

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

This matter arises out of petition for rehearing filed by Salt River Rural Electric Cooperative Corporation ("Salt River RECC") on July 17, 1990 from an Order of the Commission entered June 28, 1990. The Order directed Salt River RECC to extend service to Art C. Newman and Carol A. Newman, his wife, (collectively the "Newmans") on property owned by the Newmans in the Salt River RECC service territory, and to amend its tariff by deleting the requirement that applicants for service obtain all necessary easements. The petition requests rehearing to answer the following questions related to the Order:

"1) Who is to bear the expense for obtaining the easement if Salt River Rural Electric Cooperative Corporation is obligated to obtain the easement for and on behalf of the Newmans?

"2) Whether Salt River RECC shall become obligated to obtain easements for everyone who makes application to be served within its service area?

"3) Whether an applicant can be required to furnish Salt River RECC an easement over the applicant's property or whether Salt River will be required to purchase or condemn such an easement.?

"4) Whether Salt River RECC may condemn an easement under its power of eminent domain to provide service to a single customer?

For the purpose of this Order, the questions will be addressed in inverse order.

Whether Salt River RECC may Condemn an Easement Under the Power of Eminent Domain to Provide Service to a Single Customer.

This identical issue was raised in the original hearing on a motion by the Newmans for summary relief. The Commission, relying upon the authority of Chesapeake Stone Co. v. Moreland, 126 Ky. 656, 104 S.W. 762 (1904) and Sturgill v. Commonwealth, Department of Highways, Ky., 384 S.W.2d 89 (1964), determined that a utility had the authority to condemn an easement to extend service even though it would benefit only one customer. Salt River RECC, as the basis for its petition for rehearing, contends that those decisions are inconsistent with later decisions of the court in City of Owensboro v. McCormick, Ky. 581 S.W.2d 3 (1979), Commonwealth, Department of Highways v. Salmon Corporation, Ky. 489 S.W.2d 32 (1973) and Commonwealth, Department of Transportation v. Knieriem, Ky. 707 S.W.2d 340 (1986). A review of those decisions reveals no conflict with the earlier decisions relied upon by the Commission.

As noted by the Commission in the earlier Order, the power of eminent domain can only be exercised to condemn property for public use. However, the court held in Chesapeake Stone Co. that the number who will benefit from the taking is not determinative of

public use. Instead the issue is whether all members of the public will have the right to use the property taken upon the same terms and conditions. The decision in Chesapeake Stone Co. was reaffirmed by the court in the Sturgill case.

In both the Chesapeake Stone Co. case and the Sturgill case, the court found that the taking of property involved in each case was for a public use and was a valid exercise of the power of eminent domain. In City of Owensboro v. McCormick, supra, the court found that the taking contemplated was not for a public use and was invalid.

The McCormick case was a class action instituted on behalf of the residents of Owensboro challenging the constitutionality of the Local Industrial Authority Act. That act, in part, permits local governments to establish an industrial development authority with the power to acquire property by condemnation for resale to private industry for the purpose of constructing commercial or industrial facilities. The court stated that while the acquisition of property for commercial and industrial development may serve a public purpose, the term "public purpose" and the term "public use" were not synonymous. The court held that "when the property being condemned will not be developed for use by the public, exercise of the power of eminent domain is not permissible under sections 13 and 242 of the Constitution of Kentucky...." Id. at 7. Because the property could be condemned for resale as private property, that portion of the Act authorizing condemnation for that purpose was declared by the court to be unconstitutional.

In Commonwealth, Department of Transportation v. Knieriem, 707 S.W.2d at 341, the court reached a similar decision. The issue in that case was whether the state had the right to condemn a strip of land for a private easement to replace an easement across another strip of land condemned to widen the highway. The court held that taking the second strip of land to replace a private easement was barred by the constitutional prohibition of taking property for a private use. The Knieriem case was distinguished from the Sturgill case where a strip of land was condemned to construct an access road to serve a piece of property that had become landlocked by the construction of another road. In the Sturgill case, even though the access road would serve only one property owner, it was available for use by the public while the easement in the Knieriem case would have been a private easement available for use only to the owner of the property which it served. Therefore, the easement in Knieriem was not intended for public use and the state had no authority to condemn property for that purpose.

The third case relied upon by Salt River RECC, Commonwealth, Department of Highways v. Salmon Corp., 489 S.W.2d at 33-34, was not decided on the issue of public use. That was an action to condemn two parcels of land from a farm owned by the Salmon Corporation. One parcel was for the right-of-way for I-64 and the second smaller parcel was for an access road to a third parcel which was being landlocked by the new construction. The County Court in which the action originated approved the condemnation of both parcels and the Salmon Corporation appealed to the Circuit

Court. The Circuit Court reversed the County Court, denying the right to condemn the smaller parcel for the access road and the Department of Highways appealed.

