

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

KIMBERLY BROWN)	
)	
COMPLAINANT)	
)	
V.)	CASE NO.
)	2019-00296
LOUISVILLE GAS AND ELECTRIC COMPANY)	
)	
DEFENDANT)	

ORDER

This matter arises upon a complaint and amended complaint tendered by Kimberly Brown against Louisville Gas and Electric Co. (LG&E). On August 20, 2019, Ms. Brown tendered a complaint against LG&E challenging the Certificate of Public Convenience and Necessity (CPCN) granted by the by the Commission in 2017¹ for the construction of a new 12-inch high-pressure gas pipeline (Bullitt County Pipeline) to connect to the Calvary Pipeline in Bullitt County, Kentucky. For relief, Ms. Brown requested that the Commission void the existing CPCN and require LG&E to file a new CPCN application, and to obtain a permit (404 permit) and conduct an Environmental Assessment pursuant to Section 404 of the federal Clean Water Act.²

¹ Case No. 2016-00371, *Electronic Application of Louisville Gas and Electric Company for an Adjustment of its Electric and Gas Rates and for Certificates of Public Convenience and Necessity* (Ky. PSC June 22, 2017).

² A 404 permit application is filed with and granted by the U.S. Army Corps of Engineers, through a process which includes an environmental assessment.

By Order entered September 11, 2019, the Commission found that Ms. Brown's complaint failed to conform to the requirements of 807 KAR 5:001, Section 20 and failed to establish a prima facie case regarding Ms. Brown's allegations that: 1) LG&E's application was fraudulent because it termed the Bullitt County Pipeline as an extension rather than new construction; 2) that the Bullitt County Pipeline is not needed; and 3) that the Calvary Pipeline cannot pass safety inspections. The Commission provided Ms. Brown the opportunity to amend her complaint to cure the deficiencies. In addition, the Commission directed Ms. Brown to state with specificity the basis for her interest in the Bullitt County Pipeline, including whether Ms. Brown is a gas customer of LG&E at 6094 Cedar Grove Road, Shepherdsville, Bullitt County, Kentucky; whether the property will be subject to an easement for the Bullitt County Pipeline; and whether Ms. Brown's name is on the deed as the sole or joint owner of said property. Finally, the Commission dismissed Ms. Brown's request that LG&E be required to file a 404 permit and an Environmental Assessment. The Commission found that her complaint failed to state a claim for which relief could be granted, because both items are required by other government agencies and are outside the scope of the Commission's jurisdiction.

On October 2, 2019, Ms. Brown filed an amended complaint that added IOLA Capital, LLC (IOLA) as a complainant to this proceeding, along with Ms. Brown.³ In the amended complaint, Ms. Brown and IOLA alleged that they did not receive notice that LG&E was requesting a CPCN for the Bullitt County Pipeline and that, because the public notice referenced only the rate case, no interested party was ever put on notice regarding the CPCN. Ms. Brown and IOLA further allege that their interests were not adequately

³ Ms. Brown also filed a motion for leave to file the amended complaint one day out of time, which the Commission finds should be granted for good cause shown.

protected in Case No. 2016-00371 and that their due process rights were violated because the Commission granted the CPCN without notice to them. Ms. Brown and IOLA claimed that the Commission's decision to grant the CPCN was based upon a false claim by LG&E that the Bullitt County Pipeline was an extension of the existing system and not new construction. Ms. Brown and IOLA also allege that the project cost has escalated from \$26.7 million to \$38.7 million. They further believe that the cost could go to \$60 million, and that they should not incur rate increases for a project that is likely to double in cost and is not the least cost, most reasonable alternative, as required by law. Further, Ms. Brown and IOLA challenged the need for the Bullitt County Pipeline, asserting that there has been no interruption of service due to reliability or adequacy of the existing gas system, and that the Bullitt County Pipeline will serve only a single or handful of potential customers. Ms. Brown and IOLA argued that the Commission had no authority to grant the CPCN because it was not applied for pursuant to statutory and regulatory requirements. Finally, Ms. Brown and IOLA claimed that LG&E has a history of failing to adequately maintain, inspect, and install existing gas facilities, and that this is a dangerous pipeline, with the potential to cause tremendous property and casualty losses, as well as the deaths of multiple individuals.

