

## Kentucky Resources Council, Inc.

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AUG 31 2004

PUBLIC SERVICE  
COMMISSION

CASE 2004-00343

August 31, 2004

Jason Bentley, General Counsel  
Public Service Commission  
P.O. Box 615  
Frankfort, KY 40602

Rc: Proposed 807 KAR 5:120

Dear Mr. Bentley:

These comments **are** submitted on behalf of the Board and membership of the Kentucky Resources Council, Inc., a nonprofit environmental advocacy organization whose membership shares a common interest in prudent use **and** conservation of the natural resources of the state.

KRC participated actively in **the** development **and** legislative adoption of SB 246 **during** the last General Assembly **session**, and **submits** these comments concerning Emergency Regulation 807 KAR 5:120E and the counterpart replacement regulation, proposed 807 KAR 5:120.

### Background

The enactment of SB 246 by the 2004 General Assembly reflected **an** intent on the part **of the** legislature to empower local communities and landowners who **might** be affected by the location of proposed electric transmission lines. The construction of electric transmission lines carrying 138 or more kVs for more **than** 1 mile in length, formerly matters of extension that were considered to be "in the usual **course** of business", became through legislative action matters requiring a certificate of public convenience **and** necessity, **unless** such lines meet one **of** the **three** exceptions provided in SB 246(2)(a)-(c). The clear intent of the statute was to allow for public scrutiny **of** such line extensions **and to** require the Commission to consider the impacts of such line extensions on private and public landowners in the corridors.

The proposed regulation falls short of meeting the legislative intent, **and** these comments **are** submitted in the hope and expectation that the final regulation will be

amended to more clearly require consideration of and selection of corridors for transmission line extensions that have the least overall impact on the human environment.

### Specific Comments

The creation of a right to a local public hearing, and the requirement that a certificate of public convenience and necessity be issued for new construction of more than 1 mile of 138 kV line, was in response to several controversial line construction projects in which the absence of such a forum at the state level led to frustration from local residents and antagonism towards the local public utilities. Sponsored by investor-owned utilities and concurred in by publicly-owned electric cooperatives, SB 246 was intended to provide a public forum for evaluation of the impacts and alternatives in construction of new transmission lines.

In order to achieve this goal, these changes are recommended:

(1) Section 1(2)(b) should specify, as does Section 2(2), the map scale for the map that shows the proposed route. Instead of leaving the matter for varying interpretations about what is "suitable scale", since the regulation elsewhere describes the appropriate scale, Section 1 should mirror what will be later required anyway.

(2) The applicant should be required to provide, in all cases, a written assessment of the environmental, historical, and archaeological impact of the proposed construction; not merely in those cases where a "governmental administrative agency with jurisdiction" requires same. Investigations into impacts on such resources is typically required of rural electric cooperatives in those instances where the line extensions are funded through loans or grants from the Rural Utilities Service, and represents a standard of consideration of impacts that is appropriate for extension to investor-owned utilities as well.

(3) The regulation should be amended to include a requirement that the applicant consider the impact of the proposed transmission line on the human and natural environment, and of reasonable alternatives for routing the transmission line, and that the choice among alternatives and mitigation measures employed be explained by the applicant. Additionally, for the SB 246 process to have any meaning, the Commission must adopt a *standard* for determining when to issue the Certificate of Public Convenience And Necessity.

In the absence of a standard that requires the applicant to consider alternatives and to mitigate unavoidable adverse impacts, the SB 246 process will be hollow – with citizens attending and participating in public hearing processes anticipating that the Commission's decision will consider and minimize the adverse effects of the line construction and siting to the extent possible, only to find that (as was formerly the case with cell towers prior to the legislative amendments eliminating the PSC override of local zoning decisions) the Commission's issuance or denial of the Certificate of Public Convenience and Necessity would rest only on the need for the new line and *not* on the location.

Historically, the Commission hewed to a position that issues regarding the specific location were not relevant to issuance of a CPCN or otherwise. In the Satterwhite v. Public Service Commission case, 474 S.W.2d 387 (1972), the Court rejected the contention of the landowners over whose land the transmission line would pass, that they were interested parties and entitled to notice of the hearing on issuance of a certificate of convenience and necessity.

The Court determined that:

The trouble with this contention is that the question of what particular lands the proposed transmission line would cross was not in issue before the Public Service Commission. The application included a map showing the general course and direction of the proposed lines, but the specific paths the lines might follow were not indicated or suggested, and the order granting the certificate did not purport to fix the specific paths for the lines. *The Public Service Commission was not concerned with that detail because it was not relevant to the issue of convenience and necessity. 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.*

Id. at 388-389. (Emphasis added).

Historically, the Commission has considered environmental and scenic issues, landowner impacts and mitigation to minimize the same, as beyond the scope of inquiry. That historical position has softened in recent years, as reflected in *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 (December 30, 2003) where the Commission directed EKPC to “make every reasonable effort to mitigate any negative impact that construction of the proposed transmission facilities may have on the affected property owners.” Id. at 3.

It was clearly the intent of the legislature to endorse such an approach as the Commission reflected in the EKPC decision, since by statute the General Assembly included as an “interested person” “a person over whose property the proposed transmission line will cross.” Additionally, the new language of the statute provides a safe harbor for lines that are constructed after issuance of a CNPC, deeming them to be prudent investments are shielding the utility from later questions as to whether the mitigation measures or other expenditures pursuant to a certificate issued under this section were, in hindsight, prudent.

In order to give meaning to the requirement of a Certificate of Necessity and Public Convenience in this context, and to give substance to the right of local public hearing and

obligation of the Commission to review such lines, KRC proposes that the applicant be required to provide, as part of the application

(X) A siting assessment demonstrating that due consideration has been given, consistent with the project purpose and cost, to location, configuration and proposed maintenance of lines and corridors so as to minimize adverse property, scenic and environmental impacts, and that reasonable alternatives have been considered including co-location of the line along existing utility rights-of-way.

Likewise, the regulation should be amended to provide criteria for issuance of the CPCN by the Commission as follows:

(XX) In determining whether to issue the CPCN, the Commission must find that the applicant has demonstrated that due consideration, consistent with the project purpose and cost, has been given to location, configuration and proposed maintenance of lines and corridors so as to minimize adverse property, scenic and environmental impacts, and that all reasonable alternatives have been considered, including co-location of the line along existing utility rights-of-way.

Absent such criteria for submittal, review and issuance or denial of a certificate of public convenience and necessity in the context of 138 kV transmission lines of over 1 mile in length, the right intended to be conferred by the General Assembly will be lost and instead a hollow process resulting in increased cynicism with government regulatory processes will result.

Thank you in advance for your consideration of these comments.

Cordially,

  
Tom FitzGerald  
Director