

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. E-7, SUB 949

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	
Citizens to Protect Kituwah Valley and Swain)	
County, c/o Natalie Smith, 938 Tsalagi Road,)	ORDER GRANTING SUMMARY
Cherokee, North Carolina 28719,)	JUDGMENT, IN PART, DENYING
Complainant)	SUMMARY JUDGMENT, IN PART,
) SCHEDULING HEARING, AND
v.)	ESTABLISHING DEADLINES FOR
) FILING TESTIMONY
Duke Energy Carolinas, LLC,)	
Respondent)	

BY THE COMMISSION: On March 31, 2010, Citizens to Protect Kituwah Valley and Swain County (Complainant) filed a Complaint against Duke Energy Carolinas, LLC (Duke), and a Motion to Issue Stop Work Order concerning a transmission line and tie station project being undertaken by Duke near Cherokee in Swain County, North Carolina. In accordance with the Commission's Rules of Practice and Procedure, the Complaint was served on Duke by an April 1, 2010 Order of the Chairman, and Duke was directed to satisfy the demands of Complainant or to file an answer on or before April 16, 2010. The Chairman's Order scheduled an oral argument for April 27, 2010, to hear from the parties as to Complainant's Motion. The Public Staff was asked to participate in this oral argument.

On April 16, 2010, Duke filed a Motion to Hold Complaint in Abeyance and Waive Oral Argument, and Opposition to Motion to Stop Work. Duke asserted that the transmission line project is an upgrade and, as such, is exempted from the requirement for a Certificate of Public Convenience and Necessity (CPCN); that the first part of the upgrade would be completed by the end of April 2010; and that Duke would refrain from any additional extension of the transmission line until the site of the tie station is resolved. Duke stated that it had halted construction at the proposed tie station site and that it was working with the Eastern Band of Cherokee Indians, Swain County, and others as to possible alternative sites for the tie station. Duke moved the Commission to hold these proceedings in abeyance for 60 days and to cancel the oral argument scheduled for April 27, 2010, as moot.

On April 23, 2010, Complainant filed a Response to Duke's Motion. Complainant acknowledged that Duke had committed to halt construction on the transmission line and tie station project, except for erosion control, and Complainant agreed that this commitment "makes a hearing on the Citizens' motion for a stop work order moot at this

time.” Complainant also acknowledged that Duke had agreed to informal discovery and had committed to engage in settlement discussions with Complainant and others. Complainant asked the Commission to note these commitments in an order. Complainant objected to Duke’s request that these proceedings be held in abeyance for 60 days. Complainant noted that the Complaint presents issues other than the visual impact of the project on the sacred Kituwah mound, and Complainant asked “that a schedule should be established that moves promptly to resolve all of the issues raised in the Complaint.” Complainant asked to be heard on its objection to Duke’s Motion at the previously scheduled April 27, 2010 oral argument.

On the same date, Duke filed a Reply to Complainant’s Response to Motion. Duke stated that the basis for its Motion was an attempt to resolve the matter without further Commission involvement and that Complainant’s Response had not raised any new issue that required further reply.

Also on April 23, 2010, the Chairman issued an order finding that the Motion for a stop work order was moot and canceling the oral argument because Duke had committed to halt construction at the proposed tie station site and to refrain from any further extension of the proposed transmission line beyond that completed and energized on April 19, 2010. The Chairman further noted Duke’s commitment to engage in informal discovery and both Duke’s and Complainant’s commitments to seek a settlement with all interested parties, and urged the parties to pursue such discussions. Lastly, the Chairman denied the Motion to Hold Complaint in Abeyance and ordered Duke to file an answer to the Complaint.

