

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 two motions filed jointly by Cumberland Valley Electric, Inc. (“Cumberland Valley”): one to dismiss the petition of CTA Acoustics, Inc. (“CTA Acoustics”) on the grounds that it lacks standing and statutory authorization to seek the relief requested in its pending petition; and the other to grant Cumberland Valley summary judgment on the claims raised in the petition of CTA Acoustics. Both CTA Acoustics and Kentucky Utilities Company (“KU”) filed responses in opposition to both motions, and Cumberland Valley filed replies to both responses.

MOTION TO DISMISS

In its motion to dismiss, Cumberland Valley states that CTA Acoustics lacks standing and there is no statutory authority under the Territorial Boundary Act, KRS 278.016--278.018, to request Commission authority to retain KU as its electric supplier since CTA Acoustics is now located on property that lies totally within the certified territory of Cumberland Valley. Further, Cumberland Valley asserts lack of standing and statutory authority for CTA Acoustics to complain about the certified territorial boundary located on property in which it has no legal interest.

Cumberland Valley cites the allegations in CTA Acoustics' petition which request to retain KU as its electric supplier (Petition at 1 and 2) and claims that those allegations indicate that the only legal and financial interest that CTA Acoustics has in this proceeding is to retain KU as its electric supplier. Since KRS 278.016--278.018 deals exclusively with the territorial boundaries for electric utilities, Cumberland Valley argues that no customer has a legal right to retain an electric supplier if the customer relocates to the territory of a different supplier and that KRS 278.180(1) specifically prohibits an electric supplier from serving a customer located within the territory of another supplier.

On the issue of standing, Cumberland Valley notes that CTA Acoustics owns only one lot and has one electric-consuming facility within the Southeast Kentucky Regional Business Park ("Business Park") and that lot and facility are located totally within the territory certified to Cumberland Valley. Claiming that CTA Acoustics has no legal relationship or connection to the rest of the Business Park, Cumberland Valley argues that only the Business Park itself can file a request under KRS 278.018(1) to be determined a new electric-consuming facility located in two adjacent certified territories. CTA Acoustics cannot seek such a determination, according to Cumberland Valley, because to do so would require CTA Acoustics to assert the legal rights and interests of a third party, i.e., the Business Park.

Cumberland Valley states that the Territorial Boundary Act does not create any private right of action for relocating customers to retain their prior electric supplier or for a customer to seek a boundary change on property in which it has no legal interest. In Cumberland Valley's opinion, the real complaint of CTA Acoustics is that Cumberland Valley's electric rates are too high and the request for a boundary change is merely a

vehicle to obtain electric service from KU at lower rates. Under these circumstances, Cumberland Valley believes that CTA Acoustics should be filing a complaint to challenge the level of Cumberland Valley's rates, rather than seeking a boundary change for the Business Park.

In response to this motion, CTA Acoustics states that it is the first consumer within the Business Park and that it is asserting its own legal interests as a consumer, as that term is used in KRS 278.016, to request a modification of the territorial boundary in the Business Park. CTA Acoustics also states that the expressed goals of the Territorial Boundary Act include promoting "the public convenience and necessity" and avoiding "inconvenience, diminished efficiency and higher costs in serving the consumer," KRS 278.016, and that determining the Business Park to be one consuming facility will further these statutory goals.

In addition, CTA Acoustics cites prior Commission precedent as supporting the right of a customer to request a determination that an industrial park be considered one electric-consuming facility. In any event, CTA Acoustics claims that any objection to its petition on grounds of standing become moot when: (1) KU filed its response which similarly requested the Business Park be declared one consuming facility and service be awarded exclusively to KU; and (2) the Business Park expressed support for CTA Acoustics' request that only one electric utility be authorized to serve the entire Business Park.

KU also filed a response in opposition to Cumberland Valley's motion to dismiss. KU claims that KRS 278.018(1) expressly requires the Commission to determine which electric supplier should serve when "a new electric-consuming facility [locates] in two (2)

or more adjacent certified territories,” and that the statute does not address the issue of who has standing to request such a determination. Citing the broad purposes of the Territorial Boundary Act as set forth in KRS 278.016, as well as the Legislature’s directive that statutes “be liberally construed with a view to promote their objectives and carry out the intent of the legislature,” KRS 446.080, KU argues that it is only reasonable to allow a customer that is locating on part of an industrial park to request a determination under KRS 278.018(1) for the entire industrial park.

