

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE APPLICATION OF COLUMBIA GAS OF)
KENTUCKY, INC. FOR AN ORDER ISSUING A)
CERTIFICATE OF PUBLIC CONVENIENCE AND)
NECESSITY TO THE EXTENT SUCH A CERTIFICATE) CASE NO. 96-015
IS REQUIRED TO CONSTRUCT A PIPELINE TO)
SERVICE COOPER TIRE, INC. IN MT. STERLING,)
KENTUCKY)

O R D E R

Columbia Gas of Kentucky, Inc. ("Columbia Gas") filed its application on January 30, 1996, requesting authority to construct a pipeline to serve Cooper Tire and Rubber Company, Inc. ("Cooper Tire") or, in the alternative, a declaration that such construction is in the ordinary course of business and requires no certificate pursuant to KRS 278.020(1). Cooper Tire is located in the Woodland Industrial Park near Mount Sterling, Kentucky. Cooper Tire did not intervene in this proceeding although the record reflects that it has requested service from both utilities.¹

Delta Natural Gas, Inc. ("Delta") and Western Kentucky Gas Company ("Western"), a division of Atmos Energy, Inc., moved to intervene in the proceeding. Delta was granted full intervention since it currently supplies natural gas to the occupants of the industrial park. Western's request to intervene was denied because it has no facilities and no operations in or around the industrial park or Mount Sterling, Kentucky. Western's interest

¹ Exhibit 2, Memorandum of Delta, filed May 16, 1996; Columbia's Response to Delta's Discovery Request, Items 9-10, filed April 11, 1996.

in this proceeding was determined to be too remote to justify full intervention. Western requested leave to file and tendered an amicus curia brief addressing the legal issues in this proceeding. That request was granted by Order dated May 23, 1996.

Discovery was deemed completed on April 29, 1996 when the Commission entered an Order finding that legal memoranda and oral argument on the legal issues present in this case would be helpful. The parties were given the opportunity to request an evidentiary hearing. Since no requests were received, the case was submitted to the Commission for a decision at the conclusion of the oral arguments held on May 20, 1996.

The question presented to the Commission in this case is two-fold. Is the construction proposed by Columbia to serve Cooper Tire an extension in the ordinary course of business which does not require a certificate of convenience and necessity to construct under KRS 278.020(1)? If the construction is in the ordinary course, our inquiry ends and Columbia is permitted to construct and serve Cooper Tire. If the construction is not an extension in the ordinary course, should a certificate of public convenience and necessity be issued to Columbia permitting the construction of the facilities to serve Cooper Tire?

After consideration of the facts of record, the oral arguments and legal memoranda of the parties and being otherwise sufficiently advised, the Commission finds the proposed extension cannot be declared to be in the ordinary course of business based upon the following.

KRS 278.020(1) provides that a utility may not construct any plant, equipment, property or facilities to provide utility service without first having obtained from the Commission a certificate that public convenience and necessity require such construction.

Specifically exempted from the certificate requirement are "ordinary extensions of existing systems in the usual course of business." An ordinary extension in the usual course of business is defined by 807 KAR 5:001, Section 9(3) as:

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 same 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.

The facts of this case are essentially undisputed. The Woodland Industrial Park is located on the west side of U.S. 60, north of I-64. Delta entered into an agreement on January 10, 1991 with the Mount Sterling - Montgomery County Industrial Authority to install natural gas facilities in the industrial park. Delta currently serves all customers located within the industrial park² through existing mains located adjacent to and along the north side of the park.

Columbia's existing facilities are south of I-64 approximately 2 miles from the Cooper Tire plant. Columbia currently serves Ewington, Kentucky and proposes to serve Cooper Tire by building a 2 mile extension of 6 inch main from its current 4 inch main at the regulator station serving Ewington. Columbia states that the portion of its proposed extension that is north of I-64 will parallel Delta's existing line which is in place on the western edge of U.S. 60.

Based upon the facts stated above, the Commission finds that a duplication of Delta's existing facilities will occur if Columbia's proposed facility is built. Columbia admits in its filing that a portion of its proposed distribution main will parallel Delta's existing main.

² Delta began serving Cooper Tire on April 30, 1996.

