

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF KENTUCKY	)	
POWER COMPANY FOR A CERTIFICATE OF	)	
PUBLIC CONVENIENCE AND NECESSITY TO	)	CASE NO.
CONSTRUCT A 161 KV TRANSMISSION LINE	)	2017-00328
IN PERRY AND LESLIE COUNTIES, KENTUCKY	)	
AND ASSOCIATED FACILITIES	)	

ORDER

This matter arises on two motions filed by Kentucky Power Company (Kentucky Power) on November 5, 2018. Kentucky Power filed a motion requesting to schedule an informal conference (IC) for the purpose to presenting information to Commission Staff (Staff) and to the Attorney General of the Commonwealth of Kentucky, by and through the Office of Rate Intervention (Attorney General) that Kentucky Power intended to proffer at the November 27, 2018 hearing scheduled in this matter. Kentucky Power also filed a motion for leave to modify the order of examination of witnesses to offer direct testimony of Kentucky Power's witnesses and then proceed with cross-examination of Kentucky Power's witnesses by Staff and the Attorney General.

The Attorney General filed a motion on November 8, 2018, requesting that motion for leave to modify the order of examination of witnesses be held in abeyance until after an informal conference could be held.

PROCEDURAL BACKGROUND

This matter is on partial rehearing of the Commission's March 16, 2018 Order that denied Kentucky Power's request for a Certificate of Public Convenience and Necessity

(CPCN) to construct 46 improvements to the Hazard and Wooten substations (Supplemental Project). Kentucky Power did not request rehearing of the approval of a CPCN to rebuild an existing 6.5-mile Hazard-Wooten 161 kV transmission line (Baseline Project). As a basis for its request for partial rehearing, Kentucky Power argued that the Commission incorrectly concluded the record lacked evidence regarding the need for the Supplemental Project.

The Commission granted rehearing to more fully develop the record on the issue of the relationship between the Supplemental Project and the Baseline Project, in particular whether certain improvements in the Supplemental Project were required in order to implement the Baseline Project and to permit both Kentucky Power and the Attorney General to respond to arguments raised in the Attorney General's brief regarding an order issued by the Federal Energy Regulatory Commission (FERC) regarding the process for PJM review of supplemental projects.

A procedural schedule issued on April 25, 2018, provided for additional discovery on the rehearing issues and directed the parties to file a notice whether they requested a hearing or that the matter be decided on the written record. At the request of both parties, this matter was scheduled for a hearing on August 21, 2018. In response to a motion filed by Kentucky Power, the hearing was subsequently rescheduled for November 27, 2018.

#### KENTUCKY POWER'S MOTIONS

In its motion to modify the order of examination of witnesses, Kentucky Power requests that it be permitted to present its witnesses for direct examination by counsel for Kentucky Power, followed by cross-examination by Staff and the Attorney General.

Kentucky Power argues that 807 KAR 5:001, Section 9, establishes procedures for hearings, but that it does not mandate a specific order in which witnesses are examined. Typically, witnesses file written testimony prior to the hearing, with the party bearing the burden of proof qualifying and presenting a witness, followed by cross-examination, re-direct, and re-cross. As a basis for the motion, Kentucky Power states that the rehearing procedural schedule did not allow for the pre-filing of written testimony and asserts that modifying the order of examination will provide for orderly development of the record on rehearing. Kentucky Power states that its witnesses will provide direct testimony regarding: (1) the relationship between the improvements in the Supplemental Project and the Baseline Project; (2) engineering and other technical details of the Supplemental Project; and (3) additional orders and filings regarding a February 15, 2018 FERC Order regarding the process for PJM Interconnection, LLC's (PJM) review of supplemental projects.

In its motion to schedule an IC, Kentucky Power asserted that it wanted to provide Staff and the Attorney General with information that Kentucky Power intends to proffer at the hearing regarding; (1) the relationship between the improvements in the Supplemental Project and the Baseline Project; (2) engineering and other technical details of the Supplemental Project; and (3) additional orders and filings regarding a February 15, 2018 FERC Order regarding the process for PJM Interconnection, LLC's (PJM) review of supplemental projects. As a basis for this motion, Kentucky Power asserts that holding an informal conference will provide Staff and the Attorney General with an adequate opportunity to address the information that Kentucky Power intends to adduce at the hearing.

