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October 27, 2004

**RECEIVED**

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PUBLIC SERVICE  
COMMISSION

**VIA HAND DELIVERY**

Elizabeth O'Donnell  
Executive Director  
Kentucky Public Service Commission  
211 Sower Boulevard  
Frankfort, Kentucky 40601

**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 Louisville Gas and Electric Company's Initial Brief Pursuant to Commission's Order of October 15, 2004 in the above-referenced matter. Please confirm your receipt of this filing by placing the stamp of your Office with the date received on the enclosed additional copies and return them 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.

Very truly yours,

J. Gregory Cornett

JGC/ec

Enclosures

cc: Parties of Record



Intervene in the Proceeding at 2. For all of the reasons set forth below, that claim is without merit and must be dismissed as a matter of law.

### **FACTUAL BACKGROUND**

Construction of the Gene Snyder line is necessary to maintain continued reliability of LG&E's system in the face of significant growth in the eastern portions of the Louisville metropolitan area. The new line is within LG&E's service area and is expected to cost approximately \$6.2 million. Affidavit of Mark S. Johnson ("Johnson Affidavit"), attached as Exhibit 1, at ¶ 3.

LG&E's planning for the Gene Snyder line began in 2000. That planning involved, among other things, consideration of various alternative routes for the Gene Snyder line, some of which involved Complainants' and Intervenor's properties and some of which did not. Johnson Affidavit at ¶ 4. After studying all of the options and negotiating with the Kentucky Department of Highways (the "Highway Department") to address compatibility with planned widening of the Gene Snyder Freeway, LG&E determined that the location of the Gene Snyder line, as presently planned and being constructed along the east side of I-265, was the most appropriate alternative. Id. at ¶ 5.

LG&E representatives discussed the alternatives and the chosen route with interested parties or those parties' representatives on a number of occasions. Specifically, representatives of LG&E contacted all property owners (or their representatives) affected by the new line, participated in two public meetings in Louisville, met on two other occasions with Louisville Metro Councilman Hal Heiner (whose district includes the properties in which Complainants and Intervenor have an interest) and some of his staff, worked with Councilman Heiner and his staff

to study alternative routes and the possibility of installing some or all of the Gene Snyder line underground, and participated in a third public meeting at the Public Service Commission (“PSC” or “Commission”). *Id.* at ¶ 7. Copies of attendance sign-in sheets from the public meetings are attached collectively as Exhibit 2.

In November 2003, LG&E received approval from the Highway Department for the portions of the selected route that involved the Highway Department’s right of way, and began survey and easement acquisition work for the line. Johnson Affidavit at ¶ 6. In March 2004, LG&E began clearing work on properties where the easements or permission to use rights of way had already been obtained, and in May 2004 construction was started on the foundations for the poles themselves. Those foundations are, on average, six feet in diameter and extend below grade for 20 feet. *Id.* at ¶¶ 8-9. Each of those footings also contain specially-ordered anchor bolts of varying lengths, depending upon the size of the pole the footing will support, which bolts go into the footings below grade and also protrude above grade for the purpose of connecting to each pole. *Id.* at ¶ 10. For example, most of the poles for the Gene Snyder line will be 100 feet tall. For those poles, the anchor bolts will measure between 21.5 and 22 feet, and will extend about 20 feet below grade and approximately two feet above grade. *Id.* Photographs showing some of the construction before July 12, 2004 are attached collectively as Exhibit 3.

On May 25, 2004, following the public meeting at the PSC, members of the PSC Staff conducted a field review and were able to observe that construction of the Gene Snyder line had begun. *Id.* at ¶ 11. Construction continued thereafter and, as of July 12, 2004, LG&E had: (1) completed all engineering design work for the Gene Snyder line; (2) obtained necessary permits, as noted above, from the Highway Department; (3) obtained easements and permission to use rights of way for 5.1 of the 6.9 miles of the planned route of the Gene Snyder line; (4)

commenced and/or completed negotiations to acquire the remaining easements needed for the line; (5) begun initial preparations for any condemnation actions which might be necessary; (6) built necessary roadwork to obtain access to the sites where new poles were being constructed and would be constructed on properties where easements or permission to use rights of way had been granted; (7) performed clearing of vegetation from the planned route of the line on properties for which easements or permissions to use rights of way had been obtained; (8) ordered all materials expected to be needed for the new line as planned, including poles and wires; and (9) completed construction of 14 of the 59 poured concrete and steel-reinforced pole footings required for the line. Johnson Affidavit at ¶ 12.

Construction on the Gene Snyder line has continued through the summer and into the fall, as additional easements and permission to use rights of way have been obtained by agreement. Johnson Affidavit at ¶ 13. Condemnation actions have been filed to obtain easements on the properties in which Complainants and Intervenor have interests. Id.

## ARGUMENT

### I. A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY IS NOT REQUIRED FOR THE GENE SNYDER LINE.

KRS 278.020 sets forth the circumstances under which a CPCN is required before a utility can begin construction of certain utility assets. As the Commission is aware, KRS 278.020 was amended by the 2004 General Assembly, and that amendment became effective on July 13, 2004. A copy of the pre-amendment version of the statute is attached as Exhibit 4, and a copy of the statute as amended is attached as Exhibit 5.

As KRS 278.020 existed and was interpreted before its 2004 amendment, a CPCN was not required for the construction of transmission lines. However, the recent amendment to that

statute now requires, for the first time, that a CPCN be obtained for certain types of transmission lines which previously were considered extensions in the ordinary course of business. The issue here, as noted by the Commission in its October 15, 2004 Order, is which version of KRS 278.020 applies to the Gene Snyder line.

