

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BERNHEIM ARBORETUM AND RESEARCH FOREST)	
)	
)	
COMPLAINANT)	
)	
V.)	CASE NO.
)	2019-00274
)	
LOUISVILLE GAS AND ELECTRIC COMPANY)	
)	
)	
DEFENDANT)	

ORDER

On August 2, 2019, Complainant, Bernheim Arboretum and Research Forest (Bernheim Arboretum), filed a complaint against Defendant, Louisville Gas and Electric Company (LG&E). The complaint alleges that Bernheim Arboretum owns property in Bullitt County and that LG&E has threatened to exercise eminent domain authority to condemn Bernheim Arboretum’s property to construct a natural gas pipeline. Bernheim Arboretum asserts that it has been injured and aggrieved by the actions of LG&E and the Commission stemming from a June 22, 2017 decision by the Commission in Case No. 2016-00371 to grant LG&E a Certificate of Public Convenience and Necessity (CPCN) to construct a natural gas pipeline in Bullitt County.¹

After receipt and review of the complaint, the Commission entered an Order on August 20, 2019, establishing a briefing schedule to allow Bernheim Arboretum and

¹ Case No. 2016-00371, *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).

LG&E to submit briefs addressing the following two issues: 1) whether Bernheim Arboretum has standing to claim that notice is required upon the filing of a CPCN application for a natural gas pipeline and that it would be entitled to receive notice of a CPCN application by LG&E for construction of the Bullitt County natural gas pipeline; and 2) whether Bernheim Arboretum has a protected property interest, or any other legally recognized interest, that was allegedly violated by the Commission's June 22, 2017 Order in Case No. 2016-00371, and which now creates standing to challenge and seek review of the findings of fact and conclusions of law set forth in that Order regarding LG&E's need for the Bullitt County pipeline.² The August 20, 2019 Order in this matter provided that the Commission would take under consideration the issue of whether the instant complaint establishes a prima facie case once briefing has been completed.

On September 9, 2019, Bernheim Arboretum filed its brief in support of its position that its complaint establishes a prima facie case. Bernheim Arboretum states that it has standing to assert the claims made in its complaint. In particular, Bernheim Arboretum contends that it has standing to claim that notice is required upon the filing of a CPCN application for a natural gas pipeline and that it would be entitled to receive notice of a CPCN application by LG&E for the construction of the Bullitt County pipeline. Bernheim Arboretum maintains that there is no requirement that it must have owned property, or

² The Attorney General of the Commonwealth of Kentucky, by and through the Office of Rate Intervention (Attorney General), was granted intervention in the instant complaint case pursuant to the Commission's August 21, 2019 Order. That Order permitted the Attorney General an opportunity to also file a brief to address the two standing issues. The Attorney General did not file a brief on the issue of standing. The August 21, 2019 Order also held in abeyance the Attorney General's motion to expand the scope of the complaint until a determination has been made as to whether the complaint established a prima facie case. The August 21, 2019 Order also found that separate procedural Order will be issued to establish deadlines for the filing of response and reply to the Attorney General's request to expand the scope of the complaint should the Commission determines that the complaint has established a prima facie case.

had a property interest at the time LG&E was granted a CPCN for the Bullitt County pipeline, to provide it standing to now assert the claims raised in its complaint. Rather, Bernheim Arboretum asserts that it has standing now because it is currently suffering harm to its legal interests as a result of the Commission's 2017 decision to grant LG&E a CPCN to construct the Bullitt County pipeline. Bernheim Arboretum argues that it has legitimate safety concerns and, as an LG&E customer, cost concerns related to the subject pipeline.

Bernheim Arboretum notes that its purpose is to connect people with nature and that it is obligated to protect its property and ensure the safety of its guests and employees. As such, Bernheim Arboretum states that it has an interest in receiving reliable and safe gas service from LG&E. Bernheim Arboretum also notes that its cost concerns stem from the fact that the cost of the Bullitt County pipeline has already increased from an initial estimate of \$27.6 million to a current estimate of \$38.7 million.

Bernheim Arboretum next argues that it had standing to intervene in Case No. 2016-00371, but was unreasonably denied notice of LG&E's application for a CPCN because LG&E never applied for a CPCN. Bernheim Arboretum thus contends that the Commission's decision to grant a CPCN to LG&E for the Bullitt County pipeline was in violation of the requirements of KRS 278.020, 807 KAR 5:001, Section 14(1), and 807 KAR 5:001, Section 15(2). Bernheim Arboretum asserts that LG&E's failure to apply for a CPCN deprived LG&E's customers, including Bernheim Arboretum, of any notice that LG&E was proposing to construct the Bullitt County pipeline. Bernheim Arboretum contends that by awarding LG&E a CPCN without requiring LG&E to apply for a CPCN pursuant to KRS 278.020, LG&E and the Commission failed to afford any notice or public

hearing for all interested parties, including Bernheim Arboretum, as contemplated by KRS 278.020(1)(b).

