

RECEIVED

NOV 02 2009

PUBLIC SERVICE
COMMISSION

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

SOUTH KENTUCKY RURAL ELECTRIC)	
COOPERATIVE CORPORATION)	
_____)	CASE NO. 2009-00015
)	
ALLEGED FAILURE TO COMPLY WITH)	
KRS 278.042)	

POST HEARING BRIEF OF SOUTH KENTUCKY RURAL
ELECTRIC COOPERATIVE CORPORATION

OVERVIEW

This proceeding was initiated by the Kentucky Public Service Commission (“PSC”) against South Kentucky Rural Electric Cooperative Corporation, (“South Kentucky”) by an order dated February 11, 2009 directing South Kentucky to “show cause as to why it should not be held subject to the penalties of KRS 278.990” for an accident occurring on August 5, 2008 when two (2) employees of South Kentucky’s contractor, Davis H. Elliot Construction Company (“Elliot”) sustained minor injuries while replacing a conductor on a single phase 7200 volt tap line in a Yosemite area of Casey County, Kentucky.

In its order, the PSC determined that there was prima facie evidence that South Kentucky failed to comply with KRS 278.042 by violating the following provisions of the National Electric Safety Code (NESC), namely:

NESC Section 42, 420-C-4: Employees who work on or in the vicinity of energized lines shall consider all of the effects of their actions, taking into account their own safety as well as the safety of other employees on the job site, or on some other part of the affected electric system, the property of others, and the public in general.

NESC Section 42, 420-C-5: No employee shall approach or bring any conductive object, without a suitable insulating handle, closer

to any exposed energized part than allowed by Rule 431 (communication) or Rule 441 (supply), as applicable.

NESC Section 42, 420-H: Employees shall use the personal protective equipment, the protective devices, and the special tools provided for their work. Before starting work, these devices and tools shall be carefully inspected to make sure they are in good condition.

NESC Section 42, 421-A-1: The First-Level Supervisor or person in charge shall adopt such precautions as are within the individual's authority to prevent accidents.

NESC Section 42, 421-A-2: The First-Level Supervisor or person in charge shall see that the safety rules and operating procedures are observed by the employees under his direction.

NESC Section 42, 422-C-1: Precautions shall be taken to prevent wires or cables that are being installed or removed from contacting energized wires or equipment. Wires or cables that are not bonded to an effective ground and which are being installed or removed in the vicinity of energized conductors shall be considered as being energized.

NESC Section 44, 441-A-1: Employees shall not approach or bring any conductive object within the minimum approach distance listed in Table 441-1 or Table 441-4 to exposed parts unless one of the following is met:

- a. The line or part is de-energized and grounded per Rule 444D;
- b. The employee is insulated from the energized line or part. Electrical protective equipment insulated for the voltage involved, such as tools, gloves, rubber gloves, or rubber gloves with sleeves, shall be considered effective insulation for the employee from the energized part being worked on; or
- c. The energized line or part is insulated from the employee and from any other line or part at a different voltage.

South Kentucky responded denying any alleged NESC violations and any violation of KRS 278.042. In its response South Kentucky further indicated that it lacks the legal right or

obligation to control the day to day activities of employees of its independent contractor and should not be accountable for actions or inactions for which it did not, nor legally could not, control. Lastly, South Kentucky denied that it acted willfully as regards the August 5, 2008 incident.

A hearing was conducted before the PSC on September 1, 2009 and at the conclusion South Kentucky was directed to file this brief.

STATEMENT OF FACTS

Elliot was on August 5, 2008, and has been since 2001, an independent contractor providing services to South Kentucky (TR-129¹) and, as stated by Allen Anderson, CEO of South Kentucky, it is a top-notch company that emphasizes safety (TR-129 and 131).

In its Electrical Utility Personal Injury Incident Report attached to the February 11, 2009 order, the PSC describes the incident as follows:

A contract crew with Elliot Construction Company was performing work on South Kentucky RECC facilities when this accident took place. The task being performed by the Elliot crew was replacing conductor on a single phase 7200 volt tap line. The tap line had been de-energized for most of the day. For some reason the crew decided to re-energize the line before they were to pull up and sag the new conductor. When pulling up the new conductor, it appears the new conductor got hung under tree limbs. The victims pulled harder on the conductor and when it came free from the limbs, the new conductor made contact with the old energized conductor. This action energized the new conductor and it had not been grounded during this process. It was at this point the victims received the shock from the new conductor. The victims were pulling on a rope that was attached to the new conductor. It appears that the victims were not wearing the required rubber protective equipment during this phase of the operation. The victims were transported to the local hospital and then transported to the University of Kentucky Burn Center. The victims survived and are recovering.

¹ Reference to the transcript of evidence of the September 1, 2009 hearing shall herein be referred to as "TR-__ (page number)".

South Kentucky agrees with most of the above description of the incident but some expansion of the facts is necessary.

