

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE APPLICATION OF EAST KENTUCKY)	
POWER COOPERATIVE, INC. FOR)	
A CERTIFICATE OF PUBLIC)	CASE NO.
CONVENIENCE AND NECESSITY TO)	2005-00207
CONSTRUCT A 161 KV TRANSMISSION LINE)	
IN BARREN, WARREN, BUTLER, AND)	
OHIO COUNTIES, KENTUCKY)	

O R D E R

BACKGROUND

On July 1, 2005, East Kentucky Power Cooperative, Inc. (“Applicant” or “East Kentucky”) filed an application pursuant to KRS 278.020 for a Certificate of Public Convenience and Necessity (“CPCN”) to construct a transmission line in Barren, Warren, Butler, and Ohio counties, Kentucky.¹ The Applicant intends to use the proposed transmission project to supply power to its newest member, Warren Rural Electric Cooperative Corporation (“Warren RECC”). The Tennessee Valley Authority (“TVA”) currently supplies power to Warren RECC, but Warren RECC has served notice that it will switch wholesale power supply service to East Kentucky effective April 1, 2008.

Applicant is not directly connected to Warren RECC’s bulk power delivery locations, nor does it have high capacity transmission facilities that interconnect the

¹ The application was amended on September 12, 2005.

systems. Applicant explored wheeling power over TVA's transmission lines, but TVA has refused to allow that use of its lines. Consequently, East Kentucky has decided to build the proposed transmission line to supply power to Warren RECC.

The project is a 161 kV transmission line of 97.55 miles in length, of which 49.83 miles will follow existing corridors. The application divides the line into four segments.

By Order dated July 12, 2005, the Commission set the original procedural schedule and extended the time in which it had to consider the application to 120 days. In an August 2, 2005 Order, the Commission granted motions to intervene to John H. Colliver, Joey Roberts, Hugh Hendrick, Carroll and Doris Tichenor, H. H. Barlow, III (collectively referred to as the "Landowner Intervenors"), and Big Rivers Electric Corporation. The procedural schedule was subsequently modified by Orders entered on July 14, 2005 and August 4, 19, and 29, 2005. On August 15, 2005, ICF Resources LLC ("ICF"), the Commission's consultant on the case, filed its report. A local public hearing was held in Bowling Green, Kentucky on September 6, 2005, and the evidentiary hearing was held in Frankfort, Kentucky on September 13, 20, and 21, 2005.

MOTION TO DISMISS

On August 26, 2005, Intervenors Carroll Tichenor, Doris Tichenor, John Colliver, and H. H. Barlow ("Movants") filed a motion to dismiss the application. Applicant responded to the motion on September 9, 2005, and Movants replied on October 18, 2005. Movants argued that the application was premature and that the Applicant had not provided sufficient information to the Commission to justify the award of a CPCN. This argument was generally based on two grounds: (1) that the Commission did not have enough information on which to decide environmental, historical preservation, and

other related issues; and (2) that the Applicant had not adequately considered alternative routes. The Commission addresses the second ground in the later sections of this Order.

With regard to the first ground, the Commission's jurisdiction in this case is defined by the applicable statutes, primarily KRS 278.020. As Kentucky courts have clearly held, "The Public Service Commission's powers are purely statutory; like other administrative boards and agencies, it has only such powers as are conferred expressly or by necessary or fair implication." Croke v. Public Service Commission, 573 S.W.2d 927, 929 (Ky. App. 1978). The Commission will consider all issues subject to its jurisdiction in deciding this case, but it cannot decide issues not subject to its jurisdiction.

Movants give several examples of federal laws that the Commission should consider. Section 106 of the National Historic Preservation Act ("NHPA") is designed to protect historic properties, and Movants urge the Commission to dismiss this application because the Applicant has not conducted a complete survey of properties that might be subject to the NHPA. Yet Section 106 requires federal, not state, agencies to enforce those requirements.² By the same token, Movants insist that the Commission must enforce the National Environmental Policy Act ("NEPA"), but they acknowledge that the agency with responsibility for enforcing NEPA for this project is the Rural Utilities Service.³

² Motion to Dismiss at 18.

³ Motion to Dismiss at 24.

