

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

MATRIX ENERGY, LLC)
FOR DETERMINATION OF)
RETAIL ELECTRIC SUPPLIER) CASE NO. 2003-00228

O R D E R

This matter is before the Commission on the petition of Matrix Energy, LLC (“Matrix”) for a determination that Kentucky Power Company d/b/a American Electric Power (“Kentucky Power”) is entitled to supply retail electric service to Matrix. After the petition was filed, a procedural schedule was established which provided for discovery and the filing of prepared testimony. A hearing was held on November 24, 2003 for the purpose of cross-examining all witnesses who had filed prepared testimony.

Subsequent to the hearing, Big Sandy Rural Electric Cooperative (“Big Sandy”), which asserts a statutory right to serve Matrix, filed a motion to dismiss the petition. Responses to the motion were filed, and the parties have fully briefed the issues. Based upon the following analysis, the Commission finds that Big Sandy’s motion to dismiss should be denied and that the petition of Matrix should be granted.

BACKGROUND

Matrix, a limited liability company, intends to open a new underground mine to extract the Alma coal reserves in Martin, Floyd, and Johnson counties. Its affiliate, Czar Coal Corporation (“Czar”), leases the property upon which the coal reserves are located. Coal has been mined on the Czar site for approximately 30 years, although

Matrix was not formed until 2002. Kentucky Power has been providing retail electric service since the early 1970's for mining operations located on the Czar property. That service has been provided through the Pevler substation, which is now owned by Matrix, except for three 69 kV switches and metering equipment owned by Kentucky Power.

The Alma coal reserves are located in two adjacent certified retail territories. Approximately 24 percent of the permitted minable coal reserves, as well as the mine portal, are located in Big Sandy's territory. The remaining 76 percent of the permitted minable reserves are within Kentucky Power's territory. Matrix's mining plan calls for electricity to be supplied to the mine through four separate locations: One is the mine portal, located approximately 1,500 feet within Big Sandy's territory; and the other three are bore holes within Kentucky Power's territory. Upon commencement of commercial operation, Matrix will be mining reserves within the territories of both Big Sandy and Kentucky Power.

STATUTORY STANDARD

The Territorial Boundary Act establishes procedures for creating exclusive service territories for retail electric suppliers. The Act provides, in pertinent part:

Except as otherwise provided herein, each retail electric supplier shall have the exclusive right to furnish retail electric service to all electric-consuming facilities located within its certified territory, and shall not furnish, make available, render or extend its retail electric service to a consumer for use in electric-consuming facilities located within the certified territory of another retail electric supplier;

KRS 278.018(1). Big Sandy argues that, as the mine portal is located in its certified territory, it has the exclusive right to serve Matrix.¹ Thus, the first issue to be adjudicated is whether the electric-consuming facilities of Matrix are located within Big Sandy's certified territory.

As set forth in KRS 278.010(8), the term "electric-consuming facilities" is defined as "everything that utilizes electric energy from a central station source." Since the equipment that mines the coal from the reserves consumes electric energy, the determining factor is the location of the coal reserves. Here, those reserves are located in the certified territories of both Big Sandy and Kentucky Power. This finding is consistent with Commission precedent in territorial boundary dispute cases that the location of a mine portal is not dispositive when the reserves to be mined lie beneath two utilities' respective territories.²

Since the electric-consuming facilities of Matrix are located in two certified territories, KRS 278.018(1) provides 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).

KRS 278.017(3), in turn, requires the Commission to consider these factors:

- 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.

¹ Memorandum Brief of Big Sandy ("Big Sandy Brief") at 3-4.

² See, e.g., Case No. 93-211, *Henderson Union Rural Electric Cooperative Corp. v. Kentucky Utilities Co.* (Order dated March 3, 1994) and Case No. 2002-00008, *Kenergy Corporation v. Kentucky Utilities Co.* (Order dated October 18, 2002).

