

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

JOINT APPLICATION OF)	
LOUISVILLE GAS AND ELECTRIC)	
COMPANY AND KENTUCKY UTILITIES)	
COMPANY FOR THE CONSTRUCTION)	CASE NO. 2005-00142
OF TRANSMISSION FACILITIES IN)	
JEFFERSON, BULLITT, MEADE, AND)	
HARDIN COUNTIES, KENTUCKY)	

O R D E R

This matter is before the Commission on the joint application of Louisville Gas and Electric Company ("LG&E") and Kentucky Utilities Company ("KU") (jointly, "LG&E/KU" or the "Company") for a Certificate of Public Convenience and Necessity ("CPCN") to construct a 41.9 mile 345 kV transmission line running from LG&E's Mill Creek Substation, through Jefferson, Bullitt, Meade, and Hardin counties, to KU's Hardin County Substation.¹ The proposed transmission facilities will be used to transmit electric power required by the projected load that will be served from the proposed 750 MW nominal net (732 MW summer rating) supercritical, pulverized, coal-fired, base-load generating unit to be located at the Trimble County Generating Station ("TC2")² as

¹ This application is one of a package of three proposed transmission lines before the Commission. The other two applications are Case Nos. 2005-00154 and 2005-00155, and Orders in those cases are being issued today as well.

² This proposed plant addition is currently before the Commission in Case No. 2004-00507 and the Siting Board in Case No. 2005-00152. Neither agency has, as of the date of this Order, granted a certificate for the addition.

well as base load that will be served from other sources. The projected cost of the proposed facilities is \$59.1 million.

PROCEDURAL BACKGROUND

LG&E/KU submitted its application to the Commission on May 11, 2005. The Commission entered procedural Orders on May 23, June 10, and June 20, 2005, setting, among other deadlines, dates for interventions, the filing of testimony, and public hearings. The May 23, 2005 Order also extended the time for the Commission to process the case from 90 to 120 days, pursuant to KRS 278.020(8). The Commission granted full intervention to Cathy and Dennis Cunningham and Robert Keifer and granted limited intervention to Betty and Samuel Coyle. Only the Cunninghams participated actively in the case. The Commission also received numerous protest letters.

The Commission's consideration of the need for the proposed transmission line included a review of LG&E/KU's engineering studies and data and the report of the Commission's consultant, the Liberty Consulting Group ("Liberty"). Liberty filed its report analyzing LG&E/KU's proposal on June 15, 2005 ("Liberty Report").

The Commission held a local public hearing on July 12, 2005, in Elizabethtown, Kentucky, attended by 114 people, including representatives of LG&E/KU. Twenty-nine members of the public gave oral comments to the Commission, and two filed written comments. The Commission held an evidentiary hearing at its offices in Frankfort, Kentucky on July 26 and 27, 2005.

PROCEDURAL ISSUES

The Cunninghams filed three motions to dismiss the application. First, they argued that this application should not have been filed until the Trimble generating plant addition is certificated. LG&E/KU has countered, however, that it needs to start the transmission acquisition and construction process at about the same time as it begins to build the plant addition to make sure the lines are ready to accept the power as soon as the generator is ready. Nothing in KRS 278.020 specifically addresses this question and, without specific statutory authority to require the sequential filings that the Cunninghams urge, the Commission does not believe it should dismiss the application on this ground. Nevertheless, the Commission recognizes that issuance of a CPCN in this case is dependent upon issuance of a CPCN in Case No. 2004-00507. LG&E/KU has acknowledged that issuance of a CPCN in this case should be contingent upon issuance of a CPCN in that one. This agreement should alleviate the Cunninghams' concern.

Second, the Cunninghams argue that the application is premature because all environmental, historical, and other required assessments are not complete. They argue that the Commission should not consider this application until the Company has obtained all other necessary permits. Their expert on this issue, Leslie E. Barras, testified that the project will be subject to approval under Section 106 of the National Historic Preservation Act.

The Commission likewise finds no support in KRS 278.020 for this position. Statutes that require a particular agency or application to be the "last stop" are easy to draft; they simply state that the application for a specific permit shall not be filed until all

other necessary permits are already in hand. The absence of such a provision in KRS 278.020 is significant.

