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	)	CASE NO. 2004-00293
v.	)	
LOUISVILLE GAS & ELECTRIC CO. DEFENDANT	)	

BRIEF FOR INTERVENORS MRH DEVELOPMENT CO.

* * * * *

I. INTRODUCTION AND PROCEDURAL HISTORY

On July 22, 2004, Petitioners, Paddock at Eastpoint, LLC, Louis K. Klemenz and St. Joseph Catholic Orphan Society ("Petitioners") petitioned this Commission for an Order requiring Defendant Louisville Gas & Electric Company ("LG&E") to apply for a *Certificate of Public Convenience and Necessity* as required by KRS 278.020 and 807 KAR 5:120(E). LG&E opposed this petition. Petitioners sought this order regarding LG&E's extension of high voltage transmission line in a route which would require an easement across Petitioners' property (Exhibit "1").

On September 2, 2004, Intervenor MRH Development Co. (hereinafter "MRH") petitioned this Commission for intervention and for an order requiring LG&E to apply for a *Certificate of Public Convenience and Necessity* (Exhibit "2"). LG&E objected.

This Commission permitted MRH's intervention in its Order September 3, 2004 and the Commission then ordered the parties to mediate. Mediation was conducted on October 7, 2004,

at 8:00 a.m., but the mediation was unsuccessful. In its Order of October 15, 2004, the Commission then ordered the parties to file simultaneous opening briefs by October 27, 2004 and simultaneous responsive briefs by November 16, 2004.

On or about August 20, 2004, LG&E filed a petition in Jefferson Circuit Court (Exhibit "3") against MRH Development Co. seeking to exercise eminent domain to condemn an easement across MRH's property. LG&E has filed similar petitions in Jefferson Circuit Court against Petitioners Paddock at Eastpoint, LLC, Louis K. Klemenz and St. Joseph Catholic Orphan Society as well as other landowners. The case filed by LG&E against MRH is pending in Jefferson Circuit Court, Division Six (6), other cases are pending in other divisions of Jefferson Circuit Court. No petition to consolidate the actions have been filed, it is believed that the petition filed against MRH is the senior action.

On October 7, 2004, MRH filed a notice to dismiss the Jefferson Circuit Court action (Exhibit "4"). LG&E will file a reply.

The issue before this Honorable Commission is whether or not LG&E is required by KRS 278.020 to obtain a *Certificate of Public Convenience and Necessity* before constructing the proposed "extension" of its electrical lines which transmit more than 138 kilovolts and which are more than 5,280 feet in length.

II. FACTS

The 2004 Kentucky Legislature, with the active participation of LG&E and other public utilities, amended KRS 278.020 to provide as follows:

> "For purposes of this section, construction of any electrical transmission line of 138 kilovolts or more and of more than 5,280 (5280) feet and 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."

This amended statute was effective on July 13, 2004. All LG&E's condemnation actions were filed after July 13, 2004. LG&E filed no petition with the Public Service Commission for a *Certificate of Public Convenience and Necessity*. Instead, LG&E choose to attempt to exercise its power of eminent domain in a number of circuit courts within Jefferson County.

The land that LG&E seeks to condemn is among the most highly valued undeveloped real estate left in Jefferson County, Kentucky. This land is situated in a high visibility area along I-275 between I-64 and I-71. The development potential of this land is extremely high. Petitioner Paddock at Eastpoint has begun construction of a large multi-unit residential complex. MRH intends to develop or market for development its land for commercial purposes.

KRS 278.020 requires that the Public Service Commission will hold a public hearing regarding the required *Certificate of Public Convenience and Necessity*. The Public Service Commission, acting for the public, will then determine the public convenience and public necessity of the extension.

In LG&E's answer to Petitioners' petition in this case, it asserts that as early as November 3, 2003, it received approval from the Kentucky Department of Transportation ("DOT") to proceed along the east side of I-265 and that it "began survey work and easement acquisition". LG&E claims that by March 2004, it "began clearing the easement area" and that by May 2004, "construction was started on the foundations for the poles themselves". LG&E thus asserts that "the Gene Snyder line was under construction" prior to July 13, 2004 and that KRS 446.080(3) prohibits the amendment effective July 13, 2004 from "retroactive" application.

III. ARGUMENT

A. KRS 278.020, AS AMENDED, IS REMEDIAL AND DOES NOT REQUIRE RETROACTIVE APPLICATION

The Kentucky Supreme Court has held that "a statute, even though it does not expressly state, has retroactive application provided that the statute is remedial".

In Kentucky Insurance Guaranty Assoc. v. Jeffers, Ky. 13 S.W.3rd 606 (2002), a number of medical malpractice actions were pending prior to a legislative change which increased the Kentucky Insurance Guaranty's funds' coverage limit from $100,000.00 to $300,000.00. The legal issue on appeal was whether this legislative change was remedial and if not, whether it could be applied retroactively.

The Kentucky Supreme Court, citing its previous decision in Peabody Coal Co., v. Gossett, et al., 819 S.W.2d (1991) stated that a retroactive law is "one which takes away or impairs vested rights acquired under existing laws or which creates a new obligation and imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed". By contrast, statutes which relate to "remedies or modes of procedure which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of such rights, cannot normally come within the legal conception of a retroactive law, or the general rule against retroactive operation of statutes". Only statutes that affect substantive rights are statutes that may or may not be applied retroactively. If the Legislature intends a statute affecting substantive or "penal" rights to apply retroactively, it must expressly so state pursuant to KRS 446.080.

The Public Service Commission, by statute and through case law, is the administrative agency appointed for the purpose of "hearing facts and establishing reasonable rules, rates and services to the public in order to secure conformity of services and rates effecting all classes of customers, because for this burden to fall exclusively on the courts and to give the courts the primary and exclusive jurisdiction to pass on the reasonableness of rules, rates, schedules,

practices, etc. of the (public utilities) would lead to confusion and uncertainty". Smith v. Southern Bell Telephone & Telegraph Co., Ky. 104 S.W.2d 961, 962 (1937).

In Kentucky Insurance Guaranty, supra, the Kentucky Supreme Court again reaffirmed the "general rule of law" that remedial statutes "are entitled to a liberal construction in favor of the remedy provided by law, or in favor of those entitled to the benefits of the statute". Here, the public of whom the Petitioners and Intervenor are only one small part, is entitled to the "benefits of the statute". Therefore, the Court reaffirmed the principle that the Legislature is "presumed to have enacted "with the knowledge that it would be interpreted to apply to laws of substance only and not those dealing strictly with the extent of the remedy[1]".

The Public Service Commission is charged with determining the public convenience and necessity of the activities of publicly regulated utilities. In exchange for monopoly status, public utilities must submit to public scrutiny and, if appropriate, public hearing pursuant to laws enacted by the public through its General Assembly. Public utilities, no matter how large or powerful, have a duty to seek public acceptance of their activities through the Public Service Commission, at least to the extent that statutes require such a gate keeping function of the Public Service Commission.

In Peabody, supra, the Kentucky Supreme Court indicated clearly and unambiguously that if a statute is remedial, retroactivity is not an issue...

> "the general rule of the statute, even though it does not expressly state, has retroactive application provided the statute is remedial". This is a fundamental rule of statutory construction which does not invade the province of the Legislature".

Here, the requirement imposed by the Kentucky Legislature in 2004 merely requires LG&E to seek the approval of the Public Service Commission before it engages in new

[1] 446.080(3), requires an express statement of intent to apply substantive legislation retroactively

construction. This statute does not limit LG&E's right to construct extensions of high voltage electrical lines and it merely imposes a procedural and remedial prerequisite to construction.

The Public Service Commission will note that LG&E did not begin its eminent domain actions until after July 13, 2004. If LG&E had chosen to comply with the statute requiring an application for a *Certificate for Public Convenience and Necessity*, it probably would have had its public hearing by now and may well be entitled to proceed with condemnation and construction. LG&E was well aware of its statutory requirements regarding this Commission. Instead, LG&E decided to bypass the Public Service Commission and proceed directly, in four (4) or five (5) separate courts, to condemn extremely valuable private land without a *Certificate of Public Convenience and Necessity*. At best, LG&E's tactical choice betrays a lack of confidence in its position before this Commission and before the public and its Legislature.

B. LG&E IS PROHIBITED FROM CONDEMNING PRIVATE LAND WITHOUT A *CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.*

Because LG&E choose to proceed directly with its condemnation proceedings, the prospect of inconsistent application of the law is very real. LG&E proposes at least five (5) separate eminent domain actions, three (3) of which are in various Jefferson Circuit courts and only two (2) of which are in the same circuit court (Division 6, Hon. Steven Ryan, Judge).

