

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

RECEIVED

THE APPLICATION OF EAST KENTUCKY)
 POWER COOPERATIVE, INC. FOR A CERTIFICATE)
 OF PUBLIC CONVENIENCE AND NECESSITY FOR) **CASE NO**
 FOR THE CONSTRUCTION OF A 161 kV ELECTRIC) **2005-00207**
 TRANSMISSION LINE IN BARREN, WARREN,)
 BUTLER, AND OHIO COUNTIES, KENTUCKY)

SEP 09 2005

PUBLIC SERVICE COMMISSION

**RESPONSE OF EAST KENTUCKY POWER COOPERATIVE, INC.
TO INTERVENORS' MOTION TO DISMISS**

Comes the Applicant, East Kentucky Power Cooperative, Inc. ("EKPC") and requests the Commission to deny the Intervenors' Motion to Dismiss on the following grounds:

1. Neither Kentucky Statutes Nor Commission Regulations Provide Any Authority For The Commission To Dismiss An Application For A Certificate Of Convenience And Necessity.

As Kentucky's highest court stated in Public Service Commission v. Blue Grass Natural Gas, 197 S.W.2d 765, Ky., (1946), "The power of the Public Service Commission to deal with and regulate public utilities is authorized, controlled and restricted by Chapter 278, KRS." Id. at 767.

The actions that KRS 278.020(1) authorizes the Commission to take in a certification case are stated as follows: "Upon the filing of an Application for a certificate, . . . the commission may issue or refuse to issue the certificate or issue it in part and refuse to issue it in part. . ." To use the exact wording of the Blue Grass Natural Gas case, the Commission is specifically "restricted" to those three options in a certification case and nowhere is it "authorized" a fourth option of dismissing an

Application on its face as is being requested by the Intervenors here. The Commission can certainly reject or refuse to accept for filing an Application it deems not in conformity with its regulations. However, the Application in this case was accepted as meeting the requirements of the regulations by letter of the Executive Director dated July 8, 2005. Once the Application is accepted, the case must proceed in accordance with the statute, regulations and the Commission's scheduling orders.

2. If The Intervenors' Motion Can Be Considered A Request For Denial Of The Certificate, This Request Is Premature.

It is conceivable, through a rather large stretch of logic, that the Intervenors' Motion could be viewed as the practical equivalent of a Summary Judgment motion wherein the Intervenors have requested that the Commission deny the certificate prior to hearing any evidence. This would pre-suppose that there are no disputed issues of material fact, which is obviously not the case in these proceedings. More importantly, not only is there no statutory or regulatory provision authority to sanction this procedure, this would fly in the face of long-standing, well-established procedures of the Commission. The Commission's procedures in a certification case have been developed over the years to allow the Applicant and any Intervenors to produce requested information to the Commission on the Application, and to provide evidence on the issues relevant to the Commission's determination. This process has evolved, over the 60-some years of the Commission's existence, into a system of data requests, submittal of prepared testimony and cross-examination of that testimony at hearing.

In addition to being proscribed by Kentucky statute and regulation, denying a certificate before a hearing would deprive the Applicant of the ability, and the Applicant

would also assert the right, to present and develop additional evidence either through prepared testimony or at the hearing, and, would accordingly deprive the Applicant of the due process of law that the United States and Kentucky constitutions guarantee.

3. Kentucky Statutes And The Commission's Regulations Require That Hearings Be Held In This Case.

KRS 278.020(8) requires that the Commission, if requested, hold a local public hearing in this case. Such a request has been made and such hearing is required to be held.

807 KAR 5:001, Section 4 (1) of the Commission's Regulations contains the general requirement that a hearing be held where an Application for formal proceeding has been filed. Granted, there is language in that section which states, "except as otherwise determined in specific cases", but that exception has always been reserved for cases where the issues and facts are simple, where there are no Intervenor or opposition to the certificate, and where all parties agree to dispense with the hearing. Obviously, none of those criteria exist in this case, and as a result, the Applicant would argue that the exception would not apply and that a hearing must be held in this case.

4. The Route And Location Of The Proposed Transmission Line Are Not Issues Relevant To Whether This Line Is Required By The Public Convenience And Necessity.

