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February 26, 2014

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FEB 26 2014

**PUBLIC SERVICE
COMMISSION**

Via Hand-Delivery

Mr. Jeffrey Derouen
Executive Director
Kentucky Public Service Commission
P.O. Box 615
211 Sower Boulevard
Frankfort, KY 40602

Re: In the Matter of: Harold Barker; Ann Barker and
Brooks Barker v. East Kentucky Power Cooperative, Inc.
PSC Case No. 2013-00291

Dear Mr. Derouen:

Enclosed please find for filing with the Commission in the above-referenced case an original and ten (10) copies of East Kentucky Power Cooperative, Inc.'s Reply in Support of Motion to Dismiss. Please return a file-stamped copy to me.

Do not hesitate to contact me if you have any questions.

Very truly yours,

David S. Samford

Enclosures

M:\Clients\4000 - East Kentucky Power\1350 - Harold Barker Complaint -
PSC Case No. 2013-00291\Correspondence\Ltr. to Jeff Derouen - 140226

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

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FEB 26 2014

PUBLIC SERVICE
COMMISSION

IN THE MATTER OF:

HAROLD BARKER; ANN BARKER
AND BROOKS BARKER)
)
COMPLAINANTS)

V.)
)
EAST KENTUCKY POWER)
COOPERATIVE, INC.)
DEFENDANT)

Case No. 2013-00291

REPLY IN SUPPORT OF MOTION TO DISMISS OF
EAST KENTUCKY POWER COOPERATIVE, INC.

Comes now the Defendant, East Kentucky Power Cooperative, Inc. ("EKPC"), by counsel, and tenders its Reply in support of its Motion to Dismiss which was filed on October 10, 2013. The Complainants, Harold Barker, Ann Barker and Brooks Barker (collectively "the Barkers") filed a response to the EKPC's motion to dismiss on February 19, 2014. In further support of its motion to dismiss, EKPC respectfully states as follows:

EKPC's motion to dismiss identified several legal deficiencies with the Barkers' Complaint: (1) it seeks an adjudication of property rights and is therefore beyond the scope of the Commission's statutory jurisdiction over "rates" and "service;" (2) it presents an improper attempt to pre-empt and collaterally attack the issues which have been raised and determined in a condemnation proceeding currently pending in the Clark Circuit Court; and (3) it requests an

award of damages. The Barkers' response fails to effectively rebut any of these points and the Complaint should therefore be dismissed with prejudice.

With regard to the first point, the Barkers' response makes the extraordinary claim that "Nowhere in Chapter 278 is the PSC's jurisdiction limited to 'rates' and 'services' as claimed by EKPC." See Response, ¶ 2. Such an interpretation is inconsistent with the plain and ordinary meaning of KRS 278.040(2) and considerable precedent construing that authority. As Kentucky's highest court stated, "We have held that the jurisdiction of the Public Service Commission is *clearly and unmistakably limited to the regulation of rates and service of utilities.*" *Public Service Com'n v. Blue Grass Natural Gas Co.*, 197 S.W.2d 765, 768 (Ky. 1946) (emphasis added); *citing Smith v. Southern Bell Telephone and Telegraph Co.*, 104 S.W.2d 961 (Ky. 1937); *Benzinger, etc., v. Union Light, etc.*, 170 S.W.2d 38 (Ky. 1943); *Peoples Gas Co. of Kentucky v. City of Barbourville*, 165 S.W.2d 567 (Ky. 1942). Moreover, the Commission "has no authority to impose a new duty on utilities when that duty has no foundation in law" and to do so would constitute "an unconstitutional legislative act" by the Commission. See *Henry v. Parrish*, 211 S.W.2d 418 (1948). The entire premise of the Barkers' response misstates the scope and extent of the Commission's jurisdiction. Accordingly, the Complaint should be dismissed with prejudice as being beyond the scope of the Commission's statutory jurisdiction.