Bernheim Arboretum maintains that if LG&E had provided notice of an application for a CPCN, it would have had standing to intervene in such a proceeding. Bernheim Arboretum claims that it has been deprived of due process of law through the Commission's failure to abide by 807 KAR 5:001, Sections 14(1) and 15(2). According to Bernheim Arboretum, those regulations require a separate CPCN application to be filed for the Bullitt County natural gas pipeline project, which application would have allowed for public notice and an opportunity to be heard regarding the need for the pipeline and the reasonableness of the proposed route. Bernheim Arboretum requests that the Commission finds that it has standing to establish a prima case through its formal complaint, void the CPCN for the Bullitt County pipeline, require LG&E to apply for a CPCN for the Bullitt County pipeline, and allow interested parties to intervene in that case.

On September 19, 2019, LG&E filed a response brief, arguing that Bernheim Arboretum has failed to meet the elements of standing and that Bernheim Arboretum's attempt to obtain retroactive relief by using the complaint procedure to circumvent the appeal process should be rejected. LG&E asserts that Bernheim Arboretum does not have standing to claim that it would be entitled to receive notice of a CPCN application for construction of a natural gas pipeline because no such notice is required by statutes or regulations. Alternatively, LG&E asserts that even if such notice were required, Bernheim Arboretum was not entitled to receive notice because it acquired the property the Bullitt County pipeline will cross only in October 2018, which was more than a year after the CPCN was issued in Case No. 2016-00371. LG&E also asserts that Bernheim

Arboretum has failed to show a protected property interest or other legally recognized interest that was alleged violated by the Commission's decision in Case No. 2016-00371 because no such interest exists.

LG&E contends that Bernheim Arboretum fails to meet the elements of standing because Bernheim Arboretum has not suffered an actual injury, because any purported injury was not caused by LG&E's conduct, and because Bernheim Arboretum's alleged injury is not redressable. With regard to the element of actual injury, LG&E points out that the injury that is claimed to be suffered by Bernheim Arboretum stems from its failure to receive notice of the Bullitt County pipeline project. LG&E contends that it has complied with all notice requirements associated with its base rate application in Case No. 2016-00371. LG&E further contends that as a gas customer, Bernheim Arboretum received more notice of the base rate application in 2016 than if the Bullitt County pipeline had been the subject of a standalone CPCN proceeding. That is because there is no statutory or regulatory public notice requirement in connection with a CPCN for the construction of a natural gas pipeline.

LG&E takes issue with Bernheim Arboretum's argument that KRS 278.020(1)(b) requires notice to the public of any hearing on a CPCN matter, contending that Bernheim Arboretum attempts to selectively rewrite the statute which provides the Commission with the discretion to hold a hearing into a non-discretionary notice requirement. LG&E asserts that the statute provides that the Commission may conduct a hearing for interested parties, but it is not required to do, and that the statute never so much as alludes to a notice requirement. LG&E further asserts that even if notice was required for construction of a natural gas pipeline, Bernheim Arboretum would not have been entitled

to receive notice because it was not a property owner at the time LG&E requested a CPCN. Rather, Bernheim Arboretum acquired the subject property over one year after the Commission issued the CPCN in Case No. 2016-00371. LG&E states that any hypothetical harm that Bernheim Arboretum now alleges should be rejected as irrelevant conjecture and insufficient to establish Bernheim Arboretum's standing to file the instant complaint.

LG&E also contends that Bernheim Arboretum lacks standing to file the complaint because its purported injury, i.e., lack of notice, is not connected to LG&E's conduct because LG&E complied with all notice requirements. LG&E notes that Bernheim Arboretum's injury results from Bernheim Arboretum's claim that the Commission failed to require LG&E to file a standalone CPCN application. LG&E asserts that such a claim should be properly characterized as challenging the findings of the Commission's final order granting a CPCN in Case No. 2016-00371.

LG&E contends that Bernheim Arboretum's injury is not redressable because it requests retroactive relief in the form of voiding a CPCN *ab initio*, which the Commission cannot grant as a matter of law. LG&E argues that a Commission rate order can be set aside only upon a showing by tangible evidence that the case was tainted by malice, fraud, or corruption. LG&E also relies upon KRS 278.390, which provides that every order issued by the Commission shall continue in full force until either the Commission or a court of competent jurisdiction modifies or revokes the order. LG&E further relies upon KRS 278.270 for the proposition that the Commission may modify an earlier order as the result of a complaint, but that any such modification may only be done on a prospective basis.

