

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

KENTUCKY UTILITIES COMPANY)

COMPLAINANT)

vs.)

HENDERSON-UNION RURAL ELECTRIC)
COOPERATIVE CORPORATION)

DEFENDANT)

CASE NO. 89-349

O R D E R

Kentucky Utilities Company ("KU") brings this action against Henderson-Union Rural Electric Cooperative Corporation ("Henderson-Union") seeking Commission authorization to provide electric service to Pyro Mining Company ("Pyro") at the Poplar Ridge Mining Site in Webster County, Kentucky. KU alleges that the mining site was allocated to it when the parties drew their certified territory map in 1972. It alleges in the alternative that Pyro's facilities at the mining site are located in two adjacent certified territories and that KRS 278.018(1) requires KU to serve them. Henderson-Union denies that the mining site has been allocated to KU or that Pyro's facilities are located in two adjacent certified territories. Finding that Pyro's facilities are new electric consuming facilities which will be located in two adjacent certified territories and that, based on the criteria set forth in KRS 278.017(3), KU should serve these facilities, the

Commission authorizes KU to provide service to Pyro at the Poplar Ridge Mining Site.

In 1955 Poplar Ridge Coal Company ("Poplar Ridge") acquired a 55.46 acre tract of land in Webster County, Kentucky to develop a coal mining operation. In January 1956, it contracted with KU for electric service to this tract, which has since become known as the Poplar Ridge Mining Site. KU acquired a transmission line easement of 150 feet in width to run a 69 KV transmission line to the mining site. At a cost of approximately \$18,000, KU constructed a 69 KV transmission line and a transmission substation. Poplar Ridge, however, never began mining operations. Before completing the mine's construction, it notified KU that it was suspending all activity at the site. It subsequently reimbursed KU for the cost of constructing transmission facilities to serve the site.

Since the closing of Poplar Ridge's operations, the 69 KV line has not served any KU customer. KU de-energized this line in 1972, but continues to maintain it. Maintenance was last performed on the line in 1983.

As a result of the certified territory act, KRS 278.016 et seq., Henderson-Union and KU established the boundaries of their certified territories in the vicinity of the Poplar Ridge Mining Site. As reflected in the territorial maps which they jointly submitted to the Commission, KU's certified territory was drawn to include the 69 KV line. The boundary line follows the corridor of the 150 foot wide right-of-way. As drawn on the map, this

corridor resembles a "sore thumb" sticking out from the rest of KU's certified territory.

Recently Pyro leased most of the surface area of the Poplar Ridge Mining Site and began constructing new mining facilities. It is currently boring an air/manshaft there to support its underground mining activities. It intends to construct a substation adjacent to the airshaft, a new bathhouse and a power drop. All of these facilities are located within Henderson-Union's certified territory.

Pyro's mining activities at the Poplar Ridge Mining Site do not involve the drilling of a shaft or slope for the purpose of removing coal located directly at the site. This coal has already been removed. The facilities at the site are rather intended to provide primary underground access to Nos. 9 and 13 coal seams. These seams extend for several thousand feet in both an easterly and westward direction from the Poplar Ridge Mining Site. The new mining site will allow for faster access to the unmined coal seams and increased electrical voltage for all underground mining operations within a 7,000 foot radius of the proposed power drop.

Henderson-Union currently serves Pyro's facilities at the Poplar Ridge site with a 7200 volt line. Once the mining site becomes operational in June 1990, Pyro will require 69 KV service. Henderson-Union presently has no facilities in the immediate vicinity of the mining site which are capable of providing 69 KV service. To serve the site, it and its wholesale supplier, Big Rivers Electric Corporation, must construct a 69 KV transmission line approximately 7,000 feet in length at a cost of \$125,000. In

contrast KU's 69 KV line, built originally to serve Poplar Ridge, is very close to the Pyro facilities and would require only \$7,800 in repairs to be ready for service.

On November 22, 1989, KU filed its complaint against Henderson-Union seeking Commission authorization to serve Pyro at the Poplar Ridge Mining Site. Henderson-Union filed its answer on December 27, 1989. A hearing was held in this matter on April 12, 1990. Both parties have briefed their respective positions. Currently outstanding is a motion to dismiss this case by Henderson-Union. That motion is addressed herein.