- 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.³

MOTION TO DISMISS

Big Sandy argues that, because Matrix is not a retail electric supplier, it lacks statutory authority to bring this case. Big Sandy asserts that the purpose of the statutory scheme is to minimize disputes “between retail electric suppliers.” KRS 278.016. Accordingly, it concludes, the statutes create no private right of action for customers. Further, permitting customers to bring actions contradicts the General Assembly’s stated desire to minimize disputes between retail electric suppliers, for a customer who finds himself in the certified territory of a higher rate provider will always have incentive to file an action. Big Sandy further speculates that, absent the Matrix application, Kentucky Power and Big Sandy “could have settled this dispute” without involving the Commission.⁴

Big Sandy also argues that, as Czar owns the distribution facilities, as well as the right to the coal, and as Matrix possesses only a non-exclusive right to conduct mining operations pursuant to its contract, Czar, rather than Matrix, is the real party in interest. Big Sandy points out that no representative of Czar testified at the hearing.

Kentucky Power responds that the Commission has not historically dismissed customer applications requesting a specific retail electric supplier if the basis for the

³ These factors also served as those that the Commission was to consider when determining, as of June 16, 1972, whether a protest of the initial certification of territory should result in a change of the certified territory map. Thus, the reference to proximity to the “certified territory” rather than to the “electric-consuming facility.”

⁴ Big Sandy Brief at 10.

request is grounded in the statutes. It cites, among other cases, *Owen County Rural Electric Cooperative Corp. v. Public Service Commission*, Ky. App., 689 S.W.2d 599, 600 (1985), as a matter initially brought before the Commission by a customer, the owner of an industrial park.⁵ Kentucky Power also notes that Big Sandy failed to raise this issue until after two rounds of data requests and a day-long hearing, and should not be permitted to raise it now.

Kentucky Power also disagrees with Big Sandy's assertion that Czar, rather than Matrix, is the real party in interest. Kentucky Power points out that Matrix and Czar are affiliated companies owned by the same people, and that common employees provide services for both. For example, Paul Horn – although nominally an employee of another affiliate, Beech Fork Processing, Inc. ("Beech Fork") – performs services for all three affiliates. His testimony demonstrates that he "oversee[s] the operation of the mine, including the manner in which power is supplied to the mine site. I am also involved in planning how the mining is to be performed, obtaining the proper permits and ensuring the payment of royalties. I perform these duties for Beech Fork and for its affiliated companies, such as Matrix Energy, LLC ... and Czar...."⁶

Kentucky Power contends that Mr. Horn's testimony puts to rest Big Sandy's argument that no one testified on behalf of Czar, and contends that Mr. Horn's testimony also demonstrates that Matrix would be paying at least a portion of the power bill regardless of whether a new tap or the existing Pevler substation is used to provide

⁵ Response of Kentucky Power to Motion to Dismiss ("Kentucky Power Response") at 3.

⁶ Kentucky Power Response at 6, *quoting* Prefiled Testimony of Paul Horn, at 1-2.

electric service.⁷ Kentucky Power cites *Kentucky Center for the Arts v. Whittenberg Engineering & Construction Co.*, Ky. App., 746 S.W.2d 71, 73 (1987), wherein the Kentucky Center for the Arts was found to be a real party in interest, though it lacked legal title or interest in the construction project at issue, because of its “significant interest” in the facts of the case. The interests of Matrix are, Kentucky Power asserts, similarly significant.

Matrix also filed a response to Big Sandy’s motion to dismiss, arguing that KRS 278.016 contains numerous grounds for enacting certified territory laws that demonstrate legislative concern for consumers. Thus, the statutes are not, Matrix argues, intended simply to minimize disputes between suppliers.⁸ Matrix also cites the many precedents for customer-filed petitions for territorial boundary requests and states that its many responsibilities under its contract with Czar indicate that it is a real party in interest.

A motion similar to that of Big Sandy was filed with the Commission in Case No. 2003-00226, *Petition of CTA Acoustics, Inc. to Retain Kentucky Utilities Company as Power Supplier and For Expedited Treatment*. In the January 21, 2004 Order denying that motion, it was noted that, while KRS 278.018(1) requires the Commission to determine which electric supplier should serve when a bona fide dispute exists, the statute does not specify who may request the determination. Even if it did, the issue would be moot when, as here, the retail electric suppliers in question clearly contest the issue. Big Sandy’s reading of the statutory scheme is, accordingly, much narrower than

⁷ Kentucky Power Response at 6.

