

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF KENTUCKY)	
POWER COMPANY FOR A CERTIFICATE OF)	
PUBLIC CONVENIENCE AND NECESSITY TO)	CASE NO.
CONSTRUCT A 138 KV TRANSMISSION LINE AND)	2018-00209
ASSOCIATED FACILITIES IN PIKE AND FLOYD)	
COUNTIES, KENTUCKY)	

ORDER

On August 10, 2018, Kentucky Power Company (Kentucky Power) filed an application requesting a Certificate of Public Convenience and Necessity (CPCN) authorizing it to, among other things, construct a new double-circuit 138 kV transmission line approximately five miles in length in Floyd and Pike counties, Kentucky (hereinafter the "Application").¹ On August 31, 2018, the Commission entered an order establishing a procedural schedule, which required requests for intervention and requests for public hearings be filed no later than September 12, 2018. On September 14, 2018, the Commission received a motion tendered by Gary D. Bishop in which he requested leave to intervene on behalf of the Sendelbach Family Trust and on his behalf as a beneficiary of the trust; and in which he requested that the Commission schedule a local public hearing and an evidentiary hearing. Having reviewed Mr. Bishop's motion, the case record, and being otherwise sufficiently advised, the Commission denies Mr. Bishop's

¹ Application, Case No. 2017-00441 (filed Dec. 6, 2017).

request for intervention and his request for public and evidentiary hearings for the reasons discussed below.

The Sendelbach Family Trust (Sendelbach Trust) owns real property located at 3407 Left Fork, Island Creek, Pikeville, Kentucky (Island Creek Property) near or over which Kentucky Power intends to construct a portion of the transmission line for which it made the Application herein.² Mr. Bishop stated that (1) Mary Sendelbach, his mother, “owns” the Sendelbach Trust; (2) Ms. Sendelbach’s affairs are entrusted to Janet L. Fernandes, who has power of attorney for Ms. Sendelbach and is the Executor of the Sendelbach Trust; and (3) Mr. Bishop and his siblings are beneficiaries of the Sendelbach Trust. Mr. Bishop did not state whether the Sendelbach Trust owned property other than the Island Creek Property at issue herein and did not elaborate on the nature of his status as a beneficiary of the trust. Mr. Bishop did indicate that he did not live at the Island Creek Property in Pikeville, Kentucky.

Mr. Bishop indicated that he received notice of the proposed transmission line at some point prior to the filing of the Application.³ He stated that he contacted representatives of Kentucky Power on several occasions and spoke to the Lead Right-of-Way Agent, Scott Blevins, with the consent of Janet Fernandes, executor of the Sendelbach Trust. He stated that Mr. Blevins initially informed him that the lines would “barely clip the corner of the property.” Mr. Bishop asserted that Mr. Blevins later informed

² The proposed location for the line and right-of-way do not cross over the Island Creek Property according to maps provided by Kentucky Power, but a corner of the property opposite the road is within the siting corridor. See Application at Exhibit 3, Exhibit 11 (which includes detailed maps of the proposed locations).

³ No date is provided but he indicated that it was prior to receiving notice that the application had been filed.

him that he had consulted with the project engineers and that the proposed line route had been moved south so as not to interfere with the Island Creek Property.

On August 20, 2018, Mr. Bishop stated that he received notice (postmarked August 7, 2018, but forwarded twice for reasons Mr. Bishop does not specify) that indicated the planned electrical transmission line would “transverse practically down the middle of the property.” Kentucky Power indicated that it provided notice to the Sendelbach Trust, which is listed as the owner of the property in the Pike County Property Valuation Administrator’s records, pursuant to the Commission’s regulations on or before August 10, 2018, when it tendered the Application to the Commission.⁴ On September 14, 2018, Mr. Bishop filed this motion requesting leave to intervene and requesting public and evidentiary hearings.

DISCUSSION

Mr. Bishop requested to intervene on behalf of the Sendelbach Trust based on the argument that the trust is an interested person, stating:

Movants are interested persons under KRS 278.020(8). Gary D. Bishop has been designated to act on behalf of the Sendelbach Family Trust, owners of the property located at 3407 Left Fork of Island Creek Road, Pikeville, Kentucky and hereby requests Intervention in the above-captioned matter for the reasons outlined below.

However, before addressing whether the Sendelbach Trust is an interested party, the Commission must address whether Gary Bishop can make this motion or otherwise act on behalf of the Sendelbach Trust in matters before the Commission.

⁴ See Application.

