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 CONVENIENCE AND NECESSITY TO CONSTRUCT A 138 KV TRANSMISSION LINE IN ROWAN COUNTY, KENTUCKY	)	CASE NO. 2005-00089

RESPONSE OF INTERVENOR DOUG DOERRFELD IN OPPOSITION TO APPLICATION FOR REHEARING

Comes the Intervenor, Doug Doerrfeld (Doerrfeld) and files this response in opposition to the Application of East Kentucky Power Cooperative (EKPC) for a rehearing of this case. As argued below, EKPC has failed to satisfy the statutory requisites for granting a rehearing, and as such the Order entered on August 19, 2005 denying a Certificate of Public Convenience and Necessity (CPCN) to construct a 6.9 mile 138 kV transmission line connecting the Cranston Substation with the Rowan County Substation in Rowan County, Kentucky should stand.

Standard of Review

EKPC has moved for a rehearing of this case, asserting that the Order imposes unnecessarily higher costs on ratepayers, exposes ratepayers to the risk of cascading blackouts, and is inconsistent with the law, Commission precedent and "public policy." None of these arguments is new, and in fact each was fully presented to the Commission for consideration and has been previously rejected in an Order that is fully consistent with the prevailing case law, Commission precedent, and "public policy."

The standard for a rehearing of an adjudicated case is set out in KRS 387.400, which provides in full that:

> After a determination has been made by the commission in any hearing, any party to the proceedings may, within twenty (20) days after service of the order, apply for a hearing with respect to any of the matters determined. Service of a commission order is complete three (3) days after the date the order is mailed. The application shall specify the matters on which a rehearing is sought. The commission shall either grant or deny the application for rehearing within twenty (20) days after it is filed, and failure of the commission to act upon the application within that period shall be deemed a denial of the application. Notice of the hearing shall be given in the same manner as notice of an original hearing. Upon the rehearing any party may offer additional evidence that could not with reasonable diligence have been offered on the former hearing. Upon the rehearing, the commission may change, modify, vacate or affirm its former orders, and make and enter such order as it deems necessary.

KRS 278.400.

A rehearing is appropriate only when a "party seeks to offer additional evidence that could not, with reasonable diligence, have been previously offered." Where a party to a case that has been fully adjudicated seeks rehearing, a rehearing will not be granted for matters which have "already been fully considered by this Commission." In the Matter of: Saeid Shafizadeh, Complainant v. Cingular Wireless, Defendant, Case No. 2003-00400, 2005 Ky. PUC LEXIS 398 (April 26, 2005). See also: In the Matter of: Adjustment of the Rates of Kentucky-American Water Company, Case No. 2000-120, 2001 Ky. PUC LEXIS 500 (February 26, 2001). The utility bears the burden of exercising reasonable diligence in seeking out and producing evidence to support the requested relief from the Commission, and a rehearing is not the appropriate vehicle for a party to attempt to "provide the documentary support, which clearly existed, that it should have secured and provided as part of its application." In the Matter of:

Adjustment of Gas Rates of the Union Light, Heat and Power Company, Case No. 2001-00092, 202 Ky. PUC LEXIS 97 (March 13, 2002).

Against the backdrop of Commission precedent recognizing that a rehearing request is not the appropriate vehicle for relitigating matters already determined nor for introducing evidence that could have, with reasonable diligence, been produced and which bears on the matters decided in a material manner, it is apparent that the EKPC petition for rehearing fall shorts of the mark.

SUMMARY OF OPPOSITION TO REHEARING REQUEST

EKPC has failed to meet its burden of providing a basis, consistent with the statute, to grant a request for rehearing. The company claims that "based upon data obtained since the formal hearing" the cost of redispatch will be between 24 million and 221 million dollars. Yet EKPC acknowledges that the issue of possible increases in cost due to dispatching gas-fired power from the JK Smith Plant was known and was considered in the case, and that the company had done so in the past on "numerous occasions" to address transmission constraints. EKPC had the data, and should have reasonably anticipated that the certificate might be denied, and thus failed to justify or explain why the "new data" could not have been reasonably developed and presented at the hearing.

Similarly, the EKPC argument that any delay in the completion of the proposed line will create a risk of "cascading blackouts" is grounded in the MSB Energy Associates and ECAR Assessment reports, both of which were available to the Commission and were already considered by the Commission.