According to Ms. Brown and IOLA, for all reasons set forth above, the Commission's final Order in Case No. 2016-00371 was unlawful and unreasonable. For relief, Ms. Brown and IOLA requested that the Commission void the CPCN for the Bullitt County Pipeline, confirm that a CPCN can only be granted when applied for in a discrete application, and confirm that LG&E is required to file an application for a CPCN for the Bullitt County Pipeline.

DISCUSSION

Legal Standards

The Commission reviews complaints under standards set forth in 807 KAR 5:001, Section 20. Pursuant to 807 KAR 5:001, Section 20(1)(c), a formal complaint must state with reasonable certainty the act that is the subject of the complaint and the law, order, or administrative regulation that was allegedly violated. Pursuant to 807 KAR 5:001, Section 20(4)(a), the Commission must determine whether the complaint establishes a prima facie case. A complaint establishes a prima facie case when, on its face, it states sufficient facts that, if not contradicted by other evidence, would entitle the complainant to the requested relief.⁴ 807 KAR 5:001, Section 20(4)(a)(1) provides that a complainant be afforded the opportunity to amend a complaint that the Commission determines does not conform to the requirements set forth in the regulation because it fails to state the law, order, or regulation that was violated or fails to establish a prima facie case. If the amended complaint fails to conform to the requirements of 807 KAR 5:001, Section 20, the complaint is dismissed.⁵

The Commission reviews requests for a CPCN under standards set forth in KRS 278.020 and 807 KAR 5:001, Section 15. Pursuant to statutory and regulatory law, to obtain a CPCN to construct facilities to be used to provide service, a utility must

⁴ 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).

⁵ Ms. Brown and IOLA cite to KRS 278.410 as a basis for setting aside an order of the Commission that is "unlawful or unreasonable," but that statute does not govern formal complaints to the Commission.

demonstrate a need for such facilities and an absence of wasteful duplication.⁶ Need requires a showing of substantial inadequacy of existing service due to a substantial deficiency of utility facilities, beyond what could be supplied by routine improvements in the ordinary course of business.⁷ Wasteful duplication is defined as “an excess of capacity over need” and “an excessive investment in relation to productivity or efficiency, and an unnecessary multiplicity of physical properties.”⁸ To demonstrate that a proposed facility does not result in wasteful duplication, we have held that the applicant must demonstrate that a thorough review of all alternatives has been performed.⁹ Selection of a proposal that ultimately costs more than an alternative does not necessarily result in wasteful duplication.¹⁰

Notice

The Commission will first address Ms. Brown and IOLA’s assertion that LG&E was required by statutory and regulatory law to file notice of its intent to apply for a CPCN for the Bullitt County Pipeline.

The Commission is not persuaded by Ms. Brown and IOLA’s arguments that KRS 278.020(1)(b) requires that public notice be provided for all cases involving a CPCN, including those related to natural gas pipelines. KRS 278.020(1)(b) states that, “Upon

⁶ Kentucky Utilities Co. v. Pub. Serv. Comm’n, 252 S.W.2d 885 (Ky. 1952).

⁷ *Id.* at 890.

⁸ *Id.*

⁹ Case No. 2005-00142, *Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company for a Certificate of Public Convenience and Necessity for the Construction of Transmission Facilities in Jefferson, Bullitt, Meade, and Hardin Counties, Kentucky* (Ky. PSC Sept. 8, 2005).