Along with the motions, Kentucky Power filed a supplemental response to the Attorney General's Initial Data Requests on Rehearing (Attorney General's Rehearing Request), Item 2. Kentucky Power's response included a FERC order issued September 26, 2018, that denied rehearing of FERC's February 15, 2018 Order regarding the process for PJM's review of supplemental projects; correspondence filing revisions to PJM's Open Access Transmission Tariff and Operating Agreement; and a FERC August 31, 2018 Order addressing denying a complaint against the California Independent S Operator process for reviewing non-baseline projects.

#### ATTORNEY GENERAL'S MOTION

The Attorney General distinguished between Kentucky Power's motion to schedule an IC, which is procedural in nature, and the motion regarding the examination of witnesses, which is substantive in nature. The Attorney General did not object to scheduling an IC. The Attorney General asserted that filing a response to the substantive motion before discussing the relevant, substantive issues regarding witnesses and testimony was premature. For that reason, the Attorney General requested that he be allowed four days after the IC to file a response to the motion regarding the examination of witnesses.

#### DISCUSSION AND FINDINGS

Although Kentucky Power failed to state it in so many words, from the text and nature of the motions, Kentucky Power intends to present new evidence at the hearing through direct testimony. Further, Kentucky Power intends to provide Staff and the Attorney General with the new evidence in an IC so that Staff and the Attorney General have the opportunity to review the new evidence prior to the hearing.

KRS 278.400, which establishes the standard of review when the Commission grants rehearing of an Order, provides that “[u]pon the rehearing any party may offer additional evidence that could not with reasonable diligence have been offered on the former hearing.” Rehearing does not present parties with the opportunity to relitigate a matter fully addressed in the original order. By limiting rehearing to new evidence or new arguments not readily discoverable at the time of the original hearings, KRS 278.400 serves administrative efficiency by providing closure to a matter before the Commission. As a result, parties must use reasonable diligence in preparing and presenting their case. In addition to a rehearing based on evidence or arguments not readily discoverable at the time of the hearing, KRS 278.400 also provides an opportunity for the Commission to address any errors or omissions in our Orders.

Here, Kentucky Power requested rehearing on three matters based on alleged omissions or errors in the Commission’s March 16, 2018 Order, and not upon new evidence or arguments not readily discoverable during the pendency of the original matter.

The first rehearing issue is whether the Commission granted a CPCN for the Hazard-Jackson 69 kV reconfiguration, which was one of the 46 improvements in the Supplemental Project. In the application, Kentucky Power summarized the Baseline Project in one paragraph, summarized the Hazard-Jackson 69 kV improvement as associated with the Baseline Project in the following paragraph, and then summarized the Supplemental Project consisting of improvements to the existing Wooton and Hazard substations in a third paragraph.<sup>1</sup> In testimony filed with the application, Kentucky Power

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<sup>1</sup> Application at paragraphs 6–8.

stated that the Hazard-Jackson 69 kV reconfiguration was required by the Baseline Project. To the degree that the March 16, 2018 Order or the Order granting partial rehearing was unclear, the Commission finds that the March 16, 2018 Order should be amended to reflect that we granted a CPCN for the Hazard 69 kV reconfiguration based upon evidence in the record that the Hazard Jackson 69 kV reconfiguration is required to implement the Baseline Project.

The second and third issues for rehearing are whether 45 of the 46 improvements in the Supplemental Project are necessary to, or required by the Baseline Project. The second issue is whether nine discrete improvements in the Supplemental Project are required to implement the Baseline Project. The third issue is whether the 36 remaining improvements in the Supplemental Project are necessary to implement the Baseline Project.

Rehearing was granted regarding the relationship between the Supplemental Projects and the Baseline Projects in light of any alleged omissions or errors in the Commission's March 16, 2018 Order.