On May 10, 2010, Duke filed an Answer and Motion to Dismiss Complaint. In its Answer, Duke stated that the Complaint mainly surrounds objections to the visual impact of the Hyatt Creek Tie Station proposed to be built as part of its upgrade of the existing 66-kV Wests Mill transmission line. Duke stated that, when it became aware of the concerns regarding the location of the proposed tie station, it began working cooperatively with the leadership of the Eastern Band of Cherokee Indians, Swain County, and others to address concerns with visual impact. Duke further stated that it had temporarily halted construction at the tie station site and that it was committed to evaluating alternative workable sites suggested by the Eastern Band of Cherokee Indians and Swain County. Nevertheless, Duke argued that it is not required to obtain a CPCN from the Commission before either constructing the tie station or upgrading the 66-kV transmission line. G.S. 62-101(c)(2) provides that a certificate is not required for the “replacement or expansion of an existing line with a similar line in substantially the same location, or the rebuilding, upgrading, modifying, modernizing, or reconstructing of an existing line for the purpose of increasing capacity or widening an existing right-of-way.” Duke argued that its upgrade of the existing 66-kV transmission line to a 161-kV transmission line is both a replacement and an expansion of an existing line. Additionally, the line is being rebuilt, upgraded, modified, modernized and reconstructed, as set forth in the statute, for the purpose of increasing capacity to serve an area that is projected to experience significant

load growth.¹ Although the statute provides an exemption even if the right-of-way is widened, Duke noted that no additional right-of-way is necessary for this upgrade. Therefore, because neither the siting of the proposed tie station nor the transmission line upgrade requires a CPCN, Complainant has the burden of proof that, in siting the proposed tie station along or upgrading the transmission line, Duke acted arbitrarily and capriciously.

On October 19, 2010, Duke filed a Motion for Summary Judgment. Duke asserted that it had decided and announced that it would relocate the proposed tie station to a different site and that the allegations of the Complaint regarding the location of the tie station are now moot. As to the allegations regarding the transmission line, Duke asserted that there are no genuine issues of material fact, and Duke provided an affidavit and moved for summary judgment as to these allegations.

On November 5, 2010, Complainant filed a Response opposing the Motion for Summary Judgment. Complainant stated that Duke's plan to move the tie station "has not been finalized and no evidence of that commitment has been placed in the record of this proceeding" and that, at best, this part of the Complaint should remain open at this time. Further, Complainant stated that a change in the site of the tie station does not warrant summary judgment on all issues raised by the Complaint. Complainant asserted that Duke should have obtained a certificate before constructing the transmission line and that Complainant, not Duke, should be allowed summary judgment on this issue. In support of its argument, Complainant alleged that the 161-kV transmission line is substantially different from the 66-kV transmission line because it has more cables on significantly larger metal, rather than wood, structures; at least 10 of the 92 new towers and structures are more than 50 feet from the original line; and the cleared right-of-way is now substantially wider. Complainant provided several affidavits and exhibits with the Response.

On December 1, 2010, Duke filed a Reply and an additional affidavit, again arguing for summary judgment in its favor.

On December 3, 2010, the Chairman issued an Order scheduling an oral argument on the outstanding motions for summary judgment. The Public Staff was again asked to participate in the oral argument and to file a statement providing its views on the issues presented. The Chairman further requested that Duke work with Complainant and the Public Staff to provide at the oral argument an agreed-upon exhibit (or exhibits) illustrating in one document the location and boundaries of the rights-of-way involved, the location of the pre-existing poles and lines within these rights-of-way, and the location of the poles and towers and lines of the new transmission line.

¹ Regarding the need for the transmission upgrade, Duke stated in its Answer, "The existing Wests Mill transmission line is no longer adequate to supply the growing electricity demands of the Company's local customers' homes and businesses, primarily due to a major \$600 million expansion at Harrah's Cherokee Casino and hotel, coupled with the expected residual growth resulting from this expansion."

