

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001792-MR

ENVIROPOWER, LLC

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 05-CI-00553

PUBLIC SERVICE COMMISSION OF KENTUCKY,
EAST KENTUCKY POWER COOPERATIVE, INC.,
GREGORY D. STUMBO, ATTORNEY GENERAL OF
KENTUCKY, AND GALLATIN STEEL COMPANY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER¹ AND DIXON, JUDGES; PAISLEY, SENIOR JUDGE.²

DIXON, JUDGE: EnviroPower, LLC, appeals the Franklin Circuit Court's dismissal of its case challenging a Public Service Commission ("PSC") order denying intervention.

¹ Judge David A. Barber concurred in this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

² Senior Judge Lewis G. Paisley, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

The PSC denied EnviroPower's Motion for Intervention in a Certificate of Public Convenience and Necessity ("CON") hearing. The hearing was initiated by East Kentucky Power Cooperative, Inc's., ("EKPC") application to the PSC for permission to self-construct a 278 MW coal-fired generating plant at its Spurlock Station site in Maysville, Kentucky.

Prior to making the CON application to begin construction, EKPC had issued a "Request for Proposals ("RFP") in April 2004, for various contractors to bid on supplying the necessary power. EKPC anticipated a need to substantially increase its power generation capacity to serve a new retail customer and sought proposals from outside power suppliers to determine whether it was more economically feasible for EKPC to self-build a new power facility or purchase power from other suppliers. Ultimately, the lowest bid was EKPC's proposal to construct the facility itself. KRS 278.020 requires a CON certificate be issued before construction begins.

The CON application was docketed as PSC Case No. 2004-00423 ("CON Case"). Intervention was granted to the Office of the Attorney General and Gallatin Steel, the largest electric consumer of EKPC power. The PSC established a procedural schedule and a hearing was initially scheduled on February 18, 2005.

EnviroPower was one of thirty-nine (39) unsuccessful bidders in the earlier RFP request for power supply bids issued by EKPC. EnviroPower owns no electric generating facilities, but it proposed to construct a merchant generating plant and sell the output to EKPC. In mid-September 2004, EKPC informed EnviroPower that its bid had been rejected. On January 14, 2005, EnvrioPower filed its first request to intervene at the PSC to challenge EKPC's bid solicitation and evaluation process. By PSC order dated February 3, 2005, EnviroPower's first request to intervene was denied upon the findings that: (1) it was not a ratepayer of EKPC, but a rejected bidder whose interests were not identical to rate-payers; and (2) EnviroPower had a legal duty to its members to maximize profits; a far different goal from protection of the ratepayers. EnviroPower's interest would be served by challenging any bid evaluation process that rejected its bid and, that interest did not coincide with the interests of ratepayers. Although intervention was denied, EnviroPower's name was added to the service list so it could monitor the proceedings, submit further information, and even comment upon the issues. EnviroPower filed neither a timely request for rehearing at the PSC under KRS 278.400, nor a timely action for review in the Franklin Circuit Court under KRS 278.410(1).

On the same date that the PSC denied EnviroPower's first request to intervene, the PSC issued another order in the CON Case initiating a full investigation of EKPC's bidding procedures and evaluation process. The PSC directed EKPC to file supplemental testimony that included, but was not limited to the following issues:

1. A detailed description of the nature and extent of participation by East Kentucky Power's distribution cooperatives and Warren Rural Electric Cooperative Corporation in the bid evaluation process;
2. The details of each discussion with each bidder regarding revisions to any provision of that bidder's bid; and
3. Sufficient details to enable the Commission to objectively determine whether the capital cost and the base load requirement price for the EnviroPower bid was lower than those of the East Kentucky Power self-construct bid.

The PSC also required testimony to be filed by EnerVision, Inc., an outside consultant retained by EKPC to assist in the evaluation and economic rankings of the power supply bids. The consultant was directed to file detailed testimony on the following issues:

1. Its role in evaluating and ranking the power supply bids;
2. The extent to which its role was performed independently of East Kentucky Power;

3. Whether its economic rankings of the power supply bids coincide with those of East Kentucky Power as shown in Application Exhibit 4, p. 7; and

4. Any other information necessary or appropriate for a full and complete understanding of the bid evaluation process.

That PSC order further required EKPC to respond to a number of requests for information, including the filing of a complete copy of each of the thirty-nine (39) power supply bids received. Each of the bids, including EnviroPower's, was filed under seal and EnviroPower has never seen the details of EKPC's bid. All of the testimony and information required by the PSC's February 3, 2005, order was filed. EnviroPower filed extensive comments in the form of prepared testimony.