As revealed by the testimony presented at the hearing, the reason the line was re-energized was known and was not an arbitrary seemingly careless decision as implied by the PSC's description of the accident. It was a hot day in August and the de-energized line had terminated service to the home of elderly customers of South Kentucky who were resultantly smoldering in the heat without the ability to use their air conditioner. It was re-energized when thought safe so to allow these customers relief from the heat. Additionally, through hindsight, PSC staff was able to determine that the new conductor got hung under tree limbs. The workers did not have this knowledge at the time as it they were hundreds of feet from the snag and the terrain was hilly such that the limbs and the snag could not be seen. Lastly, South Kentucky does not concede that workers on the ground pulling on a rope that was attached to a non-energized line are required to wear rubber protective equipment as were the linemen and his helper who actually would set the line.

At the hearing, South Kentucky called Don Adkins, Elliot's Corporate Safety and Training Manager. Elliot is a power line construction and maintenance contractor which has been in business since 1946. Elliot serves a fifteen state area and has approximately 1300 employees. Elliot's safety and training staff consists of fourteen people, including Mr. Adkins. Mr. Adkins indicates that Elliot's safety program consists of "our written programs, our safety manual, our training programs, our enforcement of our safety rules and various training programs..." (TR-71). He indicates that safety training is an ongoing process (TR-72). Elliot also has a disciplinary scheme for safety violations as contained in its safety manual and disciplinary actions range from written reprimands to termination from the company. (TR-72-73). Mr.

Adkins described Elliot's investigation of the incident on pages 75-84 of the transcript of the hearing. Since this entire case involves the conduct of these two gentlemen who sustained the burns to their feet, his testimony bears repeating as follows:

Q: Well, just tell us what was the result of your investigation, of Elliot's investigation.

A: Our guys were involved with what I would characterize as a line relocation. I'm not sure the reason why the line was being relocated. I assume it was for some building construction that was going to take place. So the existing line needed to move. So our crew was in the process of moving the power line.

It began at a common origination point with the existing line and then it delineated from the existing path, kind of in a V-shape, and then came back together at the end.

During the stringing operation, you know, our crew set some additional poles and they pulled the line out on the ground, and, when the line was being raised, ultimately, at the end point, the line apparently got snagged in a tree, or bush, or something to that effect, and recoiled over and hit the existing line.

Q: Did you determine that the power was off on the existing line at first and then turned back on? Can you tell us about that?

A: Yes, the crew, on what I'll call the termination pole, the opposite end of where the line originated, at that pole, the crew had to do some reconfiguring work, which involved putting a three-foot fiberglass arm, taking the existing wire to one side of the pole to make room for the new wire that would be installed.

So they de-energized the tap line to accomplish this work, as well as put a layout arm, a three-foot fiberglass arm, on the pole prior. The termination pole had a transformer and had some other facilities on it.

So they de-energized it to relocate what they needed to on those facilities to make room for the new wire to be

terminated at that pole. So they had the power off during that work...

Q: What was the three foot you were talking about?

A: That's something we call a hot arm or a layout arm. It's a device that attaches to the pole that allows the existing conductors to be what we call outrigged, placed over to the side, still supported, but it takes it away from the pole to allow room for people to work and for new equipment to be installed.

Q: There's a drawing with the Elliot report that is included in the PSC Investigative Report. Are you familiar with that drawing? I'm going to hand it to you. It's got the date on it, "8-5-08."

A: Yes, I've seen this. Yes.

MR. SAUNDERS:

Gentlemen, it's in their report, this little drawing here.

Q: And did Elliot interview the employees?

A: Yes, we did, on a couple of different occasions.

Q: Okay. Now, were they using a rope, and what were they using a rope for?

A: Okay. The crew related to me that, and as I mentioned before, they had initially pulled the new wire out on the ground and had left some slack in it and had gone pole to pole and what we call slack tied it to the insulators, which means it's attached to the insulators but it's still capable of sliding through as they take up on it. So...

Q: Now, this new line wasn't necessarily going to be – was not necessarily going to span on the same poles as the existing line; was it?

A: No. It only shared the same poles at the beginning and the end and, aside from that, it differentiated in the path with different poles.

- Q: So your drawing is like a triangle here and that shows the distance between the two lines; right?
- A: Yes, and it was, in the middle point, the farthest part away, probably somewhere in the neighborhood of 35-40 feet apart from the old line to the new line.
- Q: And the existing line is the one that would have been energized then they were injured?
- A: Correct.
- Q: All right. Okay. What precautions were taken? I mean,, what – well, instead of that question, let me ask this. Was this a standard layout for the construction of this new line, or was it based upon the location, or why was it done this way?
- A: It's a typical type job that our construction crews do, line relocations. So it was done much like many jobs are.
- Q: Okay. I see the point of contact you have there, or the drawing has, is an "X", and that's from the pole, and you're showing the tree. So, between those two lines, at that point, do you know what the distance was?
- A: I don't know that the exact distance was. However, the old line was on a three-foot hot arm, plus the thickness of the pole, and the new wire was on, you know, the opposite side of the pole. So it was in excess of three feet at the closest point.
- Q: But further than two feet, two inches?
- A: Yes.
- Q: And that's where the contact was made?
- A: Yes.
- Q: Any question that it was further than two feet, two inches at that point?
- A: No. It was at least three feet and more.