In deciding how to proceed with the numerous applications required for such a project, utilities must apply for some permit first. If they apply to the Commission first, get a CPCN, and then apply for other permits and one or more of those later ones is rejected, they may well have to reapply here. On the other hand, if they get their other permits first, the Commission may reject the proposed route and, in that case, they would have to reapply for the other permits. In the end, the order in which they choose to apply for the different approvals is at the discretion of the utilities. Therefore, under the wording of KRS 278.020, the Commission finds that it does not have the authority to require the Company to obtain any other permits before filing its application with the Commission.

Third, the Cunninghams argue that they have been denied due process because of the truncated schedule in this case, specifically their deadline for filing testimony.³ The deadlines in the procedural schedule are dictated by the requirement in KRS 278.020(8) that the Commission must issue a final decision in no more than 120 days. Thus, at its heart, this motion asks the Commission to find that the statutory provisions requiring a decision on such a shortened schedule violates their Constitutional rights. There can be no clearer axiom of administrative law than that “an administrative agency cannot decide constitutional issues,” *Commonwealth v. DLX, Inc.*, 43 S.W.3d 624, 626 (Ky. 2001). For all these reasons, the Cunninghams’ motions to dismiss the application on these procedural grounds should be denied.

³ The Commission points out that the testimony was originally due on July 15, 2005 and the Cunninghams were granted an extension until noon on July 21, 2005.

Finally, the Cunninghams assert that LG&E/KU did not respond completely to their data requests. Although they did not press for a decision on this motion at the hearing, the Cunninghams reiterated and supplemented this motion in an August 29, 2005 filing. The Commission will not rule separately on this motion given the decision issued here.

CPCN STANDARD

The issues to be decided in an application for a CPCN to construct facilities are (1) whether the facilities are needed and (2) whether the construction will result in a duplication of facilities. *E.g., Kentucky Utilities Company v. Public Service Commission*, 252 S.W.2d 885 (Ky. 1952).

While numerous witnesses at the local hearing argued that the line is not needed, the Cunninghams presented only one witness, Geoffrey M. Young, at the evidentiary hearing on this first issue. His testimony discussed the use of alternative technologies and techniques in a general sense that the Commission does not find realistic. Moreover, under cross-examination from LG&E/KU he admitted, “Nowhere in my testimony do I state that these alternatives necessarily are preferable or should be installed in preference to your proposed power line.”⁴

LG&E/KU’s witnesses testified that, if the Trimble plant addition is built, the line will be required. The Company further stated that the main goal of the transmission project is to ensure the reliability of the network at the least cost to the public. The transmission planning studies by both LG&E/KU and the Midwest Independent Transmission System Operator, Inc. (“MISO”) considered this and the other two

⁴ Transcript (“Tr.”) p. 174, lines 2-4.

proposed lines⁵ as a package designed to accommodate bringing TC2 on-line. The transmission planning studies considered the entire transmission system of both KU and LG&E as a whole in searching for the best way to protect the system once TC2 came on-line. Liberty reviewed the transmission planning processes and preliminary transmission studies of LG&E/KU and the additional work of MISO transmission planning engineers. MISO performed all power flow and short circuit studies and all transient and long-term stability studies. LG&E/KU performed an internal short circuit analysis to verify the short circuit results obtained by MISO. Liberty agreed with the Company that the line, in addition to the other two proposed lines, will be required to carry the power from TC2 and that it should be built on the proposed schedule.⁶ Based on the testimony and other record evidence, the Commission finds that the need for the proposed line has been established and will be required upon commencement of operations at TC2.

The second issue, regarding the potential for duplication of facilities, is significantly more complicated and was fiercely contested. Public witnesses complained about a multitude of issues, such as splitting family farms, coming too close to residences, and destroying the potential marketability of properties for later subdividing.

In *Kentucky Utilities*, the Court of Appeals, then Kentucky's highest court, defined "duplication of facilities" to mean that the Commission must examine proposed facilities "from the standpoints of excessive investment in relation to efficiency, and an

⁵ These lines are the subject of Case Nos. 2005-00142 and 2005-00155.

