

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF CTA ACOUSTICS, INC.)
TO RETAIN KENTUCKY UTILITIES) CASE NO. 2003-00226
COMPANY AS POWER SUPPLIER AND)
FOR EXPEDITED TREATMENT)

O R D E R

Pending before the Commission are motions for full intervention filed by the following electric distribution cooperatives (hereinafter Petitioners):

Big Sandy Rural Electric Cooperative Corporation
Blue Grass Energy Cooperative Corporation
Clark Energy Cooperative, Inc.
Farmers Rural Electric Cooperative Corporation
Fleming Mason Energy Cooperative, Inc.
Grayson Rural Electric Cooperative Corporation
Hickman-Fulton Counties Rural Electric Cooperative Corporation
Inter-County Energy Cooperative Corporation
Jackson Energy Cooperative Corporation
Kenergy Corp.
Licking Valley Rural Electric Cooperative Corporation
Meade County Rural Electric Cooperative Corporation
Nolin Rural Electric Cooperative Corporation
Owen Electric Cooperative, Inc.
Pennyrile Rural Electric Cooperative Corporation
Salt River Electric Cooperative Corporation
Shelby Energy Cooperative, Inc.
South Kentucky Rural Electric Cooperative Corporation
Taylor County Rural Electric Cooperative Corporation
Tri-County Electric Membership Corporation
Warren Rural Electric Cooperative Corporation
West Kentucky Rural Electric Cooperative Corporation

Each motion states that the cooperative provides retail electric service within the Commonwealth of Kentucky, that the protection of the retail certified service territories is

of critical importance to the cooperative's financial strength, that the issues presented in this case will set a precedent that will directly affect the cooperative, and that the cooperative has a special interest that cannot be adequately protected by any other party.

Kentucky Utilities Company (KU) and CTA Acoustics, Inc. (CTA Acoustics) have filed responses objecting to the Petitioner's requests for intervention, and some of the cooperatives have filed replies thereto.

Based on the motions, responses, and replies, and being otherwise sufficiently advised, the Commission finds that the pending petition of CTA Acoustics sets forth two primary issues: whether the Southeast Kentucky Regional Business Park (Business Park), which is located in two adjacent certified territories, should be considered a new electric-consuming facility; and, if so, whether it should be served by KU or Cumberland Valley Electric, Inc. (Cumberland Valley). As the Commission previously found in its July 21, 2003 Interim Order, [T]here is legal precedent to find that an industrial park is an electric-consuming facility. . . , citing Owen County Rural Electric Cooperative Corp. v. Public Service Commission, Ky.App., 689 S.W.2d 599 (1985), disc rev. denied, June 5, 1985.

The Commission has also previously ruled that not every industrial park should be determined to be a new electric-consuming facility. Shortly after the Court's decision in Owen County, the Commission ruled that these types of determinations were fact specific and should be made on a case-by-case basis. See: Case No. 9203, The Application of Richwood Industrial Development Corporation for Electric Service from The Union Light, Heat and Power Company, Order dated August 7, 1985.

Thus, the Commission must determine whether the facts in this case support a finding that the Business Park is a new electric consuming facility and, if so, then apply the criteria set forth in KRS 278.017(3) to determine which of the two adjacent retail electric suppliers should serve the new facility.

None of the Petitioners have alleged that they have knowledge of any facts relating to whether the Business Park should be considered a new electric-consuming facility, or the possible application of the criteria in KRS 278.017(3), which are not already known by the existing parties to this case. Rather, the Petitioners allege that they have a special interest in this case arising from their respective certified territorial boundaries within which, they claim, they have an exclusive right to serve all new facilities. Further, the Petitioners allege that the decision in this case could establish precedent that would be binding on them and could harm their respective financial interests, as well as jeopardize the integrity of their respective certified territories, if they are no longer able to serve those portions of new industrial parks within their respective territories.

Contrary to the Petitioners' allegations, the Commission's decision in this case will not establish a precedent that will be binding on anyone other than the parties to this case. As previously discussed, above, the Court of Appeals ruled almost 20 years ago in the Owen County case that an industrial park located within two adjacent certified territories could be determined to be a new electric-consuming facility, and the Commission has already ruled that such a determination is fact specific, to be made on a case-by-case basis. Thus, the only utilities that will be bound by the decision in this case are KU and Cumberland Valley.