KU also argues that standing is not an issue here since the owner and developer of the Business Park, the Southeast Kentucky Industrial Development Authority, clearly has standing to request a determination under KRS 278.018(1) that the Business Park is a new consuming facility located in adjacent certified territories. Allowing such a request from the owner and developer of an industrial park is consistent with prior Commission precedent, KU argues, citing the Commission’s March 24, 1995 Order in Case No. 1995-00019.¹ Here, the owner and developer of the Business Park have expressed support for a Commission determination under KRS 278.018(1), and for KU to serve the entire Business Park.

Cumberland Valley filed replies to both responses, restating and reaffirming the positions set forth in its motion to dismiss. In addition, Cumberland Valley accuses both CTA Acoustics and KU of promoting an unlawfully expansive view of the Territorial Boundary Act. Citing Grayson RECC v. City of Vanceburg, 4 S.W.3d 526, 528 (1999), Cumberland Valley argues that the purpose of that Act is to “protect each KPSC-

¹ Case No. 1995-00019, Richmond-Madison County Industrial Corporation, and the City of Richmond vs. Kentucky Utilities Company and Blue Grass Rural Electric Cooperative.

regulated utility in its certified territory against invasion or competition by another KPSC-regulated utility,” and not to allow one utility to invade the territory of another to benefit one customer.

Based on the motions, the responsive pleadings thereto, and being otherwise sufficiently advised, the Commission finds that to the extent Cumberland Valley seeks dismissal of those portions of CTA Acoustics’ petition which request to retain KU as the supplier of electric service, the motion has merit. There is no provision in the Territorial Boundary Act, or elsewhere in KRS Chapter 278, that authorizes a customer to continue receiving electric service from the same electric supplier when that customer relocates to a territory certified to another supplier. Thus, the Commission has no authority to allow CTA Acoustics to retain KU as the electric supplier to a parcel of property located entirely within the territory certified to Cumberland Valley.

However, the petition filed by CTA Acoustics also requests a determination under KRS 278.018(1) that the entire Business Park in which CTA Acoustics is located to be declared one electric-consuming facility and service be awarded exclusively to KU. (Petition at 3 and 5). KRS 278.018(1) provides, in pertinent part, that:

In the event that 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).

Thus, the Commission has the authority to grant the relief CTA Acoustics requests under KRS 278.018.

Cumberland Valley also claims that CTA Acoustics lacks standing to request relief under KRS 278.018(1) for what Cumberland Valley characterizes as “the territorial boundary outside of any property in which CTA has a legal interest.” Cumberland

Valley's Motion at 1. The Commission finds no merit in this argument. In asserting CTA Acoustics' lack of standing, Cumberland Valley has too narrowly defined the parameters of the boundary dispute presented here. The fact that the boundary line between the territories of KU and Cumberland Valley within the Business Park does not intersect the property of CTA Acoustics does not mean that CTA Acoustics lacks an interest in determining whether the Business Park is a new electric-consuming facility (and, if so, which of the adjacent electric suppliers should be authorized to serve the entire Business Park).

CTA Acoustics is the first electric consumer in what appears to be a new industrial park and it clearly will be directly affected by the declaration it requests under KRS 278.018(1). Of significance to our decision here is the fact that the developer and owner of the Business Park itself has filed testimony in support of a Commission declaration under KRS 278.018(1). Specifically, the Business Park has stated that:

We are concerned that companies coming into our business park would have to be served by two different electric suppliers. This appears to us to require redundant equipment.

* * *

It would make it less complicated to have one electric supplier for the park.

Direct Testimony of Robert (Bob) S. Terrell at 3 and 5, filed August 6, 2003. Since KRS 278.018(1) does not expressly state who can or cannot request a determination that an industrial park is a new electric-consuming facility located in adjacent certified territories, allowing this case to proceed based on the request of the first consumer, with the concurrence and support of both the owner and developer of the industrial park and one of the adjacent electric suppliers (KU), is reasonable.

In denying Cumberland Valley's motion to dismiss on the issue of standing, we specifically reject its argument that proceeding to adjudicate the merits of CTA Acoustics' petition under KRS 278.018(1) violates the purpose of the Territorial Boundary Act. That portion of Cumberland Valley's motion seeking dismissal of CTA Acoustics' request to retain KU as the electric supplier has been granted. This case is no longer, assuming it ever was, about a customer attempting to choose its electric supplier in violation of the specific provisions or purposes of the Territorial Boundary Act. Rather, this case is about whether the Business Park falls within the provisions of KRS 278.018(1) as a new electric-consuming facility located within adjacent certified territories and, if so, which supplier should be authorized to serve the new facility.

