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COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

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

**THE PADDOCK AT EASTPOINT, LLC 'S  
RESPONSIVE BRIEF**

The Paddock at Eastpoint, LLC has asked this Commission to require Defendant, Louisville Gas & Electric Company ("LG&E") to comply with KRS §278.020 by obtaining a certificate of public necessity and convenience from this Commission in connection with the proposed construction of a 138 kV transmission line along I-265 in Jefferson County. LG&E has effectively requested the Commission to enter summary judgment in its favor, based on factual assertions regarding the status of the proposed line contained in an affidavit accompanying its initial brief. LG&E also contends that it is exempt from complying with the statute solely because it had purportedly begun construction of the project in good faith prior to the effective date of the 2004 amendments to KRS §278.020. Summary judgment in favor of LG&E is inappropriate because of significant questions of fact raised regarding the good faith of LG&E regarding the progress of the 138 kV line. Additionally, LG&E is not entitled to judgment as a matter of law because it cannot establish that the 2004 amendments

to KRS §278.020 do anything other than 1) expand the remedy of a public hearing to property owners affected by actions of utilities which have always been regulated under KRS §278.020(1) and 2) change the definition of “ordinary course.” Both types of statutory modifications have been found to be remedial and thus properly applied to actions in progress.

### **STANDARD OF REVIEW**

The Commission has asked the parties to address the issue of LG&E’s obligation to obtain a certificate of public necessity and convenience for the 138 kV line in their briefs. By relying almost exclusively on a detailed affidavit from one of its employees to assert numerous facts crucial to its position, LG&E is effectively seeking a summary judgment establishing that it has no obligation to comply with Commission’s governing statutes under the facts as it asserts them to be. Accordingly, LG&E’s request should be considered under the familiar summary judgment standard. Under that standard, LG&E must establish that there is no genuine issue as to any material fact, and that it is entitled to judgment as a matter of law. *See Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480* (1991). LG&E fails under both prongs of this test, as there are significant issues of material fact to be resolved surrounding the actions taken by LG&E and, more specifically, the good faith in which they were taken. Further, LG&E is not entitled to judgment as a matter of law, as the 2004 amendments to KRS 278.020 are remedial in nature, and apply to LG&E regardless of the status of the project.

#### **I. GENUINE ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT IN FAVOR OF LG&E.**

Contrary to LG&E’s contention that the obligation to obtain a certificate of public necessity and convenience under KRS § 278.020 is “tied to the beginning of construction,”

there is specific language in the statute that indicates that there is an element of good faith involved in determining whether a purported start of construction is sufficient to remove a project from further (or initial) review. KRS § 278.020(1) establishes that a certificate granted by the Commission lapses one year after it is granted unless the utility begins construction **in good faith**, and continues the prosecution thereof with reasonable diligence. There can be no question that this provision is intended to keep a utility from starting a project it may not be ready to complete in order to avoid having to come back to the Commission. The same standard should be applied to the application of the 2004 amendments to KRS § 278.020, as a utility should not be allowed to circumvent the Commission by rushing to make it appear as if a project is well underway when it actually cannot be diligently prosecuted due to lack of right of way.

With its opening brief, LG&E submits a four page affidavit of one of its employees making more than a dozen factual assertions regarding the status of LG&E's proposed 138 kV line and its actions taken to date. LG&E relies exclusively on these factual assertions for its contention that it has both begun construction of the project in good faith and is diligently prosecuting it. The Complainants have had no opportunity to examine this witness or any of the documents reflecting actions that LG&E has and has not taken. Examples of documents and testimony that could address issues associated with LG&E's good faith are:

- 1) Correspondence between LG&E and its engineers and contractors;
- 2) Construction contracts for all or parts of the work that may have been issued by LG&E;
- 3) Internal communications regarding the actual status of the Gene Snyder project;

- 4) Records of other projects indicating whether LG&E normally proceeds with construction prior to right of way acquisition.

These issues, as well as others that might come to light in discovery, all would shed light on the good faith of LG&E' efforts to avoid review by the Commission.

Questions of the good faith conduct of a party are particularly inappropriate for summary disposition. In *Pennsylvania Life Insurance Company v. McReynolds*, Ky., 440 S.W.2d 275, 279 (1969), the court reversed a summary judgment that necessarily included a finding of good faith conduct on the part of one of the parties. The court held that this was a question that must be determined by the trier of fact. A similar holding was reached in *Lillard v. Farm Credit Services of Mid-America*, Ky. App., 831 S.W.2d 626 (1991), in which summary judgment in favor of a bank was reversed so that the question of the good faith conduct of the bank could be reviewed as a question of fact. Likewise, questions of the intent of a party are generally also not appropriate for summary judgment. *James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Insurance*, Ky., 814 S.W.2d 273, 276 (1991).