Lastly, LG&E argues that the Commission should reject Bernheim Arboretum's attempt to use the complaint procedure to circumvent the statutory deadline in KRS 278.410 to collaterally attack the final order in Case No. 2016-00371, a matter to which Bernheim Arboretum was never a party. LG&E also contends that the Commission is entitled to deference in interpreting the statutes that it is charged with implementing. LG&E argues that Bernheim ignores this deference and pushes for a different interpretation of KRS 278.020. LG&E notes that the Commission has interpreted KRS 278.020(1)(b) as allowing a CPCN to be granted in a case even though the initiating application did not specifically request the issuance of a CPCN. LG&E further contends that the Commission has not interpreted KRS 278.020(1)(b) as requiring notice in the hundreds of CPCN matters that it had considered in the past.

On September 26, 2019, Bernheim Arboretum filed a reply brief, arguing that the case law that LG&E relies upon for its constitutional standing claim has been rejected by the Kentucky Supreme Court. Bernheim Arboretum contends that the proper standard for statutory standing in an administrative proceeding requires assessing whether the legislature has accorded a party such as Bernheim Arboretum the right to seek relief to redress its injuries. Bernheim Arboretum asserts that it has standing under the plain language of KRS 278.260 to bring the instant complaint. Bernheim Arboretum claims to have been injured and aggrieved by LG&E's unlawful grant of a CPCN for the Bullitt County pipeline without filing a CPCN application. Bernheim Arboretum further claims that:

As the relationship between a customer and utility is through rates and service, the injury alleged implies that the fundamental grievance is related to Bernheim's injury as a result of being a customer of LG&E. Bernheim specifically

alleged in the Formal Complaint and Brief that it has legitimate safety, rate, service, and waste concerns as an LG&E customer and as one of the largest property owners in LG&E's jurisdiction both today and at the time of the 2016 rate case.³

Bernheim Arboretum reiterates that it has complied with 807 KAR 5:001, Section 20(1), the regulation setting forth formal complaint process, in that it has fully articulated the basis of its claims that LG&E never applied for a CPCN pursuant to law and that the Commission acted outside of its authority by awarding a CPCN without a formal application. Bernheim Arboretum further argues that it has stated sufficient allegations that are not contradicted and would entitle it to the relief requested.

Bernheim Arboretum argues that even if the standing standard proffered by LG&E was to be accepted, it contends it has met those standing requirements. Bernheim Arboretum asserts that it has suffered an injury because LG&E never filed an application for a CPCN pursuant to Kentucky law and that the Commission erred in awarding LG&E a CPCN for the Bullitt County pipeline without first requiring LG&E to file a CPCN application. Bernheim Arboretum argues that LG&E's failure to file a separate CPCN for the Bullitt Count pipeline deprived it of notice and the ability to intervene or provide comments with respect to the pipeline route and how it would impact Bernheim Arboretum. Lastly, Bernheim Arboretum contends that the Commission can redress Bernheim Arboretum's harm by declaring the final Order in Case No. 2016-00371 awarding the CPCN void *ab initio*.

Having reviewed the record and being otherwise sufficiently advised, the Commission finds that Bernheim Arboretum has failed to establish that notice is required upon the filing of a CPCN application for a natural gas pipeline and that it would be entitled

³ Bernheim Arboretum's Reply Brief at 5.

to receive notice of a CPCN application by LG&E for construction of the Bullitt County pipeline. The Commission is not persuaded by Bernheim Arboretum'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 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." Bernheim Arboretum relies 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 declines to accept the interpretation as advanced by Bernheim Arboretum that KRS 278.020(1)(b) requires public notice in this instance. The language relied upon by Bernheim Arboretum 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 the CPCN regulation, 807 KAR 5:001, Section 15, reveals 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, governing CPCN applications for certain electric transmission lines, specifically requires notice to affected property owners. Likewise, KRS 278.714(2)(e), governing applications for certificate to construct nonregulated electric transmission line or 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 the Court of Appeals, 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 that the Commission 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 Bernheim Arboretum 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."⁴ In affirming the Franklin Circuit Court's judgment, the Court of Appeals 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.'"⁵

Bernheim Arboretum's principal claim is that it has suffered a due process injury because LG&E did not provide any notice of the Bullitt County pipeline project by way of a separate CPCN application for the pipeline. However, Bernheim Arboretum has not

⁴ *Satterwhite v. Public Service Commission*, 474 S.W.2d 387, 388 (Ky. 1971).

