

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

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In the Matter of:

MAR 31 2010

DR. JOHN PATTERSON, FR. JOHN RAUSCH, )  
WENDELL BERRY, SIERRA CLUB, KENTUCKY )  
ENVIRONMENTAL FOUNDATION AND )  
KENTUCKIANS FOR THE COMMONWEALTH )

PUBLIC SERVICE  
COMMISSION

PLAINTIFFS )

CASE NO.  
2009-00426

vs. )

EAST KENTUCKY POWER COOPERATIVE, INC. )

DEFENDANT )

**EAST KENTUCKY POWER COOPERATIVE, INC.'S RESPONSE  
AND OBJECTION TO MOTION TO FILE AMENDED COMPLAINT**

Comes now East Kentucky Power Cooperative, Inc. ("EKPC"), and objects to the Motion of Plaintiffs, John A. Patterson, M.D., Fr. John Rausch, and Wendell Berry (the "Complainants") for leave to amend their Complaint.<sup>1</sup>

**I. SUMMARY OF COMPLAINANTS' REQUESTED AMENDMENTS**

In their motion, the Complainants seek to amend the Complaint as follows:

- Include an individual, Mike Hannon, as a complainant.<sup>2</sup> Mr. Hannon is being added both as a member of Kentucky Environmental Foundation ("KEF") and as a "long time EKPC Customer".<sup>3</sup>

<sup>1</sup> The Complainants' motion to amend is made at a time in the case proceedings when the Commission has taken under advisement EKPC's motion to dismiss the original Complaint. Apparently believing that a dismissal of the Complaint was likely, this motion was presumably filed in an attempt to rehabilitate the Complainants' pleadings.

<sup>2</sup> Complainants' Motion to File Amended Complaint, March 24, 2010, page 2.

<sup>3</sup> Id., page 2. The Motion states: "By EKPC customer, we mean a customer of a distribution cooperative that is an owner of EKPC and gets its wholesale electricity from EKPC." Unfortunately, the Complainants never disclose the identity of the distribution cooperative to which Mr. Hannon allegedly has membership.

- Add back Kentucky Environmental Foundation, Kentuckians for the Commonwealth (“KFTC”) and Sierra Club (“SC” or “the Club”) as parties even though they were previously dismissed by the Commission.<sup>4</sup>
- Add back the claim that the Certificate of Public Convenience and Necessity (“CPCN”) issued by the Commission to EKPC for Smith I CFB is void because it has expired. This claim completely ignores the Commission’s prior Order in this case to the contrary.<sup>5</sup>

## **II. COMPLAINANTS’ MOTION TO AMEND THE COMPLAINT SHOULD BE DENIED BY THE COMMISSION**

As grounds for its belief that the Complainants’ motion should be denied, EKPC adopts and reasserts each and every argument and defense it has made to this point in support of its motion to dismiss the original Complaint. And, nothing that the Complainants argue in this motion provides an adequate reason to overcome EKPC’s motion to dismiss the original Complaint.

EKPC continues to maintain that KRS 278.260 and 278.280, in the manner employed by the Complainants in this case, do not authorize the revocation of the Smith I CPCN for all the reasons stated in EKPC’s Reply in this case.<sup>6</sup>

Likewise, EKPC continues to assert that Complainants lack standing to even initiate a complaint under KRS 278.260.<sup>7</sup>

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<sup>4</sup> Commission’s Order of December 22, 2009, pages 5-6.

<sup>5</sup> Id., pages 4-6.

<sup>6</sup> EKPC’s Reply to Response of Patterson, Rausch and Berry, March 12, 2010, pages 1-3.

<sup>7</sup> Id., pages 3-4.

Moreover, the doctrines of *res judicata* and collateral estoppel mandate that the Commission's Orders in Cases 2005-00053 and 2006-00564 preclude the Complainants' claims in both their original Complaint and in the amendment sought here.<sup>8</sup>

Finally, the Complainants simply do not understand KRS 278.020(1), its purpose, or how it is to be given effect. In their original Complaint, the Complainants alleged that since EKPC received the Smith I CFB CPCN more than one year ago, and EKPC had not commenced construction on that plant, the "Smith CFB Certificate is void."<sup>9</sup>

Now, in their Amended Complaint, the Complainants assert an equally erroneous argument. The Complainants try to convince the Commission that EKPC has not begun construction of Smith I CFB because it has not secured financing for the project and that the absence of all permits necessary for EKPC to begin construction is completely irrelevant to the discussion.

The process for permitting a plant such as Smith I CFB is difficult, expensive and time-consuming. EKPC constantly monitors the status of the many permit requests that are essential to the construction of this project and periodically updates the expected timeline for receipt of these permits from the myriad federal and state regulatory agencies involved. It is only when the last few permits are expected to be approved that a company like EKPC begins to put all of its final financing packages in place. The idea is to try and coordinate the receipt of loan proceeds (and hence, the beginning of interest payments) with the receipt of final permits necessary to begin construction.

Rest assured that if EKPC had either begun construction of Smith I CFB before securing all of its regulatory permits; or, had obtained financing and received loan proceeds many months

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<sup>8</sup> Id., pages 4-5.

<sup>9</sup> Complaint, October 28, 2009, page 22.

before securing its permits and had incurred millions of dollars of interest payments with nothing to show for it, the Complainants would be asking that the Commission take regulatory action against EKPC for gross mismanagement.

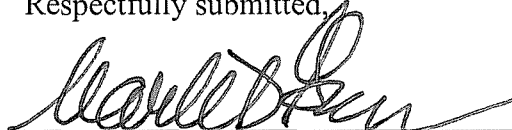
### III. CONCLUSION

For all of the many reasons stated above, in EKPC's answer to the Complaint, and in EKPC's Reply to the Complainants' Response, the Commission should dismiss the Complaint and summarily overrule the Motion to Amend the Complaint. The various arguments and defenses put forth by EKPC in this case apply mutually to the Complaint and the Amended Complaint which is sought. The Commission should so find.

WHEREFORE, EKPC respectfully requests that the Commission enter an Order dismissing the Complaint, with prejudice, and overruling the Motion to Amend the Complaint.

This 31st day of March, 2010.

Respectfully submitted,



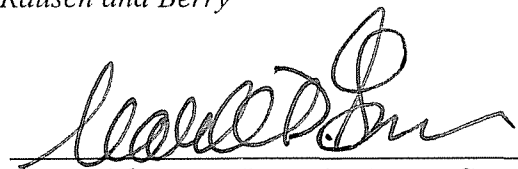
Mark David Goss  
Frost Brown Todd LLC  
250 West Main Street  
Suite 2800  
Lexington, KY 40507-1749  
*Counsel for East Kentucky Power Cooperative, Inc.*

### CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served by U.S. Mail, postage prepaid, on March 31, 2010 to the following:

Hon. Robert Ukeiley  
Law Office of Robert Ukeiley  
435 R Chestnut Street, Suite 1  
Berea, KY 40403  
*Counsel for Plaintiffs Patterson, Rausch and Berry*

Hon. Michael R. Campbell  
Law Office of Campbell, Rogers Hill, PLLC  
154 Flemingsburg Road  
Morehead, KY 40351  
*Co-Counsel for Plaintiffs Patterson, Rausch and Berry*



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Counsel for East Kentucky Power Cooperative, Inc.