On December 16, 2010, the Public Staff filed its statement, as requested. The Public Staff notes that the Complaint presents three separate sets of issues: (a) one concerning the relocation of the tie station; (b) another concerning the proper interpretation of the transmission siting requirements; and (c) a third concerning the extent of the Commission's jurisdiction and whether summary judgment is appropriate as to the remainder of the Complaint. With respect to the first set of issues, regarding relocation of the tie station, the Public Staff suggested that the only remaining issue is whether this aspect of the case may be considered resolved or should remain open now that Duke has announced a new location for the tie station and has indicated that it will need to file an application for a certificate to build a new tap line to access the site. With respect to the remaining sets of issues, the Public Staff argued that, if Duke had rebuilt, upgraded, or reconstructed the existing 66-kV line into a 161-kV line, the exemption provided in G.S. 62-101(c)(2) would apply. However, because Duke constructed new towers, put up a new 161-kV line, and then put the pre-existing 66-kV line on the new towers, the Public Staff argued that the Commission must decide whether such actions fall within the statutory exemption. The Public Staff recommended that the Commission determine that the 66-kV line was upgraded and that no certificate is required. The Public Staff further noted, however, that the attachments to Complainant's Response raise factual issues regarding the negative effect of Duke's actions on the affected property owners. G.S. 62-101(f) provides that nothing in the transmission siting statutes restricts or impairs the Commission's jurisdiction pursuant to G.S. 62-73 to hear or make complaints. Therefore, argued the Public Staff,

the Commission could conclude that the exemption from the certificate requirement applies to Duke's erection of the towers and the addition of a new 161 kV line in this case, while continuing to consider whether Duke acted in a reasonable and appropriate manner in its siting and construction of the transmission line and whether various aspects of the Complainant's requested relief (e.g., the removal of the towers between the currently proposed tie station site and the initially proposed tie station site) should be granted.

Oral argument was heard, as scheduled, on December 20, 2010.

On December 22, 2010, in response to questions raised during the oral argument, Duke filed its Late-Filed Exhibit 2, a map depicting the circuits on the upgraded transmission line and the locations of existing and proposed facilities. Exhibit 2 indicates that the new towers and structures are within the existing right-of-way.

On January 18, 2011, Complainant filed a Response to the Commission's Information Request regarding whether the new towers and structures are within the original right-of-way. Noting that Duke has maintained that all of the new towers were constructed in the original right-of-way, Complainant stated that bad weather had hampered its attempts to confirm or deny Duke's allegation, but requested that the Commission treat this allegation as proved by Duke in the context of the summary judgment. Complainant, however, argued that, even if the new towers are within the

original right-of-way, its cross-motion for summary judgment should be granted as the project is a new transmission line that should have required a certificate prior to its construction.

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Summary judgment is a means to “bring an action to an early decision on the merits, avoiding the delay and expense of trial when no material facts are at issue.” Dobson v. Harris, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000). As provided in the North Carolina Rules of Civil Procedure, “[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answer to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” Rule 56(c), G.S. 1A-1. In Kessing v. National Mortgage Corp., 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971), the North Carolina Supreme Court stated:

Rule 56 is for the disposition of cases where there is no genuine issue of fact and its purpose is to eliminate formal trials where only questions of law are involved. ... Where there is no genuine issue as to the facts, the presence of important or difficult questions of law is no barrier to the granting of summary judgment.

DISCUSSION AND CONCLUSIONS

Location of the Tie Station

Complainant initially complained that land clearing and construction at Duke’s proposed site for the tie station (which Complainant referred to as a substation) would “have an unreasonable and highly negative impact” on Complainant’s members, including “desecration of the sacred Kituwah Valley.” Complainant further complained that Duke failed to obtain a CPCN prior to construction of the “project,” by which it apparently intended to include the tie station.

While defending its initial site selection, Duke stated in its April 16, 2010 and May 10, 2010 filings that it had stopped work at the tie station in order to attempt to work with Swain County, the Eastern Band of the Cherokee Indians, and others to locate an alternative site. In its Motion for Summary Judgment, Duke stated that it had announced that it would relocate the tie station to one of two new sites, “neither of which are in the direct viewshed of Kituwah Mound.” With regard to the need for a CPCN, Duke, in its Answer, stated, “There is no statutory requirement that [Duke] obtain a CPCN to construct a new tie station.”

In its November 5, 2010 Response and at oral argument, Complainant argued that Duke’s proposal to relocate the tie station does not provide adequate ground to grant summary judgment: “[Duke’s] plan to move the tie station has not been finalized and no evidence of that commitment has been placed in the record.” Complainant requested that

this issue remain open until Duke “complies with the Transmission Line Siting Law if [it] is required to do so, and actually relocates the tie station and the new segments of the transmission line.” In its Response, Complainant reiterated its argument that Duke was required to obtain a CPCN prior to construction of the tie station.