Q: Okay. So, then, if that were the case, would the NESC even require that these gentlemen wear gloves when they're pulling?

A: No.

Q: And why is that?

A: Because it's outside of the minimum approach distance.

Q: And that's the chart; right?

A: Yes; the two foot, two you mentioned earlier.

Q: Mr. Kingsolver had mentioned; right?

A: Yes.

Q: How about the rest of the crew? Did they have proper equipment and things like that?

A: Yes. Just before the accident took place, we had a bucket truck set up on I believe that was called Fishing Creek Road, which is the origination point of this line, and the crew was preparing to send the final end of the wire up to him. The gentleman on the ground, Carl, was wearing his gloves and the gentleman in the bucket truck was wearing his rubber gloves, and not to mention...

Q: The two that were hurt were wearing leather gloves, is your understanding?

A: They were wearing leather gloves. Yes, sir.

Q: Okay. They were just pulling rope?

A: Yes, sir.

Q: Go ahead. I'm sorry I interrupted. You had a thought.

A: I just wanted to point out that, during the work I mentioned earlier where we reconfigured the termination pole and laid up some of the conductors, that was done with the lineman in the bucket wearing his rubber protective gear.

Q: Did you determine from your crew there that the power was turned back on on the existing line for the reason of the customers there nearby or something of that nature?

A: Yes. The crew had completed their work where I mentioned earlier where we had to relocate some equipment on the termination pole and reworked those facilities and moved that wire out on the hot arm. Then the crew decided it was so hot and the folks living in the home that the line served were elderly and it was, in think, in excess of 90 degrees. So the crew decided they had done their critical work. They could complete the rest of the job safely with it still energized. So, to provide some relief for the homeowners, they did opt to turn the power back on.

Q: So they had already taken measures before they turned it on? They didn't just go – they didn't turn it on haphazardly; did they?

A: That's correct. They had already outrigged the wire so it would be out of the way and...

Q: What is outrigging the wire?

A: Installing the hot arms I described earlier on the two final poles.

Q: The eight feet, or did you say three feet?

A: The three-feet long hot arms.

Q: Okay. To separate the lines?

A: Yes.

Q: So probably there was little chance of there being any contact with the two lines?

A: Right.

Q: But then, of course, there was contact with the two lines; right?

A: Ultimately, there was; yes.

Q: And the investigation revealed that – why was it?

A: That, when they were preparing to pull the line up to the final pole, to the origination pole, the guys had installed a rope on the end of – not at the end of the wire but on a point on the wire and they began to pull on it to, you know, pull the slack out and take it toward the pole next to Fishing Creek Road. As they pulled...

Q: Is that standard?

A: Yes, that's standard, and at this point, the line was basically on the ground in between each pole and kind of went up and sagged down, was on the ground between each pole. As they pulled on it, they weren't making the progress they thought they should and they could visually see that the wire wasn't leaving the ground. So they assumed it had snagged on something. So they pulled harder.

At that point, it came free from whatever was snagging it – we think it was a tree, or bush, or something – then recoiled up a surprisingly far distance and brushed the existing line, brushed contact.

Q: Okay. Did you make a determination as to how the two individuals were contacted by electricity?

A: Based on talking with the two individuals, as well as the other crew members on site, and based on what injuries that the two received, we believe that, when the brushed contact was made and the wire became energized for that short period of time, that the tip of the wire was actually touching the ground which energized the ground, and we believe the guys were affected through what we call step potential. I think someone mentioned that earlier this morning.

Q: Okay, and in your discussions with the two gentlemen that were hurt, did they indicate at all that their hands were on the wire at any time?

A: When I talked to Scotty, who was the foreman, when I initially talked to him in the hospital, the day of the incident, he could not understand how he got shocked and made a statement to the effect of, "I don't think I was, but I must have been touching the wire or otherwise I wouldn't have gotten shocked, but I think I was on the rope, but I don't see how I could have gotten shocked only being on

the rope.” Over the next day or two, as we talked to the rest of the crew members, they indicated to us that, no, they were indeed on the rope, not touching the wire. So we believe that’s what they were holding at the time.

Q: And I assume, then, that the electricity entered their feet through the ground?

A: Yes. I think each of them had a small, what I’d describe as a pencil eraser size burn. Each of them had one of those on their feet.

Q: When you viewed the site and the circumstances of this accident, did you determine that the method by which the wire was put up, the line was put up, proper? They were following proper procedure?

A: Yes. With the precautions they took with installing the hot arms, and so forth, yeah, I think their method was proper.

Q: Were they trying any shortcuts or anything of that nature?

A: No, sir.

Q: And, but for the snag, I guess, then obviously it probably wouldn’t have happened. Is there anything else they could have done other than gone down there and actually grabbed the line at the point of the snag?

