

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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COMMISSION

In the Matter of:

Columbia Gas of Kentucky, Inc.)	
)	
Complainant)	
)	
v.)	Case No. 2009-00340
)	
Natural Energy Utility Corporation)	
)	
Defendant)	

ANSWER AND MOTION TO DISMISS

Natural Energy Utility Corporation (NEUC), by counsel, for its answer to the complaint states:

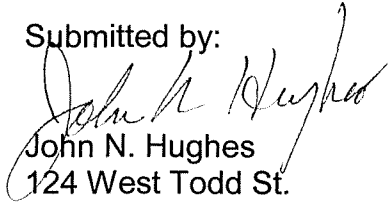
1. It admits the allegations in paragraphs (a) and (b);
2. It denies the allegations in paragraph (c) and (i).
3. It is without sufficient information to admit or deny the allegations in paragraphs (d) and (e).
4. It is without sufficient information to admit or deny the allegations and beliefs in paragraph (f)
5. Paragraphs (g) and (h) involve legal conclusions and as such are denied.
6. It is without sufficient information to admit or deny the extent of Columbia's knowledge alleged in paragraph (j).
7. Any allegation not specifically admitted is denied.

DEFENSES

The Complaint fails to state a claim for which relief can be granted.

For these reasons and those specified in the Motion to Dismiss, the Complaint should be dismissed and NEUC granted any and all relief to which it is entitled.

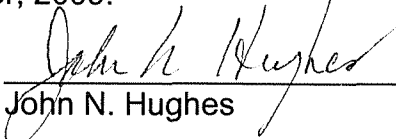
Submitted by:


John N. Hughes
124 West Todd St.
Frankfort, KY 40601
502 227 7270

Attorney for NEUC

Certification:

I certify that a copy of this Answer was served on Steve Seiple, Box 117, Columbus, OH, 43216-0117 and Richard Taylor, 225 Capital Ave., Frankfort, KY 40601 by first class mail the day of September, 2009.



John N. Hughes

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MOTION TO DISMISS

Natural Energy Utility Corporation (NEUC), by counsel, for its motion to dismiss states:

The allegations made by Columbia in its complaint are factually incorrect and do not justify its claim that NEUC unlawfully extended its facilities or is attempting to serve customers that can only be served by Columbia.

NEUC and its predecessor companies have had a franchise to serve customers within the city limits of Ashland since December, 1992, when KY-Ohio Gas Company was awarded a franchise. See Case No. 92-547. Approval to extend that franchise was granted in 2005, Case No. 2005-00289. Recently, another extension of that franchise was approved in Case No. 2009-00281.

NEUC has had a two inch steel pipeline in operation in the area that Columbia asserts the exclusive right to serve. That pipeline has been in

continuous service since Kentucky-Ohio Gas Company began operations in 1992 and it is believed to have been in place and operating since 1929. NEUC currently serves and has served residential customers from that pipeline since the initial operations of its predecessor companies in the early 1990's. As the attached plat shows, NEUC's pipeline crosses the property identified in Columbia's complaint as a "strip mall". (Exhibit 1) NEUC has customers located at each end of the mall property. NEUC and its predecessors have served those customers through that pipeline since initial operations in 1992.

In June, 2007, NEUC was contacted by a property owner about some construction in the area near the corner of Palmer Street and McKinley Street. Because of the construction in that area, NEUC relocated a portion of its existing pipeline and at the same time replaced approximately 100 feet of 2 inch steel pipe and 580 feet of four inch steel pipe with similar size plastic gas pipe, which was located on the "mall" property. The cost of this project was approximately \$2,371.00.

Contrary to Columbia's "knowledge and belief", NEUC serves the area in question, has facilities on the property where the customers are located and has not installed new facilities for the purpose of taking its customers. The pipeline that Columbia claims is a new extension is in fact part of NEUC's distribution system within Ashland and is an integral part of the distribution system in the city. The attached map (exhibit 2) clearly shows that NEUC has customers served from that pipeline and that it has customers in the immediate vicinity of the "strip mall".

Independent of the relocation and replacement of the existing steel pipeline, NEUC and Columbia were contacted by the owner of three businesses in the “mall” in February, 2009. She requested discontinuance of service from Columbia and initiation of service by NEUC. (See Exhibit 3) However, because NEUC and Columbia have a mutual agreement not to actively attempt to take customers from each other, NEUC refused to provide the service and suggested she contact Columbia about her concerns.

In May, 2009, the owner again contacted NEUC about service. NEUC then had a survey of its gas pipeline in that area by Matriks Management, PSC to verify the location of its facilities on the “mall” property. The survey confirmed that NEUC’s pipeline is located on the “mall” property and that no extension of its facilities would be required to provide service to the three businesses. (See Exhibit 4).

On July 22, 2009, the owner again contacted NEUC and requested that her service to the three businesses be switched from Columbia. A target date for the switch over was set for August 18, 2009. (See Exhibit 5) Because Columbia did not remove its facilities, NEUC could not initiate service. The only response NEUC or the customer have received from Columbia about this matter is the complaint filed by Columbia.