For all of the reasons set forth below, the pre-amendment version of KRS 278.020, which does not require a CPCN for the Gene Snyder line, must be applied here because it was the law in effect at the time construction on the Gene Snyder line was started.

**1. Construction on the Gene Snyder Line Was Well Under Way Before July 13, 2004.**

By its express terms, KRS 278.020 provides that no utility may “begin the construction” of certain enumerated assets before obtaining a CPCN.<sup>1</sup> That statute, of course, must be construed according to the plain language of the words used therein. McLain v. Dana Corp., Ky.App., 16 S.W.3d 320, 326 (1999); Mercer v. Commonwealth, Ky.App., 880 S.W.2d 899, 901 (1994). It is clear, in construing KRS 278.020 according to its plain language, that the statute is tied to the beginning of construction and therefore only applies to assets which are constructed after the effective date of the statute. There is absolutely no language in the statute which so much as implies, much less expressly states, that the statute is to be applied to lines already in the process of being constructed as of the effective date of the amendment.

As set forth in detail above, LG&E started clearing and excavation work for the Gene Snyder line in March 2004, and started installing pole foundations, containing concrete and steel extending 20 feet below grade, in May 2004. Thus, by May 2, 2004, LG&E had already conducted significant on-site work, including the placement of permanent footings in the ground which will be part of the ultimate structure of the Gene Snyder line. And, by July 12, 2004 (the

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<sup>1</sup> The recent amendment to the statute did not change that language in any way.

day before the amendment to KRS 278.020 took effect), 14 of 59, or approximately one-quarter, of the foundations for the Snyder line had been completed. There can thus be no question that LG&E's construction on the Gene Snyder line was already well under way before the July 13, 2004 effective date of the amendment to KRS 278.020.

**2. The Law in Effect at the Time Construction on the Gene Snyder Line Commenced Did Not Require a Certificate of Public Convenience and Necessity.**

It has long been the law in Kentucky that utilities are not required to seek a CPCN from this Commission for construction projects involving "ordinary extensions of existing systems." American Dist. Telegraph Co. v. Utility Regulatory Commission, Ky.App., 619 S.W.2d 504, 505 (1981); City of Georgetown v. Public Service Commission, Ky., 516 S.W.2d 842, 844 (1974); Cumberland Valley RECC v. Public Service Commission, Ky., 433 S.W.2d 103, 104 (1968); KRS 278.020(1).<sup>2</sup> And, at the time construction on the Gene Snyder line was begun, it was without question the law that the construction of a new transmission line like the one in issue here was considered an ordinary extension of a utility's existing system. Duerson v. East Kentucky Power Coop., Ky.App., 843 S.W.2d 340, 341 (1992) (holding that "transmission lines are extensions in the ordinary course of business"). Thus, under the law in effect in the first half of 2004, and at the time construction of the Gene Snyder line was begun, LG&E was not required to obtain a CPCN for that line. Id. (holding that a CPCN is not required for a transmission line extension because it is in the ordinary course of business).

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<sup>2</sup> The 2004 amendment to KRS 278.020 also did not change this language in any way.

**3. The Version of KRS 278.020 Relied Upon by the Complainants and Intervenor Can Not be Applied to the Gene Snyder Line.**

The Complainants' and Intervenor's claim that a CPCN is required for the Gene Snyder line is based entirely on the version of KRS 278.020 which was amended by the 2004 Regular Session of the General Assembly. That amendment provides that, with certain exceptions, a transmission line of 138 kV or more and 5,280 feet or longer in length shall not be considered an ordinary extension of an existing system and thus shall require a CPCN before construction commences. KRS 278.020 (2) (as amended by 2004 General Assembly). As noted earlier, that amendment, however, did not take effect until July 13, 2004 and the Gene Snyder line was already well under construction before that date. Because the amendment to KRS 278.020 was not in effect at the time construction on the Gene Snyder line was begun, application of that amendment here would constitute retroactive application of the amended statute.

It is well settled that retroactive application of a statute is unlawful. Indeed, that prohibition is codified in KRS 446.080 (3), which states that "[n]o statute shall be construed to be retroactive, unless expressly so declared." Kentucky's Supreme Court has stated that the bar against retroactive application contained in KRS 446.080(3) is "fundamental to statutory construction in Kentucky" and that "there is a strong presumption that statutes operate prospectively and that retroactive application of statutes will be approved only if it is absolutely certain the legislature intended such a result." Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Co., Ky., 983 S.W.2d 493, 499-500 (1998). Here, as discussed in section 1. above, there is absolutely no language in the amendment to KRS 278.020 which even implies, much less expressly provides, that the amended statute is to be applied retroactively to lines already under construction.



The courts have at times recognized a limited exception to the bar on retroactive application of a statute where an amendment to a statute is only remedial, and not substantive. Kentucky Ins. Guar. Ass'n v. Jeffers ex rel. Jeffers, Ky., 13 S.W.3d 606, 609 (2000). That exception, however, does not apply here. In Jeffers, the Kentucky Supreme Court defined a remedial amendment as one which merely creates an “expansion of an existing remedy without affecting the substantive basis, prerequisites, or circumstances giving rise to the remedy.” Id. A substantive change in the law, on the other hand, is one which creates “new rights and responsibilities that did not exist” previously. Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Co., Ky., 983 S.W.2d 493, 500 (1998). Stated differently, an amendment is substantive if it “change[s] the substantive rights and duties of litigants.” Dept. of Agriculture v. Vinson, Ky., 30 S.W.3d 162, 169 (2000).

