

commissioned a consultant to prepare a report on alternative routes for the pipeline, the complaint states that LG&E ultimately chose a route that was not one of the ten routes in the consultant's report but was the route selected by the distillery. The complaint also states that the Calvary Pipeline, which will connect to the new pipeline, is unable to pass an in-line tool safety inspection. Further, the complaint alleges that there are sinkholes along the chosen route and an environmental study is needed to ensure the safety of those living in proximity to the pipeline. For relief, the complaint requests the Commission to cancel the existing CPCN for the Bullitt County Pipeline and require LG&E to file a new application for a CPCN and require LG&E to obtain a "404 permit" and an "Environmental Assessment" for the pipeline.

Pursuant to 807 KAR 5:001, Section 20(4)(a), upon the filing of a formal complaint, the Commission must determine whether it establishes a *prima facie* case. A complaint establishes a *prima facie* case when, on its face, it states sufficient allegations that, if not contradicted by other evidence, would entitle the complainant to the requested relief.²

Based on a review of the complaint, the emails attached thereto, and being otherwise sufficiently advised, the Commission finds that the complaint as filed does not establish a *prima facie* case for the reasons discussed below. The Commission notes at the outset of this analysis that the complaint is not simply challenging the actions or omissions of a utility, it is challenging the findings of a Commission Order that were based on a voluminous record of evidence, compiled in a case that included multiple intervenors

² See Case No. 2010-00404, *Bulldog's Enterprises, Inc. d/b/a Bulldog's Road House v. Duke Energy Kentucky, Inc.* (Ky. PSC Nov. 15, 2010).

including the Attorney General of the Commonwealth of Kentucky by and through the Office of Rate Intervention.

The complaint alleges that LG&E filed an application that was erroneous and fraudulent, resulting in the issuance of a CPCN for the Bullitt County Pipeline, due to LG&E's representations that the pipeline would be an extension rather than new construction. However, to be entitled to relief on a claim of fraud in Kentucky, a person must establish six elements. They are: (1) material misrepresentation; (2) which is false; (3) known to be false or made recklessly; (4) made with inducement to be acted upon; (5) acted in reliance thereon; and (6) causing injury.³ Here, the CPCN for the Bullitt County Pipeline was granted in response to LG&E's 2016 application for a general adjustment in gas and electric rates based on a forecasted test year, Case No. 2016-00371.⁴ LG&E requested rate recovery of capital expenditures, including those to be incurred in the construction of a "new natural gas pipeline in Bullitt County."⁵ When asked during that rate case about the need for Commission approval of the pipeline, LG&E asserted that, "The Bullitt County pipeline is an ordinary extension of LG&E's existing gas system in the usual course of business, and a Certificate of Public Convenience and Necessity ("CPCN") therefore is not required under KRS 278.020(1) or 807 KAR 5:001 Section 15."⁶

However, after conducting an investigation of the application in that rate case, the Commission expressly rejected LG&E's position that the new pipeline would be an

³ *United Parcel Service v. Rickert*, 996 S.W.2d 464 (Ky. 1999).

⁴ Case No. 2016-00371 (Application filed Nov. 23, 2016).

⁵ *Id.* at Direct Testimony of John P. Malloy at 3–4.

⁶ Case No. 2016-00371, LG&E Response to Commission Staff's Second Request for Information, Item 64(e).

ordinary extension of its existing system in the usual course of business and found that a CPCN was needed.⁷ Based on evidence in that record, the Commission found that the new pipeline was intended to both “improve reliability by mitigating the exposure of approximately 9,500 customers to a loss of gas supply from a current one-way feed” and “allow LG&E to serve growth in Bullitt County by providing additional gas supply to existing gas infrastructure in those areas.”⁸ After citing the controlling legal criteria for granting a CPCN, the Commission concluded that the Bullitt County pipeline “would not be a wasteful duplication of any existing facilities and is necessary in order for LG&E to accommodate current and expected system requirements for safe and reliable natural gas service.”⁹ Thus, in granting the CPCN for the pipeline, the Commission did not rely on any statements by LG&E that the pipeline would be an extension rather than new construction. For this reason, the complaint fails to set forth sufficient allegations to show that the Complainant is entitled to the requested relief of a cancellation of the CPCN for the Bullitt County Pipeline.

With respect to the allegations in the complaint that the pipeline is needed only to serve a new distillery and not needed to provide reliable service to 9,500 customers, the complaint lacks sufficient support to indicate the veracity of that allegation. But even assuming that the allegation is true, the need for gas by one large customer is sufficient to support the issuance of a CPCN to construct a new gas pipeline. In addition, the statement in the complaint that the Calvary Pipeline is unable to pass an in-line tool safety

⁷ Case No. 2016-00371, Final Order at 30–31 (Ky. PSC June 22, 2017).

⁸ *Id.* at 31.