While the issues pending before the Public Service Commission are not identical to the issues pending before the Jefferson Circuit Court, they are substantially similar.

While Jefferson Circuit Court is not empowered to issue a *Certificate of Public Convenience and Necessity*, issues concerning standing, jurisdiction and necessity issues which LG&E has brought before Jefferson Circuit Court as well as this Commission.

Necessity is an issue before this body as well as in Jefferson Circuit Court.

In Bernard v. Russell County Air Board, Ky. 718 S.W.2d 123 (1986), the Russell County Air Board attempted to condemn private land for purposes of expanding its airport. The Air Board was, like LG&E in this matter, required to obtain prior approval from the County Government before proceeding with condemnation. The Kentucky Supreme Court held that the Air Board was not legally formed and it did not seek prior authority from County Government and, therefore, it was denied the right to proceed with condemnation.

The Kentucky Supreme Court took the opportunity to re-emphasize its long-standing concern regarding abuses of the powers to condemn and it cited The City of Owensboro v. McCormick, Ky. 581 S.W.2d 3 (1979) for the following proposition:

> "the opportunity for tyranny, particularly by the self-righteous, exists in condemnation of private property to a vastly greater degree than in the levying of taxes and the expenditure of public funds".

It is precisely this danger that prompted the Legislature to require LG&E and other utilities to apply to this Commission for a *Certificate of Convenience and Necessity* in order to extend this project. LG&E choose to avoid its obligation to justify its actions to the public and, instead, began private condemnation proceedings.

Since the Jefferson Circuit Court lacks the authority to provide a *Certificate of Public Convenience and Necessity* and since the statute requires such a certificate, only this Commission can effectuate the legislative intent that is so obvious in KRS 278.020(2). LG&E is statutorily prohibited from taking any actions toward this project until it receives this Commission's *Certificate of Public Convenience and Necessity*. Until such time as LG&E complies with Kentucky law, it has no authority to attempt to condemn Intervenor's valuable property.

IV. CONCLUSION

Intervenor moves this honorable body to require that LG&E properly petition the Public Service Commission for a *Certificate of Public Convenience and Necessity.*

Intervenor further moves this Commission to order that LG&E cease all eminent domain actions until it has complied with the requirements imposed by KRS 278.020.

Respectfully submitted,

TILFORD DOBBINS ALEXANDER BUCKAWAY & BLACK, LLP

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was this 27th day of October, 2004 mailed to the following parties of record:

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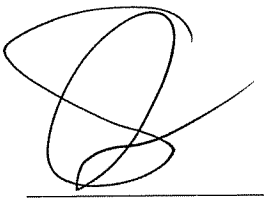

Stuart E. Alexander III

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COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

138 KV TRANSMISSION LINE LOCATED ADJACENT TO INTERSTATE 265 IN JEFFERSON COUNTY, KENTUCKY AS PROPOSED BY LOUISVILLE GAS & ELECTRIC COMPANY

CASE NO. 2004-00293

PETITION

Petitioners, Paddock at Eastpoint, LLC, a Kentucky limited liability company, and Louis K. Klemenz, and St. Joseph Catholic Orphan Society, as their interest may appear, hereby move the Public Service Commission ("PSC") to enter an order requiring Louisville Gas & Electric Company ("LG&E") to apply for a Certificate of Public Convenience and Necessity, as required by KRS 278.020 and 807 KAR 5:120E. In support of this Petition, Petitioners state:

1. Petitioners respectively own certain parcels of real property adjacent to Interstate 265 in Jefferson County, Kentucky.

2. LG&E has notified Petitioners of LG&E's intent to acquire easements over their respective properties for the extension of a 138 KV electrical transmission line in excess of more than 5,280 feet along the east boundary line of Interstate 265.

3. Although LG&E has advised Petitioners that it has had numerous planned routes for this line, some of which involve Petitioners' properties and some of which do not, at no time has

LG&E informed Petitioners that it has obtained a Certificate of Public Convenience and Necessity required by KRS 278.020, and review of PSC's records indicate that no application for such petition has been filed with the PSC.

4. Upon Petitioners' information and belief, the electrical transmission line proposed by LG&E is not exempt by KRS 278.020(2).

5. Petitioners are directly and adversely affected by LG&E's actions in violation of KRS 278.020, and are authorized, pursuant to 807 KAR 5:120E to request a local public hearing on the proposed extension, and to intervene pursuant to 807 KAR 5:001(8). LG&E's failure to file the required application has deprived Petitioners of these rights, and those flowing from it.

Based on the foregoing, Petitioners respectfully request that the Court enter an Order requiring LG&E to file an application for the construction of the extension of the subject 138 KV electrical transmission line pursuant to 807 KAR 5:120E to obtain a Certificate of Public Convenience and Necessity.

Respectfully submitted,

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St. Joseph Catholic Orphanage

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	)	CASE NO. 2004-00293
v.	)	
LOUISVILLE GAS & ELECTRIC CO. DEFENDANT	)	

MOTION FOR LEAVE TO INTERVENE IN THE PROCEEDING

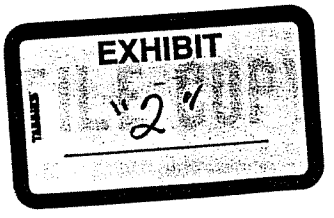
* * * * *

Comes MRH Development Company ("MRH"), by counsel and pursuant to 807 KAR 5:001(8), moves the Public Service Commission to enter an order permitting MRH to intervene in the above matter and for an order requiring Respondent Louisville Gas & Electric Company ("LG&E") to apply for a *Certificate of Public Convenience and Necessity* as required KRS 278.020 and 807 KAR 5:120(e).

In support of its motion, MRH states as follows:

1. That MRH owns a parcel of real estate adjacent to I-265 in Louisville, Jefferson County, Kentucky.

2. That MRH has been named as a Defendant in an action filed by LG&E by which it attempts to acquire an easement together with rights and authorities to enter, construct, inspect,



maintain, operate, enlarge, rebuild, repair and patrol the parcel owned by MRH (Complaint attached hereto as Exhibit "A").

3. That LG&E has numerous planned routes for this line, some of which involve MRH's parcel and some of which that do not, but LG&E has never obtained a *Certificate of Public Convenience and Necessity* as required by KRS 278.020.

4. The interests of MRH will not be adequately represented unless the Commission permits MRH to intervene as MRH is an adjoining landowner to Complainants herein, and since MRH (like Complainants) have been sued by LG&E in an attempt to avoid its statutory obligations to obtain a *Certificate of Public Convenience and Necessity* from this Commission.

5. That LG&E is required, by Kentucky law, to obtained a *Certificate of Public Convenience and Necessity* and that KRS 278.020 is a procedural statute which, among other things, represents the Legislature's intention that the issue of necessity be determined by this Commission.

Based on the foregoing, Intervening Petitioner MRH is, has been, and will be directly affected by LG&E's actions and, therefore should be granted leave to intervene and to participate in a local public hearing on the proposed extension. MRH requests that this Commission enter an order requiring LG&E to file an application for the construction of the extension of the subject 138 KV Electrical Transmission Line and to obtain a *Certificate of Public Convenience and Necessity*.

Respectfully submitted,

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Terrell L. Black
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& Black, LLP
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(502) 584-1000

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was this 2nd day of September, 2004 mailed to the following parties of record:

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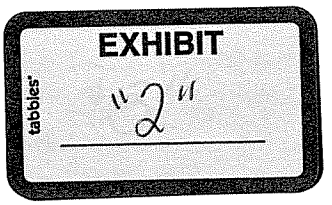
COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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



O R D E R

This matter arising upon the motion of MRH Development Company ("MRH"), filed September 2, 2004, for full intervention, it appearing to the Commission that such intervention is likely to present issues and develop facts that will assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings, and this Commission being otherwise sufficiently advised,

IT IS HEREBY ORDERED that:

1. The motion of MRH to intervene is granted.

2. MRH shall be entitled to the full rights of a party and shall be served with the Commission's Orders and with filed testimony, exhibits, pleadings, correspondence, and all other documents submitted by parties after the date of this Order.

3. Should MRH file documents of any kind with the Commission in the course of these proceedings, it shall also serve a copy of said documents on all other parties of record.

Done at Frankfort, Kentucky, this 3rd day of September, 2004.

