

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF MCCREARY)	
COUNTY WATER DISTRICT FOR A)	
DECLARATORY ORDER, OR IN THE)	CASE NO.
ALTERNATIVE, FOR A CERTIFICATE OF PUBLIC)	2022-00284
CONVENIENCE AND NECESSITY FOR CERTAIN)	
ECONOMIC DEVELOPMENT WASTEWATER)	
IMPROVEMENTS)	

ORDER

On September 7, 2022, McCreary County Water District (McCreary District) tendered an application pursuant to KRS 270.020 and 807 KAR 5:001, Sections 19, for an Order declaring that the facilities it is proposing to construct pursuant to Contract No. 37 - Fibrotex Sanitary Sewer Pump Station and Force Main (Contract 37) are an ordinary extension in the usual course of business under KRS 270.020(1)(a)(2), or in the alternative, for a Certificate of Public Convenience and Necessity (CPCN) for the proposed construction. There have been no motions to intervene or objections to McCreary District's application filed in this matter. McCreary District requested a ruling by October 15, 2022, to allow it to award the contract before expiration of the selected bid. This matter is now before the Commission for a decision.

BACKGROUND

McCreary District is a water district organized under the provisions of KRS Chapter 74. McCreary District owns and operates sewage collection and treatment facilities for compensation in McCreary County, Kentucky, serving 1,171 customers, with a daily

treatment capacity of 900,000 gallons.¹ McCreary District's net sewer utility plant as of December 31, 2021, was \$12,006,948² and McCreary District had \$4,359,028 in annual operating revenue for 2021.³

In October 2018, the U.S. Department of the Army awarded Fibrotex USA a 10-year, \$480 million contract to supply a modular fabric camouflage system for military equipment, facilities, and troops.⁴ Fibrotex USA leased an existing facility in McCreary County and began operations in 2019, while continuing to renovate and expand the facility.⁵ Fibrotex USA currently employs approximately 150 employees at the facility but expects to add 200 more when full production capacity is reached.⁶ Fibrotex USA also plans to increase monthly product output from 1,400 units to 5,000 units.⁷ The manufacturing process is water intensive and the increase in output will significantly increase wastewater production.⁸

To address the required increase in wastewater treatment capacity, McCreary District proposed an Economic Development Wastewater Improvements Project consisting of two phases: (1) improvements to the pump station and sewer main serving

¹ Application at 2-3.

² Application at 3.

³ *Annual Report of McCreary District to the Public Service Commission for the Year Ending December 31, 2021 Annual Report* at 27.

⁴ Application at 4.

⁵ Application at 4.

⁶ Application at 4.

⁷ Application at 5.

⁸ Application at 5; see *also* Application, Exhibit 3 (which includes an analysis of estimated wastewater production based on Fibrotex USA's unit production).

the Fibrotex USA facility and the treatment plant's screening system, and (2) replacement of the treatment plant's grit removal system and construction of a third oxidation ditch.⁹ The purpose of phase one improvements is to allow increased wastewater flows from the Fibrotex USA facility to the treatment facility.¹⁰ The purpose of phase two improvements is to improve the efficiency and effectiveness of the treatment plant overall.¹¹ Both phases are intended to help the McCreary District's sewer system increase capacity needed by Fibrotex USA to increase output and allow the hiring of more employees and stimulate economic growth under the auspices of the U.S. Department of Commerce Economic Development Administration (EDA) and Appalachian Regional Commission (ARC).¹²

The phase one improvements more specifically involve installing 6,375 linear feet of 8-inch polyvinyl chloride (PVC) sewer force main, 180 linear feet of 8-inch PVC gravity sewer, 240 linear feet of 16-inch steel casing pipe, three sanitary sewer manholes, a 500-gallon per minute pump station and valve vault, a magnetic meter vault, and replacement of the existing screening system at McCreary District's wastewater treatment plant.¹³ Contract 37, about which McCreary District requests a declaratory order in this matter, includes only the phase one improvements.¹⁴

⁹ Application at 5-6; Exhibit 13. This application only seeks approval for phase one of construction, as indicated by the scope of work set forth in Application Exhibit 7 (Contract 37).

¹⁰ Application at 6.

¹¹ Application at 6.

¹² Application at 13.

¹³ Application at 5-6.

¹⁴ Application at 5.

McCreary District published a request for proposals to complete the improvements proposed in Contract 37.¹⁵ Three firms submitted bids, and the lowest bid was \$1,163,154 from Roses Excavating.¹⁶ This bid expires after 90 days, on October 27, 2022.¹⁷ McCreary District's project engineer recommended that the district accept the lowest bid.¹⁸ On August 26, 2022, McCreary District awarded Contract 37 to Roses Excavating, contingent upon it obtaining a CPCN for the proposed construction or a declaratory order that the proposed construction does not require CPCN.¹⁹

The most recent estimated total cost of the phase one improvements to be completed pursuant to Contract 37, including construction and engineering costs, is \$1,751,352.²⁰ Estimated annual operations and maintenance costs for phase one improvements are \$9,000.²¹ The estimated cost of both phases of construction in an earlier engineering report was \$2,224,700.²² McCreary District was awarded an EDA grant of \$1,779,760 and an ARC grant of \$444,940 to finance the construction of the proposed facilities.²³

¹⁵ Application, Exhibit 15.