The Commission finds that Kentucky Power's motion for an IC and motion to modify the order of examination of witnesses should be denied. A party requesting to introduce new evidence upon rehearing has the burden of proof to establish that the evidence could not have been obtained with reasonable diligence during the original proceeding. Setting aside that rehearing was granted in light of the alleged errors and omissions in the March 16, 2018 Order, Kentucky Power failed to provide any basis to permit it to introduce new evidence, whether in an IC or via direct testimony at the November 27, 2018 hearing. Not only did Kentucky Power provide only a generic

statement about the new evidence it intends to present, Kentucky Power entirely failed to address why the evidence could not have been obtained with reasonable diligence during the pendency of the initial proceeding. For example, Kentucky Power stated that it intends to introduce evidence at the hearing regarding the engineering and technical specifications of the Supplemental Project. Given the planning and analysis that occurs prior to applying for a CPCN, it is bewildering how such specifications could not have been obtained with reasonable diligence during the pendency of the original proceeding. This is especially so given Kentucky Power's statement in its motion for partial rehearing that the evidence it submitted regarding the need for the Supplemental project "is substantial and uncontroverted."<sup>2</sup>

To the degree that Kentucky Power seeks to relitigate the relationship between the Baseline and Supplemental Projects, the Commission reiterates that rehearing does not afford a party the opportunity to do so. Under the statutory and regulatory framework for processing cases, the remedy for presenting evidence available, but not offered, during the pendency of a case is not via KRS 278.400 rehearing. The Commission notes that, while we denied the CPCN for the Supplemental Project because Kentucky Power failed to meet its burden of proof by presenting evidence to support its request, we did not foreclose on a future proceeding because we did not deny the CPCN with prejudice.

Turning back to Kentucky Power's motions, we find that, in addition to failing to set forth any basis to introduce new evidence, Kentucky Power utterly failed to provide any explanation why it waited until 11 business days prior to the hearing to request to offer new evidence. We note that the procedural schedule was issued on April 25, 2018. In

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<sup>2</sup> Kentucky Power's Motion for Partial Rehearing (filed April 5, 2018) at 11.

the six months between when the procedural schedule was established and the motions filed, Kentucky Power did not raise an issue regarding the need to file additional witness testimony. This is particularly concerning given that the November hearing is the second hearing date; this matter was rescheduled from July 2018 at the request of Kentucky Power.

Last, the Commission notes that a determination that evidence could not have been obtained with the exercise of reasonable diligence is made by the Commission, which speaks through its orders and not made by Staff. Thus, even if Kentucky Power had established good cause to introduce newly discovered evidence, scheduling an IC for the purpose of disseminating new evidence is neither the proper, nor efficient use of the Commission's or the parties' time and efforts.

Based upon the above, the Commission finds that the Attorney General's motion is moot, and therefore denied.

IT IS THEREFORE ORDERED that:

1. Kentucky Power's motion to schedule an IC is denied.
2. Kentucky Power's motion to modify the order of examination of witnesses is denied.
3. The Attorney General's motion to hold Kentucky Power's motion for leave to modify the order of examination of witnesses in abeyance is denied.
4. Ordering paragraph 2 of the March 16, 2018 Order is amended as follows:  
  
Kentucky Power is granted a CPCN to rebuild its existing 6.5 mile Hazard-Wooton 161 kV Transmission Line in Perry and Leslie counties, to perform the related replacement of the existing 161/138 kV single-phase transformer located at the Hazard substation with a new three-phase 161/138 kV transformer, as set forth as a Baseline Project in the



Application, and to construct the Hazard-Jackson 69 kV reconfiguration, as set forth as one of the 46 improvements in the Supplemental Project in its Application.

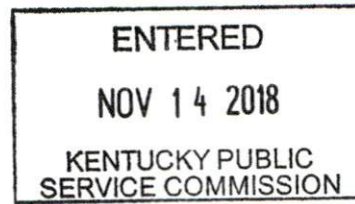
5. Ordering paragraph 2 of the March 16, 2018 Order is amended as follows:

Kentucky Power's request for a CPCN for improvements to the Wooton substation and Hazard substation as set forth as a Supplemental Project in the Application is denied, with the exception of the Hazard-Jackson 69 kV reconfiguration for which a CPCN was approved in ordering paragraph 2.

6. All other provisions of the Commission's March 16, 2018 Order not in conflict with this Order shall remain in full force and effect.

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By the Commission



ATTEST:

  
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