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Via Hand Delivery

August 31, 2004

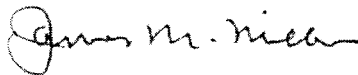
Ms. Elizabeth O'Donnell
Executive Director
Public Service Commission
211 Sower Boulevard, P.O. Box 615
Frankfort, Kentucky 40602-0615

Re: Comments of Big Rivers Electric Corporation on
Proposed Regulation: 807 KAR 5:120

Dear Ms. O'Donnell:

Enclosed are an original and ten copies of the Comments of Big Rivers Electric Corporation on Proposed Regulation 807 KAR 5:120.

Sincerely yours,



James M. Miller

JMM/ej

cc: Daniel T. Yates
Michael H. Core

RECEIVED

AUG 31 2004

PUBLIC SERVICE
COMMISSION

CBE 2004-00343

BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY
AUGUST 31, 2004

COMMENTS OF BIG RIVERS ELECTRIC CORPORATION
ON PROPOSED REGULATION 807 KAR 5:120

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PUBLIC SERVICE
COMMISSION

Big Rivers Electric Corporation ("Big Rivers") makes the following comments, through counsel, to the Kentucky Public Service Commission ("Commission") regarding the regulation proposed by the Commission (807 KAR 5:120, the "Proposed Regulation") to implement the sections of Senate Bill 246, 2004 Kentucky Acts, Chapter 75 §1, that require a certificate of convenience and necessity ("CCN") for construction of a large electric transmission line. These comments propose that an application for a certificate of convenience and necessity for a large transmission line construction project be treated no differently than any other application for a certificate of convenience and necessity, except as expressly required by statute, and make suggestions for changes in the Proposed Regulation that correct problems identified by Big Rivers.

The Proposed Regulation should be amended to be consistent with the Commission's jurisdiction over proposed large transmission line construction projects.

Senate Bill 246, codified in subsections 2 and 8 of KRS 278.020, adds an electric transmission line of 138 kV or more that is greater than one mile in length ("Large Transmission Line") to the list of utility construction projects that cannot be commenced until the Commission finds that the public convenience and necessity requires that construction. KRS

278.020(2). The courts of Kentucky hold that the requirement that the project be required for the public convenience and necessity limits the authority of the Commission in determining whether there is a need and demand for the service, and an absence of wasteful duplication resulting from the construction of the new facilities. Kentucky Utilities Company v. Public Service Commission, (Ky.) 252 S.W.2d 885 (1952). Neither existing law, nor SB 246 extend the Commission's authority to selecting the location of a proposed utility-owned electric transmission line. Satterwhite v. Public Service Commission, Ky., 474 S.W.2d 387, 388 (1971). The Commission has also expressly recognized that issues about where utility facilities are located are "not relevant to the issue of convenience and necessity". In the Matter of: The Application of Crown Communication, Inc., et al., Case No. 2001-063-UAC, Order dated March 25, 2002; see also, In the Matter of: An Investigation of the Proposed Construction of 138 kV Transmission Facilities in Mason and Fleming Counties by East Kentucky Power Cooperative, Inc., Case No. 2003-00380, Order dated December 30, 2003.

Since the Commission has no jurisdiction to establish the location of a proposed Large Transmission Line, Big Rivers urges that the Proposed Regulation be amended to delete language that suggests the Commission does possess that jurisdiction, or that requires a utility to file information that has no relevance in the absence of Commission jurisdiction. In support of this request, Big Rivers states:

1. The misimpression regarding the scope of the Commission's authority is created by several parts of the Proposed Regulation, including paragraph number (9) of the Tiering Statement in the Proposed Regulation. In that paragraph, the words used inappropriately suggest that in deciding whether to issue a CCN, the Commission has been granted the authority to consider the effect of a proposed Large Transmission Line on the owner of the property where the line is located, and on adjoining landowners:

The regulation only requires an application for those facilities that are larger and have higher transmission capacities. Larger facilities create a greater potential for disrupting the environment and the use and enjoyment of property upon or near where the lines are proposed to be placed.

The Tiering Statement should be amended to delete references to issues that fall under the jurisdiction of other agencies or the courts, rather than the Commission.

