

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

KENERGY CORPORATION)	
)	
COMPLAINANT)	
)	CASE NO.
v.)	2002-00008
)	
KENTUCKY UTILITIES COMPANY)	
)	
DEFENDANT)	

O R D E R

This case involves a dispute between Kentucky Utilities Company (KU) and Kenergy Corporation (Kenergy) as to who shall provide electricity service to Highland Mining Company (Highland) for its No. 9 mining operation. Kenergy contends that it is entitled to serve because the mine portal and the majority of the reserves to be mined in the near future lie in Kenergy s retail service territory. Kenergy also contends that, even though a portion of the area to be mined lies within KU s territory, the facility to be served comes within the adjacent territory provisions of KRS Chapter 278 only in the most technical sense. Kenergy also states that it should prevail based on the statutory factors that govern an adjacent territories dispute. KU claims that it is entitled to serve because the mine s total reserves, as well as the areas which initially will be mined and the five mile conveyor system that will transport coal to a preparation plant, are in both companies retail territories. This undisputed fact, it says, means that the factors governing disputes when a facility is to be located in adjacent territories of retail electric suppliers must govern here. Those factors, it contends, clearly favor KU.

APPLICABLE LAW

KRS 278.018 provides that retail electric suppliers have the exclusive right to serve customers in their respective territories. If, however, a new electric-consuming facility should locate in two (2) or more adjacent certified territories, the commission shall determine which retail electric supplier shall serve said facility based on criteria in KRS 278.017(3).

The criteria in KRS 278.017(3) are as follows:

- (a) The proximity of existing distribution lines to such certified territory;
- (b) Which supplier was first furnishing retail electric service, and the age of existing facilities in the area;
- (c) The adequacy and dependability of existing distribution lines to provide dependable, high quality retail electric service at reasonable costs.
- (d) The elimination and prevention of duplication of electric lines and facilities supplying such territory.

In reaching its determination, the commission shall conduct its hearing de novo; and neither supplier shall bear the burden of proof.¹

POSITIONS OF THE PARTIES

Though Kenergy places great emphasis on the fact that the portal and 98 percent of the currently permitted coal reserves are in its territory, it acknowledges that some of the reserves are in KU's territory. Thus, the criteria of KRS 278.017 apply. Kenergy

¹ These factors also served as those to which the Commission was to look to determine, as of June 16, 1972, whether a protest of the certification of territory should result in a change of the certified territory map. Thus the references to proximity to certified territory rather than to the electric-consuming facility.

contends that those four criteria favor Kenergy because its distribution lines (as opposed to transmission lines) are nearer to the facility and because its facilities in the area are older. It states it has provided service to the area since 1957. It further states that application of criterion (c) the adequacy and dependability of existing distribution lines to provide dependable service at reasonable rates favors neither supplier. Finally, Kenergy states that, as neither supplier would duplicate facilities to serve the mine, criterion (d) also favors neither supplier. Kenergy plans to serve the mine from Big Rivers 69 kv line that is over 2 miles from the facility. It also says it might be able to serve the mine from KU s 69 kv line pursuant to federal open access transmission tariffs.

KU contends, first, that while Highland has, so far, permitted rights to mine only a portion of its reserves, it plans to mine all of its reserves. Thus, KU argues, Kenergy s contention that only a small amount of coal to be mined is in KU s territory is misleading. KU also contends that it can provide service to the mine sooner, and more cheaply. Finally, it states that each of the criteria in KRS 278.017(3) favor it rather than Kenergy.

Citing the Commission s decision in Case No. 1994-00326,² KU asserts that distribution line means the line which will actually serve the facility. As KU points out, *both* utilities plan to serve the facility by means of a 69 kv line; and, furthermore, the Commission has previously ruled that while facilities operating at the 69 kv level are typically classified as transmission rather than distribution, such 69 kv facilities will be

² Case No. 1994-00326, *Inter-County RECC v. KU* (Order dated March 14, 1996).

performing the function of distribut[ion] when used to serve a customer.³ KU states it will serve the mine directly from its existing 69 kv line which is only 4,100 feet from the mine portal. It has already begun construction of the tap necessary to serve the mine so that service can be provided quickly should the Commission decide this case in KU s favor.

KU disputes Kenergy s claims that its facilities are older and that it has provided service longer. KU also claims that unnecessary duplication of facilities would result from Kenergy s receiving authority to serve the mine. Kenergy would have to construct an additional 2.5 miles of 69 kv line to provide service, and KU asserts that the extension would run parallel to, and within eyesight of, KU s existing 69 kv line, which is only 4,100 feet from the mine portal.

KU responds to Kenergy s claim that it might be able to serve the mine by means of KU s 69 kv line by asserting, first, that the Commission could not lawfully require KU to comply with such a directive. Only the Federal Energy Regulatory Commission (FERC), it says, can interpret or apply federal law relating to open access transmission tariffs. KU also points out that use of KU s line does not appear to be Kenergy s actual intention, and that Kenergy has offered no evidence to indicate that it could actually obtain access to the line. Finally, it states that even if Kenergy could serve by means of KU s line, the factors of KRS 278.017(3) would still favor KU: KU has been in the area longer pursuant to criterion (b); and Kenergy s payments to KU would mean that KU s service would be provided at a more reasonable cost under criterion (c).

³ Case No. 1993-00211, *Henderson Union RECC v. KU*, (Order dated March 3, 1994).

DISCUSSION

The parties agree that the governing statute is KRS 278.017(3), as the facility to be served lies in adjacent territories. KRS 278.018(1). While it is true that a greater portion of the facility lies in Kenergy's service territory, that is not a factor to be considered by the Commission pursuant to KRS 278.017(3). Pursuant to the statutory factors, we find that KU should prevail.

Kenergy states it will serve the mine from Big Rivers 69 kv line (and knows that KU also will provide service from a 69 kv line). However, it claims that the relative proximity of the lines that would actually be used to provide the service are irrelevant to KRS 278.017 simply *because* they are 69 kv lines. Not only would failure to consider the proximity of these lines to the customer make little sense; it would fly in the face of Commission precedent. Kenergy's definition of distribution lines undermines the clear intent of the statute to favor the utility whose cost to extend service will be less and to avoid duplication of facilities that would result from construction of more than two additional miles onto the Big Rivers line. While Kenergy would have to extend the Big Rivers 69 kv line, KU need only construct a tap and metering structure from its existing 69 kv line.

This Commission is required by law to consider whether provision of service by a particular utility would result in duplication of electric lines and facilities. KRS 278.017. We conclude that Kenergy would be required essentially to duplicate KU's existing 69 kv line in order to provide service to the mine. Kenergy's contention that this is not duplication because only one line would actually be connected to the customer should be rejected. Duplication of facilities is not favored by the law because it results in

excessive investment in relation to efficiency. *Kentucky Utilities Co. v. Public Service Commission*, 252 S.W.2d 885, 891 (Ky. 1952).

As to Kenergy's suggestion that it could use KU's 69 kv line to serve the mine, the relevance of federal transmission tariffs to Kentucky's certified retail territory law is questionable. The issue presented in this case does not concern wholesale power markets. Moreover, even if Kenergy could obtain access under FERC rules, a FERC decision on such a question could take months, resulting in unnecessary delay in serving the customer.

The Commission having been sufficiently advised, IT IS HEREBY ORDERED that KU is hereby authorized to provide electricity service to Highland for its No. 9 mining operation.

Done at Frankfort, Kentucky, this 18th day of October, 2002.

By the Commission

ATTEST:


Executive Director