The basis for the Circuit Court judgment was that no official order had been entered by the Department of Highways which designated the smaller parcel as necessary for the construction of an adequate system of highways. Under KRS 177.081(1) the Department of Highways was required to make such a designation before it could condemn any parcel of property. The Court of Appeals affirmed the Circuit Court decision and held that the Department of Highways had no authority under the statute to condemn property without such an order.

As the Commission stated in its earlier Order, although the easement to the Newman property will serve only the Newmans, it will be a part of Salt River RECC's network of electric lines and will be available for use by any consumer in Salt River RECC's service territory. Therefore, it will serve a public use within the meaning of sections 13 and 242 of the Kentucky Constitution and it is within the power of eminent domain conferred upon Salt River RECC under KRS 279.110.

Whether an Applicant Can be Required to Furnish Salt River RECC an Easement Over the Applicant's Property or Whether Salt River will be Required to Purchase or Condemn Such an Easement.

The June 28, 1990 Order only required Salt River to purchase or condemn easements necessary to reach the Newman property. Once the utility reaches the Newman property it must provide service in accordance with its rules and regulations and its normal procedures applicable to all consumers in its system. In accordance

with 807 KAR 5:041, Section 10, Salt River RECC is required to connect the service outlet on the Newman property to the utility's closest line. Since the connection is to be made at the request of the applicant, the utility may require, as a condition for receiving service, that applicants for service furnish at no cost to the utility such easements across their property as the utility deems necessary for the construction and maintenance of equipment and facilities installed to provide service to the applicant.

Whether Salt River RECC Shall Become Obligated to Obtain Easements for Everyone Who Makes Application to be Served Within its Service Area.

The Commission's June 28, 1990 Order is not intended to apply only to the Newmans. Concomitant with "the exclusive right to furnish service to all electric-consuming facilities located within its certified territory" is the obligation "to supply on reasonable terms all those who desire the service it renders." 64 Am. Jur. 2d Public Utilities §16 (1962). This obligation includes the duty to obtain any easements necessary to fulfill the utility's service obligation. Therefore Salt River is obligated to obtain easements for everyone who applies for service within its service area and to amend its tariff accordingly.

Who is to Bear the Expense for Obtaining the Easement if Salt River Rural Electric Cooperative Corporation is Obligated to Obtain the Easement for and on Behalf of the Newmans.

The question as presented by Salt River RECC misconstrues the Order of June 28, 1990. The Order does not require Salt River RECC to obtain an easement for and on behalf of the Newmans. Instead the Order requires Salt River RECC to acquire the easement in order to serve the Newmans. The distinction is not specious.

The question as presented implies that the easement, once obtained, will belong to the Newmans. That is not the case. Once obtained, the easement will be and remain the property of Salt River RECC and become a part of the utility's network of service lines. Therefore, the expense of obtaining the easement should be treated as any other expense that is incidental to extending service to a new customer. The manner in which such expenses may be apportioned between the utility and the customer is controlled by regulation.

807 KAR 5:041, Section 11(1), requires each electric utility to pay the entire cost of extending service when the extension does not exceed 1000 feet from the existing distribution line to the prospective customer's "service drop." When the extension exceeds 1000 feet, Section 11(2)(a) of the regulation permits the utility to require its customers to bear that proportion of the expense attributable to the excess footage over 1000 feet.

As applied to the Newmans, if the extension of Salt River's existing distribution line to the Newmans' service drop exceeds 1000 feet, the total cost associated with the extension, such as, for example, materials, labor, right-of-way clearing, and condemnation expenses, should be apportioned between the Newmans and Salt River. This would be accomplished by dividing the total cost by the linear footage of the extension to obtain a per foot cost and by multiplying that amount by 1000 to determine Salt River's share of the total cost. The difference between Salt River's share and the total cost should be paid by the Newmans, provided

that Salt River require all applicants for service to pay such expenses when extensions to provide service exceed 1000 feet.

Conclusion

The petition for rehearing raises no issues that are not encompassed by the June 28, 1990 Order. Therefore, the petition should be denied.

This Commission being otherwise sufficiently advised,

IT IS HEREBY ORDERED that the petition by Salt River RECC for rehearing of the June 28, 1990 Order is denied.

Done at Frankfort, Kentucky, this 2nd day of August, 1990.

PUBLIC SERVICE COMMISSION



Chairman



Vice Chairman



Commissioner

ATTEST:



Executive Director