⁸ Response of Matrix to Motion to Dismiss (“Matrix Response”) at 2.

the statute and Commission precedent indicate. Protecting consumers, as well as minimizing disputes between electric utilities, are two of the multiple reasons expressed by the Legislature in KRS 278.016 for enacting the certified territory statute.

The Commission finds that Matrix is, in fact, a real party in interest due to its manifold responsibilities under its contract with Czar, and due to the fact that Czar and Matrix are owned by the same individuals and coordinate their operations to such an extent that a single employee performs key functions for both of them. To dismiss this case because Czar rather than Matrix is the real party in interest would be to elevate form over substance.

In addition, neither the statutes nor Commission precedent requires a case of this nature to be brought initially by a utility. Finally, even though Matrix filed the petition, two utilities clearly claim the right to serve and have actively participated in this case. For all these reasons, the motion to dismiss should be denied.

APPLICATION OF KRS 278.017(3)

The first of the four factors to be considered in a dispute concerning a new electric-consuming facility located in adjacent territories is the “proximity of existing lines” to the facility.

Kentucky Power’s distribution system extends within the surface boundaries of the Matrix mine tract and is used to provide service to six customers in the tract. In addition, distribution lines owned by Czar and Matrix, including the line that currently provides temporary service to Matrix, are located within the boundaries of the Matrix mine tract. Though the latter facilities are not owned by Kentucky Power, Kentucky Power notes that they should be treated as Kentucky Power facilities for the purpose of

applying KRS 278.017(3)(a), because the statute's purpose is to keep costs low. If service is provided through the Pevler substation, existing facilities will be used.⁹ In contrast, Big Sandy's distribution facilities are outside the boundaries of the Matrix mine, with the closest line approximately 4,000 feet from the mine entrance.

Big Sandy asserts that, pursuant to the statutory criteria, the parties are on equal footing; but the record does not support the assertion. Due to the high voltage power requirements of Matrix, electric service must be provided through a transmission line, not a distribution line. The record demonstrates that Matrix will be served by a 69 kV line, and that the nearest 69 kV line belonging to Big Sandy's transmission (and generation) supplier, East Kentucky Power Cooperative, Inc. ("East Kentucky Power"), is three times as far from the mine entrance as Kentucky Power's 69 kV line.¹⁰ Thus, Kentucky Power's 69 kV facilities needed to provide service are in much closer proximity to the Matrix mine.

The record also demonstrates that Kentucky Power was serving the area since late 1950, whereas Big Sandy constructed its closest distribution line in 1955.¹¹ In fact, Kentucky Power has been providing service to other coal mining operations within the boundaries of the Czar property since the 1970's.

Next, Kentucky Power presented testimony establishing that its 69 kV transmission facilities are adequate to provide service to Matrix. If there were any

⁹ Post-Hearing Brief of Kentucky Power ("Kentucky Power Brief"), at 12, citing Transcript at 13.

¹⁰ Response of Big Sandy to Data Request (2)(a), (2)(b).

¹¹ Wagner Testimony at 3; Kentucky Power Response to Hearing Data Request 2; Big Sandy Response to Data Request (2)(a), (2)(b).

doubt, it is dispelled by Big Sandy's plan to use the same Kentucky Power transmission line, rather than those of East Kentucky Power, to provide service. Moreover, Kentucky Power can provide service sooner, and at considerably less expense, because the existing Pevler substation would be used.¹²

As to each supplier's ability to provide electric service at reasonable costs (KRS 278.017(3)(c)), service from Big Sandy would require a new tap on the Dewey-Inez 69 kV line, at a cost of \$332,000, plus a new substation at an estimated cost of \$172,000. On the other hand, Matrix can be served by Kentucky Power through its existing tap on the Dewey-Inez 69 kV line and the existing Pevler substation. Consequently, the costs for service from Kentucky Power are unquestionably more reasonable. Although there is some evidence in the record regarding each supplier's rates for the quantity of electricity anticipated to be consumed by Matrix, the Commission has not considered this evidence due to the other substantial evidence as discussed herein.