KU advances two arguments in support of its complaint. It first contends that, when drawing the boundaries of their certified territory in 1972, KU and Henderson-Union agreed that the Poplar Ridge Mining Site would be within KU's certified territory. KU argues in the alternative that service to the new Pyro facilities is service to new electric consuming facilities located in adjacent service territories and that the criteria contained in KRS 278.017(3) applies. Under that criteria, KU argues, it is best suited to serve the new Pyro facilities.

KU asserts that the 1972 territorial map clearly establishes the existence of an agreement between KU and Henderson-Union on service to the Poplar Ridge Mining Site. The map shows that the parties drew their territorial boundary along a corridor surrounding KU's 69 KV line and onto the mining site where it terminates. KU's territory, it argues, thus surrounds its line and extends onto the mine for which it was constructed to serve. "The only rational reason for the existence of either KU's 69 KV

line or for Henderson-Union's and KU's agreement to the corridor in the 1972 territorial map is that the parties agreed to allocate the mine customer to KU. The corridor and the 69 KV line can serve no other purpose." KU Brief at 8. To further support this claim, it notes that Henderson-Union has failed to offer a credible explanation for the corridor's existence.

The Commission respectfully declines KU's invitation to delve into the minds of the map's drafters. The map must be interpreted on its face. When drawing this map, the parties intended to draw a boundary line fixing their certified territories. Any facilities which fell on Henderson-Union's side of this boundary would obviously come within Henderson-Union's territory. Absent some notation on the map to the contrary, those portions of the Poplar Ridge Mining Site which fall within Henderson-Union's territory as it appears on the face of the map, must be considered as within Henderson-Union's certified territory. As large portions of the Poplar Ridge Mining Site are located on the Henderson-Union side of the boundary, the map contradicts KU's claims of an agreement to allocate this area to it.

To buttress its claims of an agreement, KU cites the testimony of William Oaks, KU's principal negotiator at the negotiations which led to the establishment of the KU-Henderson-Union territory boundary. Mr. Oaks testified that KU and Henderson-Union agreed during those negotiations that KU would serve the Poplar Ridge Mining Site. He testified that throughout the negotiations KU maintained that it should "have the right to serve the mine operations on this site because the [69 KV] line

had been built for that purpose." KU was not willing to forego any claim to serve farm and residential loads in that area. According to Oaks, Henderson-Union accepted this position and suggested that the territorial boundary be drawn along the KU 69 KV line right-of-way and on to the mining site. "The whole purpose behind showing the corridor on the territorial map was to avoid any dispute later on that KU had the right to serve mine operations at this site later on."

Henderson-Union has objected to the admission of Mr. Oaks' testimony contending it violates the deadman's statute and the parol evidence rule. Henderson-Union notes that all persons involved in the 1972 negotiations, save Mr. Oaks, are deceased. It further contends that as the map is unambiguous, any parol evidence of the negotiations on the mapping of the boundary line is incompetent.

The deadman's statute does not prohibit the introduction of Mr. Oaks' testimony. KRS 421.210 proscribes the testimony of interested witnesses. Employment by a party to an action is not a disqualifying interest. Sachs v. Title Insurance and Trust Co., 202 S.W.2d 384 (Ky. 1947); Bradley v. City of Harrodsburg, 126 S.W.2d 141 (Ky. 1938). Mr. Oaks is, in fact, no longer a KU employee.

Mr. Oaks' testimony is, however, excluded under the parol evidence rule. If a writing is plain and unambiguous on its face, its meaning must be determined without resort to parol evidence. 30 Am.Jur.2d Evidence §1016 (1967). This rule is one of substantive law. The Commission, therefore, cannot dispense with

it as being merely a technical rule of evidence. KRS 278.310. The map, as the Commission has previously noted, is not ambiguous. It clearly delineates the certified territory of each party. The above surface facilities at issue in this case are clearly located on the map. In the absence of any ambiguity, Mr. Oaks' testimony must be excluded from our consideration.

