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November 16, 2004

VIA HAND DELIVERY

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

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COMMISSION

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 Response Brief 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

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PADDOCK AT EASTPOINT, LLC,)
LOUIS K. KLEMENZ, AND)
ST. JOSEPH CATHOLIC)
ORPHAN SOCIETY)
)
COMPLAINANTS)
v.)
)
LOUISVILLE GAS AND)
ELECTRIC COMPANY)
)
DEFENDANT)

CASE NO. 2004-00293

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RESPONSE BRIEF OF LOUISVILLE GAS AND ELECTRIC COMPANY

* * * * *

INTRODUCTION

Louisville Gas and Electric Company (“LG&E” or “Company”), by counsel, and pursuant to the Commission’s Order of October 15, 2004, files this brief in response to the initial briefs filed by the Paddock at Eastpoint, LLC (the “Paddock”), Louis K. Klemenz (“Mr. Klemenz”), St. Joseph Catholic Orphan Society (“St. Joseph”) (Paddock, Klemenz and St. Joseph are collectively referred to as “Complainants”) and MRH Development Company (“MRH” or “Intervenor”). For all of the reasons set forth below, the arguments made by the Complainants and Intervenor are without merit as a matter of law, and this matter should be dismissed with prejudice.

ARGUMENT

I. SUMMARY DISPOSITION OF THIS PROCEEDING IS PROPER.

In its Opening Brief, at p. 1, the Paddock states that the issues here are “not amenable” to summary disposition. That claim is made only in passing, with no support whatsoever, and is not even raised by Mr. Klemenz, St. Joseph or MRH. Despite the Paddock’s claim, there are no questions of fact that preclude the Commission from ruling on this matter without a hearing.

The issue in this proceeding, as noted by the Commission itself in its October 15, 2004 Order, is “whether the amendments to KRS 278.020” require LG&E “to obtain a certificate to build” the new 138kV line being constructed by LG&E in eastern Jefferson County (the “Gene Snyder line”). The only factual question relevant to a resolution of that issue is the question of when LG&E started construction of the Gene Snyder line, and there is no genuine dispute as to the facts surrounding that construction. To the contrary, the evidence is clear and undisputed that LG&E took a number of significant actions that, as a matter of law, constituted the commencement of construction well before the amendment to KRS 278.020 took effect on July 13, 2004 (the “2004 amendment to KRS 278.020”). Indeed, as discussed in section II. 1. below, the Paddock does not dispute the fact that construction work was done on the Gene Snyder line in March – July of this year. Instead, the Paddock simply asserts that the work should somehow be deemed insufficient. That assertion, however, is inaccurate and incorrect as a matter of law.

There is, therefore, no genuine issue of material fact in this proceeding. Accordingly, summary disposition of this proceeding is proper. See In the Matter of: Newman v. Salt River Electric Coop. Corp., PSC Case No. 90-088 (Order of June 28, 1990) (finding that summary disposition is proper where the material facts are not in dispute).

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

The Complainants and Intervenor have not questioned the fact that, under the law existing before the 2004 amendment to KRS 278.020, LG&E was not required to obtain a certificate of public convenience and necessity (“CPCN”) for transmission lines such as the Gene Snyder line. See, e.g. Duerson v. East Kentucky Power Coop., Ky.App., 843 S.W.2d 340, 341 (1992) (holding, under the law which existed before the 2004 amendment to KRS 278.020, that “transmission lines are extensions in the ordinary course of business” and thus do not require a CPCN). Thus, unless the 2004 amendment to KRS 278.020 applies to the Gene Snyder line, LG&E is not required to obtain a CPCN for that line and the claims asserted by the Complainants and Intervenor in this proceeding should be dismissed.

For all of the reasons set forth below, the 2004 amendment to KRS 278.020 cannot lawfully be applied here. For those same reasons, this matter must be dismissed.

1. LG&E Commenced Construction on the Gene Snyder Line Well Before July 13, 2004, and There is Nothing Improper About the Timing of That Construction.

While neither Mr. Klemenz, St. Joseph nor MRH take issue with the fact that the Gene Snyder line was under construction before the 2004 amendment to KRS 278.020 took effect, the Paddock argues that LG&E took only “*de minimis*” steps toward construction which should simply be disregarded as insufficient. That claim is unsupported by the evidence, reflects a complete lack of understanding of utility practice, and is without merit as a matter of law.