Second, the Barkers fail to demonstrate that the Complaint is anything other than an attempt to re-litigate the respective property rights already asserted and adjudicated in the condemnation proceeding in the Clark Circuit Court. The Barkers' response asks the Commission to order EKPC "to move the portion of the new transmission line encroaching upon the Barkers' residence a safe distance away."¹ Response, ¶ 1. In seeking this "remedy," the

¹ The response implies that: (1) EKPC is responsible for the proximity of the transmission to the Barkers' residence; and (2) the proximity of the transmission line to the residence is somehow unsafe. In point of fact, the Barkers have

Barkers are trying to bootstrap a perceived statutory violation (the alleged failure to obtain a CPCN) into a specific equitable remedy whereby EKPC would be compelled to move its transmission line off of its existing right-of-way.² The Complaint therefore amounts to nothing more than a collateral attack on the November 17, 2006 Agreed Interlocutory Judgment entered by the Clark Circuit Court that confirmed EKPC has the legal right to take the additional strip of right-of-way necessary to upgrade and replace its existing transmission line crossing the Barkers' property.³ It bears emphasis that the request to compel relocation of the transmission line in this proceeding stands in stark contrast to the language of the *Agreed Interlocutory Judgment* which states:

IT IS THEREFORE, ORDERED AND ADJUDGED that Plaintiff under the provisions of KRS 279.110 and KRS 416.540 through 416.680 (the Eminent Domain Act of Kentucky) has the right and is entitled to condemn the lands and materials hereinafter described, and that the Plaintiff may take possession of said lands and materials for the purpose set forth in the petition upon the payment of the amount awarded by the Commissioners, which is \$12,000.00 to the Clerk of this Court.

The property right of EKPC which has been affirmed by the Circuit Court is embedded in the 1952 Transmission Line Right of Way Easements documenting and recording EKPC's right to "survey, construct, reconstruct, extend, repair, enlarge, operate, maintain and inspect" its transmission line along the right-of-way that crosses the Barkers' property. Moreover, the relief

already conceded that they constructed their residence next to the transmission line, which had been in place for many years previously. *See Complainant's Response to Commission Staff's Initial Data Request for Information to Harold Barker, Ann Barker and Brooks Barker* (November 21, 2013). Likewise, there has been no evidence tendered which demonstrates that the proximity of the transmission line to the residence – a situation caused by the actions of the Barkers – has created any safety issue.

² EKPC disputes that it violated KRS 278.020. "The replacement or upgrading of any existing electric transmission line" is expressly considered an "ordinary extension of existing systems in the usual course of business" and does not require a CPCN. *See* KRS 278.020(2)(a). The project in question clearly falls into this category.

³ *See East Kentucky Power Cooperative, Inc. v. Harold Barker, et al.*, Agreed Interlocutory Judgment, Case No. 06-CI-00419 (Clark. Cir. Ct. November 17, 2006). A copy of the Agreed Interlocutory Judgment is attached hereto and incorporated herein as Exhibit A.

sought by the Barkers would, if granted, have a meaningful impact upon the property rights of adjacent property owners and EKPC's customers as a result of incurring substantial unnecessary expense.

It is well settled that the Commission does not interfere in condemnation proceedings. Statutory jurisdiction to resolve issues under the Eminent Domain Act is granted to the circuit court in which all or the greater portion of the property sought to be condemned is located and that court has exclusive jurisdiction to hear and decide condemnation proceedings. *See* KRS 416.570. For this reason, the Commission has, on more than one occasion, declined to involve itself with matters involving condemnation, and has gone so far as to state: "Condemnation is an entirely separate and independent proceeding from a CPCN case before the PSC, and the PSC has no authority to issue an order halting that process."⁴ Yet this is exactly what the Barkers ask the Commission to do. After spending virtually all of the sums paid into the Clark Circuit Court as a result of the Commissioner's award in the condemnation case, the Barkers seek to nullify that proceeding by asking the Commission to negate EKPC's bargained for right-of-way so that the transmission line may be moved somewhere else. Since this matter clearly arises out of a condemnation proceeding, it should be dismissed.

Third, the Barkers' response concedes the point that the Commission is without statutory authority to award unliquidated damages – an issue that was firmly settled in *Carr v. Cincinnati Bell, Inc.*, 651 S.W.2d 126, 128 (Ky. App. 1983). The claim for an award of damages is improper and must also be dismissed.

⁴ *See In re Paddock at Eastpoint, LLC, et al. v. Louisville Gas and Electric Co.*, Case No. 2004-00293 (Ky. P.S.C. Jan. 27, 2005); *See also In re Smith and Mattingly v. Hardin County Water District No. 1*, Case No. 1992-00395 (Ky. P.S.C. Oct. 22, 1992) (holding that the Commission "possesses no jurisdiction to adjudicate a claim arising out of a condemnation proceeding.").