The issues the Commission must consider in an application under KRS 278.020 are the need for the facility and whether its construction will create wasteful duplication of facilities. Kentucky Utilities Company v. Public Service Commission, 252 S.W.2d 885 (1952). This Commission has previously held⁴ that the statute does not authorize the Commission to require an applicant for a CPCN to receive permits from other agencies as a prerequisite to filing its application here. As a consequence, the Commission finds that dismissal of this case on these grounds is not appropriate as requested by Movants. The Commission disagrees with Movants' arguments in their reply regarding federal law. As we interpret our statutory powers, we have no authority to dismiss or continue an application for a CPCN simply because an applicant has not received permits from the appropriate agencies under Section 106 of the NHPA and under NEPA. The Commission notes that Movants' reply cited no Kentucky cases in support of their argument to the contrary. Moreover, given its jurisdictional limits, the Commission finds it unwise to issue decisions on those issues before the appropriate agencies issue their rulings. The appropriate procedure is for the Commission to issue rulings based on a consideration of only those issues over which it has jurisdiction. If other agencies subsequently issue conflicting decisions, the Applicant will have to decide how to proceed to resolve the conflicts. For these reasons, the motion to dismiss is denied.

⁴ Orders in Case No. 2005-00142, Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company for a Certificate of Public Convenience and Necessity for the Construction of Transmission Facilities in Jefferson, Bullitt, Meade, and Hardin Counties, Kentucky, final Order dated September 8, 2005; and Case No. 2005-00154, Application of Kentucky Utilities Company for a Certificate of Public Convenience and Necessity for the Construction of Transmission Facilities in Franklin, Woodford and Anderson Counties, Kentucky, final Order dated September 8, 2005.

DISCUSSION OF 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 wasteful duplication of facilities. E.g., Kentucky Utilities Company v. Public Service Commission, 252 S.W.2d 885 (Ky. 1952).

Need

Several public witnesses in Bowling Green questioned the need for the line, and one Intervenor, Joey Roberts, challenged the need at the evidentiary hearing. By Order dated September 19, 2005, the Commission denied Roberts' request to subpoena the President and Chief Operating Officer of Warren RECC, holding that we have no jurisdiction to review Warren RECC's decision to switch its power supplier. The only issue of need, then, is whether Applicant needs the new transmission facilities to serve its members. ICF reviewed East Kentucky's analysis and the analysis performed by Commonwealth Associates, Inc. for East Kentucky and supported the choice of a 161 kV line to connect the two systems. Based on the testimony and other evidence in the record, the Commission finds that the proposed line is needed to provide power service to Warren RECC beginning on April 1, 2008.

Duplication of Facilities

The Landowner Intervenors contested this issue intensely. They claimed that the Applicant failed to comprehensively study all existing rights-of-way, evaluate the electrical possibilities of several that it did study, analyze various combinations of rights-of-way, and properly document its decisions to reject certain routes and select the one it did. They also argued that East Kentucky did not appropriately consider public input.

With regard to the Electric Power Research Institute (“EPRI”) model the Applicant employed in siting the line, the Landowner Intervenor tried to demonstrate that that model was inappropriate for this application and was misapplied in this case.

The Commission’s construction of the amendments to KRS 278.020 requiring a CPCN in this type of case, as set forth in the decisions in several recent cases,⁵ has required an applicant to perform a thorough review of all reasonable alternatives, including locating the line partially or fully along existing transmission corridors and other rights-of-way. East Kentucky maintains that it has conducted such a survey in this case and that its choice of the proposed route should be approved.

CONCLUSIONS

As the applicant in this case, East Kentucky bears the burden of proof to show that it has conducted a thorough review of all reasonable alternatives and then to show that its choice of the proposed route was reasonable.

Survey of Alternatives

On the first point, both ICF and the Landowner Intervenor pointed out that the application was deficient in documenting that East Kentucky considered existing corridors when it made its site selection. However, in response to the Commission’s September 13, 2005 oral Order, Applicant did produce evidence documenting its decision-making process in that connection.

⁵ Id., and the Order in Case No. 2005-00089, Application of East Kentucky Power Cooperative, Inc., for a Certificate of Public Convenience and Necessity for the Construction of a 138 kV Electric Transmission Line in Rowan County, Kentucky, final Order dated August 19, 2005.