In a clear effort aimed at manufacturing a factual dispute, the Paddock characterizes LG&E’s construction work, which is well-documented in this proceeding, as merely “grubbing,” with some “wooden form work,” “a handful of holes” and “a few yards of concrete.” Paddock’s

Opening Brief, at pp. 2-3. The Commission will note, however, that the Paddock's characterizations are not supported by a single piece of evidence in this case. In fact, the evidence of record here, which is absolutely uncontradicted, is that LG&E started clearing and excavation work for the Gene Snyder line in March 2004, and started installing pole foundations, which contain concrete and steel extending approximately 20 feet below grade, in May 2004. Affidavit of Mark S. Johnson ("Initial Johnson Affidavit"), attached as Exhibit 1 to LG&E's Initial Brief, at ¶ 3. Photographs depicting the steel used as part of the foundations are collectively attached hereto as Exhibit 1. Commission Staff confirmed LG&E's construction work during a field visit on May 25, 2004. Initial Johnson Affidavit, at ¶ 11. Construction continued thereafter and, by July 12, 2004 (the day before the 2004 amendment to KRS 278.020 took effect), approximately one-quarter, 14 out of 59, of the poured concrete and steel-reinforced pole footings had been completed. *Id.*, at ¶ 12. Clearly, LG&E had, by July 13, 2004, done a lot more than "grub" some dirt and fill a "handful" of holes with "a few yards of concrete."

The Paddock also claims that LG&E began its construction work "hastily," starting "in June of this year," and that "little or no work has been done since." Paddock's Opening Brief, at pp. 3-4. Again, the Paddock's claims are not supported by the evidence of record. As explained in detail in Mr. Johnson's Affidavit, LG&E's planning for the Gene Snyder line began in 2000 and continued through 2003. *Id.* at ¶¶ 4-5. Then, once a final route was selected, crossings were approved by the Kentucky Department of Highways ("Highway Department"), property owners were notified and easements or right of way access had been obtained, clearing work began in March 2004 and construction on the foundations started in May 2004. *Id.* at ¶¶ 5-9. Construction continued through the summer and into the fall of 2004, and continues at the present time, as additional easements and permission to use rights of way have been obtained by

agreement. Id. at ¶ 13. Indeed, as of November 9, 2004, LG&E had completed construction on 22 of the 59 foundations, using nearly 200 yards of concrete, cleared nearly 5.83 of the total 6.93 miles of right of way, and spent \$507,975.98 for materials, \$581,851.72 for contract labor, and \$599,803.86 in Company labor costs associated with construction for the Gene Snyder line. Supplemental Affidavit of Mark S. Johnson (“Supplemental Johnson Affidavit”), attached hereto as Exhibit 2, at ¶ 2. Condemnation actions have also been filed to obtain easements on the properties at issue in this proceeding, so that construction can begin on those parcels of land as soon as possible.¹ Initial Johnson Affidavit, at ¶ 13.

The course of construction for the Gene Snyder line has been no different than that for any other line of similar size constructed by the Company. Despite what the Paddock apparently believes, construction of a transmission line of this scope does not begin and end in the matter of only a few weeks. Supplemental Johnson Affidavit, at ¶ 3. LG&E formulated its initial construction plan for the Gene Snyder line in 2000. That plan was revised as needed based on pre-construction delays caused by negotiations with the Highway Department and affected landowners. The Company started its construction earlier this year in compliance with that plan as revised over time. Supplemental Johnson Affidavit, at ¶ 4. While there have been some delays in construction since July, those delays have been caused by external factors such as local weather, the hurricanes in Florida which diverted personnel and materials, and the actions of the Complainants and Intervenor in pursuing this matter and contesting LG&E’s right to condemn in the Jefferson Circuit Court. Supplemental Johnson Affidavit, at ¶ 5. Still, there is nothing

