

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

HAROLD BARKER,)	
ANN BARKER, AND)	
BROOKS BARKER)	
)	
COMPLAINANTS)	
)	
V.)	CASE NO.
)	2013-00291
)	
EAST KENTUCKY POWER COOPERATIVE,)	
INC.)	
)	
DEFENDANT)	

ORDER

This matter is before the Commission on the motion of Defendant, East Kentucky Power Cooperative, Inc. ("EKPC") to dismiss. For the following reasons, the Commission will grant the motion in part, deny it in part, and establish a procedural schedule for adjudicating this matter.

BACKGROUND

On July 5, 2013, Complainants Harold Barker, Ann Barker, and Brooks Barker ("Complainants") filed a formal complaint against EKPC. Complainants assert that EKPC upgraded a transmission line crossing their property, which has caused them to receive electric shocks and has created health concerns. They state that EKPC sought and received an opinion letter from Commission Staff on October 26, 2005, affirming that a certificate of public convenience and necessity ("CPCN") would not be required

for the proposed line upgrade in accordance with KRS 278.020(2).¹ The upgrade included replacing an existing 69-kV transmission line with a double-circuit 345-kV/69-kV line.² Complainants allege that because a CPCN was not required, they were denied the opportunity to argue against the upgrade before the Commission. Complainants request monetary damages incurred consequent to the line upgrade and also request the line be moved to a different location on their property farther from their residence.

By Order entered July 18, 2013, the Commission directed EKPC to satisfy or answer the complaint. On July 29, 2013, EKPC submitted an offer of settlement, in which it offered to pay Complainants the diminution of value of their home consequent to the condemnation of a portion of their property or to purchase the house and a lot surrounding the house. Complainants rejected the settlement offer on September 16, 2013. Thereafter, on October 10, 2013, EKPC filed its Answer wherein it denied Complainants' allegations and further moved to dismiss the claims asserted against it. EKPC asserts that the transmission line was constructed on a preexisting easement. It notes that Complainants were compensated for the widened easement in the course of a condemnation action in Clark Circuit Court. EKPC states that Complainants asserted several counterclaims, arising in tort, in the Clark Circuit Court action.

EKPC'S MOTION TO DISMISS

In its motion to dismiss, EKPC contends that Complainants should not be permitted to assert claims pertaining to property rights as such claims are outside of the

¹ Commission Staff Opinion Letter from Beth O'Donnell, Executive Director, Kentucky Public Service Commission to Sherman Goodpaster III, Counsel, East Kentucky Power Cooperative, Inc., Oct. 26, 2005.

² *Id.*

Commission's jurisdiction over rates and services. It asserts that issues relating to damages and real property should be dismissed for lack of statutory authority to grant any relief. Moreover, EKPC asserts that Complainants should be estopped from asserting any claims for damages for the reason that the original transmission line and easement existed prior to the construction of Complainants' residence.

On November 21, 2013, EKPC and Complainants submitted responses to Commission Staff's Initial Requests for Information. Complainants state that they had numerous conversations with EKPC representatives regarding the ultimate placement of the upgraded transmission line prior to its construction. They confirm that, at their request, prior to the line upgrade, EKPC agreed to relocate certain poles near their residence, but not the easement itself.

In its information responses, EKPC admitted that it relocated several lengths of the upgraded line. It states that the adjustments, totaling 10,730 feet, were the result of agreements with affected property owners and resulted in decreased construction costs of \$173,200, thereby leading to savings for EKPC's ratepayers. EKPC indicated that it denied all requests that did not result in savings to its ratepayers.

In response to EKPC's motion to dismiss, Complainants contend that the line upgrade was not in the ordinary course of business and that EKPC should, therefore, be compelled to relocate the line away from their residence. Complainants concede that their claim for monetary damages cannot succeed; however, they argue that the Commission has the authority to enforce the provisions of KRS Chapter 278. Complainants assert that the Commission's jurisdiction is not limited solely to rates and services. Complainants contend that by not seeking a CPCN, EKPC violated KRS

278.020(2). In support, they included an affidavit from John Pfeiffer, an electrical engineer. Complainants state that EKPC's failure to seek a CPCN deprived them of their opportunity to present their health and safety concerns before the Commission. Finally, Complainants state that they solicited EKPC's input when originally siting their house and that they did not assume the risk of the line's being upgraded or the easement being widened.

