

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	)	

ORDER

Cumberland Valley Electric, Inc. (“Cumberland Valley”) has brought a formal complaint against Kentucky Utilities Company (“KU”) in which it alleges that KU is providing retail electric service to a certain mining operation of Stillhouse Mining LLC (“Stillhouse”) in Harlan County, Kentucky in violation of KRS 278.018(1). Finding that this mining operation constitutes a new electric consuming facility that is located in two adjacent certified territories and that, based upon the criteria contained in KRS 278.017(3), KU should serve this facility, we deny the complaint.

PROCEDURE

On April 7, 2006, Cumberland Valley filed its complaint against KU in which it alleged violations of KRS 278.018(1). On April 21, 2006, KU answered the complaint and moved for its dismissal. After considering the motion and the parties’ subsequent arguments, we denied the motion and established a procedural schedule in this matter

on September 13, 2006. We further granted the motion of Black Mountain Resources, LLC (“BMR”) and Stillhouse to intervene in this proceeding.

Following extensive discovery in this matter, the Commission held an evidentiary hearing on March 14, 2007. At this hearing, the following persons testified: Ronald L. Willhite, Consultant; Mark Abner, Engineer, Cumberland Valley; Fred Howard Bush, Jr., Manager of Tariffs and Special Contracts, E.ON U.S. LLC; Lonnie E. Bellar, Director of Transmission, KU; and Frank R. Matda, Project Engineer, BMR and Stillhouse. All parties submitted post-hearing briefs on April 30, 2007.

#### STATEMENT OF THE CASE

Cumberland Valley, a rural electric cooperative organized under KRS Chapter 279, owns and operates facilities that provide retail electric service to approximately 23,430 customers in Bell, Clay, Harlan, Knox, Laurel, Letcher, Leslie, McCreary and Whitley counties, Kentucky.<sup>1</sup> It is a retail electric supplier and a utility subject to the Commission’s jurisdiction.<sup>2</sup>

KU is a Kentucky corporation that owns and operates facilities that provide retail electric service to customers in 77 counties in Kentucky,<sup>3</sup> including 7 of the same counties served by Cumberland Valley, and is also a utility subject to Commission jurisdiction and a retail electric supplier.<sup>4</sup>

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<sup>1</sup> Report of Cumberland Valley Electric, Inc. to the Kentucky Public Service Commission for the year ended December 31, 2006 at 17 and 19.

<sup>2</sup> KRS 278.010(3)(a); KRS 278.010(4); KRS 278.040(1).

<sup>3</sup> Report of Kentucky Utilities Company to the Public Service Commission of Kentucky for the year ended December 31, 2006 at 4.

<sup>4</sup> KRS 278.010(3)(a); KRS 278.010(4); KRS 278.040(1).

BMR, a Virginia corporation authorized to do business in the Commonwealth of Kentucky, owns and operates a substation adjacent to KU's substation in Lynch, Kentucky. It also owns and operates a 69 kilovolt ("kV") line that is used to distribute electric power from KU to BMR's mining operations and those of its affiliates. One of those affiliates is Stillhouse, which owns and operates underground mining operations at Stillhouse Mine No. 2 in Harlan County, Kentucky.

U.S. Steel Coal and Coke Co. purchased approximately 43,000 acres in Harlan County in the early 1900s ("U.S. Steel Property") and constructed a power plant and distribution system to serve the property. The power plant closed in 1931. KU then began providing power to the distribution system. Though upgraded, the distribution system still exists and is part of the property that BMR acquired from Arch Minerals, which closed its mining operations at Arch No. 37 in 1998. It currently carries the KU service to Stillhouse Mine No. 2.

Stillhouse began its underground mining operations at Stillhouse Mine No. 2 in the summer of 2005.<sup>5</sup> The mine's portal is located just south of US 119 near Canoe Hollow in Harlan County, Kentucky and sits exclusively within Cumberland Valley's certified territory. The coal reserves to be mined at Stillhouse Mine No. 2, however, lie in the certified territory of Cumberland Valley and KU.<sup>6</sup>

KU furnishes and meters 69 kV power from its Lynch substation to BMR for service to Stillhouse Mine No. 2.<sup>7</sup> BMR owns and operates a substation that is known

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<sup>5</sup> Direct Testimony of Richard Matda at 4.

<sup>6</sup> Direct Testimony of Howard F. Bush at 3.