The Commission agrees with Duke that a CPCN is not required prior to construction of the tie station. G.S. 62-101(a) provides,

No public utility or any other person may begin to construct a new transmission line without first obtaining from the Commission a certificate of environmental compatibility and public convenience and necessity.

“Transmission line” is defined in G.S. 62-100(7) as “an electric line designed with a capacity of at least 161 kilovolts,” and “lines” is defined in G.S. 62-100(4) as “distribution lines and transmission lines collectively.” A tie station or substation is not an electric line, and no certificate is required for its construction. There is no genuine issue of fact with regard to this issue, only a question of law. The Commission, therefore, grants summary judgment, in part, on this issue.

The Commission agrees with Complainant, however, that, even if a certificate is not required, a complainant contesting the reasonableness of an electric utility’s decisions in planning and constructing a tie station may state a claim for relief. Consequently, the concerns raised with regard to the location of the tie station and its potential adverse impacts are not moot until Duke has completed construction of the tie station on the alternate site. Duke has already begun construction at one site only to halt construction after objections were raised. Even then, Duke stated that it would resume construction if no reasonable alternative site were found. If objections were raised as to the alternative site and Duke were to fall back to its original site, numerous factual issues raised in the original Complaint would again be before the Commission. The Commission, therefore, denies summary judgment on this issue, holding it in abeyance until Duke has completed construction of the tie station.

CPCN for the Transmission Line

Complainant further complained that “[t]he construction of more than 50 towers for the new transmission line, the installation of power cables, the expansion of the cleared right-of-way, [and] new routes for the lines ... will have an unreasonable and highly negative impact” on Complainant’s members, including “desecration of the sacred Kituwah Valley.” Complainant argued that Duke violated G.S. 62-101(a) by failing to obtain a CPCN prior to construction of the new 161-kV transmission line. Stating that the purpose of the certification requirement is to require the utility to “demonstrate, along with providing other information, the need for the transmission line, its proposed location, and importantly, an environmental report that looks at the environmental impact of the action, mitigating measures that may minimize the impact and alternative actions,” Complainant argued that Duke’s failure to obtain a certificate resulted in no notice to Complainant and other interested persons and no hearing on the merits and impacts of the project.

Complainant further argued that Duke made no attempt to mitigate the impacts of the project or to find alternative routes and mischaracterized the need for the project. Complainant, therefore, requested that the Commission determine that Duke violated the statute and require it to file an application for a CPCN.

In each of Duke's filings and at oral argument, it argued that it is not required to obtain a CPCN because its upgrade of the existing transmission line "is plainly exempted from any CPCN requirement" by G.S. 62-101(c)(2). In its Answer, for example, Duke argued:

This exception clearly covers the Company's efforts to upgrade the existing 66 kV Wests Mill transmission line to a 161 kV line because it is both a replacement and an expansion of an existing line. Additionally, the line is being rebuilt, upgraded, modified, modernized and reconstructed, as set forth in the statute, for the purpose of increasing capacity to serve an area that is projected to experience significant load growth – a set of facts for which this CPCN exemption clearly was enacted. Although the statute provides an exemption even if the right of way is widened, no additional right of way is necessary for this upgrade. As such, this upgrade is plainly exempted from any CPCN requirement by N.C.G.S. § 62-101(c)(2). [Emphasis in original.]

Duke's position was supported by the Public Staff, which recommended that the Commission determine that the 66-kV line was upgraded and that no certificate is required.