Here, although there is no case directly on point, it is clear, based on the Supreme Court’s definitions of “remedial” and “substantive,” that the 2004 amendment to KRS 278.020 can only be characterized as substantive, because it created “new rights and responsibilities that did not exist” before the amendment. Kentucky Industrial Utility Customers, Inc., 983 S.W.2d at 500. Specifically, the 2004 amendment to KRS 278.400 added two new subsections, (2) and (8), which significantly and substantively affect not only the obligations of utilities like LG&E, but also the rights of landowners like Complainants and the Intervenor.

In the new subsection (2), the amendment to KRS 278.020 created an entirely new obligation for utilities to obtain a CPCN for certain kinds of transmission line extensions, by providing that those extensions can no longer be considered ordinary extensions of an existing system. As discussed in detail in section 2. above, the pre-amendment version of the statute

allowed utilities to make ordinary extensions of their transmission lines free of any requirement that they first obtain a CPCN. Duerson, 843 S.W.2d at 341.

Similarly, in the new subsection (8), the amendment to KRS 278.020 establishes an entirely new right for affected landowners to request intervention in, and seek a local public hearing for, a CPCN proceeding. Under the pre-amendment version of the statute, however, landowners had no such rights. In fact, before the 2004 amendment became effective, landowners had no right to participate in a public hearing because they were not considered “parties interested within the meaning of” the statute. Satterwhite v. Public Service Commission, Ky., 474 S.W.2d 387, 388 (1972). Rather than expand an existing remedy, the new subsection (8) creates a completely new remedy by providing for affected landowners to seek a local public hearing. See Jeffers, 13 S.W.3d at 609.

A statute cannot be applied retroactively unless such application is expressly provided for by the General Assembly, or unless the exception for remedial amendments applies. Here, the 2004 amendment to KRS 278.020 did not provide for retroactive application, and that amendment was clearly substantive and not remedial. Accordingly, because the amendment to KRS 278.020 was not in effect at the time construction on the Gene Snyder line was commenced, that amendment can not be applied to that line, and thus no CPCN was required before LG&E started construction.


### **CONCLUSION**

For all of the reasons set forth above, LG&E respectfully requests the Commission to enter an Order finding that the 2004 amendment to KRS 278.020 does not apply to the Gene Snyder line, finding that the Company was not required to obtain a CPCN before beginning

construction on that line, dismissing this matter with prejudice, and closing this proceeding on the Commission's docket.

Dated: October 27, 2004

Respectfully submitted,



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COUNSEL FOR LOUISVILLE GAS  
AND ELECTRIC COMPANY

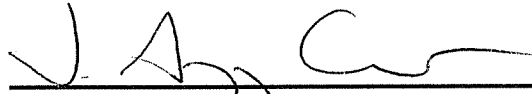
**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing Answer was served on the following persons on the 27<sup>th</sup> day of October, 2004, via U.S. mail, postage prepaid:

John H. Dwyer, Jr.  
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Louisville, Kentucky 40202-2555

Harry Lee Meyer  
Ogden & Ogden  
1610 PNC Plaza  
500 West Jefferson Street  
Louisville, Kentucky 40202

Stuart E. Alexander III  
Sandra F. Keene  
Terrell L. Black  
Tilford Dobbins Alexander Buckaway &  
Black, LLP  
401 W. Main Street, Suite 1400  
Louisville, KY 40202

  
\_\_\_\_\_  
Counsel for Louisville Gas and Electric Co.



**COMMONWEALTH OF KENTUCKY**  
**BEFORE THE PUBLIC SERVICE COMMISSION**

**In the Matter of:**

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

**AFFIDAVIT OF MARK S. JOHNSON**

Affiant, having first been duly sworn, states as follows:

1. My name is Mark S. Johnson. I am the Director of Transmission for LG&E Energy LLC, the parent company of Louisville Gas and Electric Company (“LG&E”). I have personal knowledge of the matters stated herein.
2. LG&E is constructing a new transmission line along the east side of I-265 in Jefferson County, Kentucky (the “Gene Snyder line”) because it is necessary to maintain continued reliability of LG&E’s system in the face of significant growth in the eastern portions of the Louisville metropolitan area.
3. The Gene Snyder line is within LG&E’s service area and is expected to cost approximately \$6.2 million. That is not an amount of capital outlay which materially affects the existing financial condition of the Company.

4. LG&E's planning for the Gene Snyder line began in 2000 and continued through 2003. Among other things, that planning involved the consideration of a number of alternative routes for the Gene Snyder line, some of which involved the individual properties at issue in this proceeding, and some of which did not involve those properties.
5. After studying all of the options and negotiating with the Kentucky Department of Highways (the "Highway Department"), LG&E determined that the location of the Gene Snyder line, as presently planned and being constructed, was the most appropriate alternative.
6. In November 2003, LG&E received approval from the Highway Department for the portions of the selected route that involved the Highway Department's right of way, and began survey and easement acquisition work for the Gene Snyder line.
7. LG&E representatives discussed the alternatives and the chosen route with interested parties or those parties' representatives a number of times. LG&E representatives contacted all property owners (or their representatives) affected by the new line, participated in two public meetings in Louisville in January 2004, met on two other occasions with Louisville Metro Councilman Hal Heiner (whose district includes the properties at issue in this proceeding) and some of his staff, worked with Councilman Heiner and his staff to study alternative routes and the possibility of installing some or all of the Gene Snyder line underground, and participated in a public meeting at the Public Service Commission ("PSC") in May 2004.