¹⁰ See *Kentucky Utilities Co. v. Pub. Serv. Comm’n*, 390 S.W.2d, 175 (Ky. 1965). See also Case No. 2005-00089, *Application of East Kentucky Power Cooperative, Inc. for a Certificate of Public Convenience and Necessity to Construct a 138 kV Transmission Line in Rowan County, Kentucky* (Ky. PSC Aug. 19, 2005).

the filing of an application for a certificate, and after any public hearing which the commission may in its discretion conduct for all interested parties, the commission may issue or refuse to issue the certificate, or issue in part and refuse in part.” Ms. Brown and IOLA rely upon the phrase “for all interested parties” for the proposition that some form of public notice is required to be given to parties who might be interested or affected by the CPCN application. The Commission finds that KRS 278.020(1)(b) does not require public notice in this instance. The language relied upon by Ms. Brown and IOLA does not prescribe any notice, much less public notice, but provides the Commission with the discretion to conduct a public hearing for those who are parties to the underlying proceeding. The Commission’s review of the CPCN statute, KRS 278.020, and Commission regulations, 807 KAR 5:001, Sections 14 and 15, reveal no general requirement for public notice, and no specific requirement for public notice for the construction of a natural gas pipeline. In contrast, 807 KAR 5:120, which governs CPCN applications for certain electric transmission lines, specifically requires notice to affected property owners. Likewise, KRS 278.714(2)(e), which governs applications for a certificate to construct a nonregulated electric transmission line or a carbon dioxide transmission pipeline, contains direct language requiring public notice be given by publication in a newspaper of general circulation in the general area concerned.

The Commission’s interpretation of KRS 278.020(1)(b) finds support in a decision issued by Kentucky’s then highest court in the case of *Satterwhite v. Public Service Commission*, 474 S.W.2d 387 (Ky. 1971). *Satterwhite* involved a petition filed by certain landowners requesting the Commission to set aside an order granting a CPCN to Kentucky Utilities Company (KU) to construct a transmission line and that the matter be

reconsidered at a new hearing in which the landowners would be entitled to participate. The Commission denied the petition and the Franklin Circuit Court dismissed the landowners' action for review. On appeal, the *Satterwhite* landowners, similar to Ms. Brown and IOLA in the instant proceeding, argued that as patrons of KU "they were 'parties interested' within the meaning of the provision of KRS 278.020 that a certificate of convenience and necessity may be issued 'after a public hearing of all parties interested;'" therefore they were entitled to notice of the hearing and to participate in the hearing, absent which the Public Service Commission had no jurisdiction to grant the certificate."¹¹ In affirming the Franklin Circuit Court's dismissal, the appellate court rejected the landowners' argument, reasoning that the landowners, in the capacity of KU customers, "had no status or standing different from any of the other thousands of patrons of [KU], and the appellants do not even suggest that all patrons are 'parties interested.'"¹²

Because there is no statute or regulation that requires that public notice be provided for all cases involving a CPCN, including those related to natural gas pipelines, the Commission finds that Ms. Brown and IOLA failed to conform to the requirements for a complaint because they failed to state a claim upon which relief could be granted as it relates to their notice claim.

Due Process

Ms. Brown and IOLA's claim regarding due process rests upon their contention that they did not receive notice of LG&E's request for a CPCN. Specifically, they alleged

¹¹ *Satterwhite v. Public Service Commission*, 474 S.W.2d 387, 388 (Ky. 1971).

¹² *Id.* at 389. The Commission notes that KRS 278.020(9) now provides that any interested person, including a person over whose property a proposed electric transmission line will cross, may request intervention and a hearing shall be conducted, if requested. However, there are no statutory or regulatory requirement that public notice be provide for any other CPCN matters, including requests to construct natural gas pipelines.

that the Commission failed to abide by KRS Chapter 278 and the its regulations by granting LG&E a CPCN without a distinct application for a CPCN and that the Commission's failure in that regard prevented them from receiving notice and an opportunity to be heard regarding the CPCN.¹³ However, as discussed above, Ms. Brown and IOLA have not provided any legal or regulatory support for the claim that they were entitled to notice even had LG&E filed a separate CPCN application for the Bullitt County Pipeline.

Aside from the notice issues discussed above, the fact that Ms. Brown apparently does not own the subject property is problematic to her claims. In the September 11, 2019 Order, the Commission directed Ms. Brown to, among other things, state with specificity the basis for her interest in the Bullitt County Pipeline, including whether her name is on the deed as a sole or joint owner of the property. Ms. Brown and IOLA stated that Ms. Brown owns the property at 6094 Cedar Grove Road with her husband, David Brown, but that the property is held in the name of IOLA. The Commission takes administrative notice that, according to public records available on the Kentucky Secretary of State's website, IOLA is an LLC with a single member, David Brown, and that, according to the Articles of Incorporation filed in 2006 and the Annual Reports filed between May 3, 2007 and April 22, 2019, David Brown has been the only member of IOLA. Thus, it appears that Ms. Brown does not own the property or have the ability to assert claims, if any, to which the owner of the property may be entitled.