A: Hindsight being 20-20, you know, they could have walked down and removed the snag, or cut the limb, or whatever the case may have been, but, other than that, no, nothing.

Q: Is there anything you, in your investigation, found that they did improperly that could have added to the situation as far as putting that line up?

A: Other than pulling on the line harder once it snagged, no.

Other than the incident description as set forth on page 3 above, the PSC’s Electric Utility Personal Injury Report consists only of the alleged violations of the NESC. Attached to the report are the investigative reports of Elliot and South Kentucky, the latter also filing an amended report. By use of the South Kentucky and Elliot reports, it is apparent that the PSC

staff did not make its own findings of fact but, rather, relied upon the reports of the utility and its contractor. It is equally apparent that the Elliot investigative report was crucial both to South Kentucky's investigation and the incident report of the PSC staff. There was some discussion through the PSC's witness, its Utility Inspector Steve Kingsolver, that South Kentucky submitted an amended report for a nefarious purpose. That was distinctly denied by Mr. Kingsolver through his testimony on cross examination. He was asked if he saw anything underhanded about South Kentucky submitting an amended report and he stated "I see nothing underhanded about it; no-Sir". (TR 42). He further alluded to the fact that South Kentucky obtained that information and submitted another report to provide the PSC with new information. In fact, South Kentucky had provided its initial investigative report and after reviewing Elliot's report and more specifically the interviews by Elliot of its employees, South Kentucky determined to provide that more accurate information to the PSC in an amended report. Mr. Kingsolver stated that he did not consider the additional report misleading, that he considered it factual and was no different that filing an amended tax return or an amended pleading in a case. (TR-43).

Mr. Kingsolver estimated the distance between the injured Elliot employees and the snag as a few spans away, "in the neighborhood of 750 feet to 1200 feet from where they were pulling the conductor" (TR 29) but later indicated the distance was in the neighborhood of 1500 feet. (TR 47). He agreed that the actions of the two Elliot employees was not unlike pulling a water hose around the corner of a house and jerking it when it stops, as we have all done. (TR 48). Mr. Kingsolver concluded that, aided by hindsight, theoretically the wire could make contact 750 to 1500 feet away even though the two lines were separated by the three foot hot arm (a distance greater than the NESC 2 foot, 2 inch minimum) and therefore the employees pulling the line by

the rope should have anticipated a snag and the resultant brushing contact of the wires such that they should have been wearing rubber. (TR 50).

Allen Anderson, CEO of South Kentucky testified at the hearing. In addition to his confidence in Elliot as previously eluded to, Mr. Anderson introduced the following documents regarding South Kentucky's safety program and safety awards:

1. South Kentucky's safety and corrective action policy as adopted by the Board of Directors. (South Kentucky Exhibit 2)
2. Board authorization authorizing the safety and corrective action policy. (South Kentucky Exhibit 3).
3. Governor's Safety and Health Award awarded to South Kentucky for achieving 506,036 hours work without experiencing a lost time injury or illness awarded May 12, 2006. (South Kentucky Exhibit 4).
4. National Rural Electric Cooperative Association Certificates of Safety Accreditation presented to South Kentucky for the years 2003, 2006 and 2009 (South Kentucky Exhibit 5). Inspections are conducted on 3 year intervals.
5. South Kentucky's Safety Reports from 2001 through 2009. (South Kentucky Exhibit 6).
6. Letter from Van Meter Insurance Group revealing workers compensation insurance premium reductions earned by South Kentucky for its lack of injury accidents. (South Kentucky Exhibit 7).
7. Bid qualification packet including information from Davis H. Elliot revealing South Kentucky's effort to assure that its contractors operate safely. (South Kentucky Exhibit 8).
8. Davis H. Elliot Company, Inc.'s contract with South Kentucky requiring that it comply with all applicable provisions of federal, state and municipal safety laws dealing with construction cases as well as the safety rules and regulations of South Kentucky. (South Kentucky Exhibit 9).

Neither Mr. Anderson nor any other employee of South Kentucky had any first hand knowledge of the accident giving rise to this action and therefore was not in a position to testify factually about the incident.

Although perhaps properly set forth as Statements of Fact, testimony regarding each of the seven (7) alleged violations of the NESC will be set forth in the argument phase of this brief so as not to be overly repetitive.

ARGUMENT

THE PSC HAS FAILED TO STATE A CHARGE OR CLAIM AGAINST SOUTH KENTUCKY

Nowhere in the charging document, that being the order of February 11, 2009 and the attachments thereto, the PSC staff Incident Investigation Report or otherwise has the PSC pleaded or charged a violation for which any relief can be granted. The PSC alleges that South Kentucky, through its contractor, Elliot, violated seven (7) provisions of the NESC as adopted by KRS 278.042 and directs South Kentucky to show cause why it should not be held subject to the penalties of KRS 278.990 for these alleged violations. The PSC's authority for penalizing utilities that it regulates is contained in KRS 278.990. KRS 278.990(1) provides, in relevant part, as follows:

(1) Any officer, agent, or employee of a utility, as defined in KRS 278.010, and any other person who willfully violates any of the provisions of this chapter or any regulation promulgated pursuant to this chapter...shall be subject to either a civil penalty to be assessed by the commission not to exceed two thousand five hundred dollars (\$2,500) for each offense or a criminal penalty of imprisonment for not more than six (6) months, or both. (Emphasis added).