¹ The Paddock was served in the condemnation action against it on October 28, 2004. While the Paddock has implied that LG&E has not been diligent in pursuing the condemnation actions, the Paddock’s claims are, yet again, inaccurate. LG&E is intent on having the condemnation cases decided as quickly as possible, and has used its best efforts to advance those cases to the extent possible. However, as any lawyer is well aware, there is only so much that a litigant can do to control the pace of litigation in Circuit Court. That is especially true in the early stage of a condemnation case, where the ability to advance depends entirely on when the Court appoints commissioners and when those commissioners subsequently return their reports. Nonetheless, for the reasons explained in section III below, the condemnation actions have absolutely no bearing on the disposition of this proceeding.

particularly unusual about any of those delays. It is typical for construction of lines such as the one at issue here to take place in phases, as additional land use rights are acquired and access is cleared, and it is normal for there to be delays caused by weather and other uncontrollable events. Supplemental Johnson Affidavit, at ¶ 3.

It is clear, therefore, from the undisputed evidence of record, that the Paddock has completely mischaracterized LG&E's construction activities, both before and after July 13, 2004. What is more important, however, is the fact that, based on that undisputed evidence, there can be no question that LG&E commenced construction of the Gene Snyder line well before the 2004 amendment to KRS 278.020 became effective. Although the Paddock argues that installing foundations should not be considered the commencement of construction, it offers no authority to support that argument. And while KRS 278.020 does not define what level of activity is required to justify a finding that construction has begun, there is clear guidance on that point elsewhere in Chapter 278. Specifically, KRS 278.700, which deals with an analogous situation of the construction of a merchant electric generating facility, defines "commence to construct" as being "physical on-site placement, assembly or installation of materials or equipment which will make up part of the ultimate structure of the facility" which is either done "at the site of the proposed facility or [is] site-specific." KRS 278.700(4).

Here, LG&E's construction activities squarely meet the definition set out in KRS 278.700(4). Specifically, as early as May, 2004, LG&E had placed concrete and steel approximately 20 feet into the ground to form the foundations for a number of the transmission poles themselves. Each of those foundations, which were constructed on-site and were site-specific, make up part of the ultimate structure of the Gene Snyder line, as the transmission poles cannot stand without the support of the permanent foundations placed in the ground.

Despite the Paddock's effort to misconstrue and discount LG&E's construction activities, it is undisputed that LG&E had done significant clearing work and had placed 14 permanent pole foundations before the 2004 amendment to KRS 278.020. It is only logical to conclude, based on that evidence, that construction of the Gene Snyder line had commenced before the amendment took effect. In addition, LG&E's pre-amendment activities meet the definition of "commence to construct" contained in KRS 278.700(4). There is thus no basis for any finding but that construction on the Gene Snyder had started well before the 2004 amendment to KRS 278.020 became effective. Accordingly, the question then becomes whether that statutory amendment can be retroactively applied to the Gene Snyder line. And, as explained below, retroactive application here is unlawful.

2. The Amended Version of KRS 278.020 Can Not be Retroactively Applied Here.

The Complainants and Intervenor all claim that the 2004 amendment to KRS 278.020 should be retroactively applied to the Gene Snyder line. In making that argument, the Complainants and Intervenor simply string together several cases dealing with remedial statutes, pick out favorable language from those cases to cite as authority, but never analyze the factors which distinguish a remedial statute from a substantive statute. In fact, if the Commission were to read the briefs filed by Complainants and Intervenor, and nothing more, it would likely be left with the impression that it is the rule, rather than the exception, that a statute or statutory amendment may be retroactively applied. Nothing could be further from the truth.

Quite simply, it is the law of this Commonwealth that retroactive application of a statute is ordinarily prohibited unless expressly provided for in the statute itself. KRS 446.080(3). Indeed, the Kentucky Supreme Court has stated that the prohibition against retroactive

application is “fundamental to statutory construction in Kentucky.” Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Co., Ky., 983 S.W.2d 493, 499-500 (1998). While it is accurate, as pointed out by the Complainants and Intervenor, that there is an exception to the bar on retroactive application where a statute or amendment is only remedial, and not substantive, that exception is very limited and does not apply here.

