

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

CUMBERLAND VALLEY ELECTRIC, INC.)	
)	
COMPLAINANT)	
)	
V.)	CASE NO. 2006-00148
)	
KENTUCKY UTILITIES COMPANY)	
)	
DEFENDANT)	

O R D E R

This matter is before the Commission on the complaint of Cumberland Valley Electric, Inc. (“Cumberland”) against Kentucky Utilities Company (“KU”) alleging that KU has violated the Certified Territories Act, KRS 278.016--278.018 (“Act”), by providing retail electric service in Cumberland’s exclusive certified territory. Upon receipt of the complaint, the Commission ordered KU to satisfy the matters complained of or file a written answer to the complaint. KU filed a response denying that it had violated the Act and filed a motion to dismiss the complaint. Cumberland filed a response to KU’s motion to dismiss and KU filed a reply thereto. Black Mountain Resources, LLC (“BMR”) and its affiliate, Stillhouse Mining, LLC (“Stillhouse”), filed requests for full intervention in the case. The motions have been fully briefed and are now ripe for review.

Having reviewed the filings and being otherwise sufficiently advised, the Commission finds that KU’s motion to dismiss should be denied and that the procedural

schedule established herein should be followed to ensure the orderly review and investigation of the merits of Cumberland's complaint. We also find that the motions of BMR and Stillhouse for full intervention should be granted.

BACKGROUND

Cumberland is a rural electric cooperative organized under KRS Chapter 279 and is, therefore, subject to the Commission's general supervision and jurisdiction.¹ It owns and operates facilities that provide retail electric service to customers in Whitley, Knox, Harlan, Bell, Leslie, Letcher, Laurel, and McCreary counties² and is a utility subject to Commission jurisdiction and a retail electric supplier.³

KU is a Kentucky corporation that owns and operates facilities that provide retail electric service to customers in 77 counties in Kentucky,⁴ including 5 of the same counties served by Cumberland, and is also a utility subject to Commission jurisdiction and a retail electric supplier.⁵

On April 7, 2006, Cumberland filed a formal complaint along with supporting testimony against KU alleging that Stillhouse recently opened and began the operation of a new mine located in Harlan County, Kentucky known as Stillhouse No. 2

¹ KRS 279.210.

² Annual Report of Cumberland filed with the Public Service Commission for the year ended December 31, 2005.

³ KRS 278.010(3)(a); KRS 278.010(4); KRS 278.040(1).

⁴ Annual Report of KU filed with the Public Service Commission for the year ended December 31, 2005.

⁵ KRS 278.010(3)(a); KRS 278.010(4); KRS 278.040(1).

("Stillhouse No. 2"). Cumberland states that KU furnishes and meters electric service to BMR at KU's Lynch Substation at 69 kV which is then transmitted over BMR's privately owned lines into Cumberland's certified territory for use in the Stillhouse No. 2 mine. Cumberland states that KU did not seek Commission approval to provide that service; that KU continued to provide the service after Cumberland notified KU that the service was being extended for use in Cumberland's territory; and that KU's actions are in contravention of KRS 278.018. Cumberland requests that the Commission: (a) apply the factors of KRS 278.017(3) and declare Cumberland the lawful supplier to Stillhouse No. 2; (b) order KU to cease and desist providing service to Stillhouse No. 2 as soon as Cumberland is able to extend service; (c) order KU to pay to Cumberland an amount equal to the billings that would have been otherwise rendered by Cumberland for service rendered; and (d) order the placement of a meter to capture the usage of Stillhouse No. 2 during the pendency of this proceeding. KU does not dispute that it furnishes and meters electric service to BMR at its Lynch Substation or that the load is then transmitted over BMR's privately owned lines into Cumberland's certified territory for entrance to the Stillhouse No. 2 mine. KU points out that some of the reserves of the Stillhouse No. 2 mine are in its certified territory and generally disputes Cumberland's analysis under the Act.

DISCUSSION

Cumberland claims that the portal to Stillhouse No. 2 is entirely within its service territory, that the electric service being provided by KU is being provided for use in Cumberland's territory in violation of KRS 278.018, and that Stillhouse No. 2 is a new electric-consuming facility to which the Commission will determine which supplier

should provide electric service.⁶ KU denies that there has been a violation of KRS 278.018 because the service it provides to BMR is provided within its own service territory and further denies that Stillhouse No. 2 is a new electric-consuming facility. The parties also do not agree as to the similarity or application of a prior decision by the Commission in Case No. 6637,⁷ to this case.

KRS 278.016 sets forth the general public policy that, “except as otherwise provided, no retail electric supplier shall furnish retail electric service in the certified territory of another retail electric supplier.” This policy is codified in KRS 278.018(1) which provides an alternative basis for evaluating certified boundary disputes. In cases in which an existing electric-consuming facility is at issue:

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....

When the electric consuming facility is new, however, the latter portion of KRS 278.018(1) applies:

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).

The criteria set forth in KRS 278.017(3) are as follows:

- (a) The proximity of existing distribution lines to such certified territory.