Finally, EKPC notes that the Barkers attached an opinion affidavit of John Pfeiffer, “their engineer,” to their response. In so doing, the Barkers are attempting to introduce expert testimony without having first qualified Mr. Pfeiffer as an expert witness. In *Mitchell v. Commonwealth*, 908 S.W.2d 100 (Ky. 1995), Kentucky courts adopted the standard of review set forth in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (U.S. 1993) for determining whether expert opinion testimony could be allowed in a judicial proceeding. The Court in *Mitchell* stated, “pursuant to KRE 702 and *Daubert*, expert scientific testimony must be proffered to a trial court. The trial court judge must conduct a preliminary hearing on the matter utilizing the standards set forth in *Daubert*.”⁵ The Kentucky Supreme Court also held in *Fugate v. Commonwealth*, 993 S.W.2d 931, (Ky. 1999), that “the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but also reliable.” The affidavit of Mr. Pfeiffer should not be considered as expert testimony at this point in the proceeding because the Complainants have yet to demonstrate that their claims fall within the jurisdiction of the Commission and Mr. Pfeiffer has not been qualified as an expert. EKPC reserves the right to challenge Mr. Pfeiffer’s opinion and qualifications in any further proceedings in this matter.

In conclusion, the points raised in EKPC’s motion to dismiss have not been rebutted by the Barkers. Their complaint arises from and relates to a dispute not related to the “rates” or “service” of EKPC. They are improperly using this proceeding to collaterally attack the condemnation proceeding in the Clark Circuit Court. No award of damages is authorized under Kentucky law.

WHEREFORE, on the basis of the foregoing, EKPC respectfully requests that its motion to dismiss be granted and the Barkers’ complaint to be dismissed with prejudice and removed from the Commission’s docket.

⁵ *Mitchell* at 102.

This 26th day of February, 2014.

Respectfully submitted,



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and

Sherman Goodpaster
East Kentucky Power Cooperative, Inc.
4775 Lexington Road
P.O. Box 707
Winchester, KY 40392-0707

*Counsel for East Kentucky Power
Cooperative, Inc.*

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been served, by delivering same to the custody and care of the U.S. Postal Service, postage pre-paid, this 26th day of February, 2014, addressed to the following:

Mr. Alex Rowady, Esq.
212 South Maple Street
Winchester, KY 40391



*Counsel for East Kentucky Power
Cooperative, Inc.*

ENTERED 11-17-06
DAVID N. HUNT
CLARK CIRCUIT/DISTRICT
COURT
BY J.A.S. D.C.

COMMONWEALTH OF KENTUCKY
CLARK CIRCUIT COURT
CIVIL ACTION NO. 06-CI-00419
DIVISION II

EAST KENTUCKY POWER COOPERATIVE, INC.,
A KENTUCKY CORPORATION

PLAINTIFF

VS: AGREED INTERLOCUTORY JUDGMENT

HAROLD BARKER, et al

DEFENDANTS

Upon examining the record herein, the Court finds:

1. That all the necessary parties hereto have been duly served with summonses and/or are before the Court; that the Defendants have not questioned the right of the Plaintiff to condemn the property or the use and occupation thereof.

2. That the Report of the Commissioners conforms to the provisions of KRS 416.580 and other applicable law.

3. IT IS, THEREFORE, ORDERED AND ADJUDGED that the Plaintiff under the provisions of KRS 279.110 and KRS 416.540 through 416.680 (the Eminent Domain Act of Kentucky) has the right and is entitled to condemn the lands and materials hereinafter described, and that the Plaintiff may take possession of said lands and materials for the purpose set forth in the petition upon the payment of the amount awarded by the Commissioners, which is \$12,000.00 to the Clerk of this Court.

4. It is further ordered and adjudged that upon final determination of exceptions, or if no exceptions are taken within thirty (30) days from the entry of this Interlocutory Judgment, this Court shall enter a Final Judgment, and the Master Commissioner is appointed Special Commissioner of this Court for the sole purpose of conveying the title to the Plaintiff from the following lands and materials and for the following uses and purposes:

EXHIBIT

A

a. A certain tract of real property consisting of approximately 200 acres located approximately 5 miles east of the town of Winchester, lying on the north side of Mount Sterling Road, in Clark County, Kentucky and is more particularly described as follows:

Property #1

Beginning in the center of said Pike, corner to tract allotted to George Lewis; thence along same North 03°30' East 2123 feet to a post, corner to same; thence North 73° 00' East 98 feet to a post, corner to Ratliff; thence South 07° 14' East 18.5 feet to a fence post; thence North 72° 45' East 766.26 feet to corner to Ratliff; thence South 03° East 2455 feet to center of Mt. Sterling Pike, corner to Ratliff; thence along the center of said Pike North 84° 30' West 400 feet; thence North 87° 30' West 230 feet; thence North 84° 35' West 451.5 feet to the place of beginning, containing 50 acres, more or less.