<sup>7</sup> Id. at 4.

as the U.S. Steel substation and that sits adjacent to KU's Lynch substation. BMR transmits the 69 kV power from this substation to BMR's 69/12 kV distribution substation south of Cloverlick, Kentucky. BMR then distributes the power to the mine via a newly extended BMR 12 kV distribution line. This distribution line was originally placed in service to provide power to ventilation fans in other mines, but BMR extended it approximately 1,000 feet in 2005 to serve Stillhouse Mine No. 2.<sup>8</sup>

Cumberland Valley is currently providing electric service to a water pump at Stillhouse Mine No. 2. To provide service to the entire operation would require the construction of 2,300 feet of 69 kV distribution lines and the placement of a 25/12 kV transformer bank at the mine's opening.

#### DISCUSSION

Cumberland Valley's complaint presents the one issue: Which retail electric supplier is lawfully entitled to provide retail electric service to Stillhouse Mine No. 2?

In 1972, the Kentucky General Assembly enacted the Certified Territory Act<sup>9</sup> (the "Act") to establish exclusive service territories for the state's retail electric suppliers. The Act's stated purpose was "to encourage the orderly development of retail electric service, to avoid wasteful duplication of distribution facilities, to avoid 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. . . ."<sup>10</sup>

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<sup>8</sup> Transcript of Evidence, March 14, 2007, at 47-48.

<sup>9</sup> 1972 Ky. Acts 378-384 (codified as KRS 278.016 - .018.)

<sup>10</sup> Id. at 380.

The General Assembly instructed the Commission to fix the boundaries of each retail electric supplier in the Commonwealth based upon the location of the retail electric supplier's electric distribution facilities as they existed on June 16, 1972. It further provided a set of criteria to guide the Commission in the event the distribution lines of two or more retail facilities were extensively intertwined or located. Retail electric suppliers were prohibited from furnishing retail electric service "to a consumer for use in electric-consuming facilities located within the certified territory of another retail electric supplier."<sup>11</sup>

Anticipating that some electric consuming facilities would be located in two or more adjacent certified territories, the General Assembly directed the Commission to determine which retail electric supplier would serve an electric consuming facility that locates in adjacent certified territories. It further directed the Commission to use the following criteria to make its determination:

- The proximity of existing distribution lines to such certified territory;
- Which supplier was first furnishing retail electric service, and the age of existing facilities in the area;
- The adequacy and dependability of existing distribution lines to provide dependable, high-quality retail electric service at reasonable costs; and
- The elimination and prevention of duplication of electric lines and facilities supplying such territory.<sup>12</sup>

These criteria are codified in KRS 278.017(3).

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<sup>11</sup> Id. at 382.

<sup>12</sup> Id. at 381.

Cumberland Valley contends that Stillhouse Mine No. 2 is a new electric consuming facility located in two adjacent service territories and that, based upon the criteria set forth in KRS 278.017, it is the most appropriate retail electric supplier to serve the mine. It notes that its three-phase distribution line is closer in proximity to the mine than KU's nearest three-phase distribution line. It further notes that Cumberland Valley was the first retail electric supplier to provide service in the immediate area of the mine and that its three-phase distribution line, in service since 1949, was relocated and modernized in 2006. It asserts that its facilities are dependable and that the necessary extensions and investments to provide service to the mine would be significantly less costly than those KU requires to extend service to the mine. It also asserts that, unlike KU, it would not be required to duplicate facilities to extend service to the mine.

Cumberland Valley argues that BMR's customer-owned facilities should not be considered when applying the statutory criteria. The Kentucky General Assembly, it asserts, did not envision a retail electric service customer circumventing the Act by constructing and extending its customer-owned distribution lines into another service territory. Consideration of customer-owned lines undermines legislative intent and permits circumvention of the spirit and the letter of the law.

KU disputes the contention that Stillhouse Mine No. 2 is a new electric consuming facility. It maintains that Stillhouse Mine No. 2 is located on the U.S. Steel Property and that, while several different owners owned and operated various mining operations on the property, KU has continuously served the property since 1931. It notes that Stillhouse Mine No. 2 is mining the same seam of coal – the Harlan seam – that these earlier operations mined. As a result of this continuous service, KRS 278.018(4) entitles KU to continue providing service to Stillhouse Mine No. 2.

In the alternative, KU argues that even if Stillhouse Mine No. 2 is considered a new electric consuming facility, it is located in two adjacent territories and the criteria set forth in KRS 278.017(3) require that KU provide electric service. As the coal reserves being mined at Stillhouse Mine No. 2 are located in two adjacent territories, KU argues, Stillhouse Mine No. 2 is located in the certified service territory of both retail electric suppliers. When applying the criteria set forth in KRS 278.017 and considering the BMR-owned distribution facilities, it argues, KU is clearly more suited to serve the mine. KU argues that ignoring BMR's line would result in a wasteful duplication of facilities, as it would render 2.75 miles of BMR's distribution system idle and require Cumberland Valley to construct an additional half-mile of distribution line and add a transformer bank.

