COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

O R D E R

INTRODUCTION

This case raises a question of statutory construction. Under the holding of *Duerson v. East Kentucky Power Cooperative, Inc*., 843 S.W.2d 340 (Ky. Ct. App. 1992), a utility was not required to obtain a Certificate of Public Convenience and Necessity ("CPCN") to build a new transmission line. Thus, landowners whose land would be crossed by such a line had no right to participate in a hearing at the Commission.[1] On July 13, 2004, Chapter 75 of the 2004 Legislative Session became effective.[2] This act amended KRS 278.020 to require a regulated utility to obtain a CPCN for certain transmission lines and to give affected landowners the right to request

[1] Prior to the *Duerson* decision, Kentucky's highest court had held that landowners were not "interested parties" in any Commission proceeding involving such a line. *Satterwhite v. Public Service Commission*, 474 S.W.2d 387 (Ky. 1971).

[2] Chapter 75 began its legislative journey as Senate Bill 246.

intervention in the case. The issue for the Commission to determine is whether the Chapter 75 amendments afford relief to the Complainants in this case. We find, by a 2:1 decision, that they do not.

PROCEDURAL BACKGROUND

This case arose on the filing of a formal complaint by the Paddock at Eastpoint, LLC; Louis Klemenz; and St. Joseph Catholic Orphan Society ("Complainants") on July 22, 2004. On July 29, 2004, the Commission issued an Order to Satisfy or Answer. On August 6, 2004, Louisville Gas and Electric Company ("LG&E") answered, requesting that the complaint be dismissed or, alternatively, that the Commission schedule an informal conference to decide how to proceed further. On September 2, 2004, MRH Development Company ("Intervenor") moved to intervene in the case. That motion was granted by an Order issued the following day. On September 9, LG&E filed a response answering the claims in Intervenor's motion.

By notice dated August 20, 2004, Commission Staff scheduled an informal conference for September 10, 2004. On September 22, 2004, the Commission issued an Order requiring the parties to participate in a mediation session on October 7, 2004. On October 15, 2004, the Commission issued a further Order acknowledging that the mediation did not settle the case and setting a briefing schedule on the legal issues raised in the complaint. The parties filed simultaneous opening briefs on October 27, 2004 and responsive briefs on November 16, 2004.

FACTUAL BACKGROUND

LG&E is building a 138 kV transmission line in Louisville ("the Gene Snyder line") that will run generally along I-265. The line, as proposed, will cross the land of the

Complainants and the Intervenor (collectively "the Complaining Parties"). According to LG&E, it began planning the line in 2000. By January of 2004, LG&E had contacted the owners of property to be crossed, and two public meetings had been held in Louisville. On May 12, 2004, a meeting of interested parties was held at the Commission.

Clearing along the route of the line began in March 2004. LG&E began installation of foundations in May 2004. According to LG&E, each foundation is 6 feet in diameter and 20 feet deep. Commission Staff observed these foundations on May 25, 2004. LG&E states that 14 of the eventual total of 59 foundations had been completed by July 12, 2004.

The amendments enacted as Chapter 75 became effective July 13, 2004. Under the amended version of KRS 278.020, a utility must apply for and obtain a CPCN to build a transmission line like the one involved in this case. Further, landowners whose property will be crossed by such a line have the right to move to intervene in the certificate proceeding.

ANALYSIS AND DISCUSSION

To reach a decision in this case, the Commission must first consider the language of the relevant statute. The first sentence of KRS 278.020(1) reads:

> No person, partnership, public or private corporation, or combination thereof shall commence providing utility service to or for the public or begin the construction of any plant, equipment, property, or facility for furnishing to the public any of the services enumerated in KRS 278.010, except retail electric suppliers for service connections to electric-consuming facilities located within its certified territory and ordinary extensions of existing systems in the usual course of business, until that person has obtained from the Public Service Commission a certificate that public convenience and necessity require the service or construction. (Emphasis added.)

LG&E points out that a plain reading of that language shows that the certificate requirement is tied to the beginning of construction. Therefore, any new certificate requirement could apply only to utility plant for which construction commences after the effective date of the amendment. As LG&E points out, KRS 446.080(3) states, "No statute shall be construed to be retroactive, unless expressly so declared." Courts, though, have crafted an exception to this statute for "remedial" statutes.

The Complaining Parties, however, urge the Commission to require LG&E to obtain a CPCN for the Gene Snyder line. Relying mainly on the rulings in and language from *Peabody Coal Co. v. Gossett,* 819 S.W.2d 33 (Ky. 1991), and *Kentucky Insurance Guaranty Ass'n v. Jeffers,* 13 S.W.3d 606 (Ky. 2000), they maintain that the 2004 amendments to the statute should apply to the construction of that line.