⁹ *Id.* at 34.

inspection is untrue. LG&E informed the Commission on August 29, 2018, that it completed an in-line inspection of the Calvary Pipeline.¹⁰

As noted above, the Complaint appears to be a challenge to, and a request for review of, the Commission's 2017 Order in Case No. 2016-00371 granting LG&E a CPCN for the Bullitt County Pipeline. The Complainant was not a party to that case and based on a review of the complaint it is not clear if the Complaint has standing to challenge that 2017 decision granting the CPCN. Thus, the Complainant should state with specificity the basis for her interest in the Bullitt County Pipeline, including whether the Complainant is a gas customer of LG&E at 6094 Cedar Grove Road, whether that the property at 6094 Cedar Grove Road will be subject to an easement for the Bullitt County Pipeline, and whether the Complainant's name is on the deed as the sole or joint owner of property at 6094 Cedar Grove Road.¹¹

The Commission's jurisdiction extends only to the regulation of rates and service of jurisdictional utilities,¹² and the criteria for issuing a CPCN is set forth in Kentucky statute, regulation, and case law.¹³ As noted in the 2017 Order granting the CPCN being challenged here, a CPCN can be granted only when the evidence shows that the proposed facilities are needed and that they will not create wasteful duplication. The

¹⁰ Case No. 2017-00482, *Application of Louisville Gas And Electric Company For Approval of State Waiver Of The Reassessment Interval Required By 49 C.F.R. Section 192.939* (Ky. PSC June 3, 2019), at 7-8.

¹¹ The Commission notes that the email at the bottom of the first page of the complaint refers to the Bullitt County pipeline and issues raised by a "Mr. and Mrs. Brown," but states that LG&E will make an offer to purchase an easement from "IOLA Capital."

¹² KRS 278.040(2)

¹³ See KRS 278.020(1), 807 KAR 5:001, Section 15, and *Kentucky Utilities Co. V Public Service Comm'n.*, 252 S.W.2d 885 (Ky. 1952).

factors to be considered in such an evaluation include, but are not limited to, the extent of the utility's existing facilities, its projected needs to serve customers in the future, and the available options to meet the customers' needs. While those issues are broad in scope, there are a number of limitations.

First, the Commission has no jurisdiction over the discharges of dredge or fill material into the waterways of the United States. Congress, pursuant to Section 404 of Clean Water Act, 33 U.S. Code § 1344, has delegated those issues to the United States Corps of Engineers through the issuance of what is known as a Section 404 Permit. Second, the Commission has no jurisdiction over issues of the environmental impacts from the construction of a gas pipeline. Consequently, even assuming that the Commission ultimately determined that the CPCN for the Bullitt County Pipeline should be voided, the Commission has no jurisdiction to require LG&E to obtain either a Section 404 permit¹⁴ or an Environmental Assessment in connection with the construction of a gas pipeline. For these reasons, the Commission is unable to provide the Complainant the relief requested related to a Section 404 Permit, and an Environmental Assessment and those requests are properly now denied.

Finally, the complaint includes a letter from a retired building inspector to support the assertion that a safety issue exists due to the presence of sinkholes along the route of the pipeline. While the retired building inspector states the level of training she has achieved, that training apparently does not include a degree in engineering or geology. Further, that letter recommends onsite inspection and testing be conducted prior to

¹⁴ The Commission notes that LG&E's response to Commission Staff's Second Request for Information, Item 64(c), in Case No. 2016-00371 that a Section 404 Permit "will be obtained or investigated with respect to applicability" and that such a permit would likely "be authorized under Nationwide Permit 12."

“permits being filed . . . for the concrete pad of any substation.” Since the Bullitt County pipeline is designed to transmit natural gas and there will be no substations, the Commission is unable to accept the opinions expressed in this letter as being credible. The Commission also noted that LG&E, as the operator of a gas distribution system, is subject to the safety jurisdiction of the United States Department of Transportation Pipeline and Hazardous Materials Safety Administration (PHMSA). One of the federal requirements enacted by PHMSA is that “The operator must take all practicable steps to protect each transmission line or main from washouts, floods, unstable soil, landslides, or other hazards that may cause the pipeline to move or to sustain abnormal loads.”¹⁵

IT IS THEREFORE ORDERED that:

1. Ms. Brown’s complaint is rejected for failing to conform to the requirements of 807 KAR 5:001, Section 20, and for failing to state a *prima facie* case.
2. Ms. Brown’s request that the Commission order LG&E to file for a 404 and conduct an Environmental Assessment is denied.
3. Ms. Brown shall have 20 days from the date of entry of this Order to file an amended complaint with the Commission that conforms to the requirements of 807 KAR 5:001, Section 20, and states a *prima facie* case.

¹⁵ 49 C.F.R. Section 192.317(a).

By the Commission

ENTERED
SEP 11 2019
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:



Executive Director

Kimberly Brown
6094 Cedar Grove Road
Louisville, KENTUCKY

*Rick E Lovekamp
Manager Regulatory Affairs
Louisville Gas and Electric Company
220 W. Main Street
P. O. Box 32010
Louisville, KY 40202

*Louisville Gas and Electric Company
220 W. Main Street
P. O. Box 32010
Louisville, KY 40232-2010