8. In March 2004, LG&E began clearing work on properties where the easements or permission to use rights of way had already been obtained.
9. In May 2004, construction was begun on the foundations for the poles themselves. Those foundations are, on average, six feet in diameter and extend below grade for twenty feet.
10. Each of the pole foundations, or footings, contain specially-ordered anchor bolts of varying lengths, depending upon the size of the pole the footing will support, which bolts go into the footings below grade and also protrude above grade for the purpose of connecting to each pole. For example, most of the poles for the Gene Snyder line will be 100 feet tall, and for those poles the anchor bolts will measure between 21.5 and 22 feet, and will extend about 20 feet below grade and approximately two feet above grade.
11. On May 25, 2004, members of the PSC Staff conducted a field review and were able to observe that construction of the Gene Snyder line had begun.
12. As of July 12, 2004, LG&E had: (1) completed all engineering design work for the Gene Snyder line; (2) obtained necessary permits, as noted above, from the Highway Department; (3) obtained easements and permission to use rights of way for 5.1 of the 6.9 miles of the planned route of the Gene Snyder line; (4) commenced and/or completed negotiations to acquire the remaining easements needed for the line; (5) begun initial preparations for any condemnation actions which might be necessary; (6) built necessary roadwork to obtain access to the sites where new poles were being constructed and would be constructed on properties where easements or permission to use rights of way had been granted;







# LG&E TRANSMISSION LINES MEETING

Monday, January 12, 2004

NAME	REPRESENTING	PHONE	E-MAIL
Bob King	Downwood Homes	426-4663	blong@downwoodhomes.com
George Skeets	Christian Academy	244-3225	gskeets@christianacademyla.org
Scott Hagan	Hagan Seay Pr Hagan Seay Properties	245-8800	SCOTT@HAGANSEAY.COM
George Meyer	St Joseph Catholic of Philadelphia	583-4455	hime@iglow.com
Kathy Sly	LG&E	627-3715	Kathy.Slay@lgeenergy.com
Jim Dims	LG&E	627-3712	JIM.DIMS@LGEENERGY.COM
Bob McAuffe	LG&E	664-3445	BOB10853@AOL
Jim Kennedy	Old Henry Neighborhood Organization	245-6375	
J.B. Chapman	City of Middle town	245-639-9240	
Mark Jordan	LG&E	627-2824	MARK.JORDAN@LGEENERGY.COM
Adam Douglas	LG&E	627-2930	Adam.Douglas@lgeenergy.com

55 FOREST GREEN BLVD.  
40223

Look up  
305 English Station Rd.  
40245  
2975 Shelbyville Rd  
40243  
500 W. Jefferson  
40202

225 N. Clifton Ave., Suite 5  
40206  
Look up  
901 Old Henry Tr.  
40245  
3200 Urton Ln.  
40243

714 River Green Cir  
40206  
next door to  
at All Plan Stuckle

George  
10th St  
Terra Vista  
897-7091  
Metro Council Dist. 17  
George.SIEMANT@lgeenergy.com  
Kemp, Association of Property Owners

1-29-04  
10:00 a.m.

✓  
James A

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Bobb Long blong@downwardhollow.com 773-5845  
Al Patterson one - Patterson LLC 12620 Shelbyville Rd 40245 245-6352  
Debbie Harris Debbie.Harris@ky.gov 367-6411 (Highway Dept)  
J. Byron Chapman Mayor Middletown 245-9240  
Mark S. Johnson MARK.JOHNSON@GREENEKY.COM 627-2824  
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Harvey Lee Meezer hlm@iglobe.com 583-4455  
Laura M. Douglas laura.douglas@geenergy.com 627-3960  
George Siemens george.siemens@geenergy.com 627-2323  
Kathy Slay Kathy.Slay@geenergy.com 627-3715  
Jim Dimas Jim.Dimas@L66ENERGY.COM 627-3712  
Beth Allen beth.allen@lookymetro.org 574-5170