By the Commission

ATTEST:

Executive Director

NO. 04CI07083

JEFFERSON CIRCUIT COURT

DIVISION _____

LOUISVILLE GAS AND ELECTRIC COMPANY PLAINTIFF

VS. PETITION

JEFFERSON CIRCUIT COURT
DIVISION SIX (6)

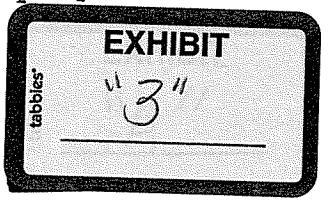
MRH DEVELOPMENT CO. DEFENDANT

Serve:
Terrell Black
3 Riverfront Plaza, Suite 320
Louisville, Kentucky 40202

* * * * *

Comes the plaintiff, Louisville Gas and Electric Company, and, for its Petition herein, states and alleges as follows:

1. That plaintiff is a corporation duly organized and existing under the laws of the Commonwealth of Kentucky, and that by reason of its creation under said laws it is authorized to construct, inspect, maintain, operate, enlarge, rebuild and repair transmission and distribution lines and systems in and through the said Commonwealth in the County of Jefferson and other counties of Kentucky for the transmission, distribution and sale of electrical energy to persons, corporations and municipalities desiring to purchase same and that plaintiff has the power of eminent domain to acquire the property rights and privileges needed for such uses and purposes.



2. That in order to construct, operate and maintain its said system of transmission and distribution lines, it is necessary that the plaintiff acquire from the defendant the easement hereinafter described, together with right and authority to enter upon said lands for the purpose of constructing, inspecting, maintaining, operating, enlarging, rebuilding, repairing and patrolling over, on and across said lands, the aforesaid lines including poles and all equipment and facilities related thereto.

3. That the easement, hereinafter described, will be located upon a portion of that land situated in Jefferson County, Kentucky, and being more particularly described in Exhibit "A" attached hereto, being a part of the same property conveyed to MRH Development Co., by deed from Jefferson County Economic Development Corporation, dated March 18, 1997, and of record in Deed Book 6860, Page 045, in the Jefferson County Court Clerk's Office.

4. That the easement for transmission line and electric distribution purposes sought on the above described property is described as follows:

> An easement for transmission line and electric distribution purposes over and across a strip of land 100 feet in width and lying 50 feet on both sides of a centerline, insofar as the lands of the defendant extend to 50 feet on each side of said centerline, which centerline is described as follows:
>
> Beginning at a point, on the East edge of right-of-way of US-I-265 (Gene Snyder Freeway ramp-1), said point being the southern most corner of the parent tract (D.B. 6860, Pg. 45), said point also being the Southwest Corner of an adjoining tract owned by The

Commonwealth of Kentucky (D.B. 5387, Pg. 633 excess purchase for the construction of US-I-265 along old Old Henry Road now a dead end); Thence with the east edge of right-of-way and the southern edge of the parent tract N56°51'40"W - 69.83 feet to the point where centerline of said easement enters parent tract and being the **Point of Beginning** for the description of centerline of said easement; Thence leaving the right-of-way of US-I-265 with the centerline of said easement and across the parent tract N07°56'25"W - 21.60 feet, N20°40'04"W - 683.54 feet, N02°57'06"E - 598.29 feet and N05°05'01"E - 494.53 feet to the point on the division line between the parent tract and Louis Klemenz (D.B. 6909, Pg. 592) and being S58°52'49"E - 14.47 feet to an iron pin found PLS 3477, said pin being the northwest corner of the parent tract. Said easement covers 2.893 acres.

5. That the above described easement is shown as the hatched area on that plat annexed hereto as Exhibit "B" and made a part hereof by reference.

6. That this action is prosecuted under KRS 416.550 to KRS 416.670.

7. That in connection with the construction, inspection, maintenance, operation, enlargement, rebuilding, repairing and patrolling of said lines, it is necessary that the plaintiff be granted the right and privilege to trim trees and cut down any trees located within said easement above described and any other trees located in such proximity to said lines that in falling might come in contact with wires, and also the right to do all trimming and removal of trees and branches necessary for the proper clearance of said lines; and that it is also necessary that plaintiff be granted the right of ingress and egress over

and upon the lands of defendant provided, however, that plaintiff will, whenever practicable to do so, use regularly established roads; and it is further necessary that the defendant be restricted from constructing any buildings, signs, towers, antennas, swimming pools or other structures upon the easement herein sought, excepting fences, and that no changes in grade be made within the easement which would interfere with the rights and privileges herein sought.

8. That plaintiff shall pay all damages that may be caused to fences and other property in constructing, inspecting, maintaining, operating, enlarging, rebuilding, repairing and patrolling said lines, except that it shall not be liable for cutting down or trimming trees or removing obstructions in the manner and to the extent above indicated.

9. That plaintiff shall also remain liable for any damages done through its negligence in the operation and management of its lines, equipment and facilities.

10. That plaintiff shall have only an easement on the lands of the defendant to use same for the purposes herein set forth and defendant shall continue to own, use, occupy and enjoy the lands crossed by the easement provided such use shall not interfere with the plaintiff's operation and management of said lines, equipment and facilities within the limitations herein set forth.

11. That plaintiff has at all times been unable to acquire by agreement with the defendant the easement and rights herein sought, although it has attempted in good faith to do so.

12. That the defendant, MRH Development Co., is the only entity that has a material interest in the property above described, insofar as it is known to the plaintiff.

WHEREFORE, plaintiff prays that this Court, or the Circuit Court Clerk in the absence of the Circuit Judge from the county, appoint commissioners to find the fair market value of the entire property immediately before the taking of the easement, and the fair market value of the entire property immediately after the taking of the easement for the purposes and uses aforesaid, and plaintiff prays for the easement, rights and privileges above described, and for all further and proper relief.

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Telephone: 859-231-3000

BY _____
ATTORNEYS FOR PLAINTIFF

STATE OF KENTUCKY

COUNTY OF Kentucky

The affiant, J. Mike Mullins, states that he is the Manager, Transmission Lines of the plaintiff, Louisville Gas and Electric Company, a Kentucky corporation, and that this affiant has read the foregoing Petition and that the statements contained therein are true.

_____

Subscribed and sworn to before me by J. Nate Mullins this the 20th day of August, 2004.

My notarial commission expires on the 17th day of March, 2005.

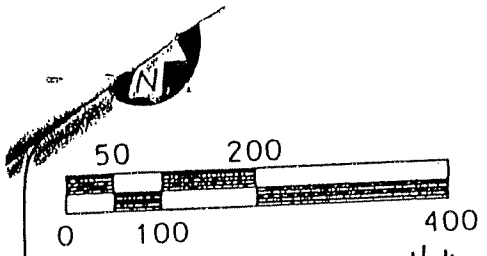
NOTARY PUBLIC
Fayette COUNTY, KENTUCKY

EXHIBIT A

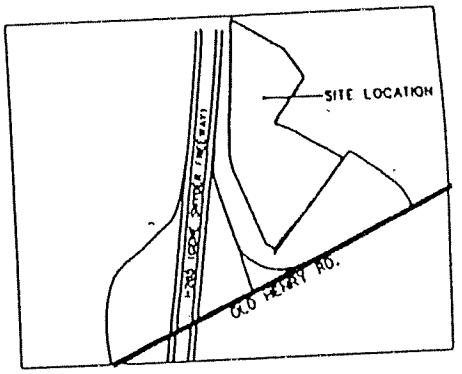
Being a part of the property conveyed to Ha-Ha, Inc. as recorded in Deed Book 4936, Page 526 in the office of the County Court Clerk of Jefferson County, Kentucky; and more particularly described as follows:

Beginning at a point in the northwest right-of-way line of Old Henry Road, said point being the southernmost corner of the remainder of property conveyed to Albin and Anna Oyr as recorded in Deed Book 1618, Page 167 and shown on the plat recorded in Deed Book 4936, Page 526 in said clerk's office; thence with Old Henry Road, South 38°12'12" West, 462.16 feet to a pipe; thence South 43°54'36" West, 353.67 feet to a pipe; thence South 33°46'41" West, 66.85 feet to a pipe; thence with the east right-of-way of Jefferson Freeway Ramp No. 1, North 56°54'54" West, 90.37 feet to a pipe; thence North 21°53'40" West, 597.18 feet to a pipe; thence with the arc of a curve to the right having a radius of 636.197 feet and a chord of North 06°07'54" West, 223.37 feet to a pipe in the east right-of-way of Jefferson Freeway; thence with the Freeway, North 02°26'14" East, 148.53 feet to a pipe; thence North 05°07'50" East, 825.85 feet to a pipe and corner to Chester W., Karl G. and Edith J. Klemenz as recorded in Deed Book 3022, Page 531 in said clerk's office; thence with Klemenz, South 58°55'51" East, 466.37 feet to a pipe and corner to Klemenz and corner to Lot 10 as shown on the plat recorded in Deed Book 5375, Page 867 in said clerk's office; thence with Lot 10, South 32°17'32" East, 275.71 feet to a fence post and corner to said Oyr; thence with Oyr, South 37°20'59" West, 439.83 feet to a metal post; thence South 57°51'25" East, 119.98 feet to a post; thence South 58°45'39" East, 490.40 feet to the point of beginning containing 19.466 acres.