On April 11, 2005, EnviroPower filed a second petition to intervene at the PSC. Finding no change in circumstances since the first petition had been denied- EnviroPower was not a ratepayer and had no interest in either the "rates" or "service" of EKPC- the PSC denied EnviroPower's second intervention petition by order dated April 18, 2005. That order also found that EnviroPower was unlikely to present issues or develop facts to assist in the consideration of the CON Case. The PSC explained "EnviroPower had no role in either the development of EKPC's bidding procedures or the evaluation of

the bids received. Only East Kentucky Power and its consultants were involved in those activities.”

EnviroPower then filed on April 19, 2005, an action in the Franklin Circuit Court requesting injunctive and declaratory relief. The Court held a brief hearing that same day and issued a restraining order which among other things, prohibited the PSC from holding its scheduled hearing. Subsequently, the Court issued its May 6, 2005, Order, which among other things, dissolved the restraining order, rejected all of EnviroPower’s challenges to the PSC’s denial of intervention, and denied a temporary injunction to prohibit a PSC hearing in the CON Case. EnviroPower requested interlocutory relief in the Court of Appeals, which was denied by Order entered May 31, 2005, and then interlocutory relief in the Kentucky Supreme Court, which was denied by Order entered June 7, 2005.

After further briefing and oral argument, the circuit court dismissed EnviroPower’s action by reaffirming the findings and conclusions in its May 6, 2005, order that EnviroPower did not have a legally protected interest which would entitle it to intervene in the CON Case, and the PSC did not abuse its discretion by denying intervention.

STANDARD OF REVIEW

At the outset, EnviroPower asserts this Court should review the PSC's decision *de novo* citing cases from other agencies. EnviroPower argues these cases establish a standard for review of PSC's decision. We find however, the cases do not support EnviroPower's conclusion..

The Court's standard for review of a decision by the PSC is set forth by statute. KRS 278.410(1) provides that an order of the PSC can be vacated or set aside only if it is found to be unlawful or unreasonable. As Kentucky's highest Court declared in *Kentucky Utilities Co. v. Farmers RECC*, 361 S.W.2d 300, 301 (Ky. 1962), a PSC order may be appealed only when there has been strict compliance with KRS 278.410(1) because, "this statute provides the exclusive method by which an order of the commission can be reviewed by the circuit court." The strict compliance standard found in KRS 278.410(1) was subsequently reaffirmed in *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450 (Ky. 1964).

Moreover, this Court has previously reviewed denials of intervention in PSC proceedings. In *Inter-County Rural Electric Cooperative Corporation v. Public Service Commission*, 407 S.W.2d 127 (Ky. 1966), this Court held the PSC decision to

deny intervention was reviewed only for an abuse of discretion. We find this appeal is governed by KRS 278.410(1), and the commission's decisions are reviewed only for an abuse of discretion.

ARGUMENTS FOR REVERSAL

EnviroPower makes three arguments for reversal of the circuit court: (1) PSC's denial of intervention was arbitrary and unlawful; (2) PSC's denial of intervention was error because EnviroPower alleged fraud in award of bid; and (3) denial of intervention deprived EnviroPower of procedural due process and equal protection of the laws.

I. Denial of Intervention as Arbitrary

EnviroPower argues it had a right to intervene in this action under KRS 278.0201(1):

Upon the filing of an application for a certificate, and after any public hearing which the commission may in its discretion conduct for all interested parties, the commission may issue or refuse to issue the certificate...(Emphasis added).

From this language EnviroPower insists it is an interested party within the meaning of this statute and, as such, has a right to intervene. The Court does not read this statute in the manner suggested by EnviroPower. The statute is clear on its face and it does not establish any specific rules defining an "interested

party." Furthermore, the controlling statute here is KRS 278.310(2), which requires the PSC to adopt rules governing hearings and investigations before the commission. The PSC has acted to adopt specific rules governing all commission proceedings. Intervention is specifically addressed in 807 KAR 5:001, Section 3(8). Under this regulation, the PSC retains the power in its discretion to grant or deny a motion for intervention. The Kentucky Attorney General has a statutory right to intervene. KRS 367.150(8)(b).

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. Second, there is the limitation in the PSC intervention regulation, 807 KAR 5:001, Section 3(8), which requires the showing of either "a special interest in the proceeding which is not otherwise adequately represented," or a showing that intervention "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."