However, even if Ms. Brown owns the property along with IOLA, the Commission finds that neither Ms. Brown nor IOLA have articulated or established that the owner of

¹³ Complaint at 9.

property that might, or will, be affected by the construction of a utility facility has a right to receive notice of a CPCN application. A property interest that entitles a person to the protections of procedural and substantive due process arises not from the federal or state Constitutions. “Rather [property interests] are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law....”¹⁴ As discussed above, no Kentucky statute or regulation requires notice of a CPCN application to potentially affected property owners. Thus, neither Ms. Brown nor IOLA have a protected property interest that could have been violated by the Commission’s decision to grant LG&E a CPCN in Case No. 2016-00371.

Ms. Brown and IOLA also stated that they have legitimate cost and safety concerns as well as an interest in LG&E’s rates and service because they are gas customers of LG&E. It is well settled law in Kentucky that utility ratepayers have no vested property interest in the rates they must pay for a utility service.¹⁵ Ms. Brown and IOLA, therefore, cannot rely upon their claimed interest in LG&E’s rates and service as a vested property interest that was violated by the Commission’s final Order in Case No. 2016-00371.

Absent any legal requirement to provide public notice for a CPCN for a natural gas pipeline, the Commission finds that Ms. Brown and IOLA failed to conform to the requirements for a complaint because they failed to state a claim upon which relief could be granted as it relates to their due process claim. Further, absent any protected property interest in LG&E’s rates and services, Ms. Brown and IOLA do not have standing to now

¹⁴ *Board of Regents of State Colleges V Roth*, 408 U.S. 564, 577 (1972).

¹⁵ *Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Company*, 983 S.W.2d 493, 497 (Ky. 1998).

challenge the Commission's decision in Case No. 2016-00371 authorizing a CPCN to LG&E for the construction of the Bullitt County Pipeline, and thus failed to state a claim upon which relief could be granted as it relates to their due process claim.

Need for and Cost of the Bullitt County Pipeline

The Commission also finds that Ms. Brown and IOLA's claim with respect to need for and cost of the Bullitt County Pipeline are general in nature and have not been articulated with specificity to establish a prima facie case. We note that the final Order in Case No. 2016-00371 discussed the Bullitt County Pipeline CPCN in detail. The discussion included the reasons advanced by LG&E that the pipeline was needed to improve reliability and to allow LG&E the ability to serve growth in the Bullitt County area by providing additional gas supply to existing gas infrastructure in the area. In the September 11, 2019 Order, we found that Ms. Brown failed to provide sufficient support to indicate the veracity of her allegations that the pipeline is needed only to serve a new distillery and not needed to provide reliable service to 9,500 customers. Instead of providing sufficient support, Ms. Brown's and IOLA's amended complaint simply restated those allegations without providing support. As we said in the September 11, 2019 Order, 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.

Similarly, although Ms. Brown and IOLA claim that the cost of the Bullitt County Pipeline has increased from \$27.6 million to \$38.7 million, with the potential to cost \$60 million, they failed to provide any information that the increase in cost was due to imprudent practices by LG&E. Further, Ms. Brown and IOLA alleged that the increase in cost would cause the route for the pipeline that was approved by the Commission to not

be the most reasonable least cost alternative, but offered no support other than their mere assertion.

Ms. Brown and IOLA also claimed that the Commission's findings regarding the need for the Bullitt County Pipeline are based upon false claims from LG&E that the pipeline was an extension. As set forth in the September 11, 2019 Order, 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 ordinary extension of its existing system in the usual course of business and found that a CPCN was needed.¹⁶ 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."¹⁷ 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."¹⁸ 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 the reasons set forth above, Ms. Brown and IOLA failed to set forth specific articulated claims with respect to the need for the Bullitt County Pipeline or that the

¹⁶ Case No. 2016-00371, Final Order at 30–31 (Ky. PSC June 22, 2017).