¹⁶ Application at 7; Exhibit 16.

¹⁷ Application at 7; Exhibit 7.

¹⁸ Application at 7; Exhibit 17.

¹⁹ Application at 8, Exhibit 24.

²⁰ Application at 7; Exhibit 14. Though, the total estimated construction costs, including engineering costs, are about \$260,000 higher than the lowest bid received, which McCreary District has accepted.

²¹ Application, Exhibit 19.

²² Application, Exhibit 13.

²³ Application at 6.

LEGAL STANDARD

No utility may construct or acquire any facility to be used in providing utility service to the public until it has obtained a CPCN from this Commission.²⁴ To obtain a CPCN, the utility must demonstrate a need for such facilities and an absence of wasteful duplication.²⁵

“Need” requires:

[A] showing of a substantial inadequacy of existing service, involving a consumer market sufficiently large to make it economically feasible for the new system or facility to be constructed or operated.

[T]he inadequacy must be due either to a substantial deficiency of service facilities, beyond what could be supplied by normal improvements in the ordinary course of business; or to indifference, poor management or disregard of the rights of consumers, persisting over such a period of time as to establish an inability or unwillingness to render adequate service.²⁶

“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.”²⁷ To demonstrate that a proposed facility does not result in wasteful duplication, the Commission has held that the applicant must demonstrate that a thorough

²⁴ KRS 278.020(1). Although the statute exempts certain types of projects from the requirement to obtain a CPCN, the exemptions are not applicable.

²⁵ *Kentucky Utilities Co. v. Pub. Serv. Comm 'n*, 252 S.W.2d 885 (Ky. 1952).

²⁶ *Kentucky Utilities Co.*, 252 S.W.2d at 890.

²⁷ *Kentucky Utilities Co.*, 252 S.W.2d at 890.

review of all reasonable alternatives has been performed.²⁸ Although cost is a factor, selection of a proposal that ultimately costs more than an alternative does not necessarily result in wasteful duplication.²⁹ All relevant factors must be balanced.³⁰

An exception to the CPCN requirement is provided in KRS 278.020(1)(a)(2) for “[o]rdinary extensions of existing systems in the usual course of business.” This exception is further described in 807 KAR 5:001, Section 15(3), which states:

A certificate of public convenience and necessity shall not 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 or contiguous area in which the utility renders service, 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.

The Commission has interpreted 807 KAR 5:001, Section 15(3) as stating that no CPCN is required for extensions “that do not result in the wasteful duplication of utility plant, do not compete with the facilities of existing public utilities, and do not involve a sufficient capital outlay to materially affect the existing financial condition of the utility

²⁸ 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), Order at 11.

²⁹ See *Kentucky Utilities Co. v. Pub. Serv. Comm'n*, 390 S.W.2d 168, 175 (Ky. 1965). See also Case No. 2005-00089, *Application of East Kentucky Power Cooperative, Inc. for a Certificate of Public Convenience and Necessity for the Construction of a 138 kV Electric Transmission Line in Rowan County, Kentucky* (Ky. PSC Aug. 19, 2005), final Order.

³⁰ Case No. 2005-00089, *East Kentucky Power Cooperative, Inc.* (Ky. PSC Aug. 19, 2005), final Order at 6.

involved or to require an increase in utility rates.”³¹ Applying that standard, the Commission has previously found proposals to be ordinary extensions in the usual course of business when the cost of the capital outlay was borne by an entity other than the utility.³²

Pursuant to 807 KAR 5:001, Section 19, the Commission may, upon application by a person substantially affected, “issue a declaratory order . . . with respect to the meaning and scope of an order or administrative regulation of the commission or provision of KRS Chapter 278.”³³ An application for a declaratory order must:

- (a) Be in writing;
- (b) Contain a complete, accurate, and concise statement of the facts upon which the application is based;
- (c) Fully disclose the applicant's interest;
- (d) Identify all statutes, administrative regulations, and orders to which the application relates; and
- (e) State the applicant's proposed resolution or conclusion.³⁴

³¹ Case No. 2000-00481, *Application of Northern Kentucky Water District (A) for Authority to Issue Parity Revenue Bonds in the Approximate Amount of \$16,545,000; and (B) A Certificate of Convenience and Necessity for the Construction of Water Main Facilities* (Ky. PSC Aug. 30, 2001), Order at 4.