⁶ Liberty Report, p. I-3.

unnecessary multiplicity of physical properties.” *Id.* at 891. The Commission in that case had approved a substantial expansion of East Kentucky Power Cooperative, Inc.’s (“EKPC”) system, granting CPCNs for both generation and transmission facilities. The Court affirmed the CPCN for the generating plant, but remanded the case to the Commission to decide if the transmission lines proposed by EKPC would needlessly duplicate existing lines of other utilities, stating:

It is our opinion that the case should be remanded to the Public Service Commission for a further hearing addressed to the question of duplication from the standpoint of an excessive investment in relation to efficiency, and from the standpoint of inconvenience to the public generally, and economic loss through interference with normal uses of the land, that may result from multiple sets of right of ways [sic], and a cluttering of the land with poles and wires.

Id. at 892.

Here, LG&E/KU has proposed the route that it determined to be the best and lowest cost. In the context of the MISO transmission studies, the package of lines represented by this specific line and the other two lines (Case Nos. 2005-00142 and 2005-00155) represents the least-cost option.

The Commission recently issued a decision in Case No. 2005-00089 in which it rejected an application by EKPC to build a transmission line in Rowan County (“Rowan Order”). There the Commission set the standard for determining if a proposed line will create wasteful duplication of facilities, stating, “future applications should comprehensively consider the use of existing corridors in planning future transmission.” That case pointed out that, in deciding the issue, “the Commission must balance all relevant factors. . . , [including] the availability of an alternative route and the magnitude of the increased cost of that alternative route.”

The witnesses for LG&E/KU testified that they looked at various alternative routes, but something went very wrong with the Company's analysis. LG&E/KU produced only one 13-page document that they labeled a "final study."⁷ They subsequently produced a PowerPoint presentation from their consultant, Photo Science Geospatial Solutions ("PSGS"), that LG&E/KU said was "preliminary."⁸ There are glaring inconsistencies within and between these studies. For example, the PSGS study is incomplete on its face; LG&E/KU's witness testified that it did not include the entire route the Company proposed.⁹ It also includes routes shown by green lines that are not discussed in the presentation at all,¹⁰ and it refers to "segments" that are not identified or explained.¹¹ When asked where the scoring of the green lines might be, the witness said, "They were probably copied over the top of."¹² In LG&E/KU's study, one route is called by two different names (East route and Far East route),¹³ with the document apparently having been revised to discuss only three of the four referenced routes.¹⁴

⁷ Tr. p. 200, lines 15-16.

⁸ Tr. p. 193, line 5.

⁹ Tr. p. 188, lines 6-9.

¹⁰ Tr. pp. 240-241.

¹¹ Tr. p. 191, line 15; p. 192, line 14.

¹² Tr. p. 242, line 3.

¹³ Tr. p. 210, lines 1-5.

¹⁴ Tr. pp. 209-211.

Based on the Company's inconsistent testimony and data request responses, the Commission has concerns about the manner in which LG&E/KU conducted its analysis. The document that the Company produced in discovery is not a comprehensive study and does not constitute substantial evidence to support a final decision on the location of a major transmission line. It shows, at a minimum, that LG&E/KU did not adequately study a sufficiently wide array of alternative routes for the proposed line.

CONCLUSIONS

In implementing the amendments to KRS 278.020, the Commission must analyze both issues Kentucky courts have identified as bearing on the issuance of a CPCN: (1) whether the facilities are needed and (2) whether the construction will result in a duplication of facilities. With regard to the first, the Commission has already found in this Order that the facilities are needed. As to the second, the Commission here reaffirms the holding in the Rowan Order that the applicant must comprehensively consider existing corridors and utility lines when it applies for a transmission line CPCN. Without this information, the Commission cannot determine whether the standards set forth in *Kentucky Utilities* are satisfied. The Commission finds that LG&E/KU's study of alternative routes in this case was not sufficiently comprehensive.

