

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 )

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PUBLIC SERVICE  
COMMISSION

**POST-HEARING BRIEF**

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INTRODUCTION

At the conclusion of the hearing on the application of East Kentucky Power Cooperative (EKPC) for a Certificate of Public Convenience and Necessity (CPCN) for the construction of a 138 kV transmission line in Rowan County, Kentucky, the requirement for post-hearing briefs was waived and a deadline of August 1, 2005 was established for any post-hearing briefs that any party might *elect* to file. Intervenor Doug Doerrfeld (Doerrfeld) tenders this post-hearing brief on the issue of the criteria for review of a CPCN request under KRS 278.020(2).

LEGAL BACKGROUND

Against the backdrop of several controversial transmission line issues across the Commonwealth, the 2004 Kentucky General Assembly considered and enacted a bill creating a process for issuance of a certificate of public convenience and necessity from the Public Service Commission for construction of certain transmission lines.

Introduced as House Bill 639 in the House on February 27, 2004 and as Senate Bill 246 (SB 246) in the Senate that same day, the bill proposed to create two new subsections of KRS 278.020. The first, a new subsection (2), read in full that:

- (2) For the purposes of this section, construction of any electric transmission line of on hundred thirty-eight (138) kilovolts or more and of more than five thousand two hundred eighty (5,280) feet in length shall not be considered an ordinary extension of an existing system in the usual course of business and shall require an certificate of public convenience and necessity. However, ordinary extensions of existing systems in the usual course of business not requiring such a certificate shall include:
- (a) The replacement or upgrading of any existing electric transmission line; or
  - (b) The relocation of any existing electric transmission line to accommodate construction or expansion of a roadway or other transportation infrastructure; or
  - (c) An electric transmission line that is constructed solely to serve a single customer and that will pass over no property other than that owned by the customer to be served; or
  - (d) An electric transmission line proposed by a corporation organized under KRC Chapter 279.<sup>1</sup>

The second, a new subsection (8), provided that:

In a proceeding on an application filed under this Act, an interested person may request intervention, and the commission shall, if requested, conduct a public hearing in a county in which the transmission line is proposed to be constructed. The commission shall issued its decision no later than one hundred twenty (120) days after the application is filed. The commission may utilize the provisions of KRS 278.255(3) if, in the exercise of is discretion, it deems it necessary to hire a competent, qualified, and independent firm to assist it in reaching its decision. The issuance by the commission of a certificate that public convenience and necessity require the construction of an electric transmission line shall be deemed to be a determination by the commission that, as of the date of issuance, the construction of the line is a prudent investment.

Both HB 639 and SB 246 were heard in the respective committees which they bill had been assigned, and in both chambers the bill was replaced by a committee

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<sup>1</sup> KRC Chapter 279 governs “rural electric and rural telephone cooperative corporations.”

substitute.<sup>2</sup> The committee substitute, which was signed into law as Senate Bill 246 on April 7, 2004, made two changes to the initial bill: the deletion of the exemption in subsection (2)(d) for transmission lines proposed by rural electric cooperatives, and revisions to subsection (8), noted below:

In a proceeding on an application filed *pursuant to this section* under this Act, an interested person, ***including a person over whose property the proposed transmission line will cross***, may request intervention, and the commission shall, if requested, conduct a public hearing in a county in which the transmission line is proposed to be constructed, ***or, if the transmission line is proposed to be constructed in more than one county, in one of those counties***. The commission shall issue its decision no later than ***ninety (90)*** ~~one hundred twenty (120)~~ days after the application is filed, ***unless the commission extends this period, for good cause, to one hundred twenty (120) days***. The commission may utilize the provisions of KRS 278.255(3) if, in the exercise of its discretion, it deems it necessary to hire a competent, qualified, and independent firm to assist it in reaching its decision. The issuance by the commission of a certificate that public convenience and necessity require the construction of an electric transmission line shall be deemed to be a determination by the commission that, as of the date of issuance, the construction of the line is a prudent investment.

KRS 278.020 (Italics, strikethroughs and bold print provided to reflect changes in text effected by Senate Committee Substitute).

On January 14, 2005, 807 KAR 5:120, the regulation adopted by the Commission to implement SB 246 became effective.