Commission regulations prohibit persons who are not authorized to practice law in Kentucky from formally representing other natural and legal persons in matters before the Commission.⁵ The Kentucky Supreme Court also prohibits such persons from practicing law on behalf of other persons, including legal persons such as corporations, even when they have an interest in common with the other person.⁶

Mr. Bishop did not identify himself as an attorney, and records from the Kentucky Bar Association do not indicate that Gary Bishop is licensed to practice law in the Commonwealth of Kentucky. Mr. Bishop also indicated that he is not the trustee of the Sendelbach Trust, so he could not represent the trustee before the Commission. Moreover, even a non-attorney trustee authorized to bring suit on behalf of a trust would not generally be permitted to represent the trust *pro se* in a legal proceeding, but rather, would need to be represented by an attorney authorized to practice in Kentucky.⁷ Thus, Mr. Bishop may not request intervention on behalf of the Sendelbach Trust or otherwise formerly represent the Sendelbach Trust in matters before the Commission (Mr. Bishop similarly could not represent his siblings before the Commission).

However, Mr. Bishop's motion could be interpreted in the alternative as a request by Mr. Bishop to intervene on his own behalf based on his status as a beneficiary of

⁵ See 807 KAR 5:001, Section 4(4) ("A person shall not file a paper [in a case] on behalf of another person, or otherwise represent another person, unless the person is an attorney licensed to practice law in Kentucky or an attorney who has complied with SCR 3.030(2).").

⁶ See also Kentucky Supreme Court Rule 3.020 (which prohibits a non-attorney from practicing law on behalf of a corporation or partnership except in small claims court); *Bobbett v. Russellville Mobile Home Park*, No. 2007-CA-000684, 2008 WL 4182001 (Ky. App. 2008) (in which the court found that the owner of a limited liability corporation (LLC) could not represent the LLC in a forcible detainer action, because the LLC was a separate legal person and the action was not in small claims court).

⁷ See *Baldwin v. Mollette*, 527 S.W.3d 830, 835 (Ky. App. 2017) (indicating that a person acting in a representative capacity cannot proceed *pro se* in a court of law); see also *Faller v. Goess-Saurau*, 490 S.W.3d 363, 364-366 (Ky. App. 2015) (where the court, though ruling on other grounds, did not indicate that an answer filed *pro se* by a trustee was valid as an answer for the trust).

Sendelbach Trust. Neither the Commission's regulations nor the rules of the Kentucky Supreme Court prohibit a natural person, such as Mr. Bishop, from representing himself in matters before the Commission. Thus, Mr. Bishop is able to represent himself before the Commission, and therefore, the Commission must determine whether he has established a right to intervene in his individual capacity as a beneficiary of the Sendelbach Trust.

The Attorney General is the only person with a statutory right to intervene in a case before the Commission.⁸ Intervention by all others is permissive and is within the sound discretion of the Commission. However, the Commission's discretion to grant or deny a motion for intervention has limits enumerated by statute and regulation.⁹ Specifically, 807 KAR 5:001, Section 4(11)(a) states that the Commission:

shall grant a person leave to intervene if . . . he or she has a special interest in the case that is not otherwise adequately represented or that his or her intervention is likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings.¹⁰

In cases involving an application for the approval of a transmission line extension, KRS 278.020(9) indicates that "interested persons" include "person[s] over whose property the proposed transmission line will cross."

⁸ Case No. 2017-00179, *Electronic Application of Kentucky Power Company for (1) A General Adjustment of its Rates for Electric Service; (2) An Order Approving Its 2017 Environmental Compliance Plan; (3) An Order Approving Its Tariffs and Riders; (4) An Order Approving Accounting Practices to Establish Regulatory Assets and Liabilities; and (5) An Order Granting all Other Required Approvals and Relief*, (Ky. PSC Aug. 3, 2017), Order at 1 ("Case No. 2017-00179, Order Granting Walmart's Intervention").

⁹ *EnviroPower, LLC v. Public Service Commission of Kentucky*, No. 2005-CA-001792-MR, 2007 WL 289328 at *3-4 (Ky. App. Feb. 2, 2007).

¹⁰ 807 KAR 5:001, Section 4(11)(a).

