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October 27, 2004

Elizabeth O'Donnell  
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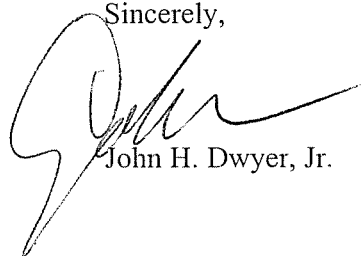
**Re: Paddock at Eastpoint, LLC, Louis K. Klemenz, and St. Joseph Catholic Orphan Society v. Louisville Gas and Electric Company  
Case No. 2004-00293**

Dear Ms. O'Donnell:

Enclosed please find and accept for filing the original and ten (10) copies of The Paddock at Eastpoint, LLC's, *Petitioner's Opening Brief* in the above-referenced matter. Please confirm your receipt of this filing by placing the stamp of your Office and the date received on the enclosed additional copy and return it to me in the enclosed self-addressed stamped envelope.

Should you have any questions or need any additional information, please contact me at your convenience.

Sincerely,



John H. Dwyer, Jr.

JHD/jt

Enclosures

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COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

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

**P E T I T I O N E R P A D D O C K A T E A S T P O I N T , L L C ' S  
O P E N I N G B R I E F**

Pursuant to the Commission's October 15, 2004 Order, Petitioner, the Paddock at Eastpoint, LLC (the "Paddock") submits its opening brief in support of its petition for an Order from the Commission that Defendant Louisville Gas & Electric Company ("LG&E") comply with KRS § 278.020 with regard to the 138kv transmission line issue in this matter.

Although the Commission has asked the parties to submit simultaneous briefs, LG&E's answer to the Paddock's petition leaves no doubt as to the issues that are going to arise. LG&E contends that it has already commenced construction in good faith on the proposed project, and is prosecuting that construction diligently. While a trip down I-265 leaves this assertion seriously in doubt, there can be no question that such a challenge to the Paddock's petition raises significant questions of fact regarding the substance of LG&E's actions which are not amenable to the summary disposition suggested by LG&E in its response to the petition.

## INTRODUCTION AND STATEMENT OF FACTS

There is no 138 KV transmission line running along I-265 in Jefferson County between I-64 and LaGrange Road. There are no poles in place; there are no wires in the air, and not one volt of electricity is flowing along a route that is currently nothing more than a tape line on an aerial photograph. Despite this, and despite the express mandate of KRS 278.020 that LG&E obtain a certificate of public necessity and convenience before constructing this proposed line, LG&E contends it should not have to answer to this Commission or to the very property owners whose land it is seeking to condemn because, prior to July 13, 2004, it dug a handful of holes and poured a few yards of concrete. To allow LG&E to yet again avoid scrutiny of its actions by pushing around some dirt miles from affected property over which it is yet to even acquire easement rights would thwart the intent of both the legislature and this Commission.

After multiple hearings and input from many interested parties, including those before the Commission in this matter, the legislature amended KRS § 278.020 to specifically require utilities such as LG&E to obtain a certificate of public convenience and necessity before installing high voltage transmission lines such as the proposed I-265 line. The legislature also allowed interested persons, specifically including those over whose property the proposed line would cross, to intervene in the proceedings associated with the certificate. As found by the Commission staff in its comments supporting the companion regulations to KRS § 278.020 (807 KAR 5:120) the purpose of the former change in the statute was to overrule the decision in *Duerson v. East Kentucky Power Cooperative, Inc.*, Ky. 843 S.W.2d

(1992), while the latter explicitly overruled *Satterwhite v Public Service Commission*, Ky. App. 474 S.W.2d 387 (1971).

LG&E participated in both hearings associated with the amendment of the statute and hearings associated with establishing the administrative regulations under which the Commission will administer the statute. Now, after professing at both of those proceedings to support the law, LG&E is taking the position that it does not apply to this proposed line because it has performed some *de minimis* grubbing and foundation work miles away from the property about which this interested petitioner is concerned. LG&E has clearly engaged in the D.A.D. (Decide, Announce, Defend) decision making model with regard to this project, and does not want to justify its actions before the Commission or anyone else.

Because allowing LG&E to avoid the clear intent of both the legislature and this Commission would fly in the face of both the letter and the spirit of the law, the Paddock respectfully requests the Commission to require LG&E to comply with its legal obligations.

### **ARGUMENT**

#### **LG&E'S *DE MINIMIS* PREPARATIONS DOES NOT CONSTITUTE GOOD FAITH CONSTRUCTION UNDER KRS § 278.020.**

LG&E concedes that, if the current law is applied to its planned 138 KV line, it will be required to obtain a certificate of public necessity and convenience under KRS § 278.020. Its sole defense to the application of the statute is its contention that it has "begun construction" on the project. From its response to the Paddock's petition, LG&E apparently intends to establish this contention by displaying a few photographs of wooden form work that someday might support the proposed transmission line. This work was hastily performed in June of this year, and even a casual review of the proposed project area shows little or no work has been done since. Significantly, LG&E has yet to acquire over one and

one half miles of property rights necessary to construct the proposed line, and, under the most optimistic scenarios, it is unlikely to even potentially acquire those rights until sometime in 2005. Accordingly, while LG&E may have dug a few holes, it cannot be said to have meaningfully commenced building *this project* because it has no legal right to utilize the very property owned by the interested property owners protected by KRS § 278.020.

