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PUBLIC SERVICE COMMISSION

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

PADDOCK AT EASTPOINT, LLC, LOUIS K. KLEMENZ AND ST. JOSEPH CATHOLIC ORPHAN SOCIETY, COMPLAINANTS	)	CASE NO. 2004-00293
v.	)	
LOUISVILLE GAS & ELECTRIC CO. DEFENDANT	)	

REPLY BRIEF FOR INTERVENORS MRH DEVELOPMENT CO.

* * * * *

Petitioners, Paddock at Eastpoint, LLC, Louis K. Klemenz, St. Joseph Catholic Orphan Society, and Intervenor MRH Development Co. have moved this Commission for an order requiring Defendant Louisville Gas & Electric Company ("LG&E") to proceed with a public hearing to obtain a *Certificate of Public Convenience and Necessity*. LG&E has responded that it has no obligation to comply with KRS 278.020, which requires such a hearing. LG&E contends that since the line was "well underway" before July 13, 2004, it was not bound by the requirements of Kentucky law. LG&E alleges that since KRS 278.020 contains no specific legislative declaration that the statute is to be applied "retroactively", LG&E has no duty to seek this Commission's approval before proceeding to condemn private property.

I. COUNTERARGUMENT

LG&E cites Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Co., Ky., 983 S.W.2d 493 (1998). LG&E cites this case for the proposition that there is a strong

presumption that statutes operate "prospectively" unless the Legislature intended them to apply "retroactively".

This case was an appeal from a Franklin Circuit Court decision that found that KRS 278.183 constitutional. KRS 278.183 permitted utilities to surcharge customers for the costs of cleaning high sulfur coal to satisfy Federal pollution control requirements. The Kentucky Supreme Court indicated that the legislation in question was substantive, not remedial, because it created "a new right for all electric utilities, that is, the right to recover expenses as well as a return on and a return of capital costs associated with environmental projects without filing a general weight case". The Supreme Court reasoned that the law would require customers "to pay for the costs of environmental compliance plan through the surcharge". Since these, "rights and responsibilities" did not exist before the enactment of the surcharge, the Kentucky Supreme Court found that the change was not a remedial change.

The Kentucky Supreme Court then examined legislative intent and found that the Legislature "intended to consider the surcharge separately without regard to any other rate making statutes". Accordingly, the Kentucky Supreme Court refused to apply the statute in question "retroactively".

Here, KRS 278.020 merely requires the utility to obtain a *Certificate of Public Convenience and Necessity*. The utility still has the right to build its' extension lines and to exercise eminent domain to condemn property as long as it satisfies the Public Service Commission. There has been no substantive change limiting the utility's right to proceed. In Commonwealth Department of Agriculture v. Vinson, Ky., 30 S.W.3rd 162 (2000), the Kentucky Supreme Court held that legislative amendments that "change and redefine the out of court rights, obligations and duties of persons in their transactions with others are to be considered changes in substantive law". By contrast, statutory amendments that apply in court procedures

and remedies that are used in "handling pending litigation, even if that litigation results from events which occurred prior to the effective date of the amendment" do not come within the rule prohibiting legislative applications. In Vinson, supra, the Kentucky Supreme Court made clear the long standing rule of statutory construction, that amendments which effect only procedure (even if litigation results from events that occurring prior to the effective date of the amendment) "do not come within the rule prohibiting retroactive application", citing Peabody Coal Co. v. Gossett, 819 S.W.2d 33 (1991). In Vinson, supra, the change in question was an amendment to KRS 61.103 which "changed the causation and weight of evidence, components as to what an employee is required to prove successfully to support a claim under the act" and "required a new burden of proof from the employer in order to successfully defend the claim under the law", at 169.

In Peabody, supra, the Kentucky Legislature amended KRS 342.125 eliminating a workers' compensation claim reopening requirement that required that an injured worker establish a worsening of physical condition as a prerequisite to a showing of increase in occupational disability. Even though this change effected the substantive rights of the parties (it certainly effected the substantive rights of the Defendant/Employer and required it to pay more money), the Kentucky Supreme Court found that the statute was "remedial" and therefore, it did not come within the "legal conception of a retrospective law".

In Kentucky Insurance Guaranty Association v. Jeffers, Ky., 13 S.W.3rd 606 (2000), the Kentucky Legislature increased the amount of coverage by Kentucky Insurance Guaranty Association from $100,000 to $300,000. Even though this change obviously effected the amount that the Kentucky Insurance Guaranty Association (and, eventually, the Kentucky taxpayers) would pay, the Kentucky Supreme Court found that this statute would be applied retroactively

because the statute was "remedial". The Kentucky Supreme Court further held that when a statute is "remedial", it need not expressly state that it has retroactive application.

LG&E now argues that by giving the public an opportunity to participate in the hearing before this Commission, KRS 278.020(8) provides "a completely new remedy". In fact, it merely creates a new procedural requirement. This procedural requirement is fully consistent with this Commission's charge to balance "industrial and commercial interest versus public interest in approving electric utility's request". Kentucky Industrial Utilities Customers, Inc., supra.

If LG&E can comply with its statutory obligation to obtain public approval, it may proceed with its project. The amended statute merely provides a remedy for LG&E which it does not perceive to be in its interest but which the Legislature has determined is unquestionably within the public's interest.

II. CONCLUSION

This Commission should order that LG&E participate in a public hearing to obtain a *Certificate of Public Convenience and Necessity*. KRS 278.020(8) merely provides an additional remedy for the public and for LG&E, and does not effect in any way LG&E's substantive rights to condemn private property.

Respectfully submitted,
TILFORD DOBBINS ALEXANDER BUCKAWAY & BLACK, LLP

Stuart E. Alexander III
Sandra F. Keene
Terrell L. Black
401 West Main Street, Ste. 1400
Louisville, Kentucky 40202
(502) 584-1000
Counsel for Intervenor MRH Development Co.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was this 16 day of October, 2004 mailed to the following parties of record:

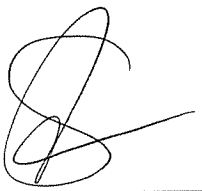
Kendrick R. Riggs
J. Gregory Cornett
OGDEN NEWELL & WELCH, PLLC
1700 PNC Plaza
500 W. Jefferson Street
Louisville, Kentucky 40202

James Dimas, Sr. Corporate Atty.
Louisville Gas & Electric Company
220 West Main Street
P.O. Box 32010
Louisville, Kentucky 40232
Counsel for LG&E

Michael S. Beer, V.P., Rates & Regulatory
Louisville Gas & Electric Company
220 W. Main Street
P.O. Box 32010
Louisville, Kentucky 40232-2010

John H. Dwyer, Jr.
PEDLEY ZIELKE GORDINIER & PENCE
2000 Meidinger Tower
462 S. 4th Street Avenue
Louisville, Kentucky 40202

Hon. Harry Lee Meyer
OGDEN & OGDEN
PNC Plaza, Ste. 1610
500 West Jefferson Street
Louisville, Kentucky 40202



Stuart E. Alexander III

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