The PSC's authority to impose penalties upon South Kentucky, or any utility it regulates, requires a "willful violation" of a provision of KRS Chapter 278. Yet nowhere in the charging document (the order of February 11, 2009) or the investigative report or any exhibit thereto has the PSC alleged that a "willful" violation occurred. This failure to set forth a charge or violation against South Kentucky is fatal to maintenance of this action.

In Personnel Board v. Heck, 725 SW2d 13 (Ky.App. 1986) it was held that the applicant for relief has the burden of proof and that the party having the burden of proof before an administrative agency must plead the issues relied upon with no requirement that the other party show the negative of an issue if the party having the burden of proof fails to do so. The court further provides that pleadings in an administrative proceeding must be sufficiently clear and specific to allow preparation of a defense. Thus, there is some procedural formality involved even in administrative proceedings and the elements of the alleged offense should be pleaded and the pleading should be sufficiently clear and specific. Since the PSC's sole authority to penalize the utilities it regulates requires a "willful violation", at the very least, it should be alleged that the alleged violations were willful.

In actions at law, an initiating pleading is governed by CR 8.01 which indicates that a claim shall contain (a) a short and plain statement of the claim showing that the pleader is entitled to relief and (b) a demand for judgment for the relief to which he deems himself entitled. Even with this liberal system of "notice pleadings", the underlying principal of stating a cause of action should be observed. "The basic element thereof should still be fairly shown: (a) a primary right of the plaintiff and (b) a wrong of the defendant that breaches that right and results in damage. A pleading that merely suggests or hints or creates suspicion that the party has a right action is not sufficient". Philipps and Kramer, 6 Kentucky Practice, Rules of Civil Procedure Annotated, 6th Edition, page 157. Also see Wright and Miller, Federal Practice and Procedures, Second Edition, Civil Section 1215. The primary right of the PSC in this action is to attempt to assert a penalty against South Kentucky for a "willful violation" of a provision of KRS Chapter 278 and the wrong of South Kentucky that breaches that right and results in damage must necessarily also involve a "willful violation" of any provision of KRS Chapter 278.

By not alleging that South Kentucky willfully violated a provision of KRS Chapter 278, the initiating pleading is insufficient. The Order of February 11, 2009 merely states that South Kentucky has failed to comply with KRS 278.042. That, alone, does not justify proceeding against South Kentucky. There must be an allegation of willful violation, purely and simply.

Also drawing from the Civil Rules, as one must since there are no rules governing pleadings in administrative proceedings generally, and the PSC specifically, CR 9.02 provides that “malice, intent, knowledge and other condition of mind of a person may be averred generally”. However, that state of mind must still be averred and will not be presumed. Willfulness is an intentional act with knowledge of the consequences and most certainly is a condition of mind which must at least be averred generally. Yet willful conduct has never been pleaded or charged.

**NO WILLFUL VIOLATION
WAS ESTABLISHED BY THE PSC**

As previously stated, and as it is assumed the PSC is aware, its ability to penalize South Kentucky for actions or inactions of its contractor stems from KRS 278.990 which requires a “willful violation” before penalties can be assessed. As we know, nowhere in the initiating pleading has South Kentucky been accused of a “willful violation” of any provision of KRS Chapter 278. Nor was any testimony presented at the hearing which even alluded to a willful violation, much less established a willful violation. The term “willful” is not mentioned once in the investigative report. It is not mentioned once in the order of February 11, 2009 commencing this case and was not mentioned once in testimony. Therefore, even though not pleaded adequately, no willful violation was established at the hearing. Therefore the matter should be dismissed.

The term “willful” is defined in Blacks Law Dictionary, Revised 4th Edition, West Publications, as “proceeding from contentious motion of the will; voluntary”. Additionally, the dictionary contains the following descriptions of the term:

A “willful” act may be described as one done intentionally, knowingly, and purposelessly, without justifiable excuse as distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently.

“Willfulness” implies an act done intentionally and designedly.

“Conscious; knowing; done with stubborn purpose”

Premeditated; malicious; done with evil intent, or with a bad motive or purpose, or with indifference to natural consequences; unlawful; without legal justification.

A statutory definition of “willful interference” is contained in KRS 216.535(7) as follows: “an intentional, knowing, or purposeful act or omission which hinders or impedes the lawful performance of the duties and responsibilities of the ombudsman as set forth in this chapter”. In a statutory connotation, it is stated in Smith v. Bob Smith Chevrolet, Inc., 275 F.Supp. 2d 808 (W.D.Ky. 2003):

To show “willful” noncompliance with the Fair Credit Reporting Act (FCRA), the plaintiff must show that defendant knowingly and intentionally committed an act in conscious disregard for the rights of others.