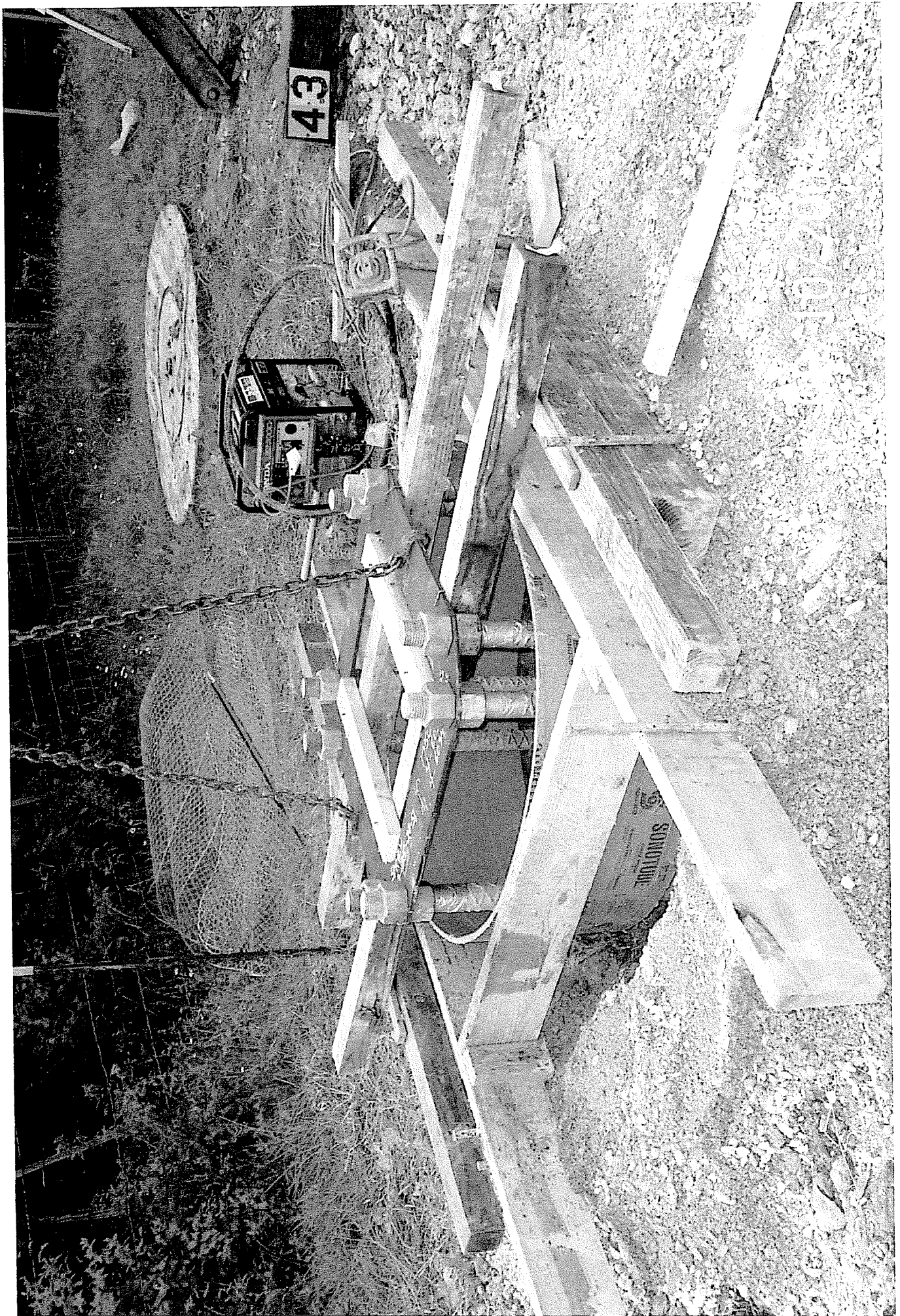
CM Stuckel  
Carl Ray  
Jim Kennedy

# LG&E Transmission Line Extension

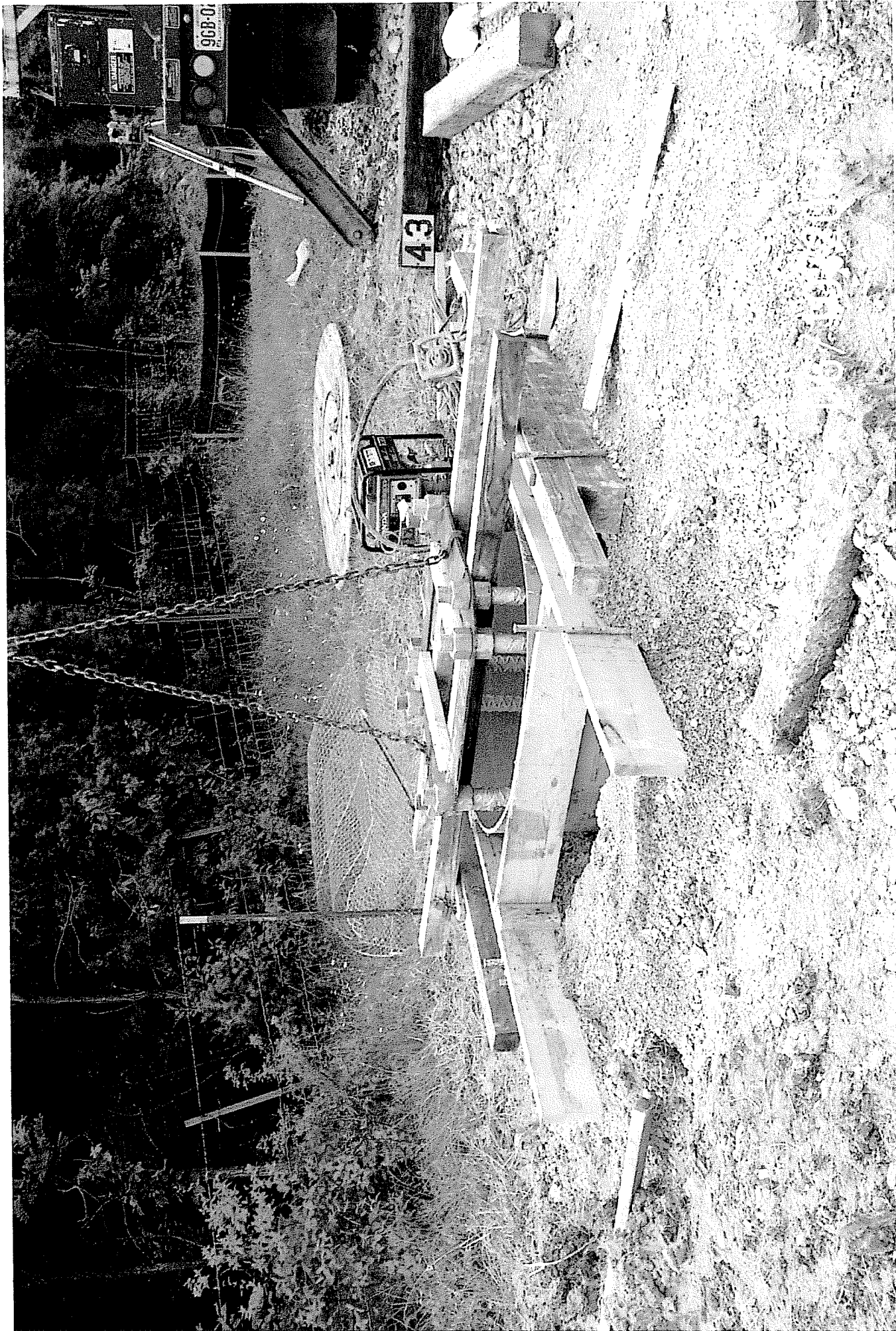
5/12/04

Name	Representing
Rebecca Goodman	PSC - Legal
Beth O'Donnell	Exec. Director
George Siemens	L.G. & E Energy
Walt Wright	PSC Legal Staff
ELEE Russell	PSC
GARY GRUBBS	PSC - ENCL.
Paul Thompson	LG&E Energy
Nate Mullins	LG&E Energy
BERNIE BOWLING	ST. JOSEPH CHILDREN'S HOSP
Scott Flynn	Hogan & Lozano
Harvey Zupnik	St. Joseph PA Cherokee Ho
Bob Amato	KPSC
AARON GREENWELL	KPSC
John Rogness III	"
JEFF SHAW	"
ISAAC SCOTT	"
Andrew Melnykovich	"
Tom Dorman	PSC
Michael Beer	LG&E
Laura Douglas	LG&E