As set forth in Kentucky Utilities v. Public Service Commission, Ky., 252 S.W.2d 885 (1952), the issues relevant to the Commission's determination of whether a project is required by public convenience and necessity are adequacy of existing service, the economic feasibility of the proposed facilities, the avoidance of wasteful duplication, and the financial ability of the Applicant. Senate Bill 246 which amended KRS 278.020 passed by the 2004 General Assembly and which did not confer siting jurisdiction upon

the Commission. Considerable effort has been made to cite the cases of Satterwhite v. Public Service Commission, 474 S.W.2d 387, Ky. (1972) and Duerson v. East Kentucky Power Cooperative, Inc., 843 S.W.2d, Ky. Ct. App. (1992) to justify the position that SB 246 did, in fact, grant to the Commission authority over the siting and routing of transmission lines. All of these efforts necessarily involve a misreading of the actual holdings of those two cases.

There were several holdings in the Duerson case, but only two had any relevance to certificate cases. The first of these holdings was that the 138 kV line in question there was an ordinary extension of existing systems in the usual course of business and as such, did not require a certificate pursuant to KRS 278.020. The second holding was that, even if such a line did require a certificate, obtaining such a certificate was not a prerequisite to exercising eminent domain. Clearly, SB 246 legislatively overruled the first holding, by specifically removing certain 138 kV lines (including, by the way, the line in Duerson) from the classification of ordinary course extensions. That was a clear declaration of the legislature specifically expanding the certificate jurisdiction of the Commission to include these 138 kV lines. The legislation in no way changed, or even addressed, the second holding dealing with the exercise of eminent domain. However, neither of these holdings is in any way pertinent to the issue of whether the Commission has authority over the routing or siting of transmission lines, and can't be relied upon as the basis for any expansion of the Commission's jurisdiction.

Satterwhite, on the other hand, only contained two holdings. First, the court held that the particular lands a proposed transmission line would cross was not an issue before the Commission in a certification case, since this "was not relevant to the issue of

convenience and necessity.” Satterwhite, at 389. “The considerations on that issue were the adequacy of existing service, the economic feasibility of the proposed facilities, the avoidance of wasteful duplication, and the financial ability of the Appellant [Applicant (brackets inserted)]” Id. at 389, citing the KU v. PSC case above. This was a separate holding, and formed the logical basis for the ultimate disposition of the case contained in the second holding. In this second holding, the court further reasoned that because location was not an issue, a person, solely by virtue of owning property crossed by the line, was not an interested party within the meaning of KRS 278.020, and could not, therefore, intervene. Clearly, SB 246 did legislatively overrule that second holding, by specifically declaring that an owner of property crossed by the line was to be deemed an interested party and could, therefore intervene in a transmission certificate case. However, the legislation in no way, shape, or form overruled or even addressed Satterwhite’s first holding, that the Commission’s jurisdiction is limited to adequacy of service, economic feasibility, wasteful duplication and financial ability. There is no declaration in the Act that the jurisdiction that the Commission has held for over 60 years and that has been upheld by the courts for all those same years, is all of a sudden being expanded to include consideration of routing and location of transmission lines. There are no criteria set forth by the Legislature as to how the Commission should evaluate location. There are no factors to be considered. There are no requirements to be followed.

Beyond removing certain transmission lines from the ordinary course exception, SB 246 simply grants intervenor status to those who previously did not have such status. The Applicant contends that it is simply unreasonable to conclude that such a minor

change in the law was intended to have such a profound expansion of the jurisdiction of the Commission.

It should be helpful to contrast this with the enactment of KRS 278.700 through KRS 278.716 in 2002. There the Legislature did intend to create siting and routing authority over certain transmission lines, and throughout that statute the Legislature set forth comprehensive and specific requirements for location and comprehensive and specific factors to be considered in routing and siting.

As a result, the issues to be considered by the Commission in determining whether a facility is required by the public convenience and necessity remains unchanged from those criteria is set forth in Satterwhite and Kentucky Utilities.

5. Even If Routing And Location Are Addressed
The Applicant Adequately Considered All
Alternatives Including Co-Location And Sharing
Of Right-Of-Way.

In response to Commission Staff Data Request 25, the Applicant furnished “Draft-EPRI Report #1012804”, Standardized Methodology for Siting Overhead Electric Transmission Lines. Developed jointly by the Electric Power Research Institute and The Georgia Transmission Company, this is the most objective, comprehensive and sophisticated methodology for siting transmission lines currently available. One of the primary factors in that methodology is co-location and the sharing of right-of-way with existing transmission lines, and in fact, a substantial portion of the Warren project is located on existing right-of-way or right-of-way shared with existing lines. The fact that the entire length of the project was not co-located does not mean that co-location was not adequately considered. To the contrary, it was adequately considered along with all other

generally accepted factors, all of which were considered and weighed on an objective basis as set forth in Warren Exhibit I to the prepared testimony of Mary Jane Warner, attached as Exhibit I to the Application.