In Wood v. Commonwealth, 56 SW2d 556 (Ky. 1933) the court states that the word “willful” or “willfully” means intentionally and not accidentally or involuntarily.

Several bankruptcy cases have defined the term willful. In In RE: Howell, 373 B.R. 1 (Bkrcty. W.D.Ky. 2007) the court indicates that for an injury to be “willful” within the meaning of the dischargeability exception of the bankruptcy code, the debtor’s conduct must involve deliberate or intentional injury. This deliberate and intentional standard is repeated in the cases

of In RE: Heflin, 326 B.R. 696 (Bkrctcy. W.D. Ky. 2005) and In RE: Kennedy, 3443 B.R. 1 (Bkrctcy. W.D. Ky 1997).

What actions or inactions have been established by staff which reveals that South Kentucky, or for that matter, even Elliot, voluntarily, intentionally, knowingly and purposefully without justifiable excuse, premeditatedly, maliciously with evil intent or bad motive or purpose or with indifference to the natural consequences acted to cause the minor injuries to the Elliot employees. They clearly did not. The incident of August 5, 2008 was an accident. It may or may not have even been careless or negligent, but without question it was not an intentional, deliberate, purposeful act aimed at causing the injuries.

It is a fact of life that accidents happen. Sometimes with fault, sometimes without fault. Accidents should remain just that – accidents. Just because an injury occurs it should not automatically be presumed to have been an intentional, knowing act done with an evil purpose. When slicing a roast for dinner it is not uncommon that a person cut his or her finger. Careless? Maybe. Intentional and deliberate and done with the evil purpose of causing harm? Certainly not. Should the manufacturer of the knife be strictly liable solely because the user was cut? Absolutely not. Should the family members for whom the roast was being sliced be punished because the carver cut his or her hand? Hardly. How does that scenario differ from the injury to the Elliot employees? Yes, there were injuries, although minor. As South Kentucky's safety record reveals, even minor injuries are important and South Kentucky is not necessarily making light of the injuries to the Elliot employees. But there is no escaping the fact that the injuries were minor and they were back to work without delay. But whatever the severity, the injuries were not the result of willful actions by the employees and certainly not the result of willful actions of South Kentucky.

The Elliot employees encountered difficulty pulling the line over a great distance (750 – 1500 feet) and could not see the line while they were pulling. They pulled harder, just like pulling a water hose at home. The line, it was later learned, had been caught in a tree and when freed a slingshot effect caused contact with the energized line. The Elliot employees were not holding the line which thereupon became energized hundreds of feet away. Rather, they were holding rope, a non-conductive material. The end of the line was on the ground and when contact was made with the energized line, the current conducted through the ground and into their feet causing the burns which were about the size of a pencil eraser. Were the Elliot employees intentionally and deliberately attempting to cause themselves harm? Was it their purpose, their scheme to hurt themselves? Of course not. This was an accident. Pure and simple. The harm could not reasonably be foreseen. They did not see the line caught up in the trees. For all they knew it was the weight of as much as 1500 feet of wire which caused difficulty in pulling the line. With the benefit of hindsight would they have done differently? Most certainly. We all would. But there is no conduct on the part of South Kentucky or Elliott which can in any manner be construed as a willful violation of any provision of KRS Chapter 278 or any provision of the NESC code.

It is troubling that the PSC staff seeks penalties whenever there is an injury, no matter the cause and however slight, involving an electric contact injury. Through prior enforcement proceedings, as well as these proceedings, it is apparent that staff has determined that utilities are strictly liable whenever there is an electric contact injury merely because it happened. There is, of course, no justification for this philosophy. Rather, staff is confined to KRS 278.990 and can impose penalties only when it can establish willful violations.

Also relevant is the fact that Elliot immediately reported the incident to the Federal Occupational Safety and Health Administration (OSHA) which thanked Elliot for reporting the incident but took no further action. (TR 84-85). Whatever problems the PSC may have with the Supremacy Clause of the United States Constitution which seemingly grants the Federal Occupational Safety and Health Administration, or its state counterpart, ultimate authority to regulate workplace injuries, and despite the fact that the PSC admittedly and expressly does not recognize OSHA or its standards (TR 86), it is telling. The federal agency charged with investigating workplace injuries did not even open a file or investigate this incident.

III

INHERENT UNFAIRNESS OF IMPOSING PENALTIES FOR CONDUCT OF CONTRACTORS

It is inherently unfair to attempt to punish South Kentucky for conduct of its independent contractor. Safety is a priority at South Kentucky as shown by the testimony of its CEO, Allen Anderson, and the various exhibits introduced at the hearing. One such exhibit is the Governor's Safety and Health Award commemorating 506,036 hours worked without experiencing a lost time injury or illness. South Kentucky has even experienced a reduction in its workers compensation insurance premiums because of its safety record. South Kentucky assigned a job to Elliot to perform and no South Kentucky employees were involved in the work being done when the two Elliot employees were injured. Fundamental fairness does have some place in the law – even in administrative proceedings. And it is fundamentally unfair to attempt to punish one for the acts of another where there is no master servant (employment) or agency relationship.

