejudice as plaintiffs for lack of standing to file the instant complaint.

By the Commission



ATTEST:


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