Finally, the EKPC argument that the Commission Order is contrary to "the law," past practices of the Commission and to "Public Policy" are merely efforts to obtain a second bite at the apple by rearguing with more emphasis the same legal and policy positions that have been fully briefed to and considered by the Commission. They do not provide a basis for rehearing.

EKPC's Claim of Higher Generation Redispatch Costs
Does Not Justify Rehearing

EKPC first argues that the denial of the construction certificate for the Cranston-Rowan project will, according to "data obtained since the formal hearing", cost between $24 million and $221 million dollars in generation redispatch costs, based on an "estimated two to three year delay in obtaining approval of a new Environmental Assessment" for the new route suggested by the Commission at the hearing.

Viewed in the light most generous to EKPC, the claim that any delay in approval of a Cranston-Rowan line will impose higher costs in order to maintain system reliability through operation of the JK Smith combustion turbines, was already known to the Commission and in fact *was* capable of being calculated with a modest modicum of effort. EKPC acknowledges that "redispatch costs were known to be a possibility at some level[,]" EKPC Application for Rehearing at 4. In fact, the Rusch Exhibit 1, titled "Final Report: Justification of Cranston-Rowan 138 kV Line" (April 23, 2002) expressly considered both the JK Smith turbine and imported Cinergy power as alternative dispatch scenarios to construction of the new line. Rusch Report, at p. 3-2.

The utility also acknowledges that the transmission constraints have in the past caused the utility to dispatch the higher-cost JK Smith power or purchased power; in fact the Warner Affidavit makes mention of the fact that "EKPC on numerous

occasions, has had to reduced coal-fired baseload generation at Spurlock Power Station and replace it with much higher priced gas-fired combustion turbine generation at J.K. Smith Station or purchased power." Warner Affidavit, para 3 (Emphasis added). Given the fact that the company has had to dispatch noneconomically "on numerous occasions" to address the transmission constraints, and that it has known since the statute was amended in 2004 to require a CPCN for this type of transmission line, that the certificate might be denied, it had all of the necessary information to have enabled it to provide in more detail what it acknowledges was argued before the Commission in general terms – that denial of the requested certificate might cause it to have to dispatch higher-cost power for a longer time under certain scenarios until a second connection is established between Cranston and Rowan Substations. The decision of the utility not to have provided hard figures (if an estimate of such breadth could be considered a hard figure) does not warrant rehearing, for as the Commission noted in In the Matter of: Adjustment of Gas Rates of the Union Light, Heat and Power Company, Case No. 2001-00092, 202 Ky. PUC LEXIS 97 (March 13, 2002), a rehearing is not the appropriate vehicle for a party to attempt to "provide the documentary support, which clearly existed, that it should have secured and provided as part of its application." Id.

EKPC claims that the commission has "attempted to change the rules" so that least cost planning is no longer the standard; when in fact the Commission's decision is fully consistent with both prior Commission Orders concerning mitigation of impacts of new lines as being a component of that "cost", In the Matter of An Investigation Of The Proposed Construction Of 138 KV Transmission Facilities In Mason And Fleming

Counties By East Kentucky Power Cooperative, Inc. Case No. 2003-00380 2003 Ky. PUC LEXIS 1106, (December 30, 2003); and the controlling case law concerning the avoidance of an "unnecessary multiplicity of physical properties." Kentucky Utilities Company v. Public Service Commission, Ky., 252 S.W.2d 885, 892 (1952).

EKPC's request for rehearing due to the possibility of higher dispatch costs fails to meet the standard of providing new evidence that could not, with reasonable effort, have been produced during the initial hearing.

The Argument that There Is A Risk of "Cascading Blackouts" Until The Cranston-Rowan Line Can Be Constructed Does Not Justify Rehearing Since The Information Was Known To And Considered By The Commission In The Initial Order Denying The CPCN

EKPC next argues that the denial of the certificate "exposes end-use ratepayers to the very real risk of cascading blackouts." This argument does not provide a basis for rehearing, since as EKPC acknowledges, the East Central Area Reliability Council Transmission Assessment was part of the record before the Commission and described the "potential for cascading blackouts in northeastern Kentucky if the Cranston-Rowan line is not constructed."