⁶ Cumberland complaint at 4.

⁷ Case No. 6637, *Jellico Electric System v. Cumberland Valley Rural Electric Cooperative Corp.*

- (b) Which supplier was first furnishing retail electric service, and the age of existing facilities in the area.
- (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.

This case involves disputes over all three components of the aforementioned statutes. As service is apparently being provided to the Stillhouse No. 2 mine, there is a dispute as to whether or not KU is violating the prohibition of KRS 278.018(1). Second, there appears to be a dispute as to whether or not the Stillhouse No. 2 mine constitutes a “new electric-consuming facility” under KRS 278.018(1). Finally, in the event the Stillhouse No. 2 mine is a “new electric-consuming facility,” there is a dispute as to which supplier should provide service to the mine upon application of the criteria set forth in KRS 278.017(3).

Though the parties have already offered several arguments and testimony to support their positions, neither has demonstrated that the evidence thus far submitted is sufficient to require dismissal of the complaint in favor of KU or to require a finding that KU has violated, and continues to violate, the Act. We further note that the documentary evidence and testimony proffered to date have not been subject to cross-examination or direct discovery by the opposing party. Based upon the current record, the Commission is satisfied that Cumberland has proffered sufficient evidence to be permitted to proceed with the prosecution of its complaint against KU. Therefore, we find that KU’s motion to dismiss should be denied and that the procedural schedule, appended hereto as Appendix A, should be followed.

In denying KU's motion to dismiss, we will also consider Cumberland's request that the Commission order KU to: (a) file an accounting of all usage provided and revenues received from Stillhouse No. 2 to date; (b) pay Cumberland an amount equal to the billings that would have been rendered by Cumberland for service to the mine; and (c) meter the usage of Stillhouse No. 2 during the pendency of this action. The Commission finds no basis to grant Cumberland's request. Cumberland's requests for an accounting and payment for claimed lost revenues is tantamount to a request for damages, which the Commission is not statutorily authorized to grant. KRS Chapter 278 does not authorize the Commission to award monetary damages. Both parties are no doubt aware that, if Cumberland ultimately prevails, it will be free to pursue remedies available in a forum appropriately authorized by law. Likewise, Cumberland's request for the installation of a separate meter at the Stillhouse No. 2 mine appears to be closely related to the issue of damages and not an issue arising under the Act. Though the Commission has the authority to require the placement of a separate meter, the current record does not suggest that such a mandate is necessary.

The remaining issues before the Commission are the outstanding motions of BMR and Stillhouse for full intervention in this proceeding. It appears to the Commission that BMR and Stillhouse are likely to present issues and help develop facts that will assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings. Therefore, the Commission finds that BMR and Stillhouse should be granted intervention in this proceeding with the full rights of a party.

IT IS THEREFORE ORDERED that:

1. KU's motion to dismiss is denied.
2. Cumberland's request for an accounting and an award of damages is denied.
3. Cumberland's request for the installation of a meter to record the usage at Stillhouse No. 2 during the pendency of this action is denied.
4. BMR and Stillhouse are granted full intervention in this proceeding and shall be entitled to the full rights of a party and shall be served with the Commission's Orders and with filed testimony, exhibits, pleadings, correspondence, and all other documents submitted by parties after the date of this Order.
5. All interrogatories and requests for production of documents shall be appropriately indexed. Responses shall include the name of the individual responsible for responding to the questions related to the information provided.
6. Service of any document or pleading shall be made in accordance with 807 KAR 5:001, Section 3(7), and Kentucky Civil Rule 5.02.
7. All documents filed with the Commission shall also be served upon all parties of record at or before the time of filing.
8. All parties shall respond to any interrogatories and requests for production of documents that Commission Staff submits in accordance with the procedural schedule set forth in Appendix A.
9. Motions for extensions of time with respect to the schedule herein shall be made in writing and will be granted only upon a showing of good cause.

10. At any public hearing in this matter, neither opening statements nor summarization of direct testimony shall be permitted.

11. Nothing contained herein shall prevent the Commission from entering further Orders in this matter.

Done at Frankfort, Kentucky, this 13th day of September, 2006.

By the Commission

ATTEST:

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

Executive Director

APPENDIX A

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE
COMMISSION IN CASE NO. 2006-00148 DATED September 13, 2006

Each party shall file with the Commission direct testimony
in verified prepared form (including any additional
testimony the Complainant may wish to file) no later than 10/04/06

Initial requests for production of documents and written
interrogatories shall be filed no later than 10/18/06

Each party shall file responses to the initial requests
for information no later than 11/01/06

Second requests for production of documents and written
interrogatories, if any, shall be filed no later than 11/15/06

Each party shall file responses to the second requests
for information no later than 11/29/06

Rebuttal testimony, if any, shall be filed in verified
prepared form no later than 12/13/06

Public hearing shall begin at 9:00 a.m., Eastern Time,
in Hearing Room 1 of the Commission's offices at
211 Sower Boulevard, Frankfort, Kentucky for the
purpose of cross-examination of witnesses To Be Scheduled