Peabody was a workers' compensation case. The claimant was a coal miner who suffered an eye injury. In 1981 the Board found that he had a 35 percent occupational disability. Claimant had great difficulty finding employment and, after a layoff, he refiled for benefits in 1988. In 1987, the General Assembly had amended the "reopening" statute so that, instead of having to show a change in "condition," a claimant merely had to show a change in "occupational disability." The issue was whether that amendment applied to claimant's condition. The employer, Peabody Coal Company, claimed that the amendment could not be applied retroactively. The Kentucky Supreme Court held that the amendment did apply to claimant's refiled claim. The Court said that "statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of such rights" are not retroactive. *Peabody*, 819 S.W.2d at 36.

Jeffers involved several malpractice claims against Kentucky physicians whose insurance carrier, PIE, became insolvent in 1998. After the insolvency, the General Assembly enacted the Kentucky Insurance Guaranty Association Act, which was designed to cover claims against insurers such as PIE. In addition, however, the act increased the amount of coverage from $100,000 to $300,000. The issue was whether the plaintiffs were entitled to the increased coverage amount. The Kentucky Supreme Court relied heavily on *Peabody* in finding that the increased amount would apply to the pending claims. The Court said, "Remedial means no more than the expansion of an existing remedy without affecting the substantive basis, prerequisites, or circumstances giving rise to the remedy." *Jeffers*, 13 S.W.2d at 609. The Court continued, "If the statute in question only serves to facilitate the remedy, and if no vested right is impaired, the amendment in question is then properly applied to preexisting unresolved claims if such application is consistent with the evident purpose of the statutory scheme." *Id*. at 610.

In each of these cases, however, the plaintiff's entitlement to relief by statute already existed when the General Assembly acted to enhance that entitlement. Moreover, contrary to the case here, both the miner's workers' compensation claim and the patient's malpractice suit had been filed before the legislature amended the statutes.

The Commission believes the more relevant case is *Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Company*, 983 S.W.2d 493 (Ky. 1998). In that case, the Commission had ruled on an application under the then-new Environmental Surcharge statute. Kentucky Utilities Company ("KU") applied for two categories of expenditures: new costs, incurred since the new statute was enacted; and old costs,

incurred prior to the new statute, but sometime after KU's most recent general rate case.

The Kentucky Supreme Court disallowed the latter category. It reasoned that KU could always ask for recovery of those costs in a general rate case, but the statute gave KU a new right—the right to recover the costs through a surcharge outside a general rate case. Moreover, it required ratepayers to pay for the costs as a surcharge and not through base rates. Thus the statute created "new rights and responsibilities [that] did not exist before the enactment of the surcharge." *Id.* at 500.

Without question, there was no requirement that LG&E obtain a CPCN for the Gene Snyder line before July 13, 2004. Before Chapter 75 became effective, when the law was governed by the rulings of *Duerson* and *Satterwhite,* utilities could construct transmission lines with no requirement that they first obtain a CPCN, and landowners had no right to participate in a public hearing. Chapter 75 reversed both, however, requiring a CPCN and authorizing landowner participation when the proposed line is designed to carry at least 138 kilovolts and is longer than one mile. Thus, rather than making merely procedural changes to an existing requirement, the amended statutory language created entirely new obligations and remedies. Moreover, the Commission notes that LG&E has expended over $1.5 million that could become stranded investment if the certificate requirement is applied retroactively. Under all three cases, *Peabody, Jeffers,* and *KIUC*, statutory changes affecting vested rights are substantive.

The Complaining Parties further argue that LG&E's construction efforts raise factual questions because they were not in good faith. The Commission believes it is important to focus first on the issue this case raises, namely whether the amendments

to the statute require LG&E to obtain a CPCN. This is a legal, not a factual, issue. The only reference to a "good faith" requirement in KRS 278.020 is with regard to a utility that has obtained a certificate and has not used it. In that case, the last sentence of subsection (1) states:

> Unless exercised within one (1) year from the grant thereof, exclusive of any delay due to the order of any court or failure to obtain any necessary grant or consent, the authority conferred by the issuance of the certificate of convenience and necessity shall be void, but the beginning of any new construction or facility in good faith within the time prescribed by the commission and the prosecution thereof with reasonable diligence shall constitute an exercise of authority under the certificate.

This requirement is clearly intended to prevent a utility from engaging in purely superficial activities, rather than actually beginning construction, just to maintain the CPCN.