East Kentucky relied heavily on the EPRI model to identify potential alternative routes and on Photo Science Geospatial Solutions to implement that model. The first phase of the model is designed to identify “macro-corridors,” or large swaths of land that could host a number of potential routes for the line. As discussed later in this Order, the Commission believes the model may not be suitable, at this point in its development, to operate as the sole means to identify alternative routes, although we believe it is helpful in that connection. Furthermore, the EPRI model does not consider existing transmission lines and other utility corridors in its “macro-corridor” generation, so it is possible to miss an alternative route that the utility should evaluate. Nevertheless, the methodology, as applied in this case, did cover the wide range of alternatives available. Under cross-examination, East Kentucky’s witnesses were aware of each alternative about which they were questioned and could point to some documentation in evidence addressing it.

Each of these cases is unique and must be decided on its own facts. In the typical situation, a utility will identify an area of potential transmission problems years in advance of the need for construction. Through its planning process, the utility should be able to conduct the survey we have held that the new statute requires well in advance of the filing of an application for a CPCN. East Kentucky had no such advance notice in this case. It could not have started planning this proposed line until Warren RECC gave TVA notice of its intention to switch power suppliers; and then the Applicant had a deadline for completion of the line to provide the new service.

The Commission also recognizes the Applicant’s efforts to comply with our interpretation of the new statutory requirement. Given the time constraints and the

extraordinary length of this proposed project, East Kentucky made a reasonable and good faith effort to identify, analyze, and document its consideration of alternative line locations. That about half of the line does co-locate with or rebuild other facilities demonstrates the positive results of its endeavors. Indeed, the Landowner Intervenor identified only very short segments that they believed were instances of needless duplication. The Commission therefore finds that, under the circumstances of this case, East Kentucky has conducted an acceptably thorough review of alternative line locations.

Reasonableness of Proposal

Having found that the survey of alternative locations is reasonable and adequate, the Commission must decide if the Applicant's choice of locations was reasonable. This question again requires us to consider the EPRI model. In the first phase of the model, the "macro-corridor" identification stage, the model is designed to find all potential regions that could host alternative lines. In the second phase, the model generates alternative corridors using more refined data with a "least cost"⁶ path analysis, and then a team delineates alternative routes. In the third phase of the model, alternative routes are evaluated using a decision matrix and expert judgment.

The Commission has some concerns about how the model operates. EPRI developed the model in Georgia in conjunction with Georgia Transmission Corporation, so it is, to a great degree, Georgia-specific. As testimony pointed out, the EPRI model does not recognize some of the geographic factors peculiar to Kentucky that should

⁶ As used in this context, this term does not apply to cost in terms of dollars but in terms of factors defined in the model to measure the suitability of the line for the proposed location.

play a role in transmission line siting here. Testimony at the hearing by the model designers implied that the EPRI model was calibrated to avoid sensitive, and hence unsuitable, areas and to locate the proposed line along paths that would cause the least problems for the utility and for other affected parties. The Applicant and the Landowner Intervenor disagreed as to whether this function of the model was appropriately applied by East Kentucky in this case.

The Commission does not believe that the failure of the EPRI model to be Kentucky-specific at this time should lead our jurisdictional utilities to reject it. The Commission recognizes that this model is useful for generating a number of viable alternative routes and then for conducting a thorough evaluation of them by employing a decision matrix. Using the model in its current Georgia-specific version, with no modifications to provide for Kentucky-specific considerations, could be problematic for utilities who employ it in future applications of this type. As such, the Commission encourages the utilities and other stakeholders to refine the model and work to develop a more Kentucky-specific model through a collaborative process.

In this particular case, then, the Commission concludes that East Kentucky's choice of a location for the line is reasonable. Although the Commission has concerns about the EPRI model's lack of Kentucky-specific considerations, we applaud East Kentucky's efforts to employ a more objective method of siting than it has employed in the past. As pointed out, although the model can be further refined and improved, in this particular case it sufficiently showed consideration of alternative routes.

Answer to Complaints

Landowner Intervenors assert that the application should be denied because East Kentucky did not adequately consider customer complaints. In our Orders in Case Nos. 2005-00142 and 2005-00154,⁷ the Commission stated that an applicant in such a case should contact the persons making comments at the public local hearing and seek to address their concerns before the evidentiary hearing. Here, East Kentucky made information available, met with people after the local hearing, and made other efforts to address their concerns, but they admittedly did not contact them personally as those earlier Orders contemplated.

The Commission will offer broad guidance later in this Order as to how applicants should address individual complaints. In this particular case, the Commission agrees with the Landowner Intervenors that East Kentucky failed to comply with the requirements of those earlier Orders. A major factor in that failure was the short time span between the Bowling Green and Frankfort hearings, which was caused by the Commission's rescheduling the local hearing in light of weather concerns. Another was the unprecedented number of witnesses at the local hearing. Under the circumstances, East Kentucky's failure is not sufficient cause to deny this application.