³² See Case No. 2020-00344, *Electronic Application of Hardin County Water District No. 1 for A Declaratory Order Regarding the Applicability of KRS 278.020(1) to Proposed Improvements to Muldraugh Water Treatment Plant* (Ky. PSC Dec. 3, 2020), Order at 13 (finding that construction for service to a particular customer and paid for by a surcharge upon that customer was an ordinary extension in the usual course of business); Case No. 2014-00292, *Application of East Kentucky Power Cooperative, Inc. for an Order Declaring the Glasgow Landfill Gas to Energy Project to Be an Ordinary Extension of Existing Systems in the Usual Course of Business and a Joint Application of Farmers Rural Electric Cooperative Corporation and East Kentucky Power* (Ky. PSC Apr. 2, 2015), Order at 9-10 (finding that construction for service to a particular customer paid for via special contract was an ordinary extension in the usual course of business).

³³ 807 KAR 5:001, Section 19(1); see also Case No. 2020-00095, *Electronic Application of Kenergy Corp. for a Declaratory Order* (Ky. PSC Mar. 11, 2021), Order at 4-5 (noting that that Commission may issue a declaratory order, in its discretion, with respect to the meaning and scope of an order, regulation, or statute if a request is made by a person substantially affected).

³⁴ 807 KAR 5:001, Section 19(2).

Any factual allegation in an application for a declaratory order must be supported by an affidavit or verified.³⁵ The Commission “may dispose of an application for a declaratory order solely on the basis of the written submissions filed”³⁶ or may allow for other actions, including additional discovery, to ensure that the record is complete.³⁷

DISCUSSION AND FINDINGS

McCreary District argued that the proposed project is an extension in the ordinary course of business because (1) it will not result in the wasteful duplication of utility plant, (2) will not result in the construction of facilities competing with the facilities of existing public utilities, and (3) does not involve a sufficient capital outlay to materially affect McCreary District’s existing financial condition or to require an increase in McCreary District’s rates.

McCreary District argued that the proposed project will not result in wasteful duplication because it is needed to meet the increased demands for wastewater collection and treatment resulting from the Fibrotex USA manufacturing facility. McCreary District provided an engineer’s analysis of alternatives to the proposed project, including only making improvements to the treatment plant, but determined that the Fibrotex USA industrial area would be underserved at its expected capacity requirements if this alternative were selected.³⁸

³⁵ 807 KAR 5:001, Section 19(6).

³⁶ 807 KAR 5:001, Section 19(7).

³⁷ 807 KAR 5:001, Section 19(8); *see also* Case No. 2020-00095, *Kenergy Corp.* (Ky. PSC Mar. 11, 2021), Order at 4-5 (noting that that Commission has discretion in whether to address an application for a declaratory order).

³⁸ Application, Exhibit 13.

McCreary District stated that it does not compete with any other wastewater utilities in the area.³⁹ McCreary District also asserted that a capital outlay does not materially affect a utility's existing financial condition or result in increased charges if the source of the capital does not require the utility to issue securities or evidences of indebtedness or create any other legal obligation on the utility's part to repay or reimburse the source of that capital.

Having considered the application and all evidence in the record, the Commission finds that McCreary District's application for a declaratory order should be granted. McCreary District is substantially affected by the applicability of the ordinary extensions exception in this case, and it met all the filing requirements in 807 KAR 5:001, Section 19 for applications for declaratory orders. Further, according to its engineer's report, the proposed project was the recommended plan for achieving the capacity needed to serve Fibrotex USA's expansion,⁴⁰ and the project does not compete with any other sewer utilities, so McCreary District established a lack of wasteful duplication and that the project does not conflict with the existing certificates or service of other utilities. Lastly, the proposed project will not require incurring debt, because the grants will pay for the project at issue herein in full, and therefore, it will have no material effect on the financial condition of the utility. Thus, the Commission finds that the phase one improvements to be completed pursuant to Contract 37 are ordinary extensions of existing systems in the usual course of business. However, the Commission notes that this declaratory order

³⁹ Application at 10.

⁴⁰ Application, Exhibit 13.

pertains only to the phase one improvements described in Contract 37 and does not apply to phase two of the proposed project.

IT IS THEREFORE ORDERED that:

1. McCreary District's application for a declaratory order is granted.
2. The phase one improvements to be completed pursuant to Contract 37 are ordinary extensions in the usual course of business, and a CPCN, pursuant to KRS 278.020(1), is not required for their construction.
3. McCreary District shall file notice of completion of construction with the Commission within 30 days of when the Contract 37 projects have been completed.
4. Any documents filed pursuant to ordering paragraph 3 herein shall reference this case number and shall be retained in the post-case correspondence file for this proceeding.
5. The Executive Director is delegated authority to grant reasonable extension of time for the filing of any documents required by ordering paragraph 3 of this Order upon McCreary District's showing of good cause.
6. This matter is closed and shall be removed from the docket.

PUBLIC SERVICE COMMISSION


Chairman

Vice Chairman


Commissioner



ATTEST:


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