

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE
COMMISSION

IN THE MATTER OF:

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)

**INTERVENORS' RESPONSE TO EKPC'S MOTION FOR AN ORDER DECLARING
AND AFFIRMING THE COMMENCEMENT DATE OF THE ONE-YEAR PERIOD
WITHIN WHICH CONSTRUCTION MUST BEGIN UNDER THE CERTIFICATE OF
CONVENIENCE AND NECESSITY**

Reversing its long-standing unwillingness to admit the applicability of federal environmental laws in this case, EKPC now asks the Commission to take notice of the requirements of those laws in order to grant EKPC reprieve from KRS 287.020(2), which vests in the Commission a non-discretionary obligation to void all certificates of public convenience and necessity under which construction has not begun within one year. The motion should be denied for three reasons. First, EKPC's delay is not a function of its failure to obtain "grant or consent." Rather, it is a result of EKPC's failure to obtain federal financing. Second, the definition of the term "exclusive of," according to Webster's Dictionary, is "not allowing for." And, third, EKPC has refused to comply with the applicable federal environmental laws—from which it now seeks benefit—and caused the delay that it now asks the Commission to excuse. Surely, the legislature did not intend to allow utilities to purposefully extend the period during which construction must begin in this way. The one-year requirement is mandatory, no exception to the requirement applies in this case, and EKPC is fully responsible for failing to meet the requirement. As a result, EKPC's motion for reprieve must be denied.

1. EKPC seeks federal financing, not a “grant or consent”

EKPC argues that the language of KRS 278.020(1) allows the Commission to lift the one-year requirement. KRS 278.020(1) states: “Unless exercised within one (1) year from the grant thereof [here, October 31, 2005], exclusive of any delay due to the order of any court or failure to obtain any necessary grant or consent, the authority conferred by the issuance of the certificate of convenience and necessity shall be void. . . .” However, the “grant[s] or consent[s]” that EKPC cites as causing delay are not “grant[s] or consent[s]” at all. EKPC states: “Applicant’s Response to Item 13 of the Commission’s First Data Requests identifies the federal environmental requirements with which the Applicant must comply before beginning construction of this project. These laws and regulations include the National Environmental Policy Act (NEPA), National Historic Preservation Act (NHPA) and the regulations of the United States Department of Agriculture, Rural Utilities Service (RUS). . . These laws and regulations require the preparation and approval of an Environmental Assess, the issuance of a Finding of No Significant Impact (FONSI), and approvals pursuant to Section 106 of the NHPA, all to be made by RUS.” These laws are not mechanisms for approval, however. Rather, these laws set forth procedural requirements; the environmental regulations merely create a process, not an approval or “grant or consent,” to be completed in order for EKPC to receive federal *financing*, again, not an approval or “grant or consent.” 7 C.F.R. Part 1794; 36 C.F.R. Part 800. *See also* Response of East Kentucky Power Cooperative, Inc. to Intervenors’ Motion to Dismiss, p. 7 (“The Intervenors are quite correct in their assertions that in order for the Applicant to obtain funding for this project, the Applicant must comply with the National Environmental Policy Act (“NEPA”) and all federal regulations related thereto, including Section 106 and the regulations

of the U.S. Department of Agriculture, Rural Utilities Service (“RUS”). RUS simply will decide to finance the project, or not, depending on the results of the environmental assessment.

Had the legislature intended to allow EKPC to extend the certification period for the purpose of securing financing, it would have made that explicit, as it did with “order of the court,” and “grant or consent.” Because the reason for delay is not an “order of any court” or a “grant or consent,” the motion should be denied.

2. Plain language

EKPC argues that the term “exclusive of” in KRS 278.020(1) means “in addition to,” thus providing EKPC extra time, beyond the one-year term, to obtain any grant or consent necessary for construction. The Webster’s definition of the term, however, is “not allowing for.” *See Webster’s Dictionary of the English Language*, 1990 ed. An accurate interpretation of the provision, then, is that the one-year limitation applies *notwithstanding* the failure to obtain any necessary grant or consent.

Intervenors are aware that the Commission previously has interpreted the statute as EKPC proposes. No search of the Commission’s Orders database, however, shows that the Commission has given any consideration to the possibility that the definition of “exclusive of” means “not allowing for.” Notwithstanding the Commission’s previous interpretations, Intervenors merely maintain that, according to a plain-language reading of the statute, EKPC’s failure to obtain the necessary approvals under the federal environmental laws does not excuse it from satisfying the one-year requirement.

3. EKPC’s disregard

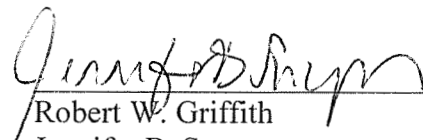
Intervenors’ plain-language interpretation makes particular sense in this case, because EKPC’s purposeful failure to complete the environmental processes has caused the delay.

Throughout these proceedings, Intervenors have argued that the Commission must dismiss EKPC's application for certification because EKPC first needed to satisfy NEPA and Section 106. All along, EKPC has argued in response that this Commission has no authority to consider those laws. *See* Response of East Kentucky Power Cooperative, Inc., To Intervenors' Motion To Compel ("The only issues relevant to the Commission's determination of whether a project is required by public convenience and necessity are adequacy of existing service, the economic feasibility of the proposed facilities, the avoidance of wasteful duplication, and the financial ability of the Applicant. Intervenors' request for information related to, inter alia, environmental studies and siting studies, is clearly not relevant to that determination.") (citation omitted)). *See also*, Response of East Kentucky Power Cooperative, Inc., To Intervenors' Motion To Dismiss, p. 7 ("[T]hese are federal requirements, administered by federal agencies pursuant to federal laws and regulations, and are not relevant to the Commission's determination. . . .").

Moreover, EKPC stubbornly has neglected its responsibilities under these laws. Now, more than one year after obtaining certification, principles of fairness dictate that EKPC not be allowed to use those laws as protection from the mandatory effect of the statute. Surely, the legislature did not intend to provide a way for utilities, such as EKPC, to have it both ways in purposefully extending the period during which construction must begin.

Accordingly, Intervenors respectfully ask the Commission to deny the motion.

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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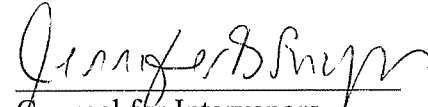
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This the 13th day of November, 2006.


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