

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ART C. NEWMAN, JR. AND)	
CAROL A. NEWMAN, HIS WIFE)	
)	
COMPLAINANTS)	
)	
VS.)	CASE NO.
)	90-088
SALT RIVER RURAL ELECTRIC)	
COOPERATIVE CORPORATION)	
)	
DEFENDANT)	

O R D E R

On May 25, 1990 the complainants, Art C. Newman Jr. and Carol A. Newman, his wife (collectively the "Newmans"), filed a motion for relief in accordance with their complaint against Salt River Rural Electric Cooperative Corporation ("Salt River RECC") on the grounds that there is no genuine issue as to any material fact and the complainants are entitled to relief as a matter of law.

This action arises out of a complaint by the Newmans requesting that the Commission compel Salt River RECC to extend electric service to residential property they own in Bullitt County. It is agreed by the parties that the property sought to be served is within the certified territory of Salt River RECC, but that the utility cannot presently serve the Newman property because it lacks the necessary easements to reach it. The Newmans contend that Salt River RECC should be compelled to obtain the necessary easements using, if necessary, its power of eminent domain.

In response, Salt River RECC contends that its power of eminent domain is limited to taking property intended for "public use" and that an easement to serve only one customer does not qualify as a public use. Salt River RECC further contends that its published tariff on file with this Commission, and effective since July 8, 1986, specifically requires that applicants for service obtain and furnish all easements necessary to provide the requested service.

A motion for summary relief, similar to a motion for summary judgment, should be granted upon a showing that there is no genuine issue as to any material fact and that the moving party is entitled to the relief requested as a matter of law. CR 56.03. Salt River RECC does not dispute the material facts upon which the motion is made. Therefore, the only issue is whether under those facts, the Newmans are entitled to the relief requested.

The undisputed facts are as follows. The Newmans own property within the service area of Salt River RECC¹ The Newmans have made application for service from Salt River RECC. The most reasonable route to provide service requires crossing adjoining property owned by a neighbor and thus obtaining an easement. Currently, Salt River RECC does not own an easement across the neighbor's property.² Salt River RECC's current tariff on file

¹ Transcript of Evidence ("T.E.") at 8.

² T.E. at 31.

with the Commission, effective July 8, 1986, provides in part that the prospective customer must provide the cooperative with all necessary easements for the requested extension. Salt River RECC is willing and able to extend service to the Newmans upon the Newmans providing the easement across the adjoining neighbor's property.³

The first legal issue presented by the Newmans' motion is whether Salt River RECC may condemn an easement under its power of eminent domain to provide service to a single customer. The authority of a utility to condemn property is derived from the Kentucky Constitution. Sections 13 and 242 confer upon the General Assembly the right to empower individuals and corporations to condemn property provided the property taken is intended for public use. Pursuant to that authority, KRS 279.110 permits rural electric cooperative corporations to condemn property for public use using the procedure provided in the Eminent Domain Act of Kentucky contained in KRS 416.540 et seq.

It is well settled in this state that "public use" means use by the public and use which justifies the taking of property by eminent domain is use for the public and not for particular individuals. But, if the right to use the property is open to members of the general public, even though only one person is able to avail himself of that right, the right remains a public use.

³ Offer of Satisfaction in lieu of answer.

Thus, in an early decision, the Kentucky Court in Chesapeake Stone Co. v. Moreland, 126 Ky. 656, 104 S.W. 762 (1904) affirmed the right of a private person to condemn a strip of land across an adjoining owner's property for use as a tramway to transport stone from her quarry to the railroad. In so holding, the Court stated at page 765:

It is not the number of people who use the property taken under the law of eminent domain that constitutes the use of it a public one; nor does the fact that the benefits will be in a large measure local enter into the question. In short, according to the generally recognized rule, the length of the public way, the places between which it runs, or the number of people who use it, is not the essential inquiry. The controlling and decisive question is: Have the public the right to its use upon the same terms as the person at whose instance the way was established? If they have, it is a public use; if they have not, it is a private one. [emphasis added]

Relying upon the language in Chesapeake Stone Co., the Court in Sturgill v. Commonwealth, Department of Highways, Ky., 384 S.W.2d 89 (1964) upheld the authority of the state to condemn a strip of land to construct an access road to serve an adjoining piece of property that became landlocked by the construction of another road. The party from whom the property was taken contended that because the access road would serve only one property owner it was not being taken for a public use, and therefore, the state had no authority to condemn it. In rejecting the property owners argument the court stated at page 91:

The accepted test [of public use] is whether the roadway is under the control of public authorities and is open to public use, without regard to private interest or advantage.