Subject to any and all easements now of record including the existing Winchester-Mt. Sterling Road, U.S. Route 60, and applicable zoning restrictions.

Being the same property conveyed from Brooks Barnes and Elizabeth Barnes, husband and wife, to Ann Brooks Barnes Barker, a two-thirds (2/3) undivided interest, by deed dated December 28, 1973, recorded in Deed Book 212, at page 133, and of record in the Clark County Clerk's office; and being a part of the same property which Brooks Barnes and Elizabeth Barnes, his wife, conveyed an undivided one-third (1/3) interest to Ann Brooks Barnes Barker, by deed dated August 7, 1970 and of record in Deed Book 195, at page 530, also of record in the Clark County Clerk's office.

Property #2

A certain tract of land located on the north side of the Winchester-Mt. Sterling Turnpike, in Clark County, Kentucky, bounded and described as follows: Beginning at figure 11 on the map, a point in the middle of said turnpike a corner to the land sold by John Judy's heirs to George O. Graves (Williams land); thence with the middle of the pike S 88 49 E 58 poles to 12, a point in the middle of the road corner to Lot #3 in the line of Etta Clark's heirs, a stone on the north side of the road, a pointer; thence with the line of Lot #3 N 10 52 E 161.7 poles to 13 corner to Lot #3 and W. O. Brock; thence with the Brock line N 3 E 79.84 poles to 14 a stone corner on the south side of the stone fence; thence N 85 52 W 98.14 poles to the

beginning of the 85 ½ acre tract of land conveyed by John D. Gay and wife to H. F. Judy on the east side of Cabin Creek and corner to W. O. Brock and Henry Besuden; thence with the Besuden line S 43 3 W 73.92 poles to 16 a stone corner to Mrs. Laura Williams; thence with her line S 1 E 54.32 poles to 17; thence N 73 5 E 46.44 poles to 18 a corner to Williams land; thence S 3 37 E 149.1 poles to the beginning, containing 150 acres of land, subject to all legal highways, easements and applicable zoning restrictions.

Being the same property conveyed to Brooks Barnes and Elizabeth Barnes, his wife, by Rodney Haggard, an unmarried man by deed dated January 13, 1951, and of record in Deed Book 140, page 539; of which the same property was conveyed by Brooks Barnes, et ux, an undivided 1/3 interest in same to Ann Brooks Barnes Barker, by deed dated August 7, 1970 and of record in Deed Book 195, page 530. The undivided 1/3 interest was further conveyed from Ann Brooks Barnes Barker and Harold F. Barker, her husband, back to Brooks Barnes and Elizabeth Barnes by deed dated December 28, 1973 and of record in Deed Book 212, page 130. Upon the death of Brooks Barnes and Elizabeth Barnes, the said property was then acquired by Ann Brooks Barnes Barker by virtue of the Last Will and Testament of Brooks Barnes dated June 13, 1975 and of record in Will Book 12, page 557 and the Last Will and Testament of Elizabeth Barnes dated October 26, 1993 and of record in Will Book 28, page 472; all of record in the Clark County Clerk's office.

b. It is further ordered and adjudged that Plaintiff, its successors and assigns, acquire the right to enter upon said property of the Defendant to construct, inspect, operate, repair, rebuild and maintain its electric transmission line and related facilities, including OPGW (optical ground wire) for electric utility purposes, along and upon the right-of-way herein described, together with the right of ingress and egress over said property of the Defendant while in the exercise of the rights and privileges granted herein, provided, however, that in exercising such right of ingress and egress the Plaintiff will, if reasonably accessible, confine said right of ingress and egress to the easement itself, and if not then whenever practicable to do so, use regularly established highways or farm roads.