The PSC properly found that since "EnviroPower had no role in either the development of EKPC's bidding procedures or the evaluation of the bids received," and its intervention was not likely to present issues or develop facts to assist the PSC in fully considering the CON Case. Moreover, the PSC noted the intervention of Gallatin Steel, EKPC's largest retail customer, and the Attorney General was adequate to protect EnviroPower's interest. In conclusion, the Court finds the denial of intervention to EnvrioPower was neither unlawful nor unreasonable.

II. Allegations of Fraud

EnvrioPower has aggressively asserted that EKPC engaged in a fraudulent RFP by skewing its evaluation to support its own self-bid proposal. However, the cases cited, *Pendleton Bros. Vending, Inc. v. Comm. of Ky. Finance and Administration Cabinet*, 758 S.W.2d 24 (Ky. 1988) and *HealthAmerica Corp. of Kentucky v. Humana Health Plan, Inc.*, 697 S.W.2d. 946 (Ky. 1985) do not apply because in those cases the issue involved a claim of fraud against a public agency as opposed to a claim of fraud against a private entity such as EKPC.

EnviroPower then argues that under Kentucky common law its allegations of fraud give it standing as a competitor "to challenge the granting of a license or permit to another

competitor by an administrative agency," citing *PIE Mutual Insurance Co. v. Kentucky Medical Insurance Co.*, 782 S.W.2d 51, 54 (Ky. App. 1990). But even this authority is unavailing here since the common law has been superseded by statutes expressly limiting the PSC's jurisdiction to "the regulation of rates and service of utilities," KRS 278.040(2), and further limiting the participation in a CON Case to "interested parties," KRS 278.020(1).

III. Constitutional Claims

EnviroPower also contends the PSC's denial of intervention deprived it of its right to procedural due process and equal protection of the law.

First, EnviroPower claims that it had a constitutionally protected property interest in its environmental permits, and by denying intervention, the PSC impermissibly deprived EnviroPower of the value of the permits. EKPC argues that EnviroPower's interest created a mere expectancy that it might develop a power plant project at a future date. Further, EKPC points out that EnviroPower never had any contract with EKPC to develop power, and nothing prevented EnviroPower from using its permits to establish other projects. The PSC argues that, as an agency, it had no

jurisdiction over the environmental permits issued to EnviroPower.

"It is well established that in order to succeed in either a procedural or substantive due process claim, such claimant must demonstrate a legitimate entitlement to a vested property interest." *Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Co.*, 983 S.W.2d 493, 497 (Ky. 1998) citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). Furthermore, a "mere subjective expectancy" of a property interest is not protected by procedural due process. *Perry v. Sindermann*, 408 U.S. 593, 603, 92 S.Ct. 2694, 2700, 33 L.Ed.2d 570 (1972).

EnviroPower insists that it has a substantial and concrete interest in the CON proceeding. EnviroPower obtained many of the critical permits requested to begin construction of the new power plant. The permits included a Construction Certificate and an Air Quality Permit. Both permits were required before construction could begin. EnviroPower also argues its reputation will be tarnished if it cannot participate in the CON proceedings.

These arguments are novel, but totally unpersuasive in establishing a right to intervene in a CON proceeding. EnviroPower could best be described as an unsuccessful bidder in

the RFP. There were thirty-eight (38) other successful bidders. As a bidder, EnviroPower knew, or should have known, that EKPC had made a self-build proposal. PSC argues EnviroPower had a mere expectancy and no fundamental property right. The Court agrees with EKPC's analysis of this issue.

In the case at bar, it appears to the Court that EnviroPower had indeed, nothing more than an expectancy interest in the environmental permits. When the PSC denied EnviroPower's intervention in the CON proceeding, it did not render the environmental permits worthless. Furthermore, EnviroPower was free to use its permits in seeking out another power plant project. Accordingly, we find that the Commission did not deprive EnviroPower of any right to procedural due process.

Finally, EnviroPower contends that the PSC violated its constitutional right to equal protection by allowing Gallatin Steel to intervene in the CON proceeding, but denying EnviroPower's petition to intervene. EKPC argues that the PSC's action is rationally related to the legitimate state interest of regulating utility rates. Appellees also point out that EnviroPower has no actual legal interest in the PSC proceeding, while Gallatin Steel is an interested ratepayer of EKPC. We agree with Appellee's position. EnviroPower, as a potential merchant energy supplier, has far different interests than that

of Gallatin Steel, an energy consumer. Gallatin's interests relate directly to the rates and services of EKPC, while EnviroPower's pecuniary interests relate solely to the marketing of its wholesale power produced. Consequently, no constitutional violation occurred.

For these reasons, we respectfully affirm the decision of the Franklin Circuit Court.

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