The Kentucky Supreme Court has established a test for determining whether an amendment to a statute is remedial or substantive. An amendment is remedial if it merely creates an “expansion of an existing remedy without affecting the substantive basis, prerequisites, or circumstances giving rise to the remedy.” Kentucky Ins. Guar. Ass'n v. Jeffers ex rel. Jeffers, Ky., 13 S.W.3d 606, 609 (2000). On the other hand, an amendment is substantive if it creates “new rights and responsibilities that did not exist” previously. Kentucky Industrial Utility Customers, Inc., 983 S.W.2d at 500. The application of those factors must be made against the backdrop of the Supreme Court’s admonition 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.” Id.

In this case, an application of the factors set out by the Supreme Court leads to only one conclusion: the 2004 amendment to KRS 278.020 is clearly substantive, not remedial, and therefore cannot be applied retroactively. It simply cannot be said that the amendment at issue merely expanded “an existing remedy without affecting the substantive basis, prerequisites, or circumstances giving rise to the remedy.” Jeffers, 13 S.W.3d at 609. To the contrary, the amendment created entirely “new rights and responsibilities that did not exist” previously. Kentucky Industrial Utility Customers, Inc., 983 S.W.2d at 500. Before the amendment, utilities could construct transmission lines free of any requirement that they first obtain a CPCN, and

landowners had no right to participate in a public hearing because they were not considered “parties interested within the meaning of” the statute. Duerson, 843 S.W.2d at 341; Satterwhite v. Public Service Commission, Ky., 474 S.W.2d 387, 388 (1972). With the amendment, however, utilities are now required to obtain a CPCN before constructing transmission lines like the Gene Snyder line, which was not the case immediately before the amendment, and interested landowners now have a right, where they did not before the amendment, to seek intervention and request a local public hearing.

The Complainants and Intervenor all imply that the 2004 amendment to KRS 278.020 is merely remedial because it only changed the existing process for obtaining a CPCN. That argument is fundamentally flawed, however, because the change to the statute does not merely adjust existing obligations and remedies, but instead creates entirely new obligations and remedies. Indeed, the Kentucky Supreme Court rejected an argument like the one offered here by the Complainants and Intervenor in Kentucky Industrial Utility Customers, Inc., 983 S.W.2d 493. In that case, a statute was passed permitting a surcharge for certain environmental compliance costs. Before the statutory enactment, such costs were permitted to be recovered by utilities only to the extent they were included in base rates in a rate proceeding initiated before the Commission. Although there was an existing procedure for recovery of those costs, through the filing of a general rate case, the Supreme Court found that the statute was substantive, not remedial, because the changes made by the statute created new rights and responsibilities. Specifically, the law created the right to recover certain environmental recovery costs “without filing a general rate case,” and required ratepayers to pay for those costs through the surcharge. Id. at 500.

Here, similarly, the 2004 amendment to KRS 278.020 did not merely adjust existing obligations and rights. Rather, the amendment created entirely new obligations and remedies. Specifically, where there was no restriction on the construction of a new transmission line like the Gene Snyder line, the 2004 amendment created a restriction by obligating utilities to obtain a CPCN before starting construction, and where there was absolutely no remedy for landowners, or any member of the public, to question the construction of a new transmission line before July 13, 2004, the 2004 amendment to KRS 278.020 created such a remedy. For that reason, as in Kentucky Industrial Utility Customers, Inc., the change in law here created “new rights and responsibilities,” making the legislation “substantive and not remedial.” Id.

A statute cannot be applied retroactively unless the General Assembly expressly provides for such application, or unless the amendment was merely remedial and not substantive. Here, the 2004 amendment to KRS 278.020 did not provide for retroactive application, and that amendment was 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 cannot be applied and thus no CPCN was required.

III. THE CONDEMNATION ACTIONS INVOLVING THE COMPLAINANTS AND INTERVENOR HAVE NO BEARING ON THIS PROCEEDING, AND THE COMMISSION HAS NO JURISDICTION WITH REGARD TO THE CONDEMNATION ISSUES.

Finally, MRH argues that LG&E is prohibited from proceeding with its condemnation action, filed in Jefferson Circuit Court, until it first obtains a CPCN for the Gene Snyder line from this Commission. MRH asks that the Commission order LG&E to cease its condemnation

actions until a CPCN is granted. That argument and request for relief are incorrect and misplaced, for several reasons.