2. The "notice of intent to file" an application for a CCN, required under Section 1(2)(b) of the Proposed Regulation, must contain "a map of suitable scale to show the route proposed *and any alternative route that was considered . . .* [emphasis added]." No other application for a certificate of convenience and necessity under KRS 278.020 is required to identify alternative project locations that were not chosen. And this information is not relevant because the Commission has no authority to consider alternative routes. This requirement should be deleted from the Proposed Regulation.

3. Section 2(2) of the Proposed Regulation requires that an application for a CCN include a map that shows “the affected property boundaries as indicated on the property valuation administrator’s maps,” and the location of the proposed transmission facilities on that property. Again, there is no justification for showing the boundary lines of each tract of property that is crossed by a Large Transmission Line, unless the Commission is going to make some investigation of the impact of the route of the proposed transmission line on the landowner. The Commission has no authority to undertake such an investigation, and this requirement should be removed from the Proposed Regulation.

Further, instead of simply relying on the existing requirement that an applicant for a CCN file evidence that all necessary permits have been acquired (see 807 KAR 5:001, Section 9(2)(b)), the Proposed Regulation seeks data that is required to obtain such permits. The Proposed Regulation requires in Section (2)(8) that the utility file with its application for a CCN for a Large Transmission Line project “[a] copy of each written assessment of the environmental, historical, and archeological impact of the proposed construction, if any, required by a governmental administrative agency with jurisdiction” This requirement suggests that the Commission has been granted authority to conduct an original, independent examination of issues already reviewed by “a governmental agency with jurisdiction,” and to change the location of the proposed transmission line based upon its

conclusions. The Commission has no such authority, and this requirement should be stricken from the Proposed Regulation.

4. The Proposed Regulation gives unjustified and unauthorized status to the owner of the property on which a proposed transmission line will be constructed. The only mention of the landowner in SB 246 is to include the landowner in the class of "interested persons," who have the right to request intervention in a CCN proceeding, and to request a hearing in the county where the project is proposed to be constructed. KRS 278.020(8). Yet the Proposed Regulation requires special, individual notice to the landowner, suggesting that the landowner has some special interest in the CCN proceeding that is not shared by other "interested persons." Proposed Regulation, Section 2(3). Because of the limited nature of the Commission's jurisdiction in CCN proceedings for Large Transmission Line projects, that is not the case. The requirement for special notice to landowners should be stricken from the Proposed Regulation. And the contents of the published notice notifying all "interested persons," including the affected landowner, of the existence of a CCN proceeding, should include a disclosure that the Commission's inquiry is limited to the question of whether the public convenience and necessity requires the construction of the line. The published notice should be honest. It should not mislead a landowner to believe that the Commission has the authority to cause the route of the transmission line to be moved from the landowner's property to

the property of another.

Likewise, there is no justification for giving discussions with a landowner in public meetings special status over discussions with any other interested person. For this reason, the requirement that the application summarize such discussions in a statement in the CCN application should be deleted. Proposed Regulation, Section 2(7).

The regulations required to implement SB 246 should be incorporated into 807 KAR 5:001, Section 9.

The Proposed Regulation makes burdensome, unnecessary and, in some instances, unauthorized distinctions between the requirements for an application for a certificate of convenience and necessity for a Large Electric Transmission line, and the requirements for an application for a CCN for other types of construction projects covered by KRS 278.020 and 807 KAR 5:001, Section 9. Big Rivers believes that the few amendments to the Commission's regulations required to comply with the amendments to KRS Chapter 278.020 made by SB 246 (the "Statutory Amendments") can and should be incorporated into the existing CCN regulation, 807 KAR 5:001, Section 9 as another subsection to that regulation. The additional changes that Big Rivers suggests to the regulations are described below, and a mark-up of the Proposed Regulation containing most changes proposed by Big Rivers is attached to these comments. The mark-up does not contain all editorial revisions that would be required to add the substantive terms of the Proposed Regulation to 807 KAR 5:001, Section 9.

1. Requirement that a utility give a 30 day notice of intent to file an application for a CCN for construction of a large electric transmission line.

Section 1 of the Proposed Regulation imposes a requirement that a utility file a notice of intent to file an application for a CCN for construction of a large electric transmission line at least thirty days before the application is filed:

Section 1. Notice of Intent to File Application. (1) At least thirty (30) days prior to filing an application to construct an electric transmission line of 138 kilovolts or more and of more than 5,280 feet in length, an applicant shall file with the commission a notice of intent to file application.