¹⁷ *Id.* at 31.

¹⁸ *Id.* at 34.

pipeline, as approved, results in wasteful duplication of facilities, or that the Commission relied upon false statements in rendering its decision. Therefore, Ms. Brown and IOLA failed to establish a prima facie case, and failed to provide sufficient support to show that they are entitled to the requested relief of a cancellation of the CPCN for the Bullitt County Pipeline.

Safety

Ms. Brown and IOLA made broad general claims that natural gas pipelines are a hazard and dangerous and that LG&E has a history of failing to adequately maintain, inspect, and install existing gas facilities. However, Ms. Brown and IOLA failed to identify any particular practice or policy implemented or conducted by LG&E that would cause the Bullitt County Pipeline to be hazardous or dangerous.

Instead, Ms. Brown and IOLA offered a statement regarding the Calvary Pipeline that, as we said in the September 11, 2019 Order, is untrue. As noted in that Order, Ms. Brown alleged that the Calvary Pipeline is unable to pass an in-line tool safety inspection. That is not the case. In the amended complaint, Ms. Brown and IOLA offer a broader unsupported statement that the Calvary Pipeline has not been adequately maintained or inspected. As we noted in the September 11, 2019 Order, LG&E informed the Commission on August 29, 2018, that it completed an in-line inspection of the Calvary Pipeline.¹⁹

¹⁹ 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.

Similarly, Ms. Brown and IOLA ignored that the reason for a gas leak for which LG&E was cited in Case No. 2017-00119²⁰ has been addressed and remediated in response to the Commission's Order in that case. The leak was due to the failure of mechanical coupling systems that LG&E has not installed since the early 2000's and that were entirely removed from the LG&E gas transmission system as of January 3, 2019.²¹ Ms. Brown and IOLA, again without sufficient support, make a general assertion that infers the Bullitt County Pipeline is hazardous or dangerous.

For the reasons set forth above, Ms. Brown and IOLA failed to establish a prima facie case because they failed to set forth specific articulated claims with respect to the safety of the Bullitt County Pipeline.

Authorization to Approve CPCN

The Commission is not persuaded by Ms. Brown and IOLA's arguments that KRS 278.020(1)(b), 807 KAR 5:001, Section 14(1), and 807 KAR 5:001, Section 15(2) require LG&E to file an application for a CPCN and that they were harmed by LG&E's failure to do so.

As noted in the final Order in Case No. 2016-00371, LG&E did not initially request a CPCN for the Bullitt County Pipeline; however, we found that the record of Case No. 2016-00371 contained all of the necessary information that would have been provided relating to the Bullitt County Pipeline had a separate CPCN application been filed. Ultimately, LG&E did request that a CPCN be authorized to permit it to construct the Bullitt

²⁰ Case No. 2017-00119, *Alleged Failure to Comply with KRS 278.495, 807 KAR 5:022, and 49 C.F.R. Part 192* (Ky. PSC Mar. 16, 2018).

²¹ *Id.* at LG&E Annual Action Plan Report (filed Jan. 31, 2019).

County Pipeline. The Commission granted that request based on the substantial evidence of record developed in Case No. 2016-00371.

The Commission finds that Ms. Brown and IOLA's complaint fails to establish a prima facie case because it fails to establish sufficient facts that would entitle the complainants to the requested relief.

IT IS THEREFORE ORDERED that:

1. Ms. Brown and IOLA's motion for an extension of time to file the amended complaint is granted.
2. Ms. Brown and IOLA's amended complaint is rejected for failing to conform to the requirements of 807 KAR 5:001, Section 20, by failing establish a prima facie case.
3. Ms. Brown and IOLA's request to void the final Order in Case No. 2016-00371 on grounds that it was deprived of notice due to LG&E's failure to file a separate CPCN application for the Bullitt County natural gas pipeline is dismissed.
4. This case is now closed and removed from the Commission's docket.

By the Commission

ENTERED
DEC 20 2019
KENTUCKY PUBLIC
SERVICE COMMISSION

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