EXHIBIT B



Scale: 1" = 200'



IPF
PLS# 3477

14.47

10.12

LOUIS KLEMENZ
D.B. 6909, PG. 592

166.37
N38°52'49"W

IRON POST FOUND

494.53
N5°5'1"E

275.71
N32°14'28"W

439.83
N37°24'3"E

119.98
N67°48'19"W

490.40
N38°42'35"W

598.29
N2°57'6"E

148.53
S2°29'17"W

PROPERTY ADDRESS

MAILING ADDRESS

MRH DEVELOPMENT CO.
3 RIVERFRONT PLAZA
LOUISVILLE, KY 40202

I HEREBY CERTIFY THAT THIS PLAT WAS MADE UNDER MY SUPERVISION AND IS CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF. DISTANCES AS SHOWN ON THIS PLAT HAVE NOT BEEN ADJUSTED FOR CLOSURE.

SURVEYOR

MRH DEVELOPMENT CO.

NO. 04-CI-07083

JEFFERSON CIRCUIT COURT
DIVISION SIX (6)

LOUISVILLE GAS AND ELECTRIC COMPANY PLAINTIFF

v. **NOTICE-MOTION-ORDER**

MRH DEVELOPMENT CO. DEFENDANT

** ** ** ** **

TO: Leslie W. Morris II
David T. Royse
Stoll, Keenon & Park LLP
300 W. Vine Street, Suite 2100
Lexington, Kentucky 40507

Please take notice that on the 11th day of October, 2004, at 10:45 a.m., in the courtroom of the above-named Court, the undersigned will make the following Motion and tender the Order attached hereto.

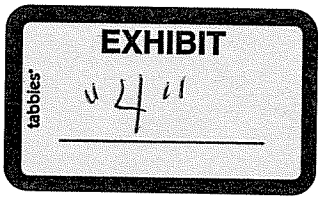
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served by U.S. Mail, postage pre-paid, this 7th day of October, 2004, to the following parties of record:

Leslie W. Morris II
David T. Royse
Stoll, Keenon, & Park LLP
300 W. Vine Street, Ste. 2100
Lexington, Kentucky 40507

MOTION

Comes Defendant MRH Development Co ("MRH"), by counsel, and moves this Court to Dismiss this Action, with prejudice. A memorandum in support of this motion is tendered herewith.



Respectfully submitted,

Stuart E. Alexander III
Sandra F. Keene
Terrell L. Black
TILFORD DOBBINS ALEXANDER
BUCKAWAY & BLACK LLP
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Louisville, Kentucky 40202
(502) 584-1000
Counsel for MRH

G:\office\tlb\mrh\lge\NMOmotinmemorandumtodismiss

NO. 04-CI-07083

JEFFERSON CIRCUIT COURT
DIVISION SIX (6)

LOUISVILLE GAS AND ELECTRIC COMPANY

PLAINTIFF

v.

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

MRH DEVELOPMENT CO.

DEFENDANT

* * * * *

Comes the Defendant, MRH Development Co. ("MRH"), by counsel, and in support of its Motion to dismiss Plaintiff's Complaint/Petition, submits the following Memorandum.

I. FACTUAL BACKGROUND

Prior to July 13, 2004, representatives of the Plaintiff contacted representatives of MRH to request an easement over MRH's property in order to construct series of electric power transmission facilities. There are no such existing electric power transmission facilities on MRH's property or within the vicinity of MRH's property. MRH's representatives told the Defendant that the company would grant such an easement if the Defendant would agree to bury the transmission lines rather than construct large above-ground tower-type facilities so as to minimize the impact of the presence of Defendant's facilities upon MRH's planned development of its property. Defendant flatly refused these conditions and filed this condemnation acting seeking to obtain a permanent easement over MRH's property for the construction and operation of Defendant's electric transmission facilities.

The 2004 Legislature amended KRS 278.020 to require public utilities constructing electric transmission lines of "138 Kilowatts to obtain a Certificate of Public Convenience and Necessity". This amendment was effective July 13, 2004. LG&E filed this action on August 13, 2004 along with a condemnation action against adjoining landowners on the same date. A

petition to require LG&E to obtain a *Certificate of Convenience and Necessity* was filed with the PSC. Plaintiff moved to intervene and the PSC permitted the intervention (Exhibits "1", "2" and "3"). Mediation is scheduled for October 7, 2004 and if unsuccessful, the issue will be briefed before the PSC.

II. PLAINTIFF HAS NO RIGHT TO CONDEMN MRH'S PROPERTY

A utility only has the right to condemn private property only when it is *necessary* to do so for a valid public use. The power to condemn is not to taken lightly and should be strictly construed. *Bernard v. Russell County Airboard,* Ky., 718 S.W.2d 123 (1986). In the case of an electric utility, the legislature has determined that the issue of "necessity" be determined by the Kentucky Public Service Commission ("PSC"). KRS 278.020(1) requires any corporation providing utility service to the public to obtain from the PSC a Certificate of Public Convenience and Necessity prior to the commencement of construction of its utility facilities.

Further, KRS 278.020(2) provides:

> For the purposes of [KRS 278.020], construction of any electric transmission line of one hundred thirty-eight (138) kilovolts or more and of more than five thousand two hundred and 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 public convenience and necessity.

The Plaintiff herein seeks to construct an electric transmission line which meets the criteria set forth in KRS 278.020(2), yet it has failed to first obtain a certificate of public convenience and necessity from the PSC. The statute is clear and unambiguous. By failing to comply with its clear mandate, the Plaintiff has not established that condemnation of MRH's property is necessary for public use.

Prior to instituting condemnation proceedings to take MRH's property, the Plaintiff first must apply for and obtain a Certificate of Public Convenience and Necessity from the PSC. As

of the date of this memorandum, the Plaintiff has not filed the required application and a complaint is pending at the PSC against the Defendant for its failure to do so. Until the Plaintiff files its application and the PSC conducts a public hearing on the issue of public convenience and necessity and issues its determination on that issue, Plaintiff has no right to condemn private property for construction of its transmission line and this action, therefore, must be dismissed for lack of subject matter jurisdiction.

A. KRS 278.020 IS REMEDIAL AND THEREFORE DOES NOT REQUIRE RETROACTIVE APPLICATION

Plaintiff LG&E has argued before the Public Service Commission ("PSC") that it is not required to obtain a *Certificate of Convenience and Necessity* because it began work on the extension of its existing power lines before the effective date of the statutory modification of KRS 278.020.

Plaintiff LG&E argues that it is exempt from seeking a *Certificate of Convenience and Necessity* from the PSC and it has no obligation to the public to justify its taking of private land to the public via the PSC. LG&E argues that the statutory change effected it substantive rights and since LG&E began this project prior to this statutory change, it has no obligation to bring this matter before the PSC.

In fact, LG&E filed this action after the effective date of the change to KRS 378.020. LG&E has no authority to condemn defendant's property unless it obtains a *Certificate of Convenience and Necessity* and this Court has no jurisdiction to proceed until LG&E satisfies its statutory obligation.

It is well-settled Kentucky law that if a statute is remedial, "it can apply retroactively if it expands existing remedy without affecting the substantive basis, prerequisites, or circumstances giving rise to the remedy". Kentucky Insurance Guaranty Association v. Jordan Jeffers, Ky. 13

S.W.3rd 606 (2002). In Kentucky Insurance, supra, the Kentucky Supreme Court affirmed the Trial Court's ruling that a change in the Kentucky Guaranty's statutory coverage amount applied to medical malpractice cases which had "occurred" before the effective date of the amended statute.

In this case, the amount of coverage was $100,000.00. The PIE Mutual Insurance Company became insolvent on March 23, 1998. The Kentucky Legislature amended the statute governing the Kentucky Insurance Guaranty Association to increase the amount of coverage to $300,000.00 and this amendment became effective on July 15, 1998.