(2) A notice of intent to file application shall include:

(a) The name, address and telephone number of the person who intends to file the application;

(b) A brief description of the proposed construction that will be the subject of the application along with a map of suitable scale to show the route proposed and any alternative route that was considered; and

(c) The name of the county or counties in which the construction will be proposed.

First, the Proposed Regulation arbitrarily singles out Large Transmission Line CCN applications for the requirement of a notice of intent to file. The Statutory Amendments do not require a notice of intent. And a notice of intent to file an application for a certificate of convenience and necessity is not required for an application for a CCN for any other type of construction project. On the basis of this arbitrary distinction alone, the requirement for a notice of intent should be deleted from the Proposed Regulation.

Second, the requirements for the contents of the notice of intent are

extensive, and unnecessary. In fact, the requirements for the contents of a notice of intent contained in the proposed regulation (see Section 1(2)(b) of the Proposed Regulation) are even more extensive than the Commission's regulations imposed upon a utility proposing to file a major rate case. See 807 KAR 5:001, Section 10(2). Section 1(2)(b) of the Proposed Regulation requires that a utility include in the notice of intent "a map of suitable scale to show the route proposed and any alternative route that was considered." This requirement essentially duplicates¹, for no apparent reason, the requirement in subsection (2)(2) of the Proposed Regulation regarding the contents of the application. Even if the Commission decides to retain the notice of intent requirement, the requirement for the contents of the letter of intent contained in Section 1(2)(b) should be deleted.

2. The "Necessity, Function, and Conformity" section of the Proposed Regulation contains an incorrect statement.

The "Necessity, Function, and Conformity" section of the Proposed Regulation incorrectly states that "KRS 278.020(2) provides that interested parties shall be notified and that a certificate of public convenience and necessity must be obtained prior to construction of an electric transmission line of 138 kilovolts or more and of more than 5,280 feet in length." In fact, the statute contains no notice requirement. This error should be corrected.

3. Section 3 of the Proposed Regulation improperly limits the right to

¹ Actually, the requirements are sufficiently different that a utility will be required to incur the expense to prepare two different maps.

request a hearing to residents of the county in which the proposed Large Transmission Line is proposed to be constructed.

Section 3(1) of the Proposed Regulation states that a local public hearing may only be requested by a resident of the county in which a Large Transmission Line is proposed to be constructed. A fair reading of KRS 278.020(8) is that a local public hearing may be requested by any "interested person." Big Rivers proposes in its suggested changes to the Proposed Regulation (see attachment) that any person whom the Commission finds has an interest in the application may request a local public hearing.

4. The scale for the maps required by the Proposed Regulation to be attached to the application should be 1 inch equals 2,000 feet.

Section 2(2) of the Proposed Regulation requires that the application include "[t]hree (3) maps of no less than (1) inch equals 400 feet scale for the property proposed." Maps using a scale of 1 inch equals 400 feet for a construction project would be extraordinarily unwieldy and impractical. For example, the maps for a ten mile transmission line would be at least 11 feet in length. And this assumes that the maps are not required to show all boundaries of the properties over which the transmission line is proposed to be constructed. Big Rivers requests that the scale for the maps required to be attached to the application be changed to 1 inch equals 2,000 feet, which is the scale used on U.S. Geological Survey topographical maps.

5. The Proposed Regulation should be amended to include a subsection allowing deviation from the requirements of the regulation.

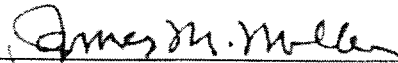
The Commission's regulations authorize the Commission, "in special cases, for good cause shown," to grant a deviation from the requirements of 807 KAR 5:001, Section 9, of its regulation regarding applications for CCNs for construction of projects other than Large Transmission Lines. See 807 KAR 5:001, Section 13. The Proposed Regulation contains no provision for deviation from its requirements. If the substantive terms of the Proposed Regulation are not incorporated into Section 9 of 807 KAR 5:001, as requested by Big Rivers, the Proposed Regulation should be amended to include a section allowing deviation from the rules. This practical device allows the utility to seek, and the Commission to grant deviation from the rules where compliance with the rules would be impractical or otherwise inadvisable in the opinion of the Commission. Deviation from the rules could not, of course, be granted by the Commission in circumstances where the requirement in the regulation is a requirement in the statute.