⁵ *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 requirements that public notice be provided for any other CPCN matters, including requests to construct natural gas pipelines.

provided any legal or regulatory support for the claim that it (or anyone else) was entitled to notice even if LG&E had filed a separate CPCN application for the Bullitt County gas pipeline. Also problematic to Bernheim Arboretum's claim that it was entitled to notice, and aside from any statutory or regulatory requirement for public notice, is the fact that Bernheim Arboretum did not, at the time the Bullitt County pipeline was considered in Case No. 2016-00371, own the property that is now in the path of the pipeline. Accordingly, the Commission finds that Bernheim Arboretum has failed to state a claim upon which relief could be granted as it relates to its notice claim,; therefore this claim should be dismissed.

With respect to the issue of whether Bernheim Arboretum has standing to challenge the Commission's final Order in Case No. 2016-00371, the Commission finds that Bernheim Arboretum has not articulated or established that it has a property interest, or any legally recognized interest, that was violated by the final Order in Case No. 2016-00371. Bernheim Arboretum states that it has legitimate cost and safety concerns as well as an interest in LG&E's rates and service because it is a gas customer of LG&E. Further, Bernheim Arboretum asserts that it has standing to establish a prima facie case to protect its property and legal interests because the Commission unlawfully granted LG&E a CPCN to construct the Bullitt County pipeline without requiring LG&E to file a separate CPCN application requesting authority to construct the pipeline. 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.⁶ Bernheim Arboretum, therefore, cannot rely upon its claimed

⁶ *Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Company*, 983 S.W.2d 493, 497 (Ky. 1998).

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 such property interest, Bernheim Arboretum does not have standing to now challenge the Commission's decision in Case No. 2016-00371 authorizing a CPCN to LG&E for the construction of the Bullitt County pipeline.

The Commission also finds that Bernheim Arboretum's claims with respect to cost and safety 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. The final Order also included a discussion of the legal standard of review for issuing a CPCN and findings of fact that LG&E had met that standard by both establishing a need for the Bullitt County pipeline and demonstrating that the pipeline would not result in wasteful duplication of facilities.

Although Bernheim Arboretum claims that the cost of the Bullitt County pipeline has increased from \$27.6 million to \$38.7 million, Bernheim Arboretum fails to provide any information to demonstrate that the increase in cost renders the Commission-approved pipeline to no longer be the most reasonable, least-cost alternative or that the increase in cost was due to imprudent practices by LG&E. Moreover, Bernheim Arboretum has set forth no claims to challenge LG&E's current need for the Bullitt County pipeline. Lastly, Bernheim Arboretum provides broad general claims that natural gas pipelines are a hazard and dangerous without identifying any particular practice or policy

implemented, conducted, or omitted by LG&E that would cause the Bullitt County pipeline construction, or its subsequent operation, to be more hazardous or dangerous than any other natural gas pipeline operated by LG&E or by any other jurisdictional utility. Absent any specific articulated claims to negate LG&E's demonstration, and the Commission's findings, that there is a need for the Bullitt County pipeline or that the pipeline will not result in wasteful duplication of facilities, the Commission cannot find that Bernheim Arboretum has established a prima facie case to challenge the Commission's Order in Case No. 2016-00371 granting LG&E a CPCN.

The Commission is also not persuaded by Bernheim Arboretum's assertion that it has been harmed by the Commission's final Order in 2016-00371 based on a claim that the Commission unlawfully awarded a CPCN to LG&E without requiring LG&E to submit a CPCN application for the Bullitt County pipeline and that such injury can be redressed by the Commission. The Commission notes that Bernheim Arboretum has failed to provide any statute or regulation that would require LG&E to file a separate CPCN application for the Bullitt County pipeline. Although LG&E did not initially request a CPCN for the Bullitt County pipeline, the case 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 County pipeline. Numerous parties were granted intervention and participated in that case, including the Attorney General of the Commonwealth of Kentucky on behalf of consumers' interests, and no party objected to LG&E's request for the issuance of a CPCN. The Commission ultimately granted LG&E's request for a CPCN based on the substantial evidence of record

developed in Case No. 2016-00371, and the Order granting the CPCN was not the result of any procedural or substantive errors as now alleged by Bernheim Arboretum. In summary, the Commission finds that Bernheim Arboretum's complaint fails to establish a prima facie case that LG&E or the Commission violated any statutes or regulations to support its requests that the Commission declare the CPCN granted in Case No. 2016-00371 is void *ab initio* and that LG&E must file a file a new application if it elects to proceed with the Bullitt County pipeline.

IT IS THEREFORE ORDERED that:

1. Bernheim Arboretum's complaint is rejected for failing to conform to the requirements of 807 KAR 5:001, Section 20, by failing to establish a prima facie case.
2. Bernheim Arboretum's request to void the final Order in Case No. 2016-00371 *ab initio* 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.
3. Bernheim Arboretum 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, by stating a prima facie case.

By the Commission

ENTERED
DEC 20 2019
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:



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