With today's issuance of this Order and the Order in Case No. 2005-00154, the Commission has now denied transmission CPCNs in three of the last four cases decided.¹⁵ With the recent change in the law, however, these decisions should not be misinterpreted as indicating a reluctance by the Commission to approve the construction of new transmission lines. The Commission fully understands the need for

¹⁵ The Commission previously rejected EKPC's application in Case No. 2005-00089 and today granted the uncontested application in Case No. 2005-00155.

a robust transmission infrastructure; indeed, in each of the three cases, we found the applicant proved a need for a line. Nevertheless, the Commission is mindful of its duties in administering the law of the Commonwealth, and a key element of that law is the admonition from over half a century ago to guard against “multiple sets of right of ways and a cluttering of the land with poles and wires.”

As the Commission discussed in the Rowan Order, a change in the law often results in some parties being caught in a dilemma wherein they began a process operating under one set of laws, and the laws change. Sometimes, as here, this change results in a significant change in the approach the parties may need to take.

These recent Orders have been the first opportunity for the Commission to apply established legal precedent to applications under the new statute. While in the short term this transition may result in minor delays in the construction of lines, in the long term the Commonwealth and its citizens will benefit from a sharing of utility easements, whenever possible.

Therefore, the Commission finds that additional transmission facilities are required to integrate the proposed TC2 generating plant into the transmission grid. We further find that LG&E/KU has established a need for such a project. Nevertheless, the Commission lacks sufficient information to determine if the proposed line would result in a wasteful duplication of facilities. Specifically, the Commission finds that LG&E/KU failed to adequately consider the use of existing rights-of-way, transmission lines, and corridors. As such, the Commission cannot determine if approval of it would violate the standards set out in the *Kentucky Utilities* case.

The Commission, having considered the evidence and testimony offered in this proceeding and being otherwise sufficiently advised, finds and concludes that LG&E/KU's application for a CPCN to construct the proposed transmission line should be denied. The Commission invites LG&E/KU to reapply for a CPCN to construct the needed transmission facilities after the Company has conducted a more thorough review of all reasonable alternatives, including locating the line partially or fully along existing transmission corridors.

COMPANY RESPONSE TO PUBLIC COMMENTS

Finally, the Commission must address LG&E/KU's response to the comments public witnesses gave at the July 5, 2005 hearing. In short, the Commission is disappointed with the approach the Company took and gives LG&E/KU and all other similar applicants notice that we expect a different response in future cases.

The Commission's general complaint jurisdiction is broad. KRS 278.260. When a customer files an informal complaint with the Consumer Services Division, the utility is required to respond within a certain number of days. If the complaint cannot be resolved informally, it may progress to a formal complaint. From that point the complaint process may follow any number of different procedural paths, including a full hearing and Commission decision. The amendments to KRS 278.020 also specifically offer persons adversely affected by a proposed transmission line an opportunity to make comments in a public hearing, thereby consolidating them all into one proceeding.

In this case, the Commission held a hearing in Elizabethtown to hear customer comments, and many customers complained. When asked at the evidentiary hearing how LG&E/KU intended to address those complaints, the Company simply responded

that it would deal with them once the Commission issued a certificate.¹⁶ As the witness readily agreed, this approach effectively precludes the Commission from exercising any jurisdiction it may have in this case related to those complaints. It also leaves the customers with few, if any, options. Perhaps a customer who is still dissatisfied at that stage could file a complaint through the Consumer Services Division, although the Commission's alternatives would be severely diminished. At that point, however, customers may well wonder what the point of the local hearing was if they have to refile their complaints after the Commission has ignored their comments and issued a certificate. More likely, they will simply drop the whole issue, convinced that they would once again be ignored. This approach has the potential to disregard the legislative directive to conduct meaningful local hearings.

In Case No. 2004-00365, Big Rivers Electric Corporation ("Big Rivers") requested a certificate to build a transmission line in Breckinridge and Meade counties. At the evidentiary hearing, Staff asked Big Rivers to respond to specific customer complaints raised at the local public hearing. Big Rivers responded that it had contacted those customers between the local public hearing and the evidentiary hearing. A review of the transcript and final Order in that case will show that, while Big Rivers was able to satisfy only a few of the complaints, it made the good faith effort to address them, and the Commission expects no less of other applicants.

IT IS THEREFORE ORDERED that LG&E/KU's application in this case is denied.

¹⁶ Tr. p. 134, line 20; p. 136, line 25.

Done at Frankfort, Kentucky, this 8th day of September, 2005.

By the Commission

ATTEST:


Executive Director