Holding

The Commission finds that East Kentucky has established by a preponderance of the evidence a need for the subject line. We also find from the evidence that East Kentucky engaged in an adequate review of alternative routes, which ultimately resulted in a route that included 49.83 miles of rebuilt or co-located conductors. Based on these

⁷ See footnote 2.

findings, the testimony and other evidence, and the record in its entirety, the Commission finds that there is a need for the proposed line and it does not create a needless duplication of facilities. Under the standards set forth in Kentucky Utilities Company v. Public Service Commission, 252 S.W.2d 885 (Ky. 1952), East Kentucky's application is approved.

Movement of the Line

Having approved this application, the Commission must turn to the Applicant's request to be able to move the centerline as much as 1,500 feet to address individual concerns. Again, the Commission will offer comments in the following section of this Order as to how to avoid this issue in the future. For this case, however, the Commission finds that moving the centerline 1,500 feet is an unreasonable request.

When the administrative regulations for the new statutory provisions were promulgated, East Kentucky requested that an applicant not be required to identify a specific route but simply offer a half-mile corridor in which it could locate the line. The Commission specifically rejected that request in adopting the current regulation. The Commission sees little difference between that request and the one in this case; in either instance, Applicant could move the line a quarter of a mile in either direction, regardless of the location the Commission approved for the centerline.

The Commission nevertheless understands the need, in limited circumstances, to give the utility the flexibility to address last-minute or unanticipated issues. East Kentucky may therefore move the approved centerline 500 feet in either direction (i.e., within a 1,000-foot corridor) as long as (1) the move does not shift the line or its right-of-way onto the property of a different landowner and (2) the property owner who is subject

to the move agrees in writing to the requested move. So that the Commission will have a record, East Kentucky must file a survey of the final location of the line after all of these moves are completed and before construction begins.

Any changes greater than this distance, or ones that involve other landowners, will require the Applicant to come back to the Commission with another application. Likewise, if another agency requires an alteration of the line that does not meet all the conditions stated in this section,⁸ that action will necessitate another application.

GENERAL COMMENTS

This case presented new questions and issues for the Commission and all parties. In an effort to offer guidance for future cases, the Commission will offer these comments to potential applicants.

Discovery

Parties must recognize the abbreviated schedule in these cases in conducting discovery. Except in the most exceptional circumstances, objections to data requests should be accompanied by an answer (which, of course, may be subject to the objection). In the rare exception when the party believes it cannot answer but must make a bare objection, that objection should be made as promptly as possible, and in no case should the party wait until the due date for the response to object. If a party believes a response is inadequate, it should file a motion to compel promptly and not wait until a ruling would require a delay in the evidentiary hearing. All parties should

⁸ Namely, (1) that the move is no more than 500 feet to either side, (2) that it does not shift the line or its right-of-way onto another landowner, and (3) that the property owner who is subject to the move agrees in writing to the requested move.

respond to data requests of other parties in the same spirit with which they respond to Staff data requests.

Identification of and Response to Complaints

Dealing with individual complaints has proved to be the most complicating factor in most of the cases to date. The evidentiary hearing is well suited to considering opinions by experts who differ over the route the line should follow, but deciding multiple individual complaints under the umbrella of one application docket has proved to be unwieldy. The vast majority of these problems can be identified and addressed, at least initially, before the application is filed. To the extent that they can be resolved ahead of the application, it will make handling these cases under the truncated schedule more manageable.

Therefore, the Commission will expect applicants to attempt to resolve individual complaints before filing applications for transmission line CPCNs. This requirement does not mean that the complaints must be satisfied, just that the utility make a good faith effort to identify and resolve them. If doing so does nothing else, it will clarify the issues to be heard at an earlier stage in the process.

IT IS THEREFORE ORDERED that:

1. Applicant is granted a CPCN to construct and operate the proposed transmission line as set forth in its application, as amended.
2. Applicant shall file a survey of the final location of the line after any moves as authorized by the Order and before construction begins.

3. Applicant shall file "as-built" drawings or maps within 60 days of the completion of the construction authorized by this Order.

Done at Frankfort, Kentucky, this 31st day of October, 2005

By the Commission

ATTEST:

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end.

Executive Director