Regarding vicarious liability for actions of independent contractors, the PSC is armed with the court of appeals case of Public Service Commission v. Jackson County Rural Electric Cooperative, Inc., 50 SW3d 764 (Ky.App. 2000). Issue is taken, however, from that court's

interpretation of KRS 278.990(1). The court reasons that liability can be asserted against a utility for the conduct of its independent contractors because an independent contractor is “any other person who willfully violates any of the provisions of this chapter”. Where does “any other person” end? This language includes any person acting within a utility’s service territory and requires no connection to the utility whatsoever. Under this interpretation, if a member of the public in the Yosemite area of Casey County, Kentucky is sawing down a tree, hits an electric line and becomes injured, South Kentucky must be penalized. Rather, as stated at the beginning of this statute, it is intended to apply to “any officer, agent or employee of a utility”. That interpretation is given credence by the last sentence of KRS 278.990(1) which provides that “(e)ach act, omission, or failure by an officer, agent, or other person acting for or employed by a utility and acting within the scope of his employment shall be deemed to be the act, omission or failure of the utility”. Therefore the “any other person” at the beginning of the statute should be construed to be “any other person acting for or employed by a utility and acting within the scope of his employment” by a utility.

A person acts for another when he is that person’s agent. A person is employed by another, obviously, when that person is an employee. Neither applies to Elliot. Elliot was not the agent of South Kentucky and therefore did not “act” for it. It had no right to act for South Kentucky. Elliot cannot present itself at a supply store and charge items to South Kentucky’s account and cannot bind South Kentucky to any type of agreement, be it for the purchase of goods, the performance of services, or otherwise, because it was not South Kentucky’s agent. Elliot is what it is: an independent contractor not authorized to act as the agent of South Kentucky. Nor is it South Kentucky’s employee. Indeed, “agency” has been defined as the fiduciary relation which results from the manifestation of consent by one person to another that

the other shall act on his behalf and subject to his control coupled with the consent by the other so to act. CSX Transp., Inc. v. First National Bank of Grayson, 14 SW3d 563 (Ky.App. 1999). Thus, an agent acts for another pursuant to the contractual relationship which exists between them. He acts on behalf of the other person as if he were the other person. Not so with an independent contractor.

The court in Public Service Commission v. Jackson County, supra, specifically found the language of KRS 278.990(1) unambiguous. When a statute can apply to every person in the population acting within a public utility's service area as "any other person" and when the last part of the statute does not agree with the first part, it is difficult to accept the court's interpretation as to lack of ambiguity. Be that as it may, Public Service Commission v. Jackson County, supra, is, until it can be challenged before the Kentucky Supreme Court, decisional authority. But the case does not mandate that whenever there is an electric contact injury the PSC must assess penalties as has been the practice. And, that case involved a death and serious injuries as opposed to the minor burns on the feet of the two Elliot employees. In each of the three consolidated cases involved, the court notes that the PSC made factual determinations that there were willful violations of NESC standards. Where, as in the instant action, willfulness has not been established, Public Service Commission v. Jackson County, supra, is not binding authority and upon the finding of no willful violations, the PSC need not be compelled to assess penalties against South Kentucky just because the case exists.

IV

THE STATED VIOLATIONS

The seven (7) alleged violations of the NESC as contained in the PSC's February 11, 2009 order and testimony indicating that they were not violated follow. The violations are presented in the same order as in the charging document.

1. NESC Section 42, 420-C-4. Employees shall consider all of the effects of their actions. It is hard to imagine how this can be a rule that a person can apply prospectively in any given situation. If they are adequately trained, which Mr. Adkins indicates they were, the Elliot employees would necessarily consider the effects of their actions. But this standard effectively can only be a requirement that is imposed retroactively after an incident has occurred. If there is an injury, it is presumed that the person did not "consider all of the effects of his actions" lest it would not have occurred. It would be difficult to find a more vague or ambiguous standard. But in any event, there was no proof offered at the hearing that these employees did not consider all of the effects of their actions. Rather, staff presumes the rule was violated only because the incident occurred. That is not proof of a violation.

2. NESC Section 42, 420-C-5. Distance from exposed energized part of a conductive object. Mr. Adkins indicated that the Elliot employees did not intentionally (TR-87) bring a conductive object without a suitable insulated handle closer to an exposed energized part than the two feet, two inches as required by the charts. The line was not within the minimum distance until the snag in the tree caused the non-energized line to impact the energized line. However, the actual point of contact was 750 - 1500 feet away from the employees and the employees were grasping a non-conductive rope and not the wire. And prior to the "slingshot effect", the lines were more than 3 feet apart. Of course, had they been electrocuted from holding

the wire, there would have been some injury to their hands. So, in essence, the conductive object was hundreds of feet away from the employees far in excess of the two feet, two inch minimum distance and even hundreds of feet away where the wires impacted the lines were more than 3 feet apart.