EKPC's reply sets forth three grounds for dismissal. First, EKPC argues that Complainants' claims for relief are outside the scope of the Commission's jurisdiction, which substantial precedent has held is limited to matters concerning a utility's rates or services. Second, EKPC contends that through requesting the transmission line's relocation, Complainants are impermissibly attempting to collaterally attack an Agreed Interlocutory Judgment entered by the Clark Circuit Court. The 2006 Judgment, signed and agreed to by the parties' respective counsel, confirms EKPC's authority to condemn the land at issue and provides for the payment of \$12,000. The Judgment states that unless exceptions were filed within 30 days, the Court would enter a Final Judgment in the matter. EKPC also asserts that should the Barker's relief be granted, relocation of the line would impact Complainants' neighbors' property rights. Accordingly, EKPC states that because the Commission does not possess jurisdiction over matters pertaining to condemnation proceedings, Complainants' claims are improperly asserted before the Commission. Thirdly, EKPC argues that Mr. Pfeiffer has not been qualified as an expert and the opinions presented in his affidavit should not be treated as expert testimony.

COMMISSION FINDINGS

The Commission's jurisdiction extends to utilities rates and services.³ The Commission has jurisdiction to adjudicate complaints that are within the scope of a utility's rates or services and to enforce the provisions of KRS Chapter 278.⁴ However, the Commission's jurisdiction does not encompass claims for monetary damage arising out of utility service.⁵ Claims for monetary damages that exceed the "direct costs for retail service" are beyond the scope of the Commission's authority to grant relief.⁶ Complainants claim for monetary damages relates neither to EKPC's rates nor its service, and the claim will accordingly be dismissed as a matter of law.

Claims pertaining to such property rights, including the location and valuation of easements, similarly fall outside the scope of the Commission's jurisdiction over rates and services.⁷ Easement and condemnation issues are exclusively within the province of the circuit court's jurisdiction.⁸ The record shows that the Clark Circuit Court entered an Agreed Interlocutory Judgment condemning certain land owned by the Complainants for the benefit of EKPC to use as an easement for its transmission line. The Clark Circuit Court has exclusive jurisdiction over all claims pertaining to the easement on Complainants' property and the Commission is consequently without any power or

³ KRS 278.040(2).

⁴ KRS 278.260; Case No. 2007-00502, *Glennis W. Blair v. Appalachian Waste Control* (Ky. PSC Oct. 27, 2008).

⁵ *Carr v. Cincinnati Bell Co.*, 651 S.W.2d 126 (Ky. App. 1983).

⁶ Case No. 2009-00094, *In the Matter of Connie C. Marshall, Complainant v. Michael Wilner, Barbara Huber and Insight Phone of Kentucky, LLC, Defendants* (Ky. PSC Mar. 26, 2009).

⁷ Case No. 94-528, *Robert J. & Nicole R. Arnold v. Blue Grass R.E.C.C.* (Ky. PSC Jan. 6, 1995).

⁸ Case No. 2010-00223, *Application of Southern Indiana Gas & Electric Co. d/b/a Vectren Energy Delivery of Indiana, Inc. for a Certificate to Construct an Electric Transmission Line from its A.B. Brown Plant to the Big Rivers Reid EHV Station at 16* (Ky. PSC Dec. 21, 2010).

authority to adjudicate the instant claims to the extent they relate to a real property dispute.⁹

Complainants' remaining claims present two primary issues: first, whether EKPC was required to obtain a CPCN prior to beginning its transmission line upgrade project; second, if a CPCN was required, whether the proximity of the upgraded line to Complainants' premises presents health and safety concerns.

The Commission is charged with issuing or refusing to issue CPCNs upon application and a hearing.¹⁰ A CPCN is required for construction of a transmission line of 138 kilovolts ("kV") or more and that is one mile or more in length.¹¹ However, replacement and upgraded lines are specifically exempted from the requirement to obtain a CPCN, regardless of voltage or length.¹² In a proceeding for the issuance of a CPCN, interested parties, including those whose property the line will cross, have the opportunity to intervene and take part in the case.¹³ Therefore, here, if a CPCN were to have been required and sought, Complainants would have had an opportunity to be heard before the Commission and to present their health and safety concerns regarding the line's placement.

The record reflects that there is a discrepancy regarding the length of the upgraded transmission line's actual deviation from the original route as presented in EKPC's 2005 request for a Staff opinion compared to the transmission line's actual

⁹ Case No. 96-479, *Hans W. Kallenberger v. Henry County Water District No. 2* (Ky. PSC Aug. 4, 1998).

¹⁰ KRS 278.020(1).

¹¹ KRS 278.020(2).

¹² KRS 278.020(2)(a).