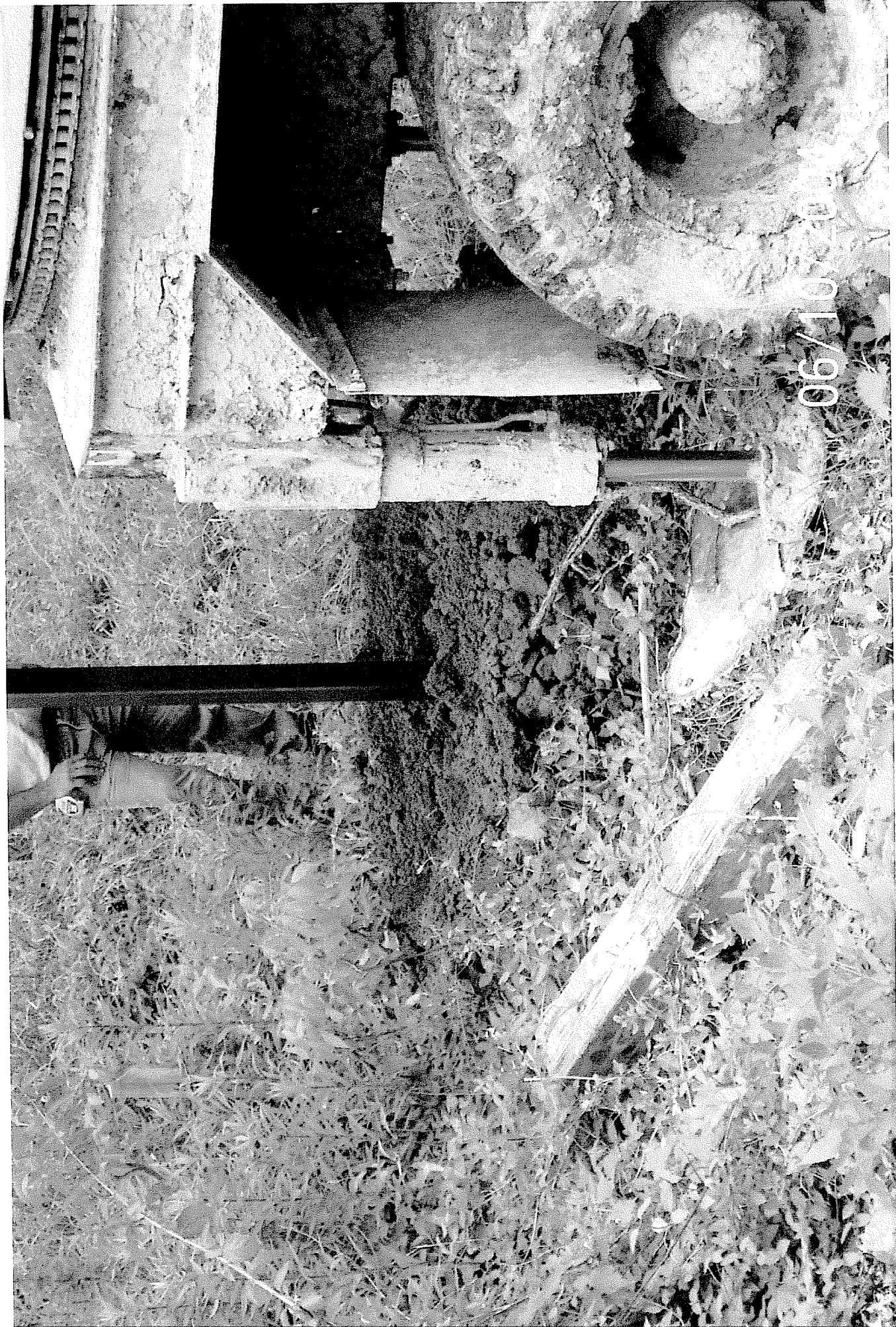








06/10/2004





application for a certificate to construct a base load electric generating facility, may consider the policy of the General Assembly to foster and encourage use of Kentucky coal by electric utilities serving the Commonwealth. Unless exercised within one (1) year from the grant thereof, 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, but the beginning of any new construction or facility in good faith within the time prescribed by the commission and the prosecution thereof with reasonable diligence shall constitute an exercise of authority under the certificate.