In its November 5, 2010 Response and at oral argument, Complainant argued that the project is not an upgrade, but a new transmission line of 161 kV subject to the requirement that Duke first obtain a CPCN: "it was a [sic] upgrade of an existing line with a 161 kV line put on top of it." Complainant further argued that "[t]aking down the 66-kV poles and replacing them with metal towers designed for 161-kV lines while keeping the 66-kV lines is far outside the scope of the upgrade, rebuild, modification, modernization or reconstruction that [G.S.] 62-101(c)(2) contemplates." Complainant argued that Duke's interpretation would allow the exception to swallow the rule by allowing a utility to build a line in two stages to avoid the certification requirement by first building a line less than 161 kV and then upgrading that line to 161 kV or greater.

In order to make the argument that the Certificate statute does not apply to the transmission line and tie station in question, Duke Energy is interpreting the word "line" to mean any size line, both unregulated lines and regulated lines under the Certificate statute, rather than the word, "transmission line," defined in G.S. 62-100(5) [sic] as a line with a capacity of at least 161-kV. ... The interpretation of the exception by giving the word "line" the meaning of "transmission line" as defined in G.S. 62-100, makes the most sense.

The Commission agrees with Duke that the CPCN requirement does not apply to the upgrade of its existing 66-kV Wests Mill transmission line. For the purpose of summary

judgment, Complainant has conceded the issue of whether the 161-kV transmission line is located beyond the boundaries of the existing right-of-way. Duke submitted maps identifying the location of the 161-kV transmission line in relation to the existing right-of-way boundaries. At the oral argument, Duke represented unequivocally with reference to those maps that not only is the 161-kV transmission line within the right-of-way, but that it is in the same location as the existing pole line. Duke further represented that there will be no widening of the existing right-of-way. When questioned on the validity of Duke's maps and representations, Complainant was unable to come forward with any support in contradiction.

Although G.S. 62-101(a) generally requires a utility to obtain a CPCN before construction of a 161-kV transmission line, the statute provides a number of exceptions. Subsection (c)(2), in particular, provides that a certificate is not required for the "replacement or expansion of an existing line with a similar line in substantially the same location, or the rebuilding, upgrading, modifying, modernizing, or reconstructing of an existing line for the purpose of increasing capacity or widening an existing right-of-way." Duke argues that its project falls within this exception; Complainant argues that Duke is, in fact, constructing a new 161-kV transmission line and moving the existing 66-kV line to the new, taller metal structures.

Complainant essentially makes two arguments, neither of which is supported by the language of the statute or its underlying intent. First, Complainant argues that "line" should be read as "transmission line," such that an "existing line" is one that was previously granted a CPCN. This is contrary to the definition of "lines" provided in G.S. 62-100(4) which states that the word "line," used alone, refers to either a distribution line or a transmission line. Here, the existing 66-kV transmission line is an "existing line" as that term is used in subsection (c)(2). The statute does not limit the exception only to transmission lines that have previously obtained a CPCN. Second, Complainant argues that the project will result in two lines – the existing 66-kV transmission line and a new 161-kV transmission line, with the new 161-kV transmission line requiring a CPCN. The word "line," as used in the definition of "lines," apparently needed no definition, but was intended to be interpreted in its usual and customary sense. As counsel for Duke stated at oral argument in response to questions by the Commission:

MR. FRANKLIN: The point that we're making is that industry wise, industry standard wise, whether you're talking about one conductor, two conductors, single circuit, double circuit, whether something is defined as a transmission line is not depending on actually how many wires you see hanging from the pole or how many conductors there are. We would not call this rebuild of the West[s] Mill – West[s] Mill transmission line as now it's – we wouldn't call it now the West[s] Mill – the transmission lines, plural. It's still the same transmission line, it's just a double circuit now, if that makes sense.

COMMISSIONER ALLEN: Yes, it does. And you use the term in industry language. But the – would you explain to me whether or not you think the

statute definition of an electric line is compatible with the industry understanding? That's number seven in the definitions under 62-100.

MR. FRANKLIN: Duke – Duke believes that it is.

The Commission concurs with Duke that the word “line” in the statute does not refer to a single conductor or set of conductors, but to a circuit or circuits in a corridor that connect two points on the electric grid. In some instances it may refer to a single conductor, as with the service drop that provides power to a customer’s residence. In other instances, such as this, it may refer to a double-circuit transmission line between utility substations. Because the new, higher-voltage transmission line will have the capacity to deliver more power to the area being served by Duke, the Commission is persuaded that the improvements proposed to the existing 66-kV Wests Mill transmission line are encompassed by the language of G.S. 62-101(c)(2) as the “rebuilding, upgrading, modifying, modernizing, or reconstructing of an existing line for the purpose of increasing capacity.”