¹³ KRS 278.020(8).

route as constructed. EKPC has characterized this transmission line project as an upgrade that would fall within the exception to the CPCN requirement set forth in KRS 278.020(2). In its response to Staff's Initial Request for Information, EKPC confirmed that the upgraded 345-kV line deviated a total of 10,730 feet from the original route, consisting of two specific deviations totaling 6,975 feet and 3,755 feet respectively.¹⁴ However, neither of the deviations were on the Complainants' property. Thus, this case raises an issue under KRS 278.020(2) of whether: (1) a CPCN is required for an entire transmission line project when one or more segments that equal or exceed one mile in length are not replacements or upgrades; or (2) a CPCN is only required for those segments of a transmission line project which equal or exceed one mile in length that are not replacements or upgrades of an existing transmission line. If a CPCN was required for EKPC's entire transmission line project, Complainants were denied an opportunity to present their health and safety concerns for our review. Since the record now before us is insufficient to determine these issues, we will deny without prejudice the remaining portions of EKPC's motion to dismiss. To achieve administrative efficiency, we will also establish a procedural schedule to process all of these remaining issues at the same time.¹⁵

IT IS THEREFORE ORDERED that:

1. EKPC's motion to dismiss Complainants' complaint is granted in part. Complainant's request for unliquidated damages is dismissed as a matter of law.

¹⁴ EKPC's Response to Staff's Initial Request for Information at 6.

¹⁵ In arriving at this conclusion, the Commission has not relied upon Complainants' Affidavit of John Pfeiffer appended to their Response to EKPC's Motion to Dismiss. Should Complainants call Mr. Pfeiffer to testify, EKPC will be afforded an opportunity to explore his qualifications as an expert witness.

2. EKPC's motion to dismiss Complainant's complaint is denied in part. EKPC's motion to dismiss Complainant's claims that a CPCN was required pursuant to KRS 278.020(2), and that the upgrade has caused health and safety issues is denied.

3. The procedural schedule set forth in the Appendix to this Order shall be followed.

4. Any party that files written testimony shall file with the Commission an original and eight copies. Written testimony shall be in verified form.

5. Any party filing a document or pleading with the Commission shall also serve such document or pleading upon all other parties to this proceeding.

6. At any hearing in this matter, neither opening statements nor summarization of direct or rebuttal testimony shall be permitted.

7. Direct examination of witnesses shall be limited to the authentication and adoption of that written testimony. No summarization of written testimony by the witness shall be permitted.

8. Witnesses who have filed written, direct, and rebuttal testimony shall present that testimony at the same sitting. Opposing parties may cross-examine such witnesses on both direct and rebuttal testimonies.

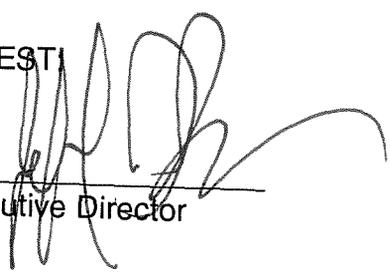
9. Motions for extensions of time with respect to the schedule herein shall be made in writing and will be granted only upon a showing of good cause.

10. Pursuant to KRS 278.360, the record of the formal hearing in this matter shall be by videotape.

By the Commission

ENTERED
APR 07 2014
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST



Executive Director

Case No. 2013-00291

APPENDIX

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE
COMMISSION IN CASE NO. 2013-00291 DATED **APR 07 2014**

Complainants' direct testimony, in verified form,
shall be filed no later than4/25/14

Requests for information to the Complainants
shall be filed no later than5/01/14

Complainants' responses to requests for information
shall be filed no later than5/12/14

EKPC's direct testimony, in verified form, shall be
filed no later than6/02/14

Requests for information to EKPC shall be
filed no later than6/12/14

EKPC's responses to requests for information
shall be filed no later than6/23/14

Public Hearing is to begin at 10:00 a.m., Eastern Daylight Time,
in Hearing Room 1 of the Commission's offices at 211 Sower
Boulevard, Frankfort, Kentucky, for the purpose of
cross-examination of witnesses7/01/14

Written briefs, if any, shall be filed with the Commission
no later than8/01/14

Harold, Ann & Brooks Barker
5450 Mt. Sterling Road
Winchester, KENTUCKY 40391

Anthony S Campbell
President & CEO
East Kentucky Power Cooperative, Inc.
4775 Lexington Road
P. O. Box 707
Winchester, KY 40392-0707

Alex Rowady
212 South Maple Street
Winchester, KENTUCKY 40391

David S Samford
Goss Samford, PLLC
2365 Harrodsburg Road, Suite B325
Lexington, KENTUCKY 40504