

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE APPLICATION OF EAST KENTUCKY )  
POWER COOPERATIVE, INC. FOR )  
A CERTIFICATE OF PUBLIC ) CASE NO. 2005-00089  
CONVENIENCE AND NECESSITY TO )  
CONSTRUCT A 138 KV TRANSMISSION LINE )  
IN ROWAN COUNTY, KENTUCKY )

O R D E R

This Order addresses the application of East Kentucky Power Cooperative, Inc. ("East Kentucky") for rehearing in this matter. On August 19, 2005, the Commission denied East Kentucky's application for a Certificate of Public Convenience and Necessity ("CPCN") to construct a 138 kV transmission line in Rowan County, Kentucky. On September 13, 2005, East Kentucky filed its application for rehearing, which was opposed by Intervenor Doug Doerrfeld in a September 26 filing. In Orders dated September 27 and October 3, 2005, the Commission granted rehearing to allow oral argument, which was held on October 17, 2005.

DISCUSSION

East Kentucky requests rehearing on both legal and factual grounds. The Commission will discuss the legal grounds first. The legal arguments focus on the Commission's holding that it could not determine if the proposed line would create a needless duplication of facilities.

## Legal Arguments

East Kentucky agrees that the case of *Kentucky Utilities Company v. Public Service Commission*, 252 S.W.2d 885 (Ky. 1952), addresses the duplication issue. It argues, however, that the Court's holding was based solely on cost, with an aim of avoiding new lines paralleling old ones. The Commission disagrees that the case is so limited in its scope and coverage. In the August 19, 2005 Order, we quoted the following language:

It is our opinion that the case should be remanded to the Public Service Commission for a further hearing addressed to the question of duplication from [1] the standpoint of an excessive investment in relation to efficiency, and from [2] the standpoint of inconvenience to the public generally, and [3] economic loss through interference with normal uses of the land, that may result from multiple sets of right of ways [sic], and a cluttering of the land with poles and wires.

*Id.* at 892 (bracketed numbers added). In fact, the Court identified three different interests that the Commission should consider, only one of which involves the cost of the facilities. The August 19, 2005 Commission Order requires a weighing of the line's cost, the effect on rates, and the impact on the use of the land. Under the 2004 legislation that controls this process, the Commission believes all the elements of the *Kentucky Utilities* case must be considered, and the case must be read in light of the new statute. The Commission therefore holds that the analysis of duplication of facilities in the August 19, 2005 Order is appropriate.

East Kentucky also argues, as it did in the rulemaking proceeding on this topic, that the Commission has no authority to look at the route and location in an application for a transmission line CPCN. In the *Statement of Consideration Relating to 807 KAR 5:120*, attached to the rehearing request, at paragraph (8) of the Summary of

Comments and Responses, we explicitly rejected that assertion, citing legislative proceedings showing the General Assembly's intent that we consider those questions. That regulation was approved through the rulemaking process, no party appealed, and the Commission does not believe that process should be reopened.

East Kentucky also argues that because the standard for CPCN cases changed, it was denied due process. The standard changed due to the amendment of KRS 278.020, so East Kentucky had the same notice as the Commission and every other party to these proceedings. When the General Assembly changes a law, all parties governed by that law are on notice. To the extent East Kentucky is claiming that it had no notice that the location of the line would be an issue, the *Statement of Consideration Relating to 807 KAR 5:120* that is attached to its filing provides adequate notice. The Commission has not created a new law -- it is implementing a new statute that the General Assembly enacted -- and when laws change, procedures, by necessity, also change.

East Kentucky next argues that "the Commission has been overly concerned with protecting the National Forest system lands,"<sup>1</sup> citing numerous references to the Daniel Boone National Forest ("Forest") in the Commission's August 19, 2005 Order. To be clear, our decision in this case would be no different regardless of whether the proposed line crossed the Forest or any other land. A consideration of environmental impacts is not within the Commission's jurisdiction under this statute.

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<sup>1</sup> September 13, 2005, Application for Rehearing and Request for Oral Argument ("Rehearing Request"), at 15.

As stated in our recent decisions under this statute, the first issue the Commission considers in determining whether a transmission line will result in needless duplication is whether the applicant has conducted a thorough review of all reasonable alternatives.<sup>2</sup> The record in this case demonstrates that East Kentucky had not adequately surveyed all potential alternative locations before deciding on the proposed one. Thus, the Commission rejected the application.

