

# Goss Samford



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August 28, 2014

*Via Hand-Delivery*

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

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AUG 28 2014

PUBLIC SERVICE  
COMMISSION

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 Motion to Strike. 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 - 140828

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

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

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

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AUG 28 2014

PUBLIC SERVICE  
COMMISSION

Case No. 2013-00291

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MOTION TO STRIKE

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Comes now the Defendant, East Kentucky Power Cooperative, Inc. ("EKPC"), by counsel, pursuant to 807 KAR 5:001, Section 11(4) and respectfully moves the Commission to strike the portions of the Complainants' Post-Hearing Brief ("Brief") that refer to matters that are not included in the record of this case. In further support of its Motion, EKPC states as follows:

An evidentiary hearing was held in this matter on July 1, 2014 and concluded on July 8, 2014. Pursuant to the Commission's Order entered on July 24, 2014, both EKPC and the Complainants filed Briefs on August 15, 2014. Significant portions of the Complainants' Brief contain new evidence for the Commission to consider for the first time, which is inappropriate and a violation of due process. 807 KAR 5:001, Section 11(4) clearly states:

Except as expressly permitted in particular instances, the commission shall not receive in evidence or consider as a part of the record a book, paper, or other document for consideration in connection with the proceeding after the close of the testimony.

The testimony was closed in this case on July 8, 2014, when the second full day of the public hearing concluded. Nevertheless, the Complainants' Brief includes extensive sections relating to: (1) the development of expert definitions for certain key statutory terms;<sup>1</sup> (2) the payment of "penalties" for self-reported reliability issues;<sup>2</sup> (3) hypothetical dangers from microshocks based upon specific scientific characteristics of human development;<sup>3</sup> and (4) the minutes of a public meeting held before the Legislative Research Committee on November 8, 2007.<sup>4</sup> While the first and third of these issues were raised at the hearing, the Complainants' Brief, which contains virtually no citations to the record on any point, goes much further than to merely characterize facts already in evidence. Instead, the Complainants seek to provide the Commission with additional "facts" and expert opinion upon which, it is claimed, the Commission's decision should rely. The second and fourth new issues raised by the Complainants were never raised at any point in the proceeding prior to the submission of the Complainants' Brief.

### **1. New Expert Opinion**

The Complainants, on page 7 of their Brief, have inserted a section titled "Definitions as they Relate to Transmission Lines". In this section, John Pfeiffer, one of the Complainants' expert witnesses,<sup>5</sup> defines the terms "new transmission line", "rebuilt transmission line", "upgraded transmission line" and "relocation (deviation) of a transmission line". These are statutory terms that are not defined within KRS Chapter 278, nor were these "definitions" included in Mr. Pfeiffer's pre-filed testimony or his testimony at the hearing in this matter.

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<sup>1</sup> See Complainants' Brief, p. 7.

<sup>2</sup> See *id.*, pp. 24-25.

<sup>3</sup> See *id.*, pp. 26-27.

<sup>4</sup> See *id.*, p. 32, Attach. 5.

<sup>5</sup> EKPC does not concede that Mr. Pfeiffer is qualified to render the opinions has offered regarding transmission line siting, design, construction and operation, or that his opinions are credible.

Indeed, they appear to be inconsistent with the testimony he offered on the witness stand.<sup>6</sup> Now that the evidence has been heard, the Complainants cannot seek to offer a new expert opinion on an issue that lies at the very heart of the statutory construction at hand.

## **2. Reliability “Penalties”**

Likewise, the Complainants’ Brief discusses and then draws certain (erroneous) conclusions about a “penalty” EKPC paid following the self-reporting of a reliability issue in a matter before the Southeast Electric Reliability Coordinator (“SERC”). This information was not provided anywhere in the record of this case, nor was there ever any mention of this information at any time during the two day hearing. The Plaintiffs cannot now try to submit this new evidence, which is misunderstood and later mischaracterized, into the record by including it in the Brief.

## **3. Human Resistance to Microshocks**

Next, on pages 26 and 27 of the Brief, the Complainants have filed new scientific and technical evidence concerning the developmental characteristics of humans and the relative resistance of various ages to the effects of microshocks. Of course, this new information is not even cited to any authority, nor is it put in any context. The additional technical evidence cannot now be introduced after the close of testimony in this matter by inserting it into a Brief.