c. Plaintiff shall also include the right to cut, fell, or otherwise control any and all trees and other vegetation and remove any structures or other obstructions, except gates and fences, located upon said easement, or any and all trees which are of such height that, in the

opinion of the Plaintiff, might come in contact with said line or system; and it is understood that all merchantable wood shall remain the property of the Defendant and will be cut in lengths specified in writing by the Defendant, except that none shall be cut shorter than eight and one-half (8-1/2) feet, with said timber and any other cuttings to be left on or alongside said easement for the use of the Defendants; however if not specified as to length as provided above, then it is to be cut in lengths determined by the Plaintiff.

d. Plaintiff shall acquire the duty to restore and repair the area affected by said easement to a reasonable condition and within a reasonable time after final completion of said construction.

e. The Plaintiff shall pay the Defendants for any and all damages that may be caused to fences, gates, crops, animals and other property, including the land not actually occupied by the poles and anchors as a result of it constructing, inspecting, repairing, operating, or rebuilding said line and related facilities, except that it is specifically understood that the Plaintiff shall not be liable for cutting or trimming trees, or otherwise controlling trees and other vegetation and removing any structures or other obstructions in the manner and to the extent hereinabove specified; and Plaintiff shall also remain liable for any damages sustained because of its negligence in the operation and maintenance of said line and related facilities.

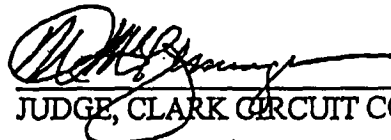
f. The Defendants, their successors, heirs, or assigns, are free to use and enjoy the property crossed by said easement, except, however, that such use shall not conflict with any rights or privileges herein granted to the Plaintiff, and that it is specifically understood that no buildings, signs, towers, antennas, swimming pools, or any other structures, except gates and fences shall be erected, maintained or moved upon the right of way described herein, nor shall any changes in the grade be made to the lands crossed by this easement without written permission from the Cooperative; and it is further understood that all poles, wires, and other related facilities installed on the herein described property at the Cooperative's expense, shall remain the property of the Cooperative and removable at the sole option of the Plaintiff.

5. It is further ordered and adjudged that Plaintiff takes and acquires hereby a transmission line easement across the above-described property and that said transmission line and related facilities are to be constructed and located according to the plat, marked "Verified Petition Appendix B," showing the centerline of survey, distance and bearings of said line and the location and number of poles and anchors thereon, and that said plat is made by reference a part hereof to the same extent as if copied in full herein. Said specific easement right-of-way which is necessary that Plaintiff acquire over and upon said property of Defendants, the centerline of which being described as follows:

Beginning at a point between the subject land herein noted and the land of U.S. Highway 60 at Kentucky State Plane, South Zone Coordinate (hereinafter called KSP, SZC) N:2262200, E:2113466, and running thence N18°50'59"E, for a total distance of approximately 519 feet to a point in the line where line turns at KSP, SZC N:2262691, E:2113634, and running thence N17°48'03"E, for a total distance of approximately 2235 feet to a point in the line where line turns at KSP, SZC N:2264819, E:2114317, and running thence N14°54'29"E, for a total distance of approximately 1359 between the subject property and the land of Gerald Rogers at KSP, SZC N:2266132, E:2114667.

6. It is finally ordered and adjudged that the Sheriff of this county is hereby authorized and directed to evict or otherwise restrain Defendants if they attempt in any manner to keep Plaintiff from exercising its said rights after Plaintiff has complied with all costs and payments as noted in paragraph 3 herein; and said Defendants shall pay for all costs and expenses of said eviction or other related action and for which cost and expense execution shall issue. All other costs in this case shall be paid by Plaintiff.

Dated this the 16th day of November, 2006.



JUDGE, CLARK CIRCUIT COURT

SEEN AND AGREED TO BY:

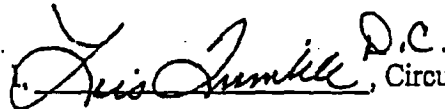


ROGER R. COWDEN
Counsel for Plaintiff



MICHAEL ALEX ROWADY
Counsel for Defendants

CIRCUIT COURT CLERK'S CERTIFICATION



Circuit Court Clerk, do hereby certify that a copy of this Interlocutory Judgment was mailed to the Defendants named in this suit at the address as shown on the subject summons on this 17th day of November 2006.

CLERK, CLARK CIRCUIT COURT

By: 