As to the Petitioners claims of a special interest arising from harm to their respective financial interests, the Court of Appeals also ruled in the Owen County case that no compensation is due when the Commission modifies a certified territorial boundary under KRS 278.018, unless an investment had already been made in the territory. Specifically, the Court held that the primary reason that no compensation is due is that KRS 278.018 provides an exception for modifying territorial boundaries. . . . No compensable property or property rights were taken in this instance. 689 S.W.2d at 602-603. Since the only issues in this case are whether the Business Park should be considered a new electric-consuming facility and, if so, whether KU or Cumberland Valley should provide service, there is no potential to harm the financial interests of the Petitions.

Finally, the Commission notes that by Order dated July 18, 2003, it denied intervention in this case to East Kentucky Power Cooperative, Inc. (East Kentucky), the wholesale supplier to Cumberland Valley. Although East Kentucky had alleged a special interest in protecting its exclusive right to sell power to its member distribution cooperatives and avoiding adverse rate impacts from loss of sales, the Commission found East Kentucky s interest to be too remote based on the ruling in Inter-County Rural Electric Cooperative v. Public Service Commission, Ky., 407 S.W.2d 127 (1961). In that case, KU and Inter-County asserted mutually exclusive rights to serve a new manufacturing customer. The Commission denied East Kentucky s request to intervene, and the Court affirmed, finding East Kentucky s interest in the maintenance of the integrity of the service areas of all other member cooperatives and in the cost of

power and its rates and service to . . . other member cooperatives to be too remote.
Inter-County at 128.

Even though East Kentucky's intervention in this case was denied, the Commission's July 18, 2003 Order authorized East Kentucky to provide legal and technical assistance to Cumberland Valley, but not as a separate party. The Petitioners here may also provide similar assistance to Cumberland Valley.

IT IS THEREFORE ORDERED that the Petitioners' motions to intervene are denied.

Done at Frankfort, Kentucky, this 13th day of November, 2003.

By the Commission

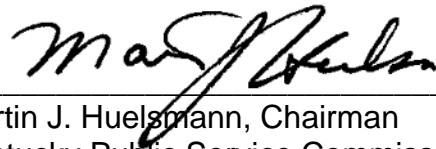
CONCURRING OPINION OF
CHAIRMAN MARTIN J. HUELSMANN

While I fully agree with the findings and conclusions set forth in the Commission's Order, I separately concur to address the points raised in the Dissent.

First, the decision to deny Petitioners' request to intervene does not amount to a denial of due process. No statute, regulation, or case law grants the Petitioners the right to intervene. Consequently, any intervention is permissive and subject to the sound discretion of the Commission.

The law in Kentucky is well settled that the only utilities that have a right to participate in a boundary dispute case are those whose rights to serve are in dispute and subject to modification. See Inter-County Rural Electric RECC, *infra*. The Petitioners do not fall within that class.

Second, it is also well settled in Kentucky law that the Commission can determine that a new industrial park, located in adjacent certified territories, is one electric-consuming facility for purposes of determining which electric supplier should have the exclusive right to serve. Any suggestion to the contrary is valid only if you ignore the Court of Appeals decision in Owen County RECC, *infra*. As to whether the industrial park at issue here should be considered a new electric-consuming facility, the Commission has made no final decision and will not do so until after the evidentiary record is fully developed and a hearing is held.



Martin J. Huelsmann, Chairman
Kentucky Public Service Commission

DISSENTING OPINION OF
COMMISSIONER ROBERT E. SPURLIN

Because I believe that denying the electric cooperatives motions to intervene in this proceeding constitutes a denial of due process, I must dissent.

This case involves fundamental legal and policy questions involving Kentucky's certified retail territory laws, KRS 278.016 *et seq.* The outcome will affect every electric utility in Kentucky. As the majority explains, we consider on its facts each case dealing with whether an entire industrial park rather than a single entity's facility should be

considered an electricity consuming facility such that an inquiry under the adjacent certified territories law is mandated by KRS 278.018(1). However, the weight and relevance accorded to each fact presented to the Commission is inextricably linked with questions of law and policy. The cooperatives whose motions are denied today should be given an opportunity to weigh in on these and related issues.

The cooperatives have a vital interest in proceedings that will affect whether they will be able to protect their right to serve large industrial customers that locate within their respective territories. Without such large customers, the cooperatives residential rates will remain higher, in general, than those of investor-owned electric companies. Denying the cooperatives an opportunity to be heard in this proceeding and thereby preventing them from protecting both their ratepayers and the principles for which the certified retail territories statutes were passed is error.

Finally, I do not agree with the majority that our previous denial of intervention to East Kentucky is comparable to the majority's denial today. East Kentucky has no certified retail territory and thus does not share the special interest of the distribution cooperatives in this case.

Accordingly, I must dissent.


Robert E. Spurlin, Commissioner
Kentucky Public Service Commission

ATTEST:


Executive Director