6. Environmental Permits, Proceedings And Approvals Are Not Relevant Considerations To The Commission's Determination Of Whether This Project Is Required By The Public Convenience And Necessity.

The majority of the Intervenor's brief deals with the federal environmental requirements of this project. The Intervenor is quite correct in their assertions that in order for the Applicant to obtain funding for this project, the Applicant must comply with the National Environmental Policies Act ("NEPA") and all federal regulations related thereto, including Section 106 and the regulations of the U.S. Department of Agriculture, Rural Utilities Service ("RUS"). The same is true with all transmission projects undertaken by the Applicant, and these environmental processes are currently ongoing. However, these are federal requirements, administered by federal agencies pursuant to federal laws and regulations, and are not relevant to the Commission's determination of public convenience and necessity for a transmission line. See the Satterwhite and Kentucky Utilities cases cited above.

The Intervenor does make an allegation that an Applicant in a certification case must obtain all environmental permits and approvals before it can file an Application. There is no such requirement contained in the law. To the extent the Applicant is required to obtain any permits from any governmental agency, there is no requirement in KRS 278.020 that those permits must be obtained or applied for prior to obtaining a certificate from the Commission. Indeed, the only part of KRS 278.020 that addresses

the order is which regulatory approvals are to be obtained calls for the certificate from the Commission to be obtained first (KRS 278.020(4)).

In Western Kraft Paper Group v. Dept. for Natural Resources and Environmental Protection, 632 S.W.2d 454 (Ky. App. 1982), the Kentucky Court of Appeals addressed the timing of environmental permitting and a certificate of convenience and necessity required for the construction of a power plant and held that a utility may apply for an environmental permit prior to obtaining a certificate of convenience and necessity. What is particularly persuasive about this case is that the court did not require that an application for environmental permit be made prior to obtaining a certificate of convenience and necessity. Thus, any assertion that permits must be obtained first is clearly not supported by the plain language of KRS 278.020 and the only authority construing it.

Further, it is important to note that the Commission did incorporate such a requirement in 807 KAR 5:1210 E, Section 2 (8), which were the emergency regulations brought into effect temporarily pursuant to SB 246. However, this section was removed in the final, approved regulations with the Commission stating in its statement of consideration that the legislative language and history do not support this requirement. With this, the Applicant agrees.

As a practical matter, if there was a requirement to obtain all of the myriad of federal and state environmental permits and approvals prior to submitting an Application, this would essentially cripple the Kentucky electric utility industry's ability to construct adequate generation and transmission to serve the ratepayers in Kentucky. The time required to obtain these permits and approvals combined with the length of the

Commission certification process would mean that some projects, such as the Warren project, could not be timely constructed to ensure the adequacy of generation and transmission as required by the Commission in Administrative Case No. 387.

The Intervenors make the assertion in their brief that applying for a certificate of convenience and necessity prior to completing the environmental approval process is an illegal act. This charge was repeated by counsel for Intervenors at the local public hearing on September 6, 2005. This is simply not the case and apparently results from a misunderstanding of the technical definitions sometimes used in federal environmental law. Suffice it to say, however, that any determination as to whether EKPC does or does not comply with federal environmental requirements must be made by the federal agencies empowered by Congress to administer federal environmental law or by the federal courts. All of these determinations will be made in due course by the proper agencies prior to commencing construction of the project. It is not within the province of the Commission to interpret federal law and attempt to make these determinations.

Conclusion

For the reasons stated herein, the Applicant respectfully requests that the Commission deny the Intervenors' Motion to Dismiss and proceed to hearing in this case as set forth in the Commission's last scheduling order.

Respectfully submitted,



DALE W. HENLEY



SHERMAN GOODPASTER III

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was filed and that the original and 10 copies have been mailed this day to the Commission and served herein by mailing such copy thereof via U.S. Mail, first-class postage prepaid to the Honorable A.W. Turner, Public Service Commission, 211 Sower Boulevard, PO Box 615, Frankfort, KY 40602; and to each person designated on the official service list compiled by the Secretary for this proceeding, this the 9th day of September, 2005.


SHERMAN GOODPASTER III

(H:legal/psc-warren-ekpc-resp to mo to dismiss)