Conclusion

Big Rivers respectfully suggests that the Proposed Regulation, with the amendments proposed by Big Rivers in the attachment to these comments, are reasonable to all interested parties, fair to the affected utilities, consistent with SB 246, and should be incorporated into the Commission's existing regulation regarding applications for CCNs, 807 KAR 5:001, Section 9. Big Rivers is particularly concerned that the Proposed Regulation be swept of any language that implies an extension of Commission jurisdiction

to the subject of transmission line location. Interested parties should not be induced to expend the time, money and energy required to participate in a Commission CCN proceeding based upon an incorrect belief that the Commission is deciding where a Large Transmission Line should be located.

August 31, 2004



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ENVIRONMENTAL AND PUBLIC PROTECTION CABINET

Kentucky Public Service Commission

(New Administrative Regulation)

807 KAR 5:120. Applications for certificate of public convenience and necessity for certain electric transmission lines.

RELATES TO: KRS 278.020(2), (8)

STATUTORY AUTHORITY: KRS 278.040(3)

NECESSITY, FUNCTION, AND CONFORMITY: KRS 278.040(3) authorizes the commission to promulgate reasonable administrative regulations to implement the provisions of KRS Chapter 278. KRS 278.020(2) provides that interested parties shall be notified and that a certificate of public convenience and necessity must be obtained prior to construction of an electric transmission line of 138 kilovolts or more and of more than 5,280 feet in length, and that interested parties shall be permitted to participate in proceedings of the commission considering an application for that certificate of convenience and necessity. This administrative regulation establishes procedures and minimum filing requirements for an application to construct an electric transmission line of 138 kilovolts or more and of more than 5,280 feet in length.

~~Section 1. Notice of Intent to File Application. (1) At least thirty (30) days prior to filing an application to construct an electric transmission line of 138 kilovolts or more and of more than 5,280 feet in length, an applicant shall file with the commission a notice of intent to file application;~~

~~(2) A notice of intent to file application shall include:~~

~~(a) The name, address and telephone number of the person who intends to file the application;~~

~~(b) A brief description of the proposed construction that will be the subject of the application along with a map of suitable scale to show the route proposed and any alternative route that was considered; and~~

~~(c) The name of the county or counties in which the construction will be proposed.~~

Section 2. Application. To apply for a certificate of public convenience and necessity to construct an electric transmission line of 138 kilovolts or more and 5,280 feet or more, a utility shall file with the commission the following:

(1) All documents and information required by:

(a) 807 KAR 5:001, Section 8, except that the applicant shall file the original and six (6) copies of the application; and

(b) 807 KAR 5:001, Section 9(2)(a) through (c) and (e) through (g);

(2) Three (3) maps of no less than one (1) inch equals ~~2000~~400 feet scale for the project proposed. The map detail shall include the ~~affected property boundaries as indicated on the property valuation administrator's maps, modified as required, and the location of all~~ proposed structures, facilities, proposed rights of way and proposed easements.

~~(3) A verified statement that each property owner over whose property the transmission line is proposed to cross has been:~~

~~(a) Notified of the proposed construction by certified mail, return receipt requested;~~

~~(b) Given the commission docket number under which the application will be processed and a map showing the proposed location;~~

~~(c) Given the address and telephone number of the executive director of the commission;~~

~~(d) Informed of his or her rights to request a local public hearing and to move to intervene in the case;~~

~~(e) Given a description, including the proposed scope, of the project.~~

(4) A copy of each notice provided to a property owner, pursuant to the preceding paragraph;

(5) A statement that a notice of the intent to construct the proposed transmission line has been published in a newspaper of general

circulation in the county or counties in which the construction is proposed, which notice included:

- (a) A map showing the proposed route;
- (b) A statement of the right to request a local public hearing; ~~and~~
- (c) A statement of the right to move to intervene; and
- (d) A statement that the sole purpose of the proceeding is to determine whether the proposed transmission line is required by the public convenience and necessity.

(6) A copy of the newspaper notice described in the preceding paragraph;

~~(7) A statement describing or summarizing discussions occurring during any public meeting with persons who own property over which the line is proposed to be constructed;~~

~~(8) A copy of each written assessment of the environmental, historical, and archeological impact of the proposed construction, if any, required by a governmental administrative agency with jurisdiction;~~

(9) A statement as to whether the project involves sufficient capital outlay to materially affect the existing financial condition of the utility involved.