In contrast, the Complaining Parties claim that LG&E did not act in good faith because it "rush[ed] to make it appear as if a project is well underway when it actually cannot be diligently prosecuted due to lack of right of way." Responsive Brief of The Paddock at 3. They cite the Commission to no statutory basis for such a claim, however. While the statute clearly imposes a good faith requirement on a certificate holder, it does not impose it on an applicant. The Commission does not have the authority to take a statutory requirement from one sentence and impose it by analogy on another. If such a requirement is to be added to the statute, that authority rests solely with the General Assembly.

This case does involve one factual issue, that being whether LG&E had actually begun construction before the 2004 amendments became effective. To demonstrate

that fact, LG&E attached affidavits to its briefs in which the affiants detailed the times and extent of work completed on the line. In contrast, the Complaining Parties filed no contradictory statements. Nevertheless, they contend a hearing is necessary to decide these factual issues. While the Complaining Parties are correct that genuine issues of fact will preclude summary disposal of cases, they have not demonstrated that there are any contested issues of fact in this case. Requests to cross-examine witnesses whose statements are not rebutted does not create a factual issue. *See, e.g., Singleton v. Board of Ed. of Harrodsburg*, 553 S.W.2d 848 (Ky. Ct. App. 1977).

Finally, the Intervenor argues that LG&E has no authority to seek condemnation of private property until it has obtained a CPCN from the Commission. The Intervenor therefore seeks an order requiring LG&E to cease all eminent domain actions until it has obtained a CPCN.

Condemnation is an entirely separate and independent proceeding from a CPCN case before the Commission, and the Commission has no authority to issue an order halting that process. Both the courts and the Commission have issued clear orders on this point. *Duerson* held that failure to obtain a certificate from the Commission is not a defense to a condemnation case, 843 S.W.2d at 343, and the Commission itself ruled in 1992 that it "possess[es] no jurisdiction to adjudicate a claim arising out of a condemnation proceeding," *In re Smith and Mattingly v. Hardin County Water District No. 1*, Case No. 1992-00395.

CONCLUSION

The Commission has considered all the arguments of the Complaining Parties, whether explicitly addressed in this Order or not, and finds all are without merit. While

we share the concerns and frustration of the Vice Chairman in her dissent, we find no statutory basis for affording any relief under the complaint.

IT IS THEREFORE ORDERED that the complaint in this case is dismissed with prejudice and is removed from the Commission's docket.

Done at Frankfort, Kentucky, this 27th day of January, 2005.

By the Commission

DISSENTING OPINION OF
VICE CHAIRMAN ELLEN C. WILLIAMS

Because of LG&E's conduct in beginning construction activities on the transmission line, which is the subject of this case, I cannot concur with the majority decision. My primary concern with this case is the manner in which LG&E initiated and managed the schedule for the construction of the 138 kV transmission line in question. Indeed, I am convinced that LG&E engaged in these activities in such a way as to avoid the necessity of obtaining Commission approval. It is uncontradicted that LG&E has been planning this particular line since 2000. I believe that LG&E knew early on that the Complainants and Intervenor in this case would voice strong opposition to the location of this transmission line. As the controversy continued to develop, the parties and other interested people met in two public meetings in Louisville in late January 2004.

Earlier the same month, the General Assembly had convened in Frankfort, and the very issues contained in this case were clearly on the minds of some legislators and lobbyists. As a result, a bill was eventually introduced to vest the Public Service Commission with jurisdiction over the construction of transmission lines of 138 kV or more and which exceeded one mile in length. In fact, LG&E was the major proponent of this legislation. Senate Bill 246, which was ultimately enacted as the amendments to KRS 278.020 that are at issue in this case, was introduced on February 27, 2004, passed by the General Assembly in its final form on March 26, 2004, and signed into law by the Governor on April 7, 2004. In LG&E's opening brief at page 3, it admits that during March 2004, it "began clearing work on those properties where the easements or permission to use rights of way had already been obtained, and in May 2004 construction was started on the foundations for the poles themselves." If LG&E had waited until July 13, 2004 to begin this work, the Company would have had to comply with the amended statute.

Needless to say, this whole situation has an extremely unpleasant appearance to me. When a particular utility is the principal proponent for the enactment of a bill addressing a serious issue and then purposely times its activities in such a way as to avoid complying with the law, as happened in this case, it reflects poorly on both the legislative and regulatory processes. I cannot support any result that encourages such behavior by one of our regulated utilities. Therefore, I would vote to set this complaint for hearing. As such, I respectfully dissent from the majority's decision to dismiss it.

ATTEST:

Executive Director

Ellen C. Williams, Vice Chairman
Kentucky Public Service Commission