Medical malpractice actions were pending prior to the date of the Legislature's change. The Court in citing Peabody Coal Co. v. Kenneth Gossett and Workers' Compensation Board, Ky. 819 S.W.2d 33 (1991), Peabody, supra, the Supreme Court had held that a "retroactive law, in legal sense, is one which takes away or impairs vested rights acquired under existing laws or which creates a new obligation and imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past". By contrast, statutes which relate to "remedies or modes of procedure which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of such rights, cannot normally come within the legal conception of a retroactive law, or the general rule against the retroactive operation of statutes".

Plaintiff LG&E argues in its opposition to defendant's motion to intervene before the PSC that KRS 446.080(3) requires a statute to expressly declare that it is to be applied retroactively. LG&E (as the Appellee in Peabody, supra) used KRS 376.020 which does not expressly declare itself to be retroactive and therefore, it cannot be retroactive.

In Peabody, supra, and again in Kentucky Insurance, supra, the Supreme Court disposed of this argument clearly and unmistakably. The Supreme Court declared that a statute cannot be

considered to be retroactive if it is remedial and that the Legislature need not expressly state its intention that it is to be applied retroactively. Further, the Supreme Court (citing Black's Law Dictionary and 73 Am Jur 2nd Statute, Sec. XI) stated that "the general rule of the statute, even though it does not expressly state, has retroactive application provided the statute to remedial. This is a fundamental rule of statutory construction which does not invade the promise of the Legislature". In fact, the Kentucky Supreme Court affirmed the "cardinal rule" of statutory construction, which is to ascertain and give effect to the intent of the Legislature, citing Cable v. Marcum, 148 F.2d 737 (2nd Cir., 1945) and Judge Lernard Hann (sp).

In its 2004 session, the Legislature clearly intended that LG&E obtain a *Certificate of Convenience and Necessity* and that LG&E account to the public for its proposed extension of the project in question. The amendment of KRS 278.020 does not "violate vested rights" and it operates merely to provide a procedural requirement as a pre-condition of the exercise of imminent domain. Accordingly, the *Certificate of Convenience and Necessity requirement* is not being applied retroactively (see, Miracle v. Riggs, 918 S.W.2d 745, Ky. App. 1996).

B. THIS COURT LACKS JURISDICTION TO GRANT THE RELIEF SOUGHT BY PLAINTIFF UNTIL IT COMPLIES WITH KRS 278.020

Obtaining a *Certificate of Convenience and Necessity* is a precondition to LG&E's attempted expansion of its current power line. The statute clearly requires LG&E to comply with the law regarding public hearings before the PSC. LG&E cannot ignore its statutory obligation and proceed directly in this Court.

The Court will note that LG&E could have petitioned the PSC for a *Certificate of Convenience and Necessity* immediately upon the effective date of the statutory amendment. LG&E choose not to comply with its statutory obligation and has maintained three (3) separate

actions attempting to condemn parcels of property. Two (2) of these actions are currently pending before this Court.

In Smith v. Southern Bell Telephone & Telegraph Co., Ky., 104 S.W.2d 961, 962 (1937), the Court of Appeals of Kentucky, the highest court of the state at the time, stated:

> The Public Service Commission is an administrative agency set up and appointed by law for the purpose of hearing facts and establishing reasonable rules, rates, and services to the public in order to secure conformity of services and rates affecting all classes of customers, because for this burden to fall exclusively on the courts and to give the courts the primary and exclusive jurisdiction to pass upon the reasonableness of the rules, services, rates, schedules, practices, etc., of the [public utilities], would lead to confusion and uncertainty....

Therefore, under the policies established by the legislature in creating the Public Service Commission and the case law interpreting that administrative agency's authority it would be improper for the trial court to hear/consider evidence and to decide any issue related to pubic utility service and practices.

CONCLUSION

The Plaintiff, LG&E, has asserted condemnation authority over MRH's private property when KRS 278.020(2) clearly requires that the PSC first determine that the construction of the proposed transmission line is required for the public's convenience and necessity. Without the required *Certificate of Convenience and Necessity* from the PSC, the Plaintiff cannot demonstrate that condemnation is necessary for public use. The issue of necessity is a jurisdictional element in a condemnation case. Because the Plaintiff cannot establish its existence, this Court is without jurisdiction to consider the matter and this action should be dismissed, or in the alternative, held in abeyance until the PSC proceedings have concluded.

Respectfully submitted,

Stuart E. Alexander III
Sandra F. Keene
Terrell L. Black
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401 West Main Street, Suite 1400
Louisville, Kentucky 40202
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Counsel for MRH

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NO. 04-CI-07083

JEFFERSON CIRCUIT COURT
DIVISION SIX (6)

LOUISVILLE GAS AND ELECTRIC COMPANY PLAINTIFF

v. **ORDER**

MRH DEVELOPMENT CO. DEFENDANT

* * * * * *

Motion having been made and this Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED that the Complaint/Petition against Defendant be and hereby is DISMISSED, with prejudice.

This is a final and appealable order and there is no just cause for delay.

_____
JUDGE:

DATE:_____

SUBMITTED TO:

Stuart E. Alexander, III
Sandra F. Keene
Terrell L. Black
TILFORD DOBBINS ALEXANDER
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Leslie W. Morris II
David T. Royse
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300 W. Vine Street, Ste. 2100
Lexington, Kentucky 40507

Lester A. BERNARD and Lacona Bernard, Movants,

v.

RUSSELL COUNTY AIR BOARD, Respondent.

Supreme Court of Kentucky.

Sept. 25, 1986.

As Corrected Nov. 5, 1986.

County air board filed a complaint of condemnation. The Circuit Court, Russell County, held that the board had the authority to condemn property. Appeal was taken. The Court of Appeals affirmed. Discretionary review was granted. The Supreme Court, Stephens, C.J., held that: (1) the county air board was not a legally formed entity where it conducted business with less than a quorum present, there were neither minutes for its first meeting, nor was there sufficient evidence of regular meetings thereafter, and no copy of the original appointment of the members by the county judge-executive was in record or proven to be in existence; (2) the doctrine of de facto existence did not apply where the board never achieved corporate status; and (3) the board was not authorized to condemn property without county approval.

Reversed.

1. Aviation ⇐223

County air board was not legally formed body where it frequently conducted business with less than quorum present, there were neither minutes for board's first meeting nor sufficient evidence of regular meetings thereafter, and no copy of original appointment of board by county judge-executive was proven to be in existence. KRS 183.132.

2. Aviation ⇐223

Concept of de facto existence did not apply to county air board which had not achieved corporate status in that it had not fulfilled procedural steps designed to safeguard public from hastily-created organizations and, therefore, board had no authority to deprive private citizens of their property. KRS 183.132.

3. Eminent Domain ⇐7

County air board could not, upon its own initiative, condemn property of private owners without need for any authorization from county government. KRS 183.133(4, 5), 416.560.

M. Gail Wilson, Robert L. Bertram, Jamestown, for movants.

Gordon T. Germain, Monticello, for respondent.

William L. Sullivan, Dorsey, Sullivan, King & Gray, Henderson, amicus curiae for Kentucky Aviation Assn.

Wilbert L. Ziegler, Covington, amicus curiae for Kenton Co. Airport Bd., Inc.

Sandra Mendez-Dawahare, Lexington, amicus curiae for Lexington and Fayette County Urban Airport Bd.

T. Kennedy Helm, Jr., Louisville, amicus curiae for Regional Airport Authority of Louisville and Jefferson County.

STEPHENS, Chief Justice.

This is an appeal from the Kentucky Court of Appeals' affirmance of the decision of the Russell Circuit Court, holding that the Russell County Air Board had authority to instigate condemnation proceedings against movants' property.

Two issues are raised by this appeal: whether the Russell County Air Board was a legally constituted organization, and if so, whether it had the right to instigate condemnation proceedings in its own name against movants' property. We reverse both the trial court and the Kentucky Court of Appeals, holding that the Russell County Air Board was not a legally constituted organization as it did not comply with the requirements of an airport board organization, as enumerated in KRS 183.132, nor did it follow proper condemnation procedures, as detailed in the Eminent Domain

Act of KRS 416.560, to grant it authority to condemn movants' property.