The record reflects that Columbia recognized that the project would require a certificate under existing statutes and in fact notified Cooper Tire that such was the case.³ Columbia's proposed extension will conflict with Delta's existing service in the area as Delta presently serves existing customers within and immediately adjacent to the industrial park.⁴ Since the construction will duplicate Delta's existing facilities and will interfere with Delta's existing obligation to serve the industrial park, the extension is clearly not in the ordinary course.

In determining whether to grant a certificate to allow the proposed construction, the Commission must determine whether the public convenience and necessity require that the construction be performed. In Kentucky Utilities Co. v. Public Service Commission of Kentucky, 252 S.W.2d 885 (Ky. 1952) the Kentucky Court of Appeals set out the essential elements necessary to show the public convenience and necessity require the construction of new facilities. According to the Court, an applicant must demonstrate that there is a substantial inadequacy of existing service.⁵ That 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

³ Columbia's Response to Delta's discovery request, Attachment B and D filed April 11, 1996.

⁴ Delta has been providing service in the area since 1953 and has been serving the industrial park since 1991.

⁵ Kentucky Utilities at 890.

an inability or unwillingness to render adequate service.⁶ Columbia has made no showing that Delta's facilities are inadequate to serve Cooper Tire nor has Columbia attempted to contradict Delta's assertion that the existing facilities are adequate to serve the needs of the customer in question.

The Court further held that "public convenience and necessity embodies the element of absence of wasteful duplication...."⁷ In light of this standard, the Commission must determine whether the public interest requires the construction of a \$261,825 project to serve the needs of one customer who can easily be served from existing facilities in the ordinary course by a local distribution company already serving in the area.⁸ Clearly, allowing such a duplication of facilities and efforts is wasteful and cannot be said to be in the public interest.

In support of its request, Columbia cites *Columbia Gas of Kentucky, Inc. v. Kentucky-Ohio Gas Company*, Case No. 92-489, for the proposition that the Commission has recognized that duplication of facilities can be incidental and limited and not contrary to the public interest. Columbia citing page 2 of the Commission's July 2, 1993 Order, states that "the existence of competition between two utilities to serve loads that were equally accessible to both utilities was not the kind of uneconomic bypass contemplated

⁶ Id. Kentucky Utilities and its progeny are both controlling and binding on the Commission in this case. (See also, Kentucky Utilities Company v. Public Service Commission, Ky.App., 390 S.W.2d 168 (1965) defining "inadequacy" and "wasteful duplication"; Kentucky Utilities Company v. Farmers R.E.C.C., Ky.App., 362 S.W.2d 498 (1962) addressing duplication of facilities; Duerson v. East Kentucky Power Coop., Inc., Ky.App., 843 S.W.2d 340 (1992) construing "ordinary course" exception.

⁷ Id.

⁸ It cannot seriously be disputed that Delta has no existing obligation to serve this customer given Delta's contractual commitment to the Industrial Authority.

by Administrative Case No. 297,⁹ and that the duplication of service connections did not present a question of economic significance."

The facts of the cited case are substantially different than those of the case at bar. In Case No. 92-489, the customer had requested service from Kentucky-Ohio Gas Company and had executed special contracts with that utility. Columbia and Kentucky-Ohio Gas Company both had facilities immediately adjacent to the customers' property line and each utility's ability to serve the customer was approximately equal. The customer was being served by Columbia but could, by merely constructing its service line to a different point of service, readily obtain the desired service from Kentucky-Ohio Gas Company. Such is clearly not the case here where Columbia must construct a two mile extension from its existing distribution system to get to the vicinity of the customer.¹⁰

IT IS THEREFORE ORDERED that Columbia's request for a certificate of convenience and necessity to construct facilities to serve Cooper Tire or, in the alternative, request for a declaration that the construction is in the ordinary course of business and needs no certificate pursuant to KRS 278.020 are both denied.

⁹ Administrative Case No. 297, Investigation of Kentucky Regulation in Light of FERC Rulemaking (Docket No. RM 85-1) - Natural Gas.

¹⁰ This "customer choice" dilemma was also addressed by the Commission in Administrative Case No. 297 wherein we stated that where both utilities were serving in the vicinity and were equally situated to serve the customer, customer preference could be considered. Clearly, Columbia and Delta are not equally situated with respect to providing service to this customer.

Done at Frankfort, Kentucky, this 10th day of July, 1996.

PUBLIC SERVICE COMMISSION

Linda K Breathitt
Chairman

Ed Johnson
Vice Chairman

Commissioner

ATTEST:

Don Hill
Executive Director