East Kentucky argues that the Commission is the proponent of a particular route. The Commission's August 19, 2005 Order was clear on this point: "The Commission has no authority to require East Kentucky Power to file its next application for any specific alternative route. Moreover, the Commission will not prohibit a new application for this same route, if further study of alternatives shows all of them to be infeasible." So that there will be no further confusion or misunderstanding, the Commission clarifies the record on this matter: The Commission has no preferred route, the Commission has not recommended any route, and the Commission has proposed no route.<sup>3</sup> East Kentucky may file an application for the same route, or for a different route, but it must adequately demonstrate it has completed a study of alternatives. Until it does, this

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<sup>2</sup> *E.g.*, Order in Case No. 2005-00207, Application of East Kentucky Power Cooperative, Inc., For a Certificate of Public Convenience and Necessity For the Construction of a 161 kV Electric Transmission Line in Barren, Warren, Butler, and Ohio Counties, Kentucky, final Order dated October 31, 2005. Once that initial threshold is met, the Commission then considers if the applicant's choice of the proposed location was reasonable. *Id.*

<sup>3</sup> While Staff, in coordination with East Kentucky and the Intervenor, did identify a route that was subsequently used in a letter request to the Forest Service and East Kentucky's response to a post-hearing data request, that involvement did not rise to the level of a Commission or Staff endorsement.

Commission cannot determine if the proposed line will create a needless duplication of facilities.

In its final discussion of legal bases for rehearing, East Kentucky argues that the Forest Service has approved a route for the proposed line, and “the Commission must accept the route or location.”<sup>4</sup> At oral argument, Applicant went further and stated that the Commission is preempted from approving a different location. The only case East Kentucky cites for this assertion is *United States v. Oregon*, 295 U.S. 1 (1935). That case was a quiet title action by the United States against the State of Oregon, and once the Supreme Court held that the United States had title to the disputed property, it stated that Oregon had no authority to dispose of the federal land. In the case presently before the Commission, the Commonwealth makes no claim to Forest property and is not seeking to dispose of any land. East Kentucky requested approval from the Forest Service to place a transmission line through the Forest at a specific location, and the Forest Service approved that request. That determination has no binding effect on the Commission, as the Supreme Court held in the case cited by the Applicant. “As [other owners] are not parties, their rights cannot be affected by any decree to be entered in the present suit.” *Id.* at 12.

In addition, East Kentucky requests that the Commission subpoena Forest Service personnel to testify on their consideration of “Alternatives.”<sup>5</sup> The issue before the Commission is not what alternatives the Forest Service considered; the issue is what alternatives East Kentucky considered before deciding on the proposed route. In

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<sup>4</sup> Rehearing Request at 19.

<sup>5</sup> *Id.*

an application under KRS 278.020, the burden of proof is on East Kentucky, and it may subpoena any witnesses it believes will help meet that burden.

For the reasons explained in this Order, the Commission finds that East Kentucky has failed to conduct a thorough review of all reasonable alternatives. Hence, we cannot determine if the proposed route will create a needless duplication of facilities.

### Factual Arguments

In its request at oral argument to present factual evidence through witnesses, East Kentucky seeks to show the redispach costs and risks of cascading blackouts related to “the new route suggested by the Commission at the hearing.”<sup>6</sup> As has been clarified in this Order, the Commission has not endorsed any route for the Rowan County line, but rather the need for a comprehensive survey of alternative routes. Only after (1) East Kentucky has conducted a comprehensive survey of alternatives, (2) the Forest Service is contacted to see if it needs to conduct a new Environmental Assessment for any of the alternatives, and (3) East Kentucky decides what route it will propose in its application will we have any estimate as to what delay, if any, could result from the proposal. Therefore, the facts that East Kentucky wishes to prove, “based on the estimated two to three year delay in obtaining approval of a new Environmental Assessment by the United States Forest Service,”<sup>7</sup> are speculative.

East Kentucky’s stated motivation in asking that we allow the construction of the line without further action is its desire “to keep electric rates low, and reliability high.”<sup>8</sup>

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<sup>6</sup> *Id.* at 2 (emphasis added).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 20.

We share those concerns and believe the best way to address them is for East Kentucky to conduct a comprehensive survey of all reasonable alternatives, including the use of existing high voltage transmission rights-of-way, and come back before the Commission with a complete application that meets the requirements of the 2004 transmission line certificate law.

IT IS THEREFORE ORDERED that the September 13, 2005 Application for Rehearing of East Kentucky is denied.

Done at Frankfort, Kentucky, this 9<sup>th</sup> day of November, 2005.

By the Commission

ATTEST:

A handwritten signature in black ink, consisting of several overlapping loops and flourishes, positioned above a horizontal line.

Executive Director