### SUMMARY OF ARGUMENT

The enactment of Senate Bill 246 by the 2004 General Assembly was intended to enlarge the scope of issues and concerns considered by the Commission in

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<sup>2</sup> The House version of the measure, HB 639, was heard before the House Tourism Development and Energy Committee on March 12, and House Committee Substitute to HB 639 was favorably reported to the House Rules Committee on March 18, and thereafter recommitted to House Appropriations and Revenue Committee in favor of its identical counterpart SB 246. SB 246 was heard by the Senate Agriculture and Natural Resources Committee and a Senate Committee Substitute was approved on March 11, passed as part of the Consent Orders by the Senate on March 17, was reported by the House Committee on March 24, passed by the full House on March 27 and was signed into law on April 7, 2004.

reviewing the construction of certain transmission lines, both by creating a *prior* right of agency and public review of new or relocated transmission lines above a certain capacity and length and a corresponding obligation on the utility to *justify* the new line, and by enfranchising those interested in the proposed lines, *including* property owners over whose lands the lines would be located. Where formerly the Commission confined itself principally to issues of electrical necessity and duplication of services, the amendments to KRS 278.020 reflect a clear legislative intent that the concerns of landowners and other interested parties regarding the adverse effects of the routing and construction of these lines *be* evaluated in determining whether and under what conditions to approve the request for construction. In this case, the lack of adequate assessment of two alternatives; the modified MSB alternative and the alternative route along the edge of the western right-of-way on I-64; requires denial of the requested certificate.

## ARGUMENT

### I. SENATE BILL 246 INTENDED TO MODIFY PRE-EXISTING AGENCY PRACTICE CONCERNING REVIEW AND APPROVAL OF TRANSMISSION LINES BY LIMITING EXEMPT LINE EXTENSIONS AND REQUIRING CONSIDERATION OF IMPACTS ON LANDOWNERS AND THE PUBLIC

The amendments to KRS 278.020 were adopted with a specific legislative intent, and it is the obligation of the agency to give effect to that intent. In viewing the amendments creating KRS 278.020(2) and (8), the established rules of statutory construction “presume that the legislature is aware of the state of the law at the time it enacts a statute, Shewmaker v. Commonwealth, Ky. App., 30 S.W.3d 807, 809 (2000),

including judicial construction of prior enactments. Button v. Hikes, 296 Ky. 163, 176 S.W.2d 112, 117 (1943) ("It is presumed that the legislature is acquainted with the law; that it has knowledge of the state of it upon subjects upon which it legislates; that it is informed of previous legislation, and the construction it has received.") St. Clair v. Commonwealth, Ky., 140 S.W.3d 510, 570 (2004); See also: Haven Point Enterprises, Inc. v. United Kentucky Bank, Ky., 690 SW2d 393 (1985), Commonwealth v. Fox, 48 S.W.3d 24 (2001).

SB 246 was not intended to ratify the earlier judicial interpretations of KRS 278.020 as it applied to review and approval of electric transmission lines, but instead to supersede and to reverse what had been the state of Kentucky law concerning the rights of landowners who might be adversely affected by the siting of transmission lines.

Among those was the case of Satterwhite v. Public Service Commission, Ky., 474 S.W.2d 387 (1971) where the Court considered and rejected the request of landowners over whose lands an easement had been condemned by Kentucky Utilities for location of a transmission line that a certificate of convenience and necessity issued KU be set aside and that the matter be reconsidered at a new hearing in which the petitioners be entitled to participate. The Court rejected the proposition of the owners of lands over which would pass the transmission lines that they were "parties interested" within the meaning of the provision of KRS 278.020, concluding that

The trouble with this contention is that the question of what particular lands the proposed transmission line would cross was not in issue before the Public Service Commission. The application included a map showing the general course and direction of the proposed lines, but the specific paths the lines might follow were not indicated or suggested, and the order granting the certificate did not purport to fix the specific paths for the lines. The Public Service

Commission was not concerned with that detail because it was not relevant to the issue of convenience and necessity. The considerations on that issue were the adequacy of existing service, the economic feasibility of the proposed facilities, the avoidance of wasteful duplication, and the financial ability of the appellant. See *Kentucky Utilities Co. v. Public Service Commission, Ky.*, 252 S.W.2d 885.

Furthermore, the landowners over whose lands K.U. chose to build the transmission lines, *after* the certificate was granted, were not and could not be "parties interested" in the application for the certificate, within the meaning of KRS 278.020, because when the application was being considered they had not been determined. Certainly every landowner in Jessamine and Fayette Counties over whose lands K.U. *might* choose, after the certificate was granted, to build the transmission lines, could not reasonably be held entitled to notice of hearing on the application for the certificate.