Here, Mr. Bishop seems to claim that he is an interested person as defined by KRS 278.020(9) based on his status as a beneficiary of the Sendelbach Trust and the trust's ownership of the property in question. However, the Commission observes that the use of the possessive "whose" in KRS 278.020(9) indicates that the statute is referring to the owner of the property as being the interested person. Mr. Bishop acknowledged that he does not own the property at issue but rather stated that the property is owned by the Sendelbach Trust and that the Sendelbach Trust is owned by Mary Sendelbach. Mr. Bishop only states that he is a beneficiary of the Sendelbach Trust without defining that interest in the trust or stating whether his interest is contingent or revocable. Thus, Mr. Bishop failed to present evidence indicating that he is a person over whose property the proposed transmission will cross under any reasonable interpretation of that phrase.

The Commission's interpretation of Mr. Bishop's claimed interest is consistent with Kentucky courts' interpretations regarding the right of a trust beneficiary to take legal action to protect or recover trust property. Specifically, Kentucky courts, like those in nearly every other jurisdiction, have held that the trustee of a trust is ordinarily the proper person to assert a claim for any injury done to the trust property. Conversely, the beneficiary of a trust, like Mr. Bishop, is not generally considered the real party of interest with respect to claims against third parties regarding trust property.¹¹ There are limited

¹¹ See *Forester v. Werner*, 174 Ky. 180, 191 S.W. 884, 885 (Ky.1917) (indicating in dicta that a beneficiary of a trust would not be the real party in interest with the ability to sue a third party for damage to trust property because that right is held by the trustee); see also *Lovell v. Nelson*, 6 J.J. Marsh. 247, 1831 WL 2303 (where the Court held that the beneficiary of a trust may not maintain an action against the grantor of property based on a covenant in the deed to the trustee); *Slaughter v. Swicegood*, 591 S.E.2d 577 (N.C. App. 2004) (stating that "[t]he common law rule provides that any injury to the property placed in a trust may only be redressed by the trustee."); Restatement (Second) Trusts § 281 (indicating that the beneficiary of trust is not generally able to maintain a suit a law against a third party for damage to trust property).

exceptions recognized in some jurisdictions, such as when the trustee has acted improperly in failing to protect the trust or when there is a conflict of interest, but no facts were alleged here that support the application of those exceptions.¹² Thus, the Commission finds that Mr. Bishop failed to establish that his status as a beneficiary of the Sendelbach Trust grants him a “special interest” or makes him an “interested person” justifying intervention.

Mr. Bishop could still intervene pursuant to 807 KAR 5:001, Section 4(11)(a), if he demonstrated some other special interest or if he presented evidence that he would present issues or develop facts that would assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings. However, he made no such showing because the basis of his motion was his status as a beneficiary of the Sendelbach Trust and the trust’s ownership of the property at issue. Moreover, absent some extraordinary circumstances, the Commission finds that permitting the beneficiaries of trusts to intervene in cases of this nature, as opposed to the legal representative of the trust (i.e., the trustee), would unduly complicate the proceedings by introducing questions regarding who speaks for the trust, and potentially requiring applicants to respond to the positions of multiple persons purportedly representing the same interest. It could also place the Commission in the improper position, given its jurisdiction, of resolving trust disputes, and would be similar to allowing members or shareholders of a corporation to intervene to assert the interests of the corporation as to property it owned, which would also be improper. Thus, the Commission finds that Mr. Bishop failed to establish a right to intervene pursuant to KRS 278.020 or 807 KAR 5:001, Section 4(11)(a).

¹² See *Slaughter*, 591 S.E.2d at 465 (discussing limited exceptions to the general rule that the trustee is the proper person to assert a legal right on behalf of a trust).

In addition to requesting intervention, Mr. Bishop also requested an evidentiary and a public hearing pursuant to 807 KAR 5:120, Section 3. That regulation states, in relevant part, that:

Local Public Hearing. (1) Any interested person under KRS 278.020(8)¹³ may request that a local public hearing be held . . . This hearing shall be requested no later than thirty (30) days after filing of an application for a certificate of public convenience and necessity.

A person may obtain a deviation from the requirement that local public hearings be requested within 30 days by showing good cause for the deviation and “that failure to permit the deviation will adversely affect utility rates or service.”¹⁴

Here, Kentucky Power filed the Application on August 10, 2018, so pursuant to 807 KAR 5:120, Section 3(1), any request for a local public hearing had to be filed by September 9, 2018. Mr. Bishop did not request a local public hearing until September 14, 2018, so his request was not timely. The Commission, in its procedural order, did extend the deadline for requesting a local public hearing until September 12, 2018, but Mr. Bishop’s request for a local public hearing was untimely pursuant to that deadline as well. Thus, the Commission can only grant Mr. Bishop’s request for a local public hearing if he demonstrated good cause for the untimely filing and that the failure to grant him a deviation from the filing requirement “will adversely affect utility rates or service.”¹⁵

Mr. Bishop made no attempt to demonstrate why he should be granted a deviation from the requirement that a local public hearing be requested within 30 days of the filing

¹³ KRS 278.020 was recently renumbered such that KRS 278.020(8) referred to in this regulation is now located at KRS 278.020(9).