In support of KU's position, BMR and Stillhouse argue that KU's provision of electric service to the U.S. Steel Property for mining operations in the Harlan seam predates the enactment of the Act. They further argue that, should Stillhouse Mine No. 2 be determined to be a new electric consuming facility, the statutory criteria clearly establish KU's entitlement to provide service. They maintain that disregarding BMR's customer-owned lines would result in a duplication of facilities, a waste of resources and an encumbrance of the landscape. Finally, they urge the Commission to consider the rates of both retail service providers, which they assert favor KU.

KRS 278.010(8) defines an electric consuming facility as "everything that utilizes electric energy from a central station source." As the equipment that is being used at Stillhouse Mine No. 2 uses electric energy, the mine is clearly an electric consuming facility.

Previous mining activity within a coal seam is not dispositive of the facility's status as a new electric consuming facility. While the mining of the same coal seam may suggest some relationship between prior mining activity and proposed mining, it is the location of the mine works and not the identification of the coal seam that defines the scope of the electric consuming facility. The Commission must examine the totality of circumstances surrounding the proposed operation to determine if it is a continuation of prior efforts. The circumstances in this case do not suggest so.

We are unpersuaded by KU's argument that the Stillhouse Mine No. 2 is a continuation of prior mining operations and is an existing electric consuming facility. The mining operations in the vicinity of the Stillhouse Mine No. 2 have not been continuous. The records of the Kentucky Department of Mines and Minerals ("KDM&M") indicate that mining operations of Arch Minerals, the previous owner, ceased in 1998.<sup>13</sup> Arch Minerals reported to the U.S. Securities and Exchange Commission in 1998 that its mining operations in the area had ceased in January 1998.<sup>14</sup> KDM&M, furthermore, has designated Stillhouse Mine No. 2 as a new mine.<sup>15</sup> The record clearly demonstrates that Stillhouse Mine No. 2 is a new electric consuming facility.

We further find that, given the location of the coal reserves that Stillhouse Mine No. 2 plans to mine, the mine is located in two adjacent certified territories. The parties concede that reserves that will be mined from Stillhouse Mine No. 2 are located within

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<sup>13</sup> Direct Testimony of Ronald L. Willhite ("Willhite Direct"), Exhibit 1, Item 6.

<sup>14</sup> Surrebuttal Testimony of Ronald L. Willhite at 3.

<sup>15</sup> Willhite Direct at Exhibit 1, Item 2.



the certified territories of both KU and Cumberland Valley. We have previously recognized that, when a new electric consuming facility is a coal mining operation, the location of coal reserves will generally govern the extent of the facility's location.<sup>16</sup>

Having determined that Stillhouse Mine No. 2 is a new electric consuming facility that lies in adjacent certified territories, the Commission must apply the criteria set forth in KRS 278.017(3). When applying these criteria, we are of the opinion that the customer-owned facilities should be considered under the unique facts presented in this case. Such action is necessary to ensure full effect is given to the General Assembly's intent to "encourage the orderly development of retail electric service, to avoid wasteful duplication of distribution facilities, to avoid unnecessary encumbering of the landscape of the Commonwealth of Kentucky, [and] to prevent the waste of materials and natural resources. . . ." To do otherwise would require us to ignore the existence of facilities that have been in existence in some form prior to the enactment of the Act.<sup>17</sup>

As to the first statutory criterion, "the proximity of existing distribution lines," we find that the facilities currently being used by KU to serve the mine are the closest in

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<sup>16</sup> Case No. 1993-00211, *Henderson-Union Electric Cooperative Corporation v. Kentucky Utilities Co.* (Ky. PSC Mar. 3, 1994) at 3 ("the location of the coal reserves should be the pivotal factor in this case since this delineates the location of the new electric consuming facility"); Case No. 2002-00008, *Kenergy Corporation v. Kentucky Utilities Co.* (Ky. PSC Oct. 18, 2002) at 2 (finding that a proposed mining activity was located in adjacent certified territories because two percent of mine's reserves lay in the certified territory of another retail electric supplier).

<sup>17</sup> We do not hold today that customer-owned or constructed facilities should be considered in all cases because we are mindful that to do so could function to circumvent the Certified Territory Act as Cumberland Valley suggests. In the present case, however, there is no evidence that the customer-owned facilities were constructed for that purpose. Indeed a significant portion of these facilities existed for many years and well before Stillhouse Mine No. 2 became operable.

proximity. In contrast, Cumberland Valley's facilities are approximately one-half mile from the mine portal.