KRS § 278.020, both before and after the 2004 amendments, requires utilities to obtain certificates of public convenience and necessity prior to constructing *any* facility. The certificate lapses within one year of the grant unless the utility begins construction **in good faith**, and continues the prosecution thereof with reasonable diligence. The same good faith standard must be applied throughout the statute in determining whether LG&E has “begun construction” of its facility. While LG&E apparently did some preliminary work in right-of-way it currently possesses, it cannot be said to have commenced construction of the proposed project in good faith, as it does not yet possess the necessary right-of-way to complete its proposed project, nor is it diligently pursuing the completion of the project. Specifically, LG&E has apparently done little, if any, work since the initial clearing and footing work referenced in its response to the petition in this matter. Further, although LG&E has filed eminent domain petitions against the Paddock and other properties needed for completion of the facility, it has failed to serve summons on the Paddock, despite the filing of the commissioner’s award, and has failed to take any steps to determine its right to take the property in other actions in which that right has been challenged. The determination of LG&E’s good faith commencement of construction and its diligence in prosecuting that construction are questions of fact that the Commission will have to resolve as part of this matter.

**LG&E'S "FALSE START" ON THE PROJECT VIOLATES THE SPIRIT OF KRS § 278.020.**

LG&E participated in the legislative process leading to the amendments to KRS § 278.020, and was aware that it would have to submit its plans to the Commission for approval as a result of those amendments. Knowing this, LG&E specifically attempted to prevent the very project specifically discussed at the hearings regarding the amendment to KRS § 278.020 from falling under the application the statute by purporting to commence work on the project when it does not possess critically components of the right of way necessary to complete the project. Apparently, LG&E even had staff members of the Commission visit its right of way in an effort to "confirm" that it really was working on a project it can't finish. In the absence of a binding definition of the phrase "begin the construction" as stated in KRS § 278.020, the Commission is free to look at the substance of LG&E's actions, and can conclude that it is not "begun" to construct a project that isn't capable of completing or even moving beyond where it is today. This is clearly an effort to elevate form over substance, and the issue of whether LG&E has begun construction in good faith and is prosecuting it diligently is an open one.

**EVEN IF LG&E IS FOUND TO HAVE COMMENCED CONSTRUCTION, THE REMEDIAL NATURE OF THE 2004 AMENDMENTS KRS § 278.020 REQUIRES AN APPLICATION FOR THIS PROPOSED LINE.**

The 2004 amendments to KRS § 278.020 provided a new set of procedures for applications for certificates of public necessity and convenience, along with the first set of definitions of the concept of "ordinary extensions" applicable to the existing statute. Accordingly, as the amendments only explain the procedure applicable to the already existing requirement that LG&E obtain its certificate of public convenience and necessity, it is not subject to challenge pursuant to KRS 446.080(3), by application of *Spurlin v. Adkins*,

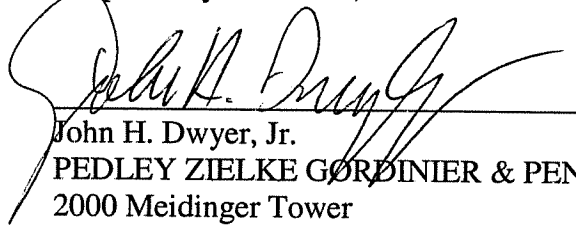
Ky., 940 S.W.2d 900, 901 (1997). In *Spurlin*, the court explained that a statute which only affected procedure governing existing rights and obligations was not subject to the application of KRS 446.080(3), and should be applied to transactions which took place before the effective date of the statute without an expressed declaration of retroactivity.

In this case, the 2004 amendments to KRS § 278.020 deal with only application procedures before the commission and the definition of extensions in the ordinary course of business, a term already existing in the statute, but heretofore undefined. Accordingly, there is no prohibition opposed on applying the 2004 amendments to KRS § 278.020 under the retroactivity provision of KRS § 446.080.

#### CONCLUSION

LG&E wishes to build 138 KV transmission lines over the Paddock's property. Under Kentucky law, it must obtain a certificate from the Commission. Despite LG&E's efforts to extricate itself from this requirement, the Paddock respectfully requests the Commission to require LG&E to comply with its legal obligations before this Commission.

Respectfully submitted,



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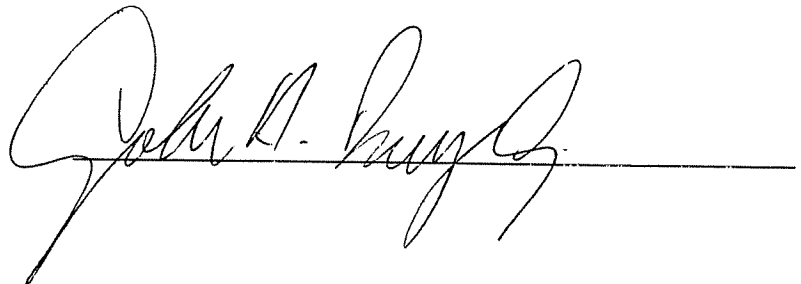
**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing was served by mail this 27<sup>th</sup> day of October, 2004 to:

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A handwritten signature in black ink, appearing to read "John R. Riggs", is written over a horizontal line. The signature is fluid and cursive.