SB 246 reflects a specific intent to enfranchise those parties that the Satterwhite Court had determined to be outside the scope of agency consideration. Specifically, KRS 278.020(8) allows "any interested person including a person over whose property the proposed transmission line will cross" a right of intervention and to request a local hearing," effectively nullifying the holding in Satterwhite both by specifically including landowners directly impacted by the line routing in the review process, and also by requiring that the specific path of the line be identified in the application for a CPCN.<sup>3</sup>

It is equally apparent that the General Assembly, in amending KRS 278.020(2) and (8), sought to nullify the effect of Duerson v. East Kentucky Power Cooperative, Ky.App., 843 S.W.2d 340 (1992). In that case the Court rejected a challenge by landowners to the right of EKPC to condemn rights-of-way for the purpose of a transmission line. Among the claims was that EKPC could not condemn unless first obtaining a "Certificate of Public Convenience and Necessity" from the Public Service

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<sup>3</sup> Obviously, since subsection (8) allows intervention by any interested person including the landowner over whose property the line will cross, it is contemplated that the application must include identification of the specific route for which the certificate is sought.

Commission. Considering appellants' argument that a certificate of convenience and necessity is required, the Court determined that:

the transmission lines are extensions in the ordinary course of business and, under [KRS 278.020(1)], do not require a certificate of convenience and necessity. The statute provides for two exceptions: retail service connections and ordinary course of business extensions. It is our view that a correct interpretation of the statute requires that the latter exception applies to all utilities. There is nothing in the wording to dictate otherwise. As such, the power lines under consideration clearly fall within this latter exception.

In an effort to comply with the statute, the commission has adopted a regulation defining extensions in the ordinary course of business. That regulation (807 KAR 5:001, § 9(3)) reads as follows:

(3) Extensions in the ordinary course of business. No certificate of public convenience and necessity will be required for extensions that do not create wasteful duplication of plant, equipment, property or facilities, or conflict with the existing certificates or service of other utilities operating in the same area and under the jurisdiction of the commission that are in the general area in which the utility renders service or contiguous thereto, and that do not involve sufficient capital outlay to materially affect the existing financial condition of the utility involved, or will not result in increased charges to its customers.

We are of the opinion that the foregoing statute and regulation are designed to protect the public against exorbitant utility rates emanating from unnecessary and duplicitous power facilities. We think it unreasonable to conclude that their purpose lies in protecting landowners from eminent domain.

As we examine the record, there is more than ample evidence supporting the fact that the transmission lines in question comport with the regulation and statute. For that reason, we conclude that the defense that appellee has not obtained as a precondition to condemnation a certificate of convenience and necessity has no merit.

Duerson, *supra*, at 342.

Through the enactment of SB 246, the General Assembly removed electric transmission line construction from the category of “ordinary extensions of existing systems in the usual course of business” and elevated the review and approval of 138 kV lines of over a mile in length by requiring the obtaining of a Certificate of Public

Convenience and Necessity *and* by explicitly involving affected landowners and *other* interest parties in that review process. In so doing, the General Assembly telegraphed to the Commission that Satterwhite and Duerson were no longer controlling with respect to this class of high voltage transmission lines, and that the specific concerns of landowners and other interested parties should be factored in the decision to grant, deny or condition a CPCN, as this Commission had done 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 (December 30, 2003); 2003 Ky. PUC LEXIS 1106.

II. CONSIDERATION OF ALTERNATIVES AND MITIGATION  
OF ADVERSE IMPACTS SHOULD BE CRITERIA WEIGHED IN THE  
ISSUANCE OF CERTIFICATES FOR TRANSMISSION LINE CONSTRUCTION.

Having seen that the enactment of KRS 278.020(2) and (8) effected significant changes in the *procedures* for construction of certain transmission lines, by removing those lines from the exempted category of KRS 278.020(1) extensions “in the usual course of business” and instead requiring the utility to *justify* the line construction; by requiring that the specific line routing be disclosed; and by providing for intervention by landowners and other interested parties in the review process, the question remains whether the General Assembly intended the concerns of landowners and other interested persons to be included among the factors evaluated in determining whether to grant, deny or condition the CPCN. Consistent with established rules of statutory construction, the Commission should conclude that the concerns of landowners and other interested parties regarding the property and other adverse effects of



transmission line routing are to be considered in the review of applications for certificates under KRS 278.020(2).