Section 3. Local Public Hearing. (1) A person whom the commission finds has an interest in the application~~resident of a county in which a transmission line of 138 kilovolts or more and of more than 5,280 feet in length is proposed to be built~~ may request that a local public hearing be held by sending a written request complying with subsections (2) and (3) of this section to the Executive Director, Public Service Commission, 211 Sower Boulevard, P.O. Box 615, Frankfort, Kentucky 40602.

(2) A request for a local public hearing shall contain:

- (a) The docket number of the case to which the request refers;
- (b) The name, address, and telephone number of the person sending the request; and

(c) A statement as to whether the person making the request wishes to participate in an evidentiary hearing or to make unsworn public comment.

(3) If a person requesting a local public hearing wishes to participate in an evidentiary hearing, the written request shall include a request, pursuant to 807 KAR 5:001, Section 3(8), to intervene in the commission proceedings on the application.

MARK DAVID GOSS, Chairman

MARK YORK, Deputy Secretary

as authorized by LAJUANA S. WILCHER, Secretary

APPROVED BY AGENCY: July 13, 2004

FILED WITH LRC: July 13, 2004 at 4 p.m.

PUBLIC HEARING AND PUBLIC COMMENT PERIOD: A public hearing on this proposed administrative regulation shall be held on August 31, 2004, at 10 a.m., Eastern Daylight Time, at the Public Service Commission's office, 211 Sower Boulevard, Frankfort, Kentucky 40601. Individuals interested in being heard at this hearing shall notify this agency in writing at least five workdays prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by August 24, 2004, the hearing may be canceled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on this proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted until August 31, 2004. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to: Jason Bentley, General Counsel, Public Service Commission, P.O. Box 615, Frankfort, Kentucky 40602, phone (502) 564-3940, fax (502) 564-7279.

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Contact Person: A.W. Turner, Jr.

(1) Provide a brief summary of:

(a) What this administrative regulation does: This regulation establishes a procedure for applications for a certificate of convenience and necessity for construction of a transmission line under KRS 278.020. It also provides for public notice of such an application and a procedure for members of the affected public to participate in the certificate proceedings.

(b) The necessity of this administrative regulation: This proposed regulation will assist the Public Service Commission in enforcing the statutes, and is necessary to the Public Service Commission's authority to regulate utilities and enforce KRS Chapter 278.

(c) How this administrative regulation conforms to the content of the authorizing statutes: KRS 278.020 authorizes the commission to grant certificates of convenience and necessity for construction of certain utility plant. The amendments of Chapter 75 (SB 246) of the latest legislative session extend this authority to certain significant transmission lines. This regulation establishes procedures for utilities to apply for such a certificate and provides for public participation in that process.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This regulation establishes the procedure for a public electric utility to apply for a certificate of convenience and necessity to construct a transmission line that, under the amendments to KRS 278.020, requires such a certificate. In addition, the regulation explains how the affected public may participate in the certificate case. Adoption of the regulation will therefore assist the commission in administering this new set of certificate cases.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation: N/A

(b) The necessity of the amendment to this administrative regulation: N/A

(c) How the amendment conforms to the content of the authorizing statutes: N/A

(d) How the amendment will assist in the effective administration of the statutes: N/A

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: This regulation will affect 21 rural electric utilities their customers, 5 investor-owned electric utilities their customers, and any persons owning property over which a utility proposes to locate such a transmission line.

(4) Provide an assessment of how the above group or groups will be impacted by either the implementation of this administrative regulation, if new, or by the change if it is an amendment: The impact of implementing this administrative regulation is not extensive. It will establish necessary procedures for processing applications for transmission line certificates.

(5) Provide an estimate of how much it will cost to implement this administrative regulation:

(a) Initially: Implementation of the proposed amendment will not involve additional costs.

(b) On a continuing basis: No additional costs are expected.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: No additional funding is required.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment: No increase in fees or funding is necessary.

(8) State whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees: No

(9) TIERING: Is tiering applied? Yes, tiering is used in this proposed regulation. The regulation only requires an application for those facilities that are larger and have higher transmission capacities. ~~Larger facilities create a greater potential for disrupting the environment and the use and enjoyment of property upon or near where the lines are proposed to be placed.~~ In addition, larger facilities tend to generate more public involvement in the process.