Assuming arguendo that Mr. Oaks' testimony were admissible, the Commission finds that it should be afforded little weight. The testimony is inconsistent with other evidence. Mr. Oaks testified that KU wanted to keep the mining site within its certified territory to protect its investment in building the 69 KV line to serve Poplar Ridge. KU, however, had already been reimbursed for its costs. There was little or no investment to protect. Mr. Oaks lacked the authority to approve the final certified territorial map for KU. Other KU officials not directly involved in the negotiations with Henderson-Union held the right of final approval. These officials were never informed of the existence of any agreement. Furthermore, despite Mr. Oaks' claims of an agreement, no mention of such an agreement appears in any of KU's records despite an extensive search by KU officials. In light of these inconsistencies and the clear and unambiguous nature of the territorial map, the Commission finds that no agreement allocating the entire Poplar Ridge Mining Site to KU exists.

The Commission agrees with KU's contention that service to the Poplar Ridge Mining Site will involve service to new electric consuming facilities located in two adjacent certified territories

and requires the application of the criteria in KRS 278.017(3).¹ A new electric consuming facility is created whenever a new central source station is required. In the instant case, a substation will be built to serve the Poplar Ridge Mining Site. Most of the facilities to be served by it are newly constructed. Service to Pyro at the Poplar Ridge Mining Site will, therefore, involve new electric consuming facilities.

The Commission further finds that these facilities will be located in two adjacent certified territories. Henderson-Union contends that the electric consuming facilities -- the bathhouse, air/manshaft and power drop -- are situated exclusively in its certified territory. It notes that most, if not all, planned mining activity will be within Henderson-Union's certified territory. According to the testimony of Pyro's engineer, 95 percent of all Pyro's coal reserves are located within Henderson-Union territory.

In determining the location of the electric consuming facilities, the Commission finds that underground facilities must also be considered. In this instance some of the facilities to be served by the Pyro substation at the Poplar Ridge Mining Site will

¹ KRS 278.018(1) states in part:

In the event that a new electric-consuming facility should locate in two or more adjacent certified territories, the commission shall determine which retail electric supplier shall serve said facility based on criteria in KRS 278.017(3).

be located in KU certified territory. In fact, as coal seam No. 13 runs eastward from the Poplar Ridge Mining Site, it passed through KU certified territory. Electric service, therefore, will be provided to an electric consuming facility located in two adjacent certified territories.

As the new electric consuming facility will be located in two adjacent certified territories the Commission is required to use the following criteria to select the retail electric supplier to serve the facility.

(a) The proximity of existing distribution lines to such certified territory.

(b) Which supplier was first furnishing retail electric service, and the age of existing facilities in the area.

(c) The adequacy and dependability of existing distribution lines to provide dependable, high quality retail electric service at reasonable costs.

(d) The elimination and prevention of duplication of electric lines and facilities supplying such territory.

KRS 278.017(3). Under this criteria KU should be authorized to serve the Poplar Ridge Mining Site. KU already has adequate facilities near the site. Henderson-Union in contrast must construct 1.5 miles of 69 KV line to provide service to the site. KU was the first to furnish retail service to the site. Its existing lines are adequate to meet Pyro's needs whereas Henderson-Union's are not. Furthermore, the needless duplication of distribution facilities and the unnecessary encumbering of the landscape of the Commonwealth will be avoided by permitting KU to provide retail electric service.

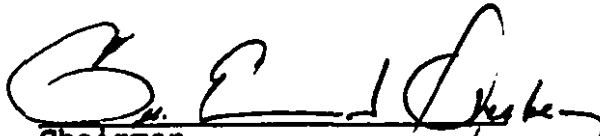
The authorization granted herein to KU shall be to provide electric service to the Poplar Ridge Mining Site only and shall not be construed as authorizing KU to provide service to electric consuming facilities serving any future mining operations which may be located in the two adjacent certified territories of Henderson-Union and KU.


IT IS THEREFORE ORDERED that:

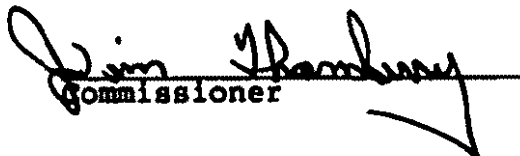
1. Henderson-Union's motion to dismiss KU's complaint is denied.
2. KU shall serve Pyro facilities located at the Poplar Ridge Mining Site in Webster County, Kentucky.
3. Upon connection of KU's 69 KV transmission line to Pyro's proposed substation at the Poplar Ridge Mining Site, Henderson-Union is enjoined from providing further service to Pyro facilities at that site.

Done at Frankfort, Kentucky, this 23rd day of May, 1990.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director