Columbia asserts that NEUC has violated Commission’s regulations by extending facilities to serve these customers under the guise of the ordinary course of business.

807 KAR 5:001(9)(3) Extensions in the ordinary course of business. No certificate of public convenience and necessity will be required for extensions that do not create wasteful duplication of plant, equipment, property or facilities, or conflict with the existing certificates or service of other utilities operating in the same area and under the jurisdiction of the commission that are in the general area in which the utility renders service or contiguous thereto, and that do not involve sufficient capital outlay to materially affect the existing financial condition of the utility involved, or will not result in increased charges to its customers.

NEUC has not violated any aspect of this regulation. It has an operating pipeline that traverses the property in question. That pipeline currently serves customers near the northwestern and southeastern corners of the "mall" property. Because it has this pipeline and serves customers, and that service has been approved by the PSC and the city of Ashland, there is no wasteful duplication of facilities in or contiguous to the "mall" property.

Wasteful has been defined as meaning an excess of capacity over need as well as an excessive investment in relation to productivity or efficiency and an unnecessary multiplicity of physical properties. Kentucky Utilities Company v. Public Service Commission, Ky., 252 S.W.2d 885 (1952). "This statutory standard, as defined by the courts, is the standard which guides the Commission..." "Application of Kentucky CGSA, Inc. for a Certificate of Convenience and Necessity to Construct a Cell Site", Case No. 96-081, Order of February 4, 1997, p.5. Because NEUC has facilities in place and serving customers adjacent to the "mall", there is no wasteful duplication of any facility

The cost of the recent replacement of the steel pipe with plastic was only approximately \$2,300. That is an immaterial amount and did not result in any increase in charges to NEUC's customers. Nothing Columbia alleged in its Complaint about the location, existence, operation or extension of the pipeline is correct.

Neither Columbia's certificate of convenience and necessity, franchise nor other Commission order give it the right to serve customer's to NEUC's exclusion. As the Commission stated in "Mountain Utilities, Inc. v. Equitable Gas Company", Case No. 91-316, Order dated April 6, 1992:

Mountain misunderstands the purpose and effect of a Certificate of Convenience and Necessity. A certificate is required before the construction of any utility facilities which are not ordinary extensions of existing systems in the usual course of business. It is intended to prevent the wasteful duplication of utility facilities. It does not establish an exclusive service territory for the applicant utility. The certificates granted to Mountain and its predecessors, in fact, make no mention of an exclusive service territory but merely authorize the construction of a gas distribution system. This Commission is not authorized to establish exclusive service territories for natural gas utilities. See Kentucky Utilities Co., Inc. v. Pub. Serv. Comm'n, Ky, 390 S.W.2d 168, 175 (1965) (stating that existing utilities do not "have any right to be free from competition.")

If there are two competing utilities with facilities already in place on the customer's property, the Commission has allowed the customer to choose the utility provider. In Case No. 92-489, "Columbia Gas of Kentucky, Inc. v. Kentucky-Ohio Gas Company", Order dated July 2, 1993, the Commission confirmed KOG's right to serve customers that had been customers of Columbia.

KOG had facilities on the customers' property and needed only to install service lines to the customers to effectuate service - the same situation as in this case.

In that case, the Commission said:

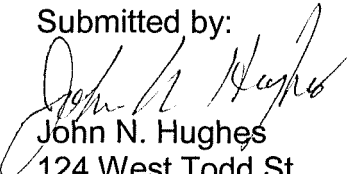
"KOG's proposed service to the apartment buildings does not constitute a physical bypass of Columbia which would require certification. The existence of competition between two utilities to serve these loads that are residential in nature and equally accessible to both utilities is not the kind of uneconomic bypass contemplated by Administrative Case No. 297. There would be no duplication of facilities other than service connections to the customers and no shifting of costs contrary to the public interest." "Columbia Gas of Kentucky, Inc. v. Kentucky-Ohio Gas Company", Case No. 92-489, Order of July 2, 1993, pp. 1-2.

The issue of customer choice was also addressed by the Commission in Administrative Case No. 297, which states that where both utilities are serving in the vicinity and are equally situated to serve the customer, customer preference could be considered. See also "Columbia Gas v. Delta Gas/Cooper Tire", Case No. 96-015, Order of July 10, 1996.

Based on the facts – specifically that NEUC has facilities on the customers' property and is capable of service to the property, that there has been no unlawful extension of service and that NEUC has been requested to provide service to replace Columbia's – there is nothing to support Columbia's allegation of unlawful conduct by NEUC. Further, based on the law – NEUC has an equal right to serve the mall property as Columbia, Columbia has no exclusive right to serve and the customer has a choice to select its gas supplier – there is nothing to support Columbia's allegations.

For these reasons, NEUC requests that the complaint be dismissed and that Columbia be ordered to disconnect its service to the property in question so that the customer can obtain the service it desires from NEUC.

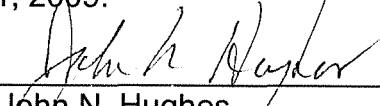
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EXHIBIT 1