The Russell County Air Board's decision to expand the Russell County Airport and its attempts to obtain movants' land began in 1982. On November 12, 1982, movants were first ordered to allow their property adjacent to the Russell County Airport to be surveyed by representatives of the airport board. Movants sought and obtained a writ of prohibition from the Court of Appeals forbidding any orders from being entered wherein a lawsuit had not yet been filed. The Air Board then filed a complaint of condemnation in Russell Circuit Court against movants and an order was entered requiring movants to allow a survey of their land. The Court of Appeals granted movants a second writ of prohibition. A hearing was held on October 20, 1983, in Russell Circuit Court to determine whether the Russell County Air Board had the right to condemn movants' land, and on February 23, 1984, the trial court held that the Air Board did have such authority. The Kentucky Court of Appeals affirmed and we granted discretionary review.

[1] First, movants contend that the Russell County Air Board did not comply with the requirements of an airport board organization as enumerated in KRS 183.132. We agree. The relevant sections of KRS 183.132 provide:

"**183.132. Local air boards.**—(1) Any city or county, or city and county acting jointly, or any combination of two (2) or more cities and/or counties may establish a nonpartisan air board composed of six (6) members.

(2) The board shall be a body politic and corporate with the usual corporate attributes, and in its corporate name may sue and be sued, contract and be contracted with and do all things reasonable or necessary to effectively carry out the duties prescribed by statute. The board shall constitute a legislative body for the purposes of KRS 183.630 to 183.740.

(3) The members of an air board shall be appointed as follows: ...

(b) *If the air board is established by a county, such members shall be appointed by the county judge/executive;* ...

(4) Members of the board shall serve for a term of four (4) years each, and until their successors are appointed and qualified, provided, however, that initial appointments shall be made so that two (2) members are appointed for two (2) years, two (2) members for three (3) years and two (2) members for four (4) years. Upon expiration of these staggered terms, successors shall be appointed for a term of four (4) years.

(5) Members of the board shall serve without compensation but shall be allowed any reasonable expenses incurred by them in the conduct of the affairs of the board. The board shall, upon the appointment of its members, organize and elect officers. The board shall choose a chairman and vice chairman who shall serve for terms of one (1) year. The board shall also choose a secretary-treasurer who may or may not be a member of the board. The board may fix a salary for the secretary-treasurer and the secretary-treasurer shall execute an official bond to be set and approved by the board, and the cost thereof shall be paid by the board.

(6) The board may employ necessary counsel, agents and employes to carry out its work and functions and prescribe such rules and regulations as it deems necessary.

(7) *The secretary-treasurer shall keep the minutes of all meetings of the board and shall also keep a set of books showing the receipts and expenditures of the board.* He shall preserve on file duplicate vouchers for all expenditures and shall present to the board, upon request, complete reports of all financial transactions and the financial condition of the board. Such books and vouchers shall at all times be subject to examination by the legislative body or bodies by whom the board was created. He shall transmit at least once annually a detailed report of all acts and doings of the board

to the legislative body or bodies by whom the board was created....

(9) *A quorum for the transacting of the business of the board shall consist of four (4) members.* Meetings of the board may be called by the chairman or by four (4) members. In case of tie voting by the board, the issue shall be deemed to have failed passage.

(10) A board member may be replaced by the appointing authority upon a showing to such authority of misconduct as a board member or upon conviction of a felony. No board member shall hold any official office with the appointing authority." (emphasis added).

Respondent substantially deviated from these statutory requirements. The secretary-treasurer of the Russell County Air Board testified that the Air Board frequently conducted business with less than a quorum present, in direct violation of KRS 183.132(9). Indeed, there was less than a quorum in attendance at the meeting during which the Air Board approved the plans for the airport expansion which included movants' property. Testimony at trial showed that there were neither minutes for the Airport Board's first meeting, as required by KRS 183.132(7), nor was there sufficient evidence of regular meetings thereafter. Moreover, KRS 183.132(3)(b) specifically requires "If the air board is established by a county, such members shall be appointed by the county/judge executive." No copy of the original appointment of the Air Board by the county judge-executive was in the record or proven to be in existence.

[2] Respondent argues that although it may not have strictly complied with the requirements of KRS 183.132, it had a de facto existence which was later ratified. *Schaffield v. Hebel*, 301 Ky. 358, 192 S.W.2d 84 (1946). We disagree. The concept of de facto existence applies only to corporations, municipal or otherwise. The Russell County Air Board had not achieved corporate status, for it had not fulfilled the numerous procedural steps designed to safeguard the public from organizations which have been created in haste, without due consideration and careful inquiry. Without clear evidence the Airport Board was properly established in accordance with the statute's mandatory language, the Russell County Air Board had no authority to deprive private citizens of their property.

[3] Second, movants contend that the Russell County Air Board failed to follow the condemnation procedures detailed in the Eminent Domain Act of KRS 416.560 granting it authority to condemn movants' land. We agree. The Russell County Air Board is not a wholly independent board, but is subject to, and under the aegis of, the provisions of KRS 416.560. That statute provides:

416.560. Initiation of condemnation proceedings—Costs-Right of entry—Damages.—(1) Notwithstanding any other provision of the law, a department, instrumentality or agency of city, county or urban-county government, other than a waterworks corporation the capital stock of which is wholly owned by a city of the first class, having a right of eminent domain under other statutes *shall exercise such right only by requesting the governing body of the city, county, or urban-county to institute condemnation proceedings on its behalf.* If the governing body of the city, county or urban-county agrees, it shall institute such proceedings under KRS 416.570, and all costs involved in the condemnation shall be borne by the department, instrumentality or agency requesting the condemnation. (emphasis added).

Therein lie the procedures which must be followed whenever condemnation proceedings are commenced. The Russell County Air Board must comply with those procedures, because of the language in KRS 183.133(5). That section states:

(5) The board or any other governmental unit may by resolution reciting that the property is needed for airport or air navigation purposes direct the condemnation of any property, including navigation or other easements. The procedure for condemnation shall conform to the proce-

dures set out in the Eminent Domain Act of Kentucky.

The Russell County Air Board is subordinate to the Russell County government, and as we said must comply with the procedures for condemnation set out in KRS 416.560.

Respondent, however, argues that condemnation has always been a power granted to airport boards, and that KRS 183.-133(4) empowers the board among other things, to condemn property upon its own initiative, without the need for any authorization from the county government.

> (4) The board may acquire by contract, lease, purchase, gift, condemnation or otherwise any real or personal property, or rights therein, necessary for establishing, operating or expanding airports and air navigation facilities. The board may erect, equip, operate and maintain on such property, buildings and equipment necessary, desirable or appropriate for airport or air navigation facilities. The board may dispose of any real or personal property, or rights therein, which, in the opinion of the board are no longer needed for operating or expanding the airport or air navigation facilities.

We disagree that this language authorizes the board to condemn absent county participation. The power to condemn is not to be taken lightly. As we stated in *City of Owensboro v. McCormick*, Ky., 581 S.W.2d 3, 7 (1979):

> "The opportunity for tyranny, particularly by the self-righteous, exists in condemnation of private property to a vastly greater degree than in the levying of taxes and the expenditure of public funds."

A board comprised of six individuals should not have the power independent of the Russell County government, to take property away from private citizens. Respondent argues that airport boards are not departments of county government, yet claims the Russell County Air Board was appointed by the county judge-executive and is funded and authorized by the county. The board's attachment to the Russell County government indicates the board should be held responsible to the county government.

Thus, we hold that the Russell County Air Board was not a legally formed entity; it had not followed the requirements of KRS 416.560, and had no authority to condemn movants' property.

Therefore, we reverse the Court of Appeals.

LEIBSON, STEPHENSON, WHITE and WINTERSHEIMER, JJ., concur.

GANT and VANCE, JJ., dissent.

Alan M. CARTA, Movant,

v.

Theta M. DALE, Respondent.

Supreme Court of Kentucky.

Oct. 16, 1986.

Owner and operator of motor vehicle which collided with vehicle operated by insured was sued by insured for bodily injuries, pain and suffering, medical expenses, and lost wages. The Circuit Court, Jefferson County, entered judgment in accordance with jury verdict awarding insured damages for pain and suffering, medical expenses, and lost wages. After defendant's motions to amend judgment and for new trial were overruled, defendant appealed to Court of Appeals, which dismissed the appeal because of failure of defendant to join reparations obligor as necessary party. The Supreme Court granted discretionary review, and Vance, J., held that owner and operator of motor vehicle which collided with vehicle operated by insured had right to object to submission to jury of claims for lost wages and medical expenses which were payable to injured insured as

KENTUCKY INSURANCE GUARANTY ASSOCIATION, Appellant,

v.