MOTION FOR SUMMARY JUDGMENT

Cumberland Valley asserts that, even assuming that CTA Acoustics has standing to request a determination under KRS 278.018(1) that the Business Park is a new electric-consuming facility, prior Commission precedent applied to the facts of this case will only support a finding that the Business Park is not a new electric-consuming facility. Based on the facts as recited by Cumberland Valley, and its analysis of prior Commission precedent, Cumberland Valley states that it is entitled to a summary judgment in its favor since the Business Park cannot be considered a new electric-consuming facility under KRS 278.018(1).

CTA Acoustics and KU filed responses in opposition to the motion for summary judgment. Both responses state that the Commission rarely grants such motions because the resolution of disputes arising under the Territorial Boundary Act requires detailed findings of facts which are specific to each dispute. Further, both responses

assert that Cumberland Valley's recitation of the facts does not include many of the facts set forth in the testimony of CTA Acoustics and KU. Finally, both responses conclude that there are material facts in dispute and that an evidentiary hearing is required for the Commission to resolve the facts.

In reply to these responses, Cumberland Valley argues that there is no dispute as to the facts relating to whether the Business Park is a new electric-consuming facility. Cumberland Valley asserts that prior Commission precedent has severely restricted the facts upon which a new industrial park can be determined to be a new electric-consuming facility and the facts here fall short.

With respect to Cumberland Valley's motion for summary judgment, the Commission finds, as it has in previous boundary dispute cases, that each case must be decided on its specific facts. While Cumberland Valley has presented what it characterizes as the material facts as viewed in the light most favorable to the Petitioner, both CTA Acoustics and KU contest those facts and assert that their respective testimonies support contrary findings. Under these circumstances, the Commission finds summary judgment to be inappropriate. The Commission notes that even in cases where the parties have agreed to stipulate the facts, the Commission's responsibility to protect the public interest may well justify further inquiry and hearing.

IT IS THEREFORE ORDERED that:

1. Cumberland Valley's motion to dismiss is granted to the extent that there is no statutory authority for CTA Acoustics to retain KU as the electric supplier and denied to the extent that CTA Acoustics has standing to request a declaration under KRS 278.018(1).

2. Cumberland Valley's motion for summary judgment is denied.

Done at Frankfort, Kentucky, this 21st day of January, 2004.

By the Commission

DISSENTING OPINION OF
COMMISSIONER ROBERT E. SPURLIN

I agree with the majority that CTA Acoustics has no statutory right to obtain service from its choice of retail electric supplier. However, I would take the next logical step and grant Cumberland Valley's motions. There simply is no right on the part of a Kentucky retail electricity customer to demand service from a supplier that does not serve the customer's certified territory. Nor is there a right on the part of a retail supplier to serve a customer not within its territory.

I was a member of the Commission when the "certified territory" statutes went into effect in 1972. The intent is expressed clearly in KRS 278.016:

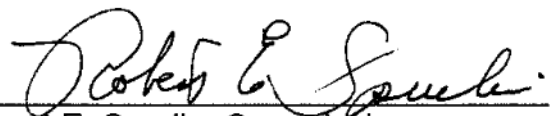
It is hereby declared to be in the public interest that, in order to encourage the orderly development of retail electric service, to avoid wasteful duplication of distribution facilities, to avoid the unnecessary encumbering of the landscape of the Commonwealth of Kentucky, to prevent the waste of materials and natural resources, for the public convenience and necessity and to minimize disputes between retail electric suppliers which may result in inconvenience, diminished efficiency and higher costs in serving the consumer, the state be divided into geographical areas, establishing the areas within which each retail electric

supplier is to provide the retail electric service as provided in KRS 278.016 to 278.020 and, except as otherwise provided, no retail electric supplier shall furnish retail electric service in the certified territory of another retail electric supplier.

Nowhere in this statute is there provision for a company to forum-shop for the cheapest electricity.

CTA Acoustics is located totally within the certified territory of Cumberland Valley. The Commission erred when it determined that interim service could be provided by KU. It compounded the error by making that determination without first having held a hearing. Matters were only made worse by the Commission's denial of other electric cooperatives' motions to intervene.

This case does not contain a single disputed fact that is material to the issue before us: whether CTA Acoustics is entitled under Kentucky law to serve a customer that is located within its certified territory. Consequently, I must respectfully dissent to the Commission's denial of CTA Acoustics' motion for summary judgment, and to its decision to retain a case which could have been -- and should have been -- dismissed as a matter of law on the day it was filed.



Robert E. Spurlin, Commissioner
Kentucky Public Service Commission

ATTEST:



Executive Director