To begin with, for all of the reasons stated above, LG&E was not required to obtain a CPCN for the Gene Snyder line. That line was under construction before the 2004 amendment to KRS 278.020 took effect, and that amendment cannot be retroactively applied. Under the law in effect at the time construction was commenced, a CPCN was not required for that line.

Second, it is well-established law in this Commonwealth that the allegation that a condemnor has failed to obtain a CPCN from this Commission is not a defense to a condemnation action. Duerson, 843 S.W.2d at 343 (recognizing that “administrative requirements neither lend to nor take away from a government’s power to condemn,” and holding that a utility’s failure to obtain a CPCN and other administrative approvals was not an “effective defense[] to condemnation”).² That is so because the power of condemnation is inherent in the state alone, is justified on the ground that individual rights must yield to the consideration of the public good and common welfare, and is not subject to abridgement or impairment. Id.; Cornwell v. Central Kentucky Natural Gas Co., Ky., 249 S.W.2d 531 (1952); Smith v. Tygrett, Ky., 302 S.W.2d 604 (1956).

Finally, Kentucky’s Eminent Domain Act places jurisdiction of condemnation proceedings exclusively in the circuit courts. KRS 416.570. For that reason, the Commission has never involved itself with matters involving condemnation. E.g. In the Matter of Smith and Mattingly v. Hardin Co. Water Dist. No. 1, PSC Case No. 92-395 (Order of October 22, 1992) (holding that the Commission “has jurisdiction over complaints as to rates or service of a utility,

² Contrary to the assertions of the Complainants, Duerson was not completely “overruled” by the 2004 amendment to KRS 278.020. That amendment only affects so much of Duerson as involves the question of whether a CPCN is needed for transmission lines started after the effective date of the amendment. The other aspects of Duerson, including the cited holding, are unaffected by the amendment and remain good law.

but possesses no jurisdiction to adjudicate a claim arising out of a condemnation proceeding”). There is thus no legal basis on which the Commission can consider any issues relating to the condemnation proceedings in Jefferson Circuit Court.

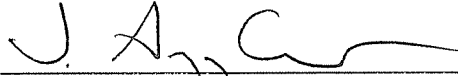
The issues involved in the condemnation actions between the parties are separate and distinct from the issues in this proceeding and are not within the jurisdiction of the Commission. There is thus no basis at law for the Commission to inject itself into the jurisdiction of the Jefferson Circuit Court by ordering LG&E to cease its condemnation action against the Intervenor. For that reason, MRH’s final argument must be rejected.

CONCLUSION

There is no question that LG&E commenced construction of the Gene Snyder line well before the 2004 amendment to KRS 278.020 took effect, and it is clear that the amendment was substantive, not remedial, and thus cannot be applied retroactively to the Gene Snyder line. Accordingly, 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: November 16, 2004

Respectfully submitted,



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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 16th day of November, 2004, via U.S. mail, postage prepaid:

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

SUPPLEMENTAL 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's construction of the new transmission line in eastern Jefferson County, Kentucky (the "Gene Snyder line") is ongoing. As of November 9, 2004, LG&E had completed construction on 22 of the 59 foundations, using nearly 200 yards of concrete, cleared nearly 5.83 of the total 6.93 miles of right of way, and spent \$507,975.98 for materials, \$581,851.72 for contract labor, and \$599,803.86 in Company labor costs associated with construction for the Gene Snyder line.
3. The course of construction for the Gene Snyder line has been similar to that for other lines of similar size constructed by LG&E. Construction of a transmission line of this scope does not begin and end in the matter of only a few weeks. It is

typical for construction of lines such as the one here to take place in phases, as additional land use rights are acquired and access is cleared.

4. LG&E formulated its initial construction plan for the Gene Snyder line in 2000. That plan was revised as needed based on pre-construction delays caused by negotiations with the Highway Department and affected landowners. The Company started its construction earlier this year in compliance with that plan as revised over time.
5. There have been some delays in construction on the Gene Snyder line since July caused by external factors such as local weather, the hurricanes in Florida which diverted personnel and materials, and the actions of the Complainants and Intervenor in pursuing this matter and contesting LG&E's right to condemn in the Jefferson Circuit Court. However, those delays are not particularly unusual. In fact, delays caused by weather and other uncontrollable events are normal with this type of construction.

Further, the Affiant sayeth not.