Intervenor takes exception to the repeated suggestion that it is the Commission's Order that "has put northeastern Kentucky at risk of cascading blackout for the two to three years that may be required." In fact, the possibility of denial of a requested CPCN is a reasonably foreseeable outcome in a field as pervasively regulated as that of a public utility. The timing and proposed routing alternatives for the construction of the transmission line was within the control of EKPC, and as the transmission constraints in this area did not arise overnight or in an unexpected fashion, it is the decision of the utility with respect to the timing of upgrading of the transmission

capacity in this area, and the utility's decision not to consider a range of reasonable alternatives that included use of existing rights-of-way and transmission lines and corridors, that is responsible for the Commission's denial of the CPCN request and for any service interruptions or additional costs associated with a more complete consideration of alternatives. The utility has known since June of 2004 that a CPCN would be required, and has had since that time to prepare a comprehensive study of alternatives that would include co-location along existing corridors. It has known since 1952, when the Kentucky Utilities Company v. Public Service Commission decision was published that avoidance of unnecessary multiplicity of physical properties was one of the benchmarks for issuance of a CPCN.

Failing to provide new evidence on this issue, the application for rehearing should be denied.

EKPC Is Incorrect in Asserting That The Commission's Order Is Contrary To Law, And Rehearing Is Not An Appropriate Mechanism For Rearguing The Merits Of A Case

EKPC argues that the Commission's Order is contrary to the decision of Kentucky Utilities v. Public Service Commission, 252 S.W.2d 885 (1952) since the only appropriate consideration for granting a Certificate of Public Convenience and Necessity is cost minimization, and the "wasteful duplication" should not be used as a standard to impose higher costs. According to EKPC, the Commission's Order elevates environmental considerations over other concerns and is in excess of the authority of the Commission for considering such matters. Finally, EKPC claims that the Commission is bound by law to accept the route or location of the line as determined by the U.S. Forest Service.

Initially, EKPC has failed to satisfy the threshold for rehearing, since it has provided no new evidence, but instead is seeking to reargue the appropriate standard for approval of a CPCN and to raise a novel argument which certainly could have been presented initially, to wit, that the Forest Service grant of a special use permit somehow usurps the Commission's authority under Chapter 278 and compels Commission acceptance of a route through the national forest.

EKPC is mistaken on each count.[1]

The Commission's Order is fully consistent with the legal standard for awarding a Certificate of Public Convenience and Necessity. Though EKPC appears believes that cost minimization should be the only consideration in issuance of a CPCN, the case law suggests otherwise. In Kentucky Utilities Company v. Public Service Commission, Ky. 390 S.W.2d 168 (1965), the Court of Appeals noted that "cost is only one factor to be considered." Id., at 174. Citing to the 1952 decision relied upon by EKPC, the Kentucky Utilities Court rejected the suggestion that the CPCN for the Big Rivers plant should have been denied because KU could have expanded its transmission lines to serve the load at a lower cost for line construction. The standard for "wasteful duplication" does not, as implied by EKPC, embrace only the question of lowest cost, for the likely answer will be a straight line from point A to B, but instead contemplates a more complex assessment, including "an excess of capacity over need, an excessive investment in relation to

[1] As to EKPC's arguments regarding the proposed alternatives discussed by Dr. Mendl at the hearing, Intervenor would note only that the Commission has not dictated a particular route, but instead has directed a more thorough consideration of alternatives in furtherance of an obligation to assure that the utility meets its burden of demonstration that the new corridor and new lines will not result in wasteful duplication of facilities. The Commission order leaves open the possibility that the proposed line is the best option but requires the utility to complete a more thorough assessment, including comprehensive consideration of the use of existing corridors.

productivity or efficiency, or an unnecessary multiplicity of physical properties."

Kentucky Utilities, 390 S.W. 2d at 173.

EKPC claims that it lacked fair notice of the Commission's position with respect to the interpretation of the 2004 Amendment to KRS 278.020, yet in direct response to comments from EKPC and Big Rivers that the statutory amendment effected no change in the considerations to be evaluated in determining whether to issue a CPCN, the agency responded that:

> The PSC believes that the legislative intent demonstrates that the views of Big Rivers and EKPC are far too limited. This issue in Kentucky has previously been guided by judicial decision, The key cases are *Satterwhite v. Public Service Commission,* 474 S.W.2d 387 (Ky. 1972), and *Duerson v. East Kentucky Power Cooperative, Inc.,* 843 S.W.2d 340 (Ky. Ct. App. 1992). *Satterwhite* decided two issues: (1) that individual landowners whose land was to be crossed by the transmission line are not interested persons and thus are not entitled to intervene because (2) the only issues were whether there is a need and demand for the service and whether its construction would be a wasteful duplication of facilities. In *Duerson,* the court ruled that **all** transmission lines are extensions in the ordinary course of business and thus, under the exception of KRS 278.010, do not require a certificate.
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> In requiring utilities to file a certificate case for transmission lines of a certain size and length, Chapter 75 (Senate Bill 246) directly overruled *Duerson.* The provision specifying that individually-affected landowners are interested persons who may intervene likewise directly overruled the contrary result in *Satterwhite.* Moreover, the latter provision expanded the issues the PSC may consider when such a landowner intervenes. If the only issues the landowner could raise were the ones delineated in Big Rivers' comments and in *Satterwhite,* allowing individual landowner intervention would make no sense. In fact, the legislative debate confirms a contrary intent. For example, in his comments in this rulemaking proceeding, Scott Hagan specifically talked about his testimony in committee on Senate Bill 246, and he pointed out, "Every legislator who spoke that day in committee indicated that the passage of this bill was intended for me and every property owner like me who deserves a hearing and an opportunity for an independent body (the Public Service Commission) to review the need for such a dramatic investment and **the wisdom of its placement in the community.** (Emphasis original). PSC Staff was present and heard similar testimony and legislators' comments indicating an intent to overrule the limited issue requirement in *Satterwhite.*
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> The PSC believes the proposed regulation allowing individual landowners to

intervene and raise their property-specific issues in a transmission certificate case is in furtherance of the legislative intent of the new statutory provisions.

Statement of Consideration Relating To 807 KAR 5:120 (October 15, 2004), p.4.

The Commission placed the jurisdictional utilities on notice that Duerson and Satterwhite are no longer controlling after the legislative amendments to KRS 278.020(2) and (8), and that a site-specific concerns would be evaluated in determining whether to issue a certificate. In order to give meaning to the requirement of a Certificate of Necessity and Public Convenience in this context, and to give substance to the right of local public hearing and to the newly-imposed obligation of the utility to justify such lines, the Commission properly considered whether applicant has demonstrated that due consideration, consistent with the project purpose and cost, has been given to location, configuration and proposed maintenance of lines and corridors so as to minimize adverse property, scenic and environmental impacts, and that all reasonable alternatives have been considered, including co-location of the line along existing utility rights-of-way, and that adverse effects have, to the extent practicable, been mitigated. This approach is fully consistent with prior Commission evaluation of the impact of transmission lines on property owners, In the Matter of An Investigation Of The Proposed Construction Of 138 KV Transmission Facilities In Mason And Fleming Counties By East Kentucky Power Cooperative, Inc. Case No. 2003-00380, 2003 Ky. PUC LEXIS 1106 (December 30, 2003) and with the long-recognized obligation, independent of cost considerations, to avoid "an unnecessary multiplicity of physical properties," Kentucky Utilities Company v. Public Service Commission, Ky. 390 S.W.2d 168, 173 (1965), "multiple sets of right of ways, and a

cluttering of the land with poles and wires." Kentucky Utilities v. Public Service Commission, Ky., 252 S.W.2d 885, 892 (1952).

As to the suggestion that the Commission is somehow bound by the issuance of a Special Use Permit by the U.S. Forest Service for a particular route, the suggestion is as novel as it is erroneous. As the record makes clear, the Forest Service accepted the proposed routing offered by the *applicant*, and then evaluated a series of alternatives *to that requested* route as required under the National Environmental Policy Act. The Forest Service did not dictate the route, and as EKPC suggests elsewhere in its Rehearing Application, alternative routes that affect Forest Service land may be proposed through a new application for a Special Use Permit and may be evaluated under the same procedures. There is no authority in state or federal law for the proposition that approval of a Special Use Permit for a particular route requested by a private party binds the Commission to that route or precludes the Commission from finding that other alternatives should have been evaluated in more detail to meet the threshold of avoiding wasteful duplication of physical properties.

Conclusion

For the reasons stated herein and in light of the standard for granting a petition for rehearing, Intervenor Doug Doerrfeld respectfully requests that the Application for Rehearing and Request for Oral Argument be denied.

Respectfully submitted,

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September 22, 2005

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing served by first-class mail upon the following individuals, and on counsel for EKPC and PSC electronically, this 22nd day of September, 2005:

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