Jordan JEFFERS, A Minor by and Through Her Next Friends Natural Guardians and Parents, David JEFFERS and Vickie Jeffers; Patricia Sebree, Individually and as Executrix of the Estate of Louis W. Sebree; Walter Lewis Individually and Co-Administrator of the Estate of Walter Ryan Lewis; Elizabeth Lewis Individually and Co-Administrator of the Estate of Walter Ryan Lewis; Daniel McCullah, Individually and as Guardian for Flossie McCullah; James A. Dienes, M.D.; Margarete Lockhard, Appellees,

and

Kentucky Academy of Trial Attorneys, Amicus Curiae.

No. 98-SC-0770-TG.

Supreme Court of Kentucky.

March 23, 2000.

Patients of physicians whose malpractice insurer became insolvent sought payment from the Insurance Guaranty Association (IGA). The Circuit Court, Jefferson County, retroactively applied increase in coverage limits. IGA appealed. The Court of Appeals affirmed. Review was granted. The Supreme Court, Graves, J., held that amendment to the Insurance Guaranty Association Act increasing the limits of coverage applies retroactively to all unresolved cases at the time of the effective date.

Affirmed.

Cooper, J., dissented and filed opinion joined by Keller, J.

Keller, J., dissented and filed opinion joined by Cooper, J.

1. Insurance ⇐1499

Amendment to the Insurance Guaranty Association Act increasing the limits of coverage is remedial and applies retroactively to all unresolved cases at the time of the effective date; it is not limited to cases in which the insolvency occurred after the effective date of the amended statute. KRS 304.36-080(1)(a)3, 446.080(3).

2. Statutes ⇐264

The general rule is that a statute, even though it does not expressly state, has retroactive application provided the statute is remedial.

3. Statutes ⇐267(1)

A statute is "remedial" and can apply retroactively if it expands an existing remedy without affecting the substantive basis, prerequisites, or circumstances giving rise to the remedy.

See publication Words and Phrases for other judicial constructions and definitions.

4. Statutes ⇐267(1)

The underlying test to be applied in determining whether a statute is penal or remedial is whether it primarily seeks to impose an arbitrary, deterring punishment upon any who might commit a wrong against the public by a violation of the requirements of the statute, or whether the purpose is to measure and define the damages which may accrue to an individual or class of individuals, as just and reasonable compensation for a possible loss having a causal connection with the breach of the legal obligation owing under the statute to such individual or class.

5. Statutes ⇐236

Legislation which has been regarded as "remedial" in its nature includes statutes which abridge superfluities of former laws, remedying defects therein, or mischiefs thereof, whether the previous difficulties were statutory or a part of the common law.

6. Statutes ⇐236

"Remedial legislation" implies an intention to reform or extend existing rights, and has for its purpose the promotion of justice and the advancement of public welfare and of important and beneficial public objects.

See publication Words and Phrases for other judicial constructions and definitions.

7. Statutes ⇐243

The term, "remedial statute," applies to a statute giving a party a remedy where he had none, or a different one, before.

See publication Words and Phrases for other judicial constructions and definitions.

8. Insurance ⇐1020

When a plaintiff sues a defendant, the plaintiff has no vested right in the defendant being insured or in the amount of insurance coverage, for purposes of determination of whether a statutory amendment should be applied retroactively.

9. Statutes ⇐270

The judicial determination of whether a statutory amendment should be applied retroactively involves a two-step inquiry: (1) whether the amendment is limited to the furtherance, facilitation, improvement, etc ., of an existing remedy and (2) whether it impairs a vested right.

10. Statutes ⇐270

If the statute in question only serves to facilitate the remedy, and if no vested right is impaired, the amendment in question is then properly applied retroactively to preexisting unresolved claims if such application is consistent with the evident purpose of the statutory scheme.

11. Statutes ⇐181(1)

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature.

12. Statutes ⇐263, 267(1)

When the Kentucky Legislature pronounced in statute that laws should not be applied retroactively, it is presumed to have done so with the knowledge that this would be interpreted to apply to laws of substance only, and not those dealing strictly with the extent of remedy. KRS 446.080(3).

13. Statutes ⇐236

It is a general rule of law that statutes which are remedial in nature are entitled to a liberal construction in favor of the remedy provided by law, or in favor of those entitled to the benefits of the statute.

Armer H. Mahan, Jr., Louisville, for appellant.

William B. Hoffman, Paul A. Casi II, Louisville, Douglas H. Morris II, Louisville, Larry B. Franklin, Louisville, Richard Hay, Somerset, Douglass Farnsley, Louisville, Susan P. Spickard, Louisville, William J. Driscoll, Louisville, William R. Garmer, Lexington, for appellee.

GRAVES, Justice.

[1] The sole issue before this Court is whether a Legislative provision amending the Kentucky Insurance Guaranty Association Act, KRS 304.36–010 et. seq., to increase the amount of coverage from $100,000 to $300,000 in cases involving insolvent insurance companies is limited only to those cases in which the insolvency occurred after the effective date of the amended statute, or applies retroactively to all unresolved cases. We affirm the declaratory judgment of the Jefferson Circuit Court which ruled the amendment was remedial and had retroactive application.

PIE Mutual Insurance Company was a major medical malpractice insurance carrier providing professional liability insurance for numerous physicians in Kentucky. PIE was adjudged insolvent on March 23, 1998. Appellees are individuals who have medical malpractice claims against Kentucky physicians who were insured by PIE for acts of medical negligence. In all of

these actions, the remedy sought is compensation for damages allowed under Kentucky law.

Kentucky established the Kentucky Insurance Guaranty Association (KIGA), KRS 304.36–010 et. seq., to cover claims made against insureds whose carrier becomes insolvent. This non-profit unincorporated legal entity requires insurance carriers of most types of insurance, licensed to operate in Kentucky, to be members of the association. The statutory coverage limit by KIGA was $100,000 prior to July 15, 1998. In House Bill 415, the 1998 General Assembly amended many parts of the KIGA Act. In addition to other portions of the amendment, House Bill 415 provides for an increase in the maximum coverage from $100,000 to $300,000 per covered claim. KRS 304.36–080(1)(a)(3). This amendment to the statute became effective on July 15, 1998.

All of the actions concerning Appellees in this case were pending at the time House Bill 415 became effective. In all of the underlying malpractice actions, KIGA denied that the increased coverage applied to any PIE claims because PIE became insolvent before the effective date of House Bill 415.

The purpose of the KIGA Act, as amended, is:

> [T]o provide a mechanism for the payment of covered claims under certain insurance policies to avoid excessive delay in payment and to the extent provided in this subtitle to minimize financial loss to claimants or policy holders because of the insolvency of an insurer, to assist in the detection and prevention of insurer insolvencies, and to provide a means of funding the cost of such protection among insurers. KRS 304.36–020.

As amended, the statute provides in pertinent part as follows:

> "Covered claim" means an unpaid claim, ... which arises out of and is within the coverage ... of an insurance policy to which this subtitle applies issued by an insurer, if the insurer becomes an insolvent insurer after June 16, 1972.... KRS 304.36–050(6)(a).
>
> [KIGA] shall: (a) Be obligated to the extent of the covered claims existing prior to the order of liquidation.... The obligation shall be satisfied by paying to the claimant ... (3) An amount not exceeding three hundred thousand dollars ($300,000) per claimant.... KRS 304.35–080(1)(a)(3).
>
> [KIGA] shall: (c) Be deemed the insurer to the extent of its obligation on the covered claims and to that extent shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent, ... KRS 304.36–080(1)(c).

Further, KRS 304.36–040, as amended, states: "This subtitle shall be construed to effect the purpose under KRS 304.36–020 which shall constitute an aid and guide to interpretation." By its own clear terms as amended, the entire statute applies to all open claims, that is, claims existing at the time of PIE's insolvency.

In *Peabody Coal Company v. Gossett*, Ky., 819 S.W.2d 33 (1991), this Court decided the issue of retroactive application of a statute in the absence of express legislative guidance. *Peabody* involved an injured worker awarded workers' compensation benefits in 1981. Prior to 1987, the workers' compensation statute allowed the reopening of an award only for a change of physical condition. The General Assembly amended and enlarged the statute in 1987 for a reopening on a change of occupational disability. Even though there was no change in the injured worker's underlying medical condition, he became unemployed in 1984 and was unsuccessful for two years in obtaining other employment as a coal miner. Because of these changed circumstances in employability, the injured worker moved to reopen his 1981 claim under the 1987 amendment.