The complainants in this action have not even had an opportunity to commence any discovery of LG&E in these proceedings. There has been no review of any documentation, no hearings held, and no depositions taken. It is currently impossible for the Complainants to meaningfully challenge the conduct of LG&E, as the opportunity for such discovery is a prerequisite for the entry of summary judgment. In *Roberson v. Lampton*, Ky., 516 S.W.2d 838 (1974), the court found that the entry of a summary judgment prior to the development of any evidence, by testimony or otherwise, was premature. This conclusion is applicable to this action as well.

## **II. ADDING THE REMEDY OF A PUBLIC HEARING DOES NOT RESULT IN AN IMPROPER RETROACTIVE APPLICATION OF A STATUTORY AMENDMENT.**

The 2004 amendments to KRS § 278.020 do not change in any way the operative section of that statute, KRS §278.020(1). Rather, the amendments only provide, for the first time, a definition of the existing term of “ordinary extension,” as well as an expanded remedy of a public hearing to affected property owners. The substantive obligations of a utility to obtain a certificate of public necessity and convenience, set forth in subsection (1) of the statute, are unchanged. Accordingly, the application of the 2004 amendments to LG&E, even in the event that the Commission finds that it has begun the 138 kV line in good faith, does not constitute the retrospective application of a substantive statute.

The retroactive application of statutes and amendments is governed by both statutory and common law. If a statute contains a new substantive right or duty, KRS §446.080(3) requires an express statement of retroactive applicability by the legislature. If the statute or amendment merely affects the procedures associated with particular rights and obligations, refines definitions, or changes a procedure, it shall be applied to matters pending at the time of their adoption. *See Peabody Coal Co. vs. Gossett*, Ky., 819 S.W.2d 33, 36 (1991).

In *Peabody*, the court held that a change in the definitional standard for reopening a workers’ compensation claim would apply to allow a claim determined under the previous standard to be reopened and evaluated in light of the new standard. In this matter, the amendment to subsection (2) of KRS §278.020 has the same effect; it changes the definition of “ordinary extension” in subsection (1). Under *Peabody*, the 2004 amendment is thus a remedial amendment, and can be applied whether LG&E has begun construction or not.

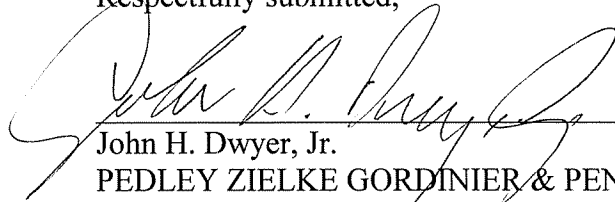
In another recent case involving a remedial amendment, *Kentucky Insurance Guaranty Association v. Jeffers*, Ky., 13 S.W.3d 606 (2000), the court reviewed an amendment to the insurance guaranty statute which tripled the amount that a claimant could recover from the fund. In holding that this was a remedial amendment, and thus applied to actions pending at the time it was enacted, the court observed that the statute merely expanded an existing remedy, and did not create a new right. The hearings associated with a certificate of public convenience and necessity provision of KRS § 278.020 have been a constant requirement for utilities in this state. The 2004 amendments simply expand that remedy to the property owners most affected by the project, as opposed to limiting that remedy to the Commission as the representatives of the property owners. The 2004 amendments to KRS § 278.020 are thus remedial, and are to be applied to actions in progress as of the date of the amendment. Accordingly, even if the Commission finds, after reviewing the evidence, that LG&E has begun the line in good faith, the obligation to obtain a certificate of public necessity and convenience still exists.

### **CONCLUSION**

LG&E's motion for summary judgment does not even address the question of its good faith conduct in analyzing its activities associated with the 138 kV line. Without evidence to provide a basis for determining that LG&E has acted in good faith, it is impossible for LG&E to meet its burden that this matter should be resolved by summary disposition, as opposed to at a hearing on the merits. Further, LG&E's legal argument is flawed in that it incorrectly addresses the ability of a statute to be applied retroactivity when it is limited to remedial purposes, such as expanding the remedy available to an interested property owner or refining the definition of what is an "ordinary extension" of a transmission

line. Accordingly, the Paddock at Eastpoint, LLC respectfully requests the Commission to reject LG&E's request for summary judgment, and to schedule a hearing on the merits of LG&E's project, after appropriate discovery has taken place.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John H. Dwyer, Jr.", written over a horizontal line.

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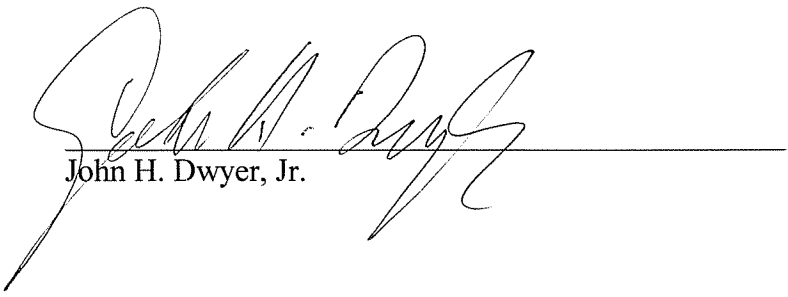
**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing was served by mail this 16 day of November, 2004 to:

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