

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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IN THE MATTER OF:

OCT 21 2005

APPLICATION OF EAST KENTUCKY)
POWER COOPERATIVE FOR A)
CERTIFICATE OF PUBLIC CONVENIENCE) DOCKET NO.
AND NECESSITY FOR CONSTRUCTION) 2005-00207
OF TRANSMISSION FACILITIES IN)
BARREN, WARREN, BUTLER, AND)
OHIO COUNTIES, KENTUCKY)

PUBLIC SERVICE
COMMISSION

MEMORANDUM IN REPLY TO APPLICANT’S RESPONSE
TO INTERVENORS’ MOTION TO DISMISS

Intervenors, Carroll Tichenor, Doris Tichenor, John Colliver, and H. H. Barlow, by counsel, hereby reply to the response of East Kentucky Power Cooperative (“Applicant”) to Intervenors’ Motion to Dismiss. The Applicant’s response incorrectly states that no law requires it to obtain all environmental permits and approvals before it files an application with this Commission. Response, at 7. In reality, the regulations of the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. (“NEPA”), require the Applicant, through its funding source—the Rural Utility Service of the United States Department of Agriculture—to complete certain NEPA requirements before selecting and proposing its preferred route. 40 C.F.R. § 1501.

Intervenors understand that this Commission believes that it does not have jurisdiction over “environmental matters” and that, as a result, it cannot require the Applicant to obtain environmental permits prior to filing its application for certification. The Commission also has stated that the relationship of environmental permitting to this certification process is akin to the “chicken and egg” conundrum: which comes first? The Commission has explained:

If they apply to the Commission first, get a CPCN, and then apply for other permits and one or more of those later ones is rejected, they may well have to reapply here. On the other hand, if they get their other permits first, the Commission may reject the proposed route and, in that case, they would have to reapply for the other permits. In the end, the order in which they choose to apply for the different approvals is at the discretion of the utilities.

Order, Case Number 2005-00142, p. 4. This conclusion, respectfully, is plainly wrong.

As demonstrated below, there is no “chicken or egg” problem. Moreover, the Commission has jurisdiction to dismiss applications that are incomplete. An application for certification that has not satisfied NEPA requirements is incomplete, and the Commission can safely dismiss that application as failing to provide sufficient notice to landowners (specifically, those who may be affected following any route changes required in the NEPA process) and as being generally unripe for the Commission’s review.

The law resolves both concerns of the Commission. First, NEPA regulations require that certain NEPA requirements be satisfied at the earliest stage, thus indicating that applications lacking requisite NEPA approvals are not complete and therefore not properly before the Commission. Second, NEPA regulations require that NEPA be satisfied before the filing of an application for certification, thus eliminating the “chicken or egg” concern.

Section 1501.2(d) of the NEPA regulations requires agencies to provide for the early application of NEPA to cases where actions are planned, as here, by non-Federal entities and are, at some stage, subject to federal approval of permits, loans, loan guarantees, insurance or other actions.

Specifically, section 1501.2(d) requires federal agencies to take steps toward ensuring that private parties and state and local entities initiate environmental studies as soon as federal involvement in their proposals can be foreseen. This section is intended to ensure

that environmental factors are considered at an early stage in the planning process and **to avoid the situation where the applicant for a federal permit or approval has completed planning and eliminated all alternatives to the proposed action by the time the EIS process commences or before the EIS process has been completed.** . . . Through early consultation, business applicants and approving agencies may gain better appreciation of each other's needs and foster a decisionmaking process which avoids later unexpected confrontations. . . .

Council on Environmental Quality, Executive Office of the President, *Memorandum to Agencies: Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026 (Jan. 24, 2000) (emphasis added).

Furthermore, satisfying NEPA before selecting a preferred route and filing an application ensures that public input is meaningfully incorporated into the Applicant's route selection decisionmaking. This chronology would provide the degree of public opportunity that the legislature intended in adopting KRS 278.020. Certainly, it would provide more opportunity than is currently provided in this 120-day shotgun proceeding. Courts have recognized as much:


The importance of an EA or an EIS lies not merely in the aid it may give to the agency's own decisionmaking process, but also in the notice it gives the public of both the environmental issues the agency is aware of and those it has missed. The EA or EIS should provide a springboard for public comment, bringing to the agency viewpoints and options it might otherwise lack. *See Calvert Cliffs' Coordinating Comm.*, 449 F.2d at 1114; 40 C.F.R. § 1501.2(d)(2).

Ill. Commerce Com. v. Interstate Commerce Com., 848 F.2d 1246, 1260 (D.C. Cir. 1988). All parties in this case have acknowledged that the 120-day whirlwind schedule for these proceedings provides little opportunity for the parties, let alone the public, to get up to speed on what is being proposed and what obstacles and concerns exist relating to that proposal, and to respond to the issues presented. Requiring an applicant to satisfy NEPA requirements before filing its application would ensure that the public had its statutorily-mandated opportunity to comment.

The Applicant has failed to satisfy NEPA requirements before filings its application.

Accordingly, the application must be dismissed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was duly served by mailing, first class postage prepaid to the following:

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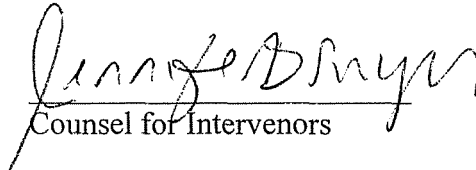
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This the 18th day of October, 2005.


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