## **4. Minutes of the 2007 LRC Hearing**

Finally, the Complainants seek to introduce evidence in the form of a new exhibit which contains the minutes of a 2007 hearing before the Legislative Research Commission on electric

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<sup>6</sup> For instance, while certain of the characteristics of an “upgraded transmission line” are consistent in Mr. Pfeiffer’s testimony at the hearing and his argument in the Complainants’ Brief, the new definition set forth in the Brief includes additional restrictions relating to terminal points and right-of-way. These restrictions were not mentioned at the hearing. *See* HVR 14:55:16 (July 1, 2014). In short, the new definitions are a thinly veiled attempt by Mr. Pfeiffer to amend his opinion, now that it cannot be subjected to further scrutiny, to try to buttress the Complainants’ statutory construction argument.

transmission lines. Although Ms. Warner was on the witness stand for close to two hours during the hearing, the Complainants failed to mention the LRC hearing, to present her with a copy of the minutes upon which they now rely or to ask her a single question about her prior statements to the LRC. There is absolutely no reason why the Complainants would have been unable – using reasonable diligence – to have used a nearly seven year old summary of a meeting at the hearing. Instead of using the witnesses’ actual answers to precise questions about this specific transmission line, the Complainants are relying upon an old, general summary from a meeting held in a much different context. The Complainants’ refusal to afford Ms. Warner the courtesy of being able to respond to documents upon which they now rely is unacceptable.

**5. Commission Precedent and 807 KAR 5:001, Section 11(4) Support  
Striking Portions of the Complainants’ Brief**

All of the foregoing information was available to the Complainants before they even filed their Complaint in July of 2013. There is no excuse that can be made for not presenting this information, if they believe it to be important to their case, before or at the hearing. Therefore, any new evidence sought to be introduced in the Complainants’ Brief is in violation of 807 KAR 5:001, Section 11(4) and should be stricken from the record – a conclusion supported by ample Commission precedent. For instance, the Commission has previously held that information submitted after the evidentiary record has closed and which could have been, with reasonable diligence, filed prior to the hearing, was not admissible under 807 KAR 5:001, Section 11(4).<sup>7</sup> In fact, just three days after the conclusion of the hearing in this matter, the Commission entered

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<sup>7</sup> See, *In the Matter of the Application of Kentucky Power Company for (1) a Certificate of Public Convenience and Necessity Authorizing the Transfer to the Company of an Undivided Fifty Percent Interest in the Mitchell Generating Station and Associated Assets; (2) Approval of the Assumption by Kentucky Power Company of Certain Liabilities in Connection with the Transfer of the Mitchell Generating Station; (3) Declaratory Rulings; (4) Deferral of Costs Incurred in Connection with the Company’s Efforts to Meet Federal Clean Air Act and Related Requirements; and (5) All Other Required Approvals and Relief*, Order, Case No. 2012-00578, (Ky. P.S.C., Nov. 26, 2013).



an Order in another proceeding which struck exhibits and portions of an applicant's brief due to the fact that the filed information amounted to new evidence and the intervenors did not have an opportunity to question or challenge the information presented for the first time.<sup>8</sup> In another recent case, the Commission held that a water district's attempt to introduce evidence after the close of testimony, which was otherwise available at the time of the hearing, "deprived the intervenors of notice" of an issue, as well as "any opportunity to address this evidence or to confront the Water District's claim of conflicting positions."<sup>9</sup> The Commission further stated that "[s]uch notice and opportunity are the essence of due process."<sup>10</sup> Furthermore, in striking a letter filed by a witness after the close of testimony, the Commission held in Case No. 1989-00349 that "[t]he Commission must ensure that all parties to its proceedings are afforded due process. Despite the relaxed nature of Commission proceedings, each party must still have the opportunity to confront and cross examine adverse witnesses...."<sup>11</sup> EKPC did not have the opportunity to cross-exam Mr. Pfeiffer on his newest opinion as to how the statutory terms should be defined, nor on his (or someone else's) thoughts regarding the microshock resistance factors of humans at various stages of development. Likewise, the question of the (ir)relevance of the SERC proceeding and the context of the LRC hearing are issues that have been raised for the first time in the Complainants' Brief. Each of these is clearly a violation of the

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<sup>8</sup> *In the Matter of the Application of Water Service Corporation of Kentucky for an Adjustment of Rates*, Order, Case No. 2013-00237, (Ky. P.S.C., July 11, 2014).

<sup>9</sup> *In the Matter of the Application of Jessamine-South Elkhorn Water District for a Certificate of Public Convenience and Necessity to Construct and Finance a Waterworks Improvements Project Pursuant to KRS 278.020 and 278.300*, Order, Case No. 2012-00470, pp. 4-5 (Ky. P.S.C., Apr. 30, 2013).

<sup>10</sup> *Id.*

<sup>11</sup> *In the Matter of Kentucky Utilities Company v. Henderson-Union Rural Electric Cooperative Corporation*, Order, Case No. 89-349, (Ky. P.S.C., May 21, 1990).

Commission's regulation and, fundamentally, EKPC's due process rights. The offending portions of the Complainants' Brief should be stricken.

WHEREFORE, on the basis of the foregoing, EKPC respectfully requests that the Commission strike the portions of Complainants' Brief referenced above.

This 28<sup>th</sup> day of August, 2014.

Respectfully submitted,



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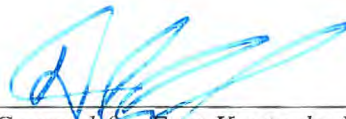
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### **CERTIFICATE OF SERVICE**

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 28<sup>th</sup> day of August, 2014, addressed to the following:

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



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*Counsel for East Kentucky Power  
Cooperative, Inc.*