The Workers' Compensation Board initially denied his motion to reopen, but a

successor board reversed and reopened the claim. The procedural history is succinctly stated in the *Peabody* opinion as follows:

> The employer appealed to the Court of Appeals which affirmed the New [sic] Board's reversal. The Court of Appeals noted that it was presented a single issue of first impression: "Did the 1987 amendment to KRS 342.125 eliminate the reopening requirement that the injured worker establish a worsening of physical condition as a prerequisite to showing an increase in occupational disability?" The court also noted that as a collateral issue, it must determine whether, if no worsening of physical condition must be shown, KRS 342.125, as amended, applies to compensation cases which arose prior to the amendment's effective date, October 26, 1987. The court then concluded in the affirmative as to both issues.

Peabody, supra, at 34.

In *Peabody*, the issue concerning retroactivity was premised on KRS 446.080(3), which provides that "no statute shall be construed to be retroactive, unless expressly so declared." However, this Court reasoned:

> A retrospective law, in a legal sense, is one which takes away or impairs vested rights acquired under existing laws, or which creates a new obligation and imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past. Therefore, despite the existence of some contrary authority, remedial statutes, or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of such rights, do not normally come within the legal conception of a retrospective law, or the general rule against the retrospective operation of statutes. In this connection it has been said that a remedial statute must be so construed as to make it effect the evident purpose for which it was enacted, so that if the reason of the statute extends to past transactions, as well as to those in the future, then it will be so applied although the statute does not in terms so direct, unless to do so would impair some vested right or violate some constitutional guaranty. 73 Am.Jur.2d *Statutes* § 354 (1974). (Footnotes omitted.)

Although KRS 446.080(3) states that, "[n]o statute shall be construed to be retroactive, unless expressly so declared," it can be seen from the above commentary that since the 1987 amendment to KRS 342.125 is remedial, it does not come within the legal conception of a retrospective law nor the general rule against the retrospective operation of statutes. We believe our holding on this issue is consistent with the provision contained in KRS 446.080(1) that "[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...."

Peabody, supra, at 36.

[2, 3] The general rule is that a statute, even though it does not expressly state, has retroactive application provided the statute is remedial. This is a fundamental rule of statutory construction which does not invade the province of the legislature. Remedial means no more than the expansion of an existing remedy without affecting the substantive basis, prerequisites, or circumstances giving rise to the remedy.

[4] *Black's Law Dictionary*, (6th ed.1990), defines remedial statute, and in the third paragraph provides a clear and unequivocal guideline for identifying remedial statutes:

> The underlying test to be applied in determining whether a statute is penal or remedial is whether it primarily seeks to impose an arbitrary, deterring punishment upon any who might commit a wrong against the public by a violation of the requirements of the statute, or

whether the purpose is to measure and define the damages which may accrue to an individual or class of individuals, as just and reasonable compensation for a possible loss having a causal connection with the breach of the legal obligation owing under the statute to such individual or class.

The *Black's Law Dictionary* definition is consonant with this Court's holding in *Peabody, supra.* This Court has described remedial statutes as those relating "to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of such rights." *Id.* at 36 (citing 73 Am.Jur.2d *Statutes* § 354 (1974)).

[5–7] A remedial statute is defined in the first full paragraph of 73 Am.Jur.2d *Statutes* § 11 (1974), titled "Statutes Regarded as Remedial," as follows:

Legislation which has been regarded as remedial in its nature includes statutes which abridge superfluities of former laws, remedying defects therein, or mischiefs thereof, whether the previous difficulties were statutory or a part of the common law. Remedial legislation implies an intention to reform or extend existing rights, and has for its purpose the promotion of justice and the advancement of public welfare and of important and beneficial public objects. The term applies to a statute giving a party a remedy where he had none, or a different one, before. Another common use of the term "remedial statute" is to distinguish it from a statute conferring a substantive right.

Both definitions of a remedial statute were approved by the Kentucky Court of Appeals in *Kentucky Insurance Guaranty Association v. Conco, Inc.*, Ky.App., 882 S.W.2d 129 (1994). In *Conco,* a worker was injured in October 1984, while employed by Conco, Inc. The company had workers' compensation insurance with a carrier later adjudged to be insolvent, with the result being that KIGA assumed coverage. At the time of the insolvency, KIGA's coverage was limited by statute to $50,000. In 1990, the statute was amended to remove the cap from KIGA's coverage of workers' compensation claims. Based on the holding in *Peabody, supra,* the Court of Appeals held that the amendment removing the cap was remedial legislation which had retroactive application. *Conco, supra,* at 130.

Further, the Court of Appeals in *Conco,* affirmed a basic concept of statutory interpretation as set out in KRS 446.080(1), that "all statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the Legislature." *Conco, supra,* at 130.

[8–10] When a plaintiff sues a defendant, the plaintiff has no vested right in the defendant being insured or in the amount of insurance coverage. The insurance coverage is merely a means of providing funds for the judgment. Likewise, when an insurance company becomes insolvent, KIGA provides funds to satisfy a judgment. Thus, the judicial determination of whether a statutory amendment should be applied retroactively involves a two-step inquiry: (1) Is the amendment limited to the furtherance, facilitation, improvement, etc ., of an existing remedy; and (2) If so, does it impair a vested right. If the statute in question only serves to facilitate the remedy, and if no vested right is impaired, the amendment in question is then properly applied to preexisting unresolved claims if such application is consistent with the evident purpose of the statutory scheme.

[11, 12] The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. In *Cabell v. Markham,* 148 F.2d 737, 739 (2nd Cir. 1945), Judge Learned Hand commented:

Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of

any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

When the Kentucky Legislature pronounced in KRS 446.080(3) that laws should not be applied retroactively, it is presumed to have done so with the knowledge that this would be interpreted to apply to laws of substance only, and not those dealing strictly with the extent of remedy. More specifically, when the 1998 General Assembly increased the limits of KIGA liability, it is presumed to have done so in light of *Peabody, supra*, and particularly, in full appreciation that the increase in liability limits would be applied to existing claims, just as an earlier identical amendment was so applied in *Conco, supra*.

Accordingly, given the intent of the legislature as manifested in the language of the KIGA Act itself, the policy underlying the statute, and past judicial interpretation of similar statutes, it is properly consistent to apply the statutory amendments to KRS 304.36–010 et. seq., to claims which existed at the time the legislature acted. This application should include the claims made by Appellees in this matter.

The KIGA Act does not create a vested right. It merely provides a remedy when there is a judgment. KIGA accords the necessary means to satisfy judgments in the event of insurance insolvency. Consequently, any amendments which provide an increase in the coverage for those judgments are remedial and applicable to pending cases.

[13] According to 73 Am.Jur.2d *Statutes*, § 278 (1974), "It is a general rule of law that statutes which are remedial in nature are entitled to a liberal construction in favor of the remedy provided by law, or in favor of those entitled to the benefits of the statute." *Southerland Statutory Construction*, § 60.01 (5th ed.1992), lends further support for the liberal interpretation of remedial statutes. "Remedial statutes are liberally construed to suppress the evil and advance the remedy. The policy that a remedial statute should be liberally construed in order to effectuate the remedial purpose for which it was enacted is firmly established." *Id.*

Here, the evil which is to be suppressed is that some physicians, because of the financial insolvency of their chosen insurance company, will be unable to accord satisfaction to their injured patients. In addition, the injured patients have lost a definite source of funding for their judgments. KIGA is the remedy for such losses. Rather than make a fortress out of the dictionary, we should attempt to carry out the legislature's intended goal.

Accordingly, we affirm the judgment of the Jefferson Circuit Court, ruling that the amendments to the KIGA Act, KRS 304.36–010 et. seq., are remedial and have retroactive application.

LAMBERT, C.J., GRAVES, JOHNSTONE, STUMBO, and WINTERSHEIMER JJ. concur.

COOPER, J., dissents by separate opinion in which KELLER, J., joins.

KELLER, J., also dissents by separate opinion in which COOPER, J., joins.

COOPER, Justice, dissenting.

On December 10, 1997, the Superintendent of Insurance for the state of Ohio filed a Complaint for Rehabilitation in the Franklin County, Ohio, Court of Common Pleas against The P.I.E. Mutual Insurance Company. P.I.E. was placed into rehabilitation on December 15, 1997. A liquidation hearing was scheduled for February 17, 1998 and later rescheduled for March 23, 1998.

On January 26, 1998, House Bill 415 was introduced in the Kentucky House of Rep-