As to the second criterion, the record indicates that KU has been providing service in the area since 1931, approximately 18 years prior to Cumberland Valley's provision of service to the area of the mine. KU recently completed an upgrade of the line that would be used to serve the mine.

Cumberland Valley asserts that its facilities are the earliest in the "vicinity" of the mine and that KU's nearest facility to the mine is approximately 7.5 miles away. When considering this factor, the Commission notes that both utilities are well-established service providers that have been providing reliable service in the general area for a very long time. Since the first criterion was the proximity of lines, we are of the opinion that the second criterion should focus upon the age of the facilities in the general area of the electric consuming facility. KU has served this area longer than Cumberland Valley.

As to the third criterion, the Commission finds that the existing distribution lines of each retail electric supplier are capable of providing dependable, high-quality retail electric service at reasonable cost. We further find that, given the existence of BMR's lines, KU would not be required to make additional investments in its distribution system. On the other hand, Cumberland Valley's system would require the additional line extension and transformer bank previously discussed.

As to the elimination and prevention of duplication of electric lines and facilities, this criterion favors KU. If the right to provide retail electric service to Stillhouse Mine No. 2 is awarded to Cumberland Valley, duplicative distribution facilities must be built and customer-owned facilities that are currently in operation and capable of significant

use will be rendered inoperative. Such a result is clearly contrary to the stated purpose of the Act.

Having considered the criteria set forth in KRS 278.017(3) and giving equal weight to each criterion, the Commission finds that KU should be authorized to provide retail electric service to Stillhouse Mine No. 2.

We hold no illusions that our decision today will end or significantly reduce disputes between retail electric service providers over service to coal mining facilities. One source of conflict is the relatively common use of customer-owned distribution lines to provide electric service to coal mining facilities. Both KU and Cumberland Valley operate in areas where mining operations are prevalent and often traverse territorial boundaries and where customer-owned lines are common. In the absence of an express legislative or judicial statement to the contrary, we believe KRS 278.017(3) permits us to take customer-owned facilities into account when considering the extent of a utility system. Each retail electric supplier should make every effort possible to ensure that the retail electric service that it provides is used solely within its territory. KRS 278.018, which expressly prohibits a jurisdictional retail electric supplier from furnishing, making available, rendering or extending its retail electric service to a customer for “use. . .within the certified territory of another retail electric supplier,” requires such efforts.

KU has committed to the Commission to advise all customers who use customer-owned distribution lines to notify KU before undertaking any expansion of the customer-owned facilities. Such action represents a small step toward preventing a recurrence of the case at bar. Both parties should seriously consider amending their existing rules for

service to require such notice as a condition for receiving and continuing to receive electric service.

### SUMMARY

Having considered the evidence of record and being otherwise sufficiently advised, the Commission finds that:

1. Stillhouse Mine No. 2 is a new electric consuming facility located in the adjacent certified territories of KU and Cumberland Valley.

2. KU's existing distribution facilities are closer in proximity to Stillhouse Mine No. 2 than those of Cumberland Valley.

3. KU has provided retail electric service in the general vicinity of Stillhouse Mine No. 2 since 1931. Cumberland Valley has provided such service since 1949.

4. KU and Cumberland Valley are capable of providing adequate and dependable service to Stillhouse Mine No. 2.

5. KU does not require additional investments to its distribution system to provide electric service to Stillhouse Mine No. 2.

6. Cumberland Valley would require the construction of at least 2,300 feet of kV line and the installation of a 25/12 kV transformer bank at a cost of at least \$40,000 to serve the mining operations.

7. Cumberland Valley's provision of electric service to the Stillhouse Mine No. 2 will require the construction of duplicative facilities and require the abandonment of existing customer-owned distribution facilities.

8. Based upon the criteria set forth in KRS 278.017(3), KU should provide electric service to Stillhouse Mine No. 2.

IT IS THEREFORE ORDERED that:

1. Pursuant to KRS 278.018(1), KU is authorized to provide retail electric service to Stillhouse Mine No. 2.

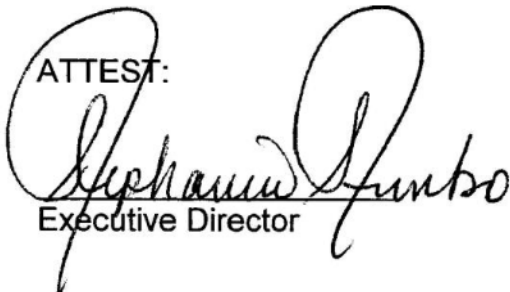
2. Cumberland Valley's complaint is denied.

Done at Frankfort, Kentucky, this 21<sup>st</sup> day of March, 2008.

By the Commission

Commissioner Clark Abstains.

ATTEST:

  
Executive Director