3. NESC Section 42, 420-H. Personal protective equipment shall be worn. For the job the two employees were performing, that being manually pulling the line by a rope, they were equipped properly as per Mr. Adkins (TR-88) and no proof was presented otherwise at the hearing. Again, by hindsight, staff alleges a violation. The old line was on three foot hot arm and the new line was on the other side of the pole therefore the lines were separated in excess of three feet. Mr. Adkins indicated that “they were pulling on a rope and, with everything positioned outside the minimum approach distance, there was no need to have on electrical protective equipment”. (TR 88). The employees nearest the energized wires, one up in a bucket and one below the bucket assisting, were wearing rubber gloves.

4. NESC Section 42, 421-A-1. Supervisor or person in charge shall adopt such precautions as are within the individual’s authority to prevent accidents. Again, this appears to be a retroactive standard. If an incident occurs, therefore the supervisor or person in charge did not adopt appropriate precautions. Additionally, Mr. Adkins indicated that he determined from his investigation that the supervisor fulfilled his duty by the instructions he gave and the plan he formulated and the way he ran his job that day (TR-88). See also the narrative of Mr. Adkins set forth in the statement of the case above indicating the methodology used in completing the job. Additionally, rubber coverings were added to the energized lines (TR 89). Adequate precautions were taken.

5. NESC Section 42, 421-A-2. Supervisor or person in charge shall see that safety rules and operating procedures are observed. See the commentary under NESC Section 42, 421-A-1 above.

6. NESC Section 42, 422-C-1. Precautions should be taken to prevent wires or cables from contacting energized wires or equipment. The wires were separated by a layout arm, or hot arm, which is a three foot fiberglass arm placed on the termination pole (TR-76). The other line was actually on the other side of the pole on a three foot fiberglass arm and therefore the lines were more than three feet apart which exceeded the minimum NESC distances. The fiberglass arm moved the energized conductors away from the pole. At those points, rubber coverings were placed over the existing lines as well as some hoses and blankets. (TR 89). Adequate precautions were taken for foreseen circumstances. Of course, the incident did occur and the wires did contact each other but not due to a lack of precautions but from the unanticipated, unforeseen snagging of one line in a tree and the resultant “slingshot effect” when pulled. If one observes the situation just prior to the incident, and not with the benefit of hindsight, there can be no criticism of the precautions taken by Elliot.

7. NESC Section 44, 441-A-1. Another minimum approach distance standard much the same as #2 above. At page 89 of the transcript Mr. Adkins was asked the following question and provided the following answer:

Q: Did your investigation reveal whether your employees intentionally or knowingly brought a conductive object within the minimum approach distance?

A: No, we believe they did not intentionally bring it other than what I mentioned before, the snag and the recoil of the wire. Other than that, no, sir.

Most, if not all, of the NESC sections alleged to have been violated are the result of hindsight. If examined before the incident occurred, however, it would appear adequate safety precautions were taken. Of course, the incident did occur and because of the incident alone, it appears the staff, by hindsight alone, has determined these safety violations occurred. It is not clear, though, that even with hindsight, the violations occurred as per the testimony at the hearing summarized above. However, what is revealed, without doubt, is the lack of any willful violation of these sections of the NESC. An unforeseen accident happened as they do from time to time in life in general. But the accident was not caused by a willful violation of any safety standard. The Elliot employees did not intentionally, knowingly, purposefully, voluntarily and premeditatedly violate any of these safety standards with an evil intent or bad motive or purpose. It was just an unanticipated, unforeseeable accident for which no liability should be found.

CONCLUSION

For the reasons above stated, the PSC is requested to find that there was no willful violation of the NESC standards as adopted by KRS 278.042 and to dismiss this action without sanctions.



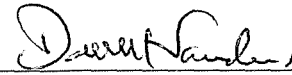
DARRELL L. SAUNDERS, P.S.C.
ATTORNEY AT LAW
700 MASTER STREET
P.O. BOX 1324
CORBIN, KENTUCKY 40702
TELEPHONE: (606) 523-1370
FAX NUMBER: (606) 523-1372

ATTORNEY FOR SOUTH KENTUCKY RURAL
ELECTRIC COMMISSION

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was on the 2nd day of November, 2009 hand delivered to Mr. Rick Bertelson, Attorney for the Public Service Commission, at his office address of 211 Sower Blvd., Frankfort, KY 40602-0615.

Original and ten (10) copies also hand delivered on November 2, 2009 to Mr. Jeff Derouen, Executive Director, Public Service Commission, 211 Sower Blvd., Frankfort, KY 40602-0615.



ATTORNEY FOR SOUTH KENTUCKY RURAL
ELECTRIC COOPERATIVE CORPORATION