The General Assembly has codified the common law principle at KRS 446.080(1) that all statutes are to be liberally construed with a view “to promote their objects and carry out the intent of the legislature[.]” While certainly the utility might prefer to continue to exclude consideration of property and ecological impacts and selection of routes from the CPCN process, it would lead to an absurd result to read KRS 278.020(2) and (8) so narrowly. The General Assembly cannot have intended to enfranchise the landowner and other interested parties by creating a new right to be heard and imposing on the utility a new duty to justify new line construction, only to have intended that the concerns voiced by those parties be ignored and dismissed as being beyond the scope of inquiry. Instead, the historic policy considerations of the adequacy of existing service, the economic feasibility of the proposed facilities, the avoidance of wasteful duplication, and the financial ability of the utility that the Commission had read into the undefined statutory phrase “certificate of public convenience and necessity” were intended by the General Assembly to be applied in conjunction with consideration of non-electrical impacts, so as to more coherently consider the “public convenience” in the line routing and the “necessity” in both electrical and physical terms.

In Scoenbachler v. Minyard, Ky., 110 S.W.3d 776, 783 (2003), the Court implied into statute an obligation to file an income statement for domestic support purposes, reasoning that while not explicitly required,

[n]o rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that significance and effect shall, if possible, be

accorded to every part of the Act." Additionally, "[a]ll statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature[.]..." And, it is axiomatic that, when interpreting a provision of a statute, a court should not, if possible, adopt a construction that renders a provision meaningless or ineffectual' or interpret a provision in a manner that brings about an absurd or unreasonable result.'

Id. at 783.

To construe KRS 278.020(2) and (8) as leaving unaffected the scope of inquiry in the issuance of the certificate, is to presume that the legislature intended to create a sham procedural right in which the public, particularly affected landowners, could participate and voice their concerns, but that those concerns would not be considered relevant to the decision on the certificate. Such a stilted construction of the statutory amendments would render the hearing process a hollow exercise in futility, and would further frustrate rather than enfranchise affected landowners.<sup>4</sup>

As argued above, the General Assembly is presumed to have been aware of the existing state of the law when it amended KRS 278.020, including this Commission's decision in 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 (December 30, 2003) wherein EKPC was directed to "make every reasonable effort to mitigate any negative impact that

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<sup>4</sup> Anticipating that the utility might argue that the right of intervention was intended only to allow the landowner to participate in the review of the "electrical" necessity of the line and not to raise routing or other concerns, it is a dubious proposition that the legislature intended that the public and landowner participate in order to provide independent expert testimony on the adequacy of existing service and other, historic considerations; particularly since the General Assembly authorized the agency to *hire* that expertise as needed in KRS 278.020(2).

construction of the proposed transmission facilities may have on the affected property owners[.]” Id. at 3.

The enfranchisement of “a person over whose property the proposed transmission line will cross” and other interested parties into a new hearing process on what had formerly been an exempt utility decision, was intended obviously as a vehicle for presenting those concerns to the Commission in order that they be evaluated in determining whether and under what conditions to issue a Certificate.<sup>5</sup>

Finally, the narrow view of KRS 278.020(2) and (8) as allowing consideration only of electrical demand and avoidance of wasteful duplication, has been rejected by the Commission in the adoption of the regulations implementing SB 246. In the Statement of Consideration filed with the Legislative Research Commission on October 15, 2004 on 807 KAR 5:120, the Commission rejected the contention of Big Rivers that the only issues in the case “are whether there is a need and demand for the service and whether [the line] construction would be a wasteful duplication of facilities.” 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

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<sup>5</sup> Further indicia that concerns beyond the traditional “electrical necessity” were to be considered is seen in the legislative record of SB 246. The bill was presented on the House Floor by Representative Mike Denham, who filed but did not call a floor amendment (HFA2) that would have required the Commission to “consider the effects of the transmission line on agricultural land[.]” Presumably, had Rep. Denham believed the amendment necessary to allow consideration of those impacts he would have called the amendment.

*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.

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*.

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.

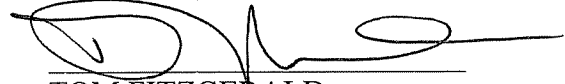
The Commission has thus adopted the position that Duerson and Satterwhite are no longer controlling after the legislative amendments to KRS 278.020(2) and (8), and that a broader range of physical and ecological concerns are to be included in determining whether to issue a certificate. In order to give 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 should evaluate whether the 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, 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.

CONCLUSION

WHEREFORE, on the basis of the entire record before the Commission and against the legal standards of KRS 278.020(2) and (8), Intervenor Doug Doerrfeld respectfully requests that the Certificate of Public Convenience and Necessity be denied without prejudice at this time for want of adequate evaluation of alternatives of potentially less overall landowner and environmental impact.

Respectfully submitted,



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August 1, 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 1st day of August, 2005:

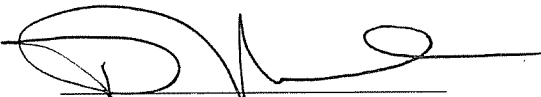
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