- (2) No utility shall exercise any right or privilege under any franchise or permit, after the exercise of that right or privilege has been voluntarily suspended or discontinued for more than one (1) year, without first obtaining from the commission, in the manner provided in subsection (1) of this section, a certificate of convenience and necessity authorizing the exercise of that right or privilege.
- (3) No utility shall apply for or obtain any franchise, license, or permit from any city or other governmental agency until it has obtained from the commission, in the manner provided in subsection (1) of this section, a certificate of convenience and necessity showing that there is a demand and need for the service sought to be rendered.
- (4) No person shall acquire or transfer ownership of, or control, or the right to control, any utility under the jurisdiction of the commission by sale of assets, transfer of stock, or otherwise, or abandon the same, without prior approval by the commission. The commission shall grant its approval if the person acquiring the utility has the financial, technical, and managerial abilities to provide reasonable service.
- (5) No individual, group, syndicate, general or limited partnership, association, corporation, joint stock company, trust, or other entity (an "acquirer"), whether or not organized under the laws of this state, shall acquire control, either directly or indirectly, of any utility furnishing utility service in this state, without having first obtained the approval of the commission. Any acquisition of control without prior authorization shall be void and of no effect. As used in this subsection, the term "control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a utility, whether through the ownership of voting securities, by effecting a change in the composition of the board of directors, by contract or otherwise. Control shall be presumed to exist if any individual or entity, directly or indirectly, owns ten percent (10%) or more of the voting securities of the utility. This presumption may be rebutted by a showing that ownership does not in fact confer control. Application for any approval or authorization shall be made to the commission in writing, verified by oath or affirmation, and be in a form and contain the information as the commission requires. The commission shall approve any proposed acquisition when it finds that the same is to be made in accordance with law, for a proper purpose and is consistent with the public interest. The commission may make investigation and hold hearings in the matter as it deems necessary, and thereafter may grant any application under this subsection in whole or in part and with modification and upon terms and conditions as it deems necessary or appropriate. The commission shall grant, modify, refuse, or prescribe appropriate terms

**278.020 Certificate of convenience and necessity required for construction provision of utility service or of utility; exception; approval required for acquisition or transfer of ownership; severability of provisions**

- (1) No person, partnership, public or private corporation, or combination thereof shall commence providing utility service to or for the public or begin the construction of any plant, equipment, property, or facility for furnishing to the public any of the services enumerated in KRS 278.010, except retail electric suppliers for service connections to electric-consuming facilities located within its certified territory and ordinary extensions of existing systems in the usual course of business, until that person has obtained from the Public Service Commission a certificate that public convenience and necessity require the service or construction. Upon the filing of an application for a certificate, and after any public hearing which the commission may in its discretion conduct for all interested parties, the commission may issue or refuse to issue the certificate, or issue it in part and refuse it in part, except that the commission shall not refuse or modify an application submitted under KRS 278.023 without consent by the parties to the agreement. The commission, when considering an



and conditions with respect every such application within sixty (60) days after the filing of the application therefor, unless it is necessary, for good cause shown, to continue the application for up to sixty (60) additional days. The order continuing the application shall state fully the facts that make continuance necessary. In the absence of that action within that period of time, any proposed acquisition shall be deemed to be approved.

- (6) Subsection (5) of this section shall not apply to any acquisition of control of any:
- (a) Utility which derives a greater percentage of its gross revenue from business in another jurisdiction than from business in this state if the commission determines that the other jurisdiction has statutes or rules which are applicable and are being applied and which afford protection to ratepayers in this state substantially equal to that afforded such ratepayers by subsection (5) of this section;
  - (b) Utility by an acquirer who directly, or indirectly through one (1) or more intermediaries, controls, or is controlled by, or is under common control with, the utility, including any entity created at the direction of such utility for purposes of corporate reorganization; or
  - (c) Utility pursuant to the terms of any indebtedness of the utility, provided the issuance of indebtedness was approved by the commission.
- (7) If any provision of this section or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this section which can be given effect without the invalid provision or application, and to that end the provisions are declared to be severable.

HISTORY: 2001 c 35, § 1, eff. 6-21-01; 1998 c 388, § 1, eff. 7-15-98; 1994 c 144, § 1, eff. 7-15-94; 1992 c 102, § 2, eff. 7-14-92; 1988 c 22, § 5, c 12, § 3, c 335, § 1; 1986 c 368, § 1; 1982 c 130, § 1, c 82, § 5; 1978 c 379, § 6; 1974 c 388, § 3; 1972 c 83, § 5; 1942 c 208, § 1; KS 3952-25



**278.020 Certificate of convenience and necessity required for construction provision of utility service or of utility -- Exceptions -- Approval required for acquisition or transfer of ownership -- Public hearing on proposed transmission line -- Severability of provisions.**