The final factor, avoidance of duplication of facilities, also weighs in favor of Kentucky Power. If Big Sandy provides service, it will have to build a new tap on

¹² In its Response to Hearing Data Request, Item No. 4 Supplemental, Kentucky Power explains that:

The cost for AEP [Kentucky Power] to serve the entire 5 to 7 MW load at the Matrix Mining [sic] from the existing Pevler 69 kV delivery point will be approximately \$154,000 and will take up to four months to complete. [T]his includes motorizing the two existing 69 kV in-line switches and using the existing metering equipment at the Pevler 69 kV delivery point.

In comparison, establishing a new interconnection point for EKPC [East Kentucky Power] on the Dewey-Inez 69 kV line will cost approximately \$332,000 plus site preparation and take up to six months to complete. The estimated cost also assumes that EKPC will provide, at their cost, land for the station and the graveled road for access to the station through a locked gate, in a timely manner to allow AEP time to install the facilities within the six-month period.

Kentucky Power's 69 kV Dewey-Inez line at a cost of \$332,000, and a new substation will be necessary.¹³ In contrast, Kentucky Power will provide service using an existing tap and the existing Pevler substation, thereby permitting Matrix to use the 0.8 miles of existing distribution line built to provide temporary service.¹⁴ Big Sandy itself pointed out that it had decided to obtain transmission service from Kentucky Power because, among other things, "EKPC [East Kentucky Power] did not want to duplicate transmission facilities. AEP [Kentucky Power] has a 69 kV line and a 138 kV line on the Beechfork property capable of servicing this load."¹⁵

The Commission finds that, based on the statutory factors discussed above, Kentucky Power is lawfully entitled to serve Matrix. The record indicates that the statutory factors, particularly the cost to provide service and the unnecessary duplication of infrastructure, support Matrix's petition. Duplication of facilities is not favored by law because it results in "excessive investment in relation to efficiency."¹⁶ Further, Big Sandy's attempt to distinguish Czar from Matrix – for the purpose of establishing that the Pevler substation may not actually be available – should be rejected. The record demonstrates that Czar and Matrix are under the same ownership, that they share employees, and that, in short, their full cooperation with each other is assured.

¹³ Transcript at 10, 12, 43-44.

¹⁴ Transcript at 13, 42.

¹⁵ McKinney Direct Testimony at 4.

¹⁶ *Kentucky Utilities Co. v. Public Service Comm'n*, 252 S.W.2d 885, 891 (1952).

TEMPORARY ELECTRIC SERVICE

Matrix spent considerable time and effort to develop this new mine for commercial operation. That process included the digging of a shaft and slope for access to the mine, which necessitated electric service. Matrix has been receiving temporary electric service from Kentucky Power since 2002 pursuant to what appeared to be written authorization from Big Sandy for Kentucky Power to provide temporary service.

After this case was filed, Big Sandy indicated that its written authorization was not for the Matrix mine but a different mine in a nearby location. Consequently, Big Sandy now claims that Kentucky Power is willfully trespassing on Big Sandy's service territory and that Kentucky Power should be required to pay damages to Big Sandy.

Based on the evidence of record, the Commission finds no basis to grant the relief requested by Big Sandy. First, KRS Chapter 278 does not authorize the Commission to award monetary damages for willful trespass or any other statutory or common law violation. Second, Kentucky Power provided temporary electric service only after Matrix provided written authorization for such service from Big Sandy. Kentucky Power relied upon this authorization in good faith, and had no reason to believe that the mine location referenced in the authorization letter was not that of the Matrix mine. Third, since Matrix is a new electric-consuming facility located in the certified territories of both Kentucky Power and Big Sandy, Kentucky Power is not willfully trespassing on the service territory of Big Sandy.

The Commission further finds that these disputes could possibly be avoided if electric suppliers took reasonable steps to verify information prior to initiating temporary

service. When service is initiated pursuant to another supplier's authorization, verification of that authorization, as well as the exact location of the customer's facilities, is essential to ensure compliance with the provisions of the Territorial Boundary Act.

IT IS THEREFORE ORDERED that:

1. Big Sandy's motion to dismiss is denied.
2. Kentucky Power is authorized to provide retail electric service to Matrix.

Done at Frankfort, Kentucky, this 3rd day of May, 2004.

By the Commission

ATTEST:


Executive Director