¹⁴ 807 KAR 5:120, Section 4.

¹⁵ *Id.*

of the Application. In explaining why his request to intervene was untimely, he did indicate that he misunderstood the notice provided by Kentucky Power—apparently thinking that the 30 days for requesting intervention ran from the date he received the notice—and that the notice came to him about 10 days after the Application was filed because it was forwarded several times. However, he did not dispute evidence presented by Kentucky Power that it properly provided notice to the Sendelbach Trust (Mr. Bishop’s statements support Kentucky Power’s assertion that it did since he indicated the notice was postmarked on August 7, 2018). The Commission also notes that it is obligated to issue an order on CPCNs for transmission line extensions within 120 days, which limits its ability to schedule a local public hearing requested after the expiration of the 30-day deadline. Finally, Mr. Bishop made no showing that the failure to provide a deviation from the 30-day deadline will adversely affect utility rates or service (the concerns he raised do not relate to rates and services). Thus, Mr. Bishop has not established that he is entitled to a deviation from the 30-day deadline for requesting a local public hearing, and therefore, his request for a local public hearing must be denied.

The 30-day deadline is not applicable to Mr. Bishop’s request for an evidentiary hearing.¹⁶ However, Mr. Bishop would not be able to participate as a party at an evidentiary hearing since he was not permitted to intervene in this matter.¹⁷ An evidentiary hearing might be necessary following additional investigation by the Commission. However, at this time, the Commission has not determined whether an

¹⁶ See 807 KAR 5:120, Section 3(1)(where the deadline is only mentioned with respect to a local public hearing).

¹⁷ See 807 KAR 5:120, Section 3(3)(“If a person requesting a local public hearing wishes to participate in an evidentiary hearing as well, that person shall also apply to intervene in the commission proceeding on the application pursuant to 807 KAR 5:001, Section 4(11).”).

evidentiary hearing is necessary as compared to the Commission's current investigation. Thus, Mr. Bishop's motion for an evidentiary hearing is denied with the caveat that this determination will not preclude the Commission from scheduling an evidentiary hearing on its own motion.

Because Mr. Bishop's motion is being denied, the Commission will treat his motion and the concerns raised regarding the route of the transmission line as a written public comment. The Commission will review and consider Mr. Bishop's concerns in reaching its substantive decision and will further investigate any concern raised to the extent determined necessary. Moreover, Mr. Bishop should not interpret this order as precluding him from making further written comments on this Application to the extent he determines they are necessary.

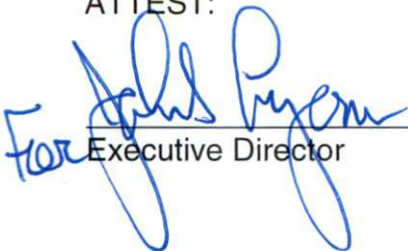
IT IS HEREBY ORDERED that:

1. Gary D. Bishop's request to intervene and his request for a local public hearing and an evidentiary hearing are denied.
2. Nothing in this order shall affect the ability of the Commission to schedule an evidentiary hearing if necessary following additional investigation by the Commission.
3. Nothing in this order shall affect a member of the public's right to file written public comments with the Commission or the Commission's consideration of those comments in a manner consistent with the relevant statutes and regulations.

By the Commission

ENTERED
OCT 18 2018
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:



Executive Director

*Christen M Blend
Kentucky Power Company
855 Central Avenue, Suite 200
Ashland, KY 41101

*Hector Garcia-Santana
Kentucky Power Company
855 Central Avenue, Suite 200
Ashland, KY 41101

*Kentucky Power Company
855 Central Avenue, Suite 200
Ashland, KY 41101

*Kentucky Power Company
Kentucky Power Company
855 Central Avenue, Suite 200
Ashland, KY 41101

*Honorable Mark R Overstreet
Attorney at Law
Stites & Harbison
421 West Main Street
P. O. Box 634
Frankfort, KENTUCKY 40602-0634

*Stacy L Bankston
Kentucky Power Company
855 Central Avenue, Suite 200
Ashland, KY 41101