While the electric line the Newmans seek to have extended to their property will, at least initially, serve only them, it will be a part of Salt River RECC's network of electric lines, will be under the utility's control, and will be available for use by any consumer in Salt River RECC's certified territory. Therefore, it will be available for public use within the meaning of the Eminent Domain Act and Salt River RECC has the authority to obtain an easement for the line by condemnation.

The second issue presented by the motion concerns the tariff requirement that applicants for electrical service obtain all necessary easements. Salt River RECC contends that, regardless of the statute, this tariff provision, which has been on file since 1986, relieves the utility from any obligation to obtain the easements necessary to extend service to the Newmans.

KRS 278.280(1) confers upon the Commission the authority to review any rule, regulation, or practice of a utility under its jurisdiction to determine whether it is just or reasonable. When the Commission determines that a rule, regulation, or practice is not just or reasonable, it is required to determine and establish by Order what would be proper under the circumstances.

As noted at the hearing on this issue, the provision in Salt River RECC's tariff requiring applicants to furnish all necessary easements could effectively preclude the Newmans from ever obtaining electrical service from Salt River RECC. The Newmans have no power or right to compel their neighbors to convey the necessary easements, only the utility has that authority. That authority was given to electric utilities to enable them to

provide service to everyone within their certified territory and it is unreasonable to allow a utility to frustrate that purpose by adopting a rule or regulation that subverts the statute.

The Commission therefore finds that it is unreasonable for any utility to require its customers to obtain the easements necessary for the extension of service prior to extending service. The utility should bear the responsibility of obtaining all easements necessary for extensions of service, through the exercise of eminent domain or otherwise. This is consistent with past Commission Orders.⁴ The requirement in the tariff of Salt River RECC that applicants for service obtain all necessary easements is determined to be unreasonable.

IT IS THEREFORE ORDERED:

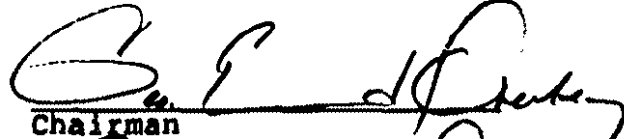
1. The complainants' motion for summary relief is hereby granted, and Salt River RECC shall extend service to the complainants, Art C. Newman, Jr. and Carol A. Newman, consistent with the findings herein.

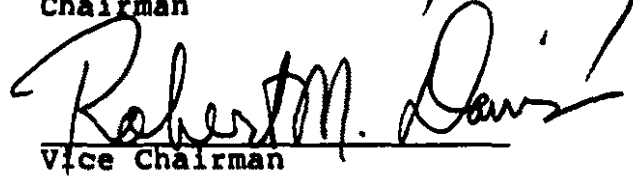
2. Salt River RECC shall file a revised tariff consistent with the findings herein, within 20 days of the date of this Order.

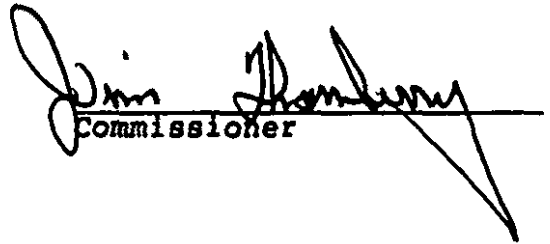
⁴ Case No. 6507, The Complaint of Mr. Joseph H. Wells Against Inter-County Rural Electric Cooperative Corporation (July 22, 1976). Case No. 89-133, Garrard County Water Association's Water Line Extension Policy (May 26, 1989).

Done at Frankfort, Kentucky, this 28th day of June, 1990.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director