- (1) No person, partnership, public or private corporation, or combination thereof shall commence providing utility service to or for the public or begin the construction of any plant, equipment, property, or facility for furnishing to the public any of the services enumerated in KRS 278.010, except retail electric suppliers for service connections to electric-consuming facilities located within its certified territory and ordinary extensions of existing systems in the usual course of business, until that person has obtained from the Public Service Commission a certificate that public convenience and necessity require the service or construction. Upon the filing of an application for a certificate, and after any public hearing which the commission may in its discretion conduct for all interested parties, the commission may issue or refuse to issue the certificate, or issue it in part and refuse it in part, except that the commission shall not refuse or modify an application submitted under KRS 278.023 without consent by the parties to the agreement. The commission, when considering an application for a certificate to construct a base load electric generating facility, may consider the policy of the General Assembly to foster and encourage use of Kentucky coal by electric utilities serving the Commonwealth. Unless exercised within one (1) year from the grant thereof, 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, but the beginning of any new construction or facility in good faith within the time prescribed by the commission and the prosecution thereof with reasonable diligence shall constitute an exercise of authority under the certificate.
- (2) For the purposes of this section, construction of any electric transmission line of one 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 a 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.
- (3) No utility shall exercise any right or privilege under any franchise or permit, after the exercise of that right or privilege has been voluntarily suspended or discontinued for more than one (1) year, without first obtaining from the commission, in the manner provided in subsection (1) of this section, a certificate of convenience and necessity authorizing the exercise of that right or privilege.

- (4) No utility shall apply for or obtain any franchise, license, or permit from any city or other governmental agency until it has obtained from the commission, in the manner provided in subsection (1) of this section, a certificate of convenience and necessity showing that there is a demand and need for the service sought to be rendered.
- (5) No person shall acquire or transfer ownership of, or control, or the right to control, any utility under the jurisdiction of the commission by sale of assets, transfer of stock, or otherwise, or abandon the same, without prior approval by the commission. The commission shall grant its approval if the person acquiring the utility has the financial, technical, and managerial abilities to provide reasonable service.
- (6) No individual, group, syndicate, general or limited partnership, association, corporation, joint stock company, trust, or other entity (an "acquirer"), whether or not organized under the laws of this state, shall acquire control, either directly or indirectly, of any utility furnishing utility service in this state, without having first obtained the approval of the commission. Any acquisition of control without prior authorization shall be void and of no effect. As used in this subsection, the term "control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a utility, whether through the ownership of voting securities, by effecting a change in the composition of the board of directors, by contract or otherwise. Control shall be presumed to exist if any individual or entity, directly or indirectly, owns ten percent (10%) or more of the voting securities of the utility. This presumption may be rebutted by a showing that ownership does not in fact confer control. Application for any approval or authorization shall be made to the commission in writing, verified by oath or affirmation, and be in a form and contain the information as the commission requires. The commission shall approve any proposed acquisition when it finds that the same is to be made in accordance with law, for a proper purpose and is consistent with the public interest. The commission may make investigation and hold hearings in the matter as it deems necessary, and thereafter may grant any application under this subsection in whole or in part and with modification and upon terms and conditions as it deems necessary or appropriate. The commission shall grant, modify, refuse, or prescribe appropriate terms and conditions with respect to every such application within sixty (60) days after the filing of the application therefor, unless it is necessary, for good cause shown, to continue the application for up to sixty (60) additional days. The order continuing the application shall state fully the facts that make continuance necessary. In the absence of that action within that period of time, any proposed acquisition shall be deemed to be approved.
- (7) Subsection (6) of this section shall not apply to any acquisition of control of any:
  - (a) Utility which derives a greater percentage of its gross revenue from business in another jurisdiction than from business in this state if the commission determines that the other jurisdiction has statutes or rules which are applicable and are being applied and which afford protection to ratepayers in this state substantially equal to that afforded such ratepayers by subsection (6) of this section;



- (b) Utility by an acquirer who directly, or indirectly through one (1) or more intermediaries, controls, or is controlled by, or is under common control with, the utility, including any entity created at the direction of such utility for purposes of corporate reorganization; or
  - (c) Utility pursuant to the terms of any indebtedness of the utility, provided the issuance of indebtedness was approved by the commission.
- (8) In a proceeding on an application filed pursuant to this section, any 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 the 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) 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.
- (9) If any provision of this section or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this section which can be given effect without the invalid provision or application, and to that end the provisions are declared to be severable.

**Effective:** July 13, 2004

**History:** Amended 2004 Ky. Acts ch. 75, sec. 1, effective July 13, 2004. -- Amended 2001 Ky. Acts ch. 35, sec. 1, effective June 21, 2001. -- Amended 1998 Ky. Acts ch. 388, sec. 1, effective July 15, 1998. -- Amended 1994 Ky. Acts ch. 144, sec. 1, effective July 15, 1994. -- Amended 1992 Ky. Acts ch. 102, sec. 2, effective July 14, 1992. -- Amended 1988 Ky. Acts ch. 12, sec. 3, effective July 15, 1988; ch. 22, sec. 5, effective July 15, 1988; ch. 335, sec. 1, effective July 15, 1988. -- Amended 1986 Ky. Acts ch. 368, sec. 1, effective July 15, 1986. -- Amended 1982 Ky. Acts ch. 82, sec. 5, effective July 15, 1982; ch. 130, sec. 1, effective July 15, 1982. -- Amended 1978 Ky. Acts ch. 379, sec. 6, effective April 1, 1979. -- Amended 1974 Ky. Acts ch. 388, sec. 3. -- Amended 1972 Ky. Acts ch. 83, sec. 5. -- Recodified 1942 Ky. Acts ch. 208, sec. 1, effective October 1, 1942, from Ky. Stat. sec. 3952-25.