Significantly, the 161-kV transmission line will be located in the same right-of-way along the same pole line as the existing 66-kV transmission line and will require no widening of the existing corridor. Upon examination of the facts of Duke’s construction activity in the context of G.S. 62-101 in its entirety and the intent of the statute to require a certificate in some instances but to waive this requirement in others, the Commission concludes that Duke is not required to obtain a CPCN prior to upgrading the existing Wests Mill transmission line and grants summary judgment to Duke regarding this issue.

Design and Construction of New Transmission Facilities

Lastly, Complainant complained that the “environmental and visual impacts of the transmission towers and lines, and the substation, will directly cause the loss of property value to residents ... and businesses along the project’s route.” Complainant argued that, “[i]n most instances, Duke Energy used older easements given by homeowners for the purposes of connecting electrical service to their homes as a condition for running new 161 kV transmission line, towers, and clearing of right-of-ways in close proximity to such residences.” Complainant also raised concerns about aesthetics, stating that the “impacts of clearing and expanding the present right-of-way and new routes for the transmission lines will degrade Swain County’s natural legacy” and “will have a severe impact on the scenic beauty of Swain County.” Even if the Commission determines that Duke does not need a CPCN, argued Complainant, “the impacts are so devastating that the project should not be allowed to continue.” Among the requested relief, Complainant seeks to have the cleared areas for towers and substation overlooking the Kituwah valley restored back to its original topography and flora.

In its April 15, 2010 filing, in which it requested that the Complaint be held in abeyance, Duke stated that it had stopped work on the tie station while negotiating with interested persons to identify an alternative site, but that it was continuing with the first part of the upgrade to the transmission line to connect it to the Bryson Tap in order to

prevent significant reliability issues in the area during the summer of 2010. Duke stated that, once there is a resolution to the ultimate location of the tie station, it would extend the transmission line to that location; until then, Duke would refrain from completing the additional extension of the transmission line. In its Motion for Summary Judgment, Duke denied that it had unlawfully widened various rights-of-way in rebuilding the transmission line. Moreover, even had it done so, argued Duke, the exemption provided by G.S. 62-101(c)(2) applies whether or not the right-of-way is widened. Duke further argued that Complainant's land devaluation claims are not properly before the Commission because the Commission does not have jurisdiction to award monetary damages.

In its November 5, 2010 Response and at oral argument, Complainant argued that "[i]ssues related to Duke Energy's siting practices are specifically within the realm of a complaint proceeding." Complainant argued that G.S. 62-73 broadly allows anyone to raise issues about "unjust and unreasonable" acts done by a utility, noting, for example, that the issue of impacts of a transmission line on residences was raised by complainants in Dixon v. Duke Power, 94 N.C.U.C. 307, Docket No. E-7, Sub 743 (2004). Similarly, in this case, "the construction and continuous presence of the transmission line have had a significant and undue effect on landowners." Throughout its filings, Complainant noted that the new transmission line is now on significantly larger metal towers, that the towers are more visually intrusive, that they are in different locations than the previous wooden poles, and that they are much closer to residences. Complainant stated that "property values have been decimated ... because of the intrusive towers and transmission lines." Complainant alleged that it "is unreasonable for Duke Energy to site a new and significantly larger transmission line, with towers in new locations, on narrowly drawn easements, without notice to landowners."

In its Statement of Position and at oral argument, the Public Staff supported the Complainant on this issue, stating that "the attachments to the Complainant's response, particularly the photographs, raise factual issues regarding the negative effect of Duke's actions on the affected property owners." The Public Staff further stated that the Commission could grant summary judgment for Duke on the CPCN issues,

while continuing to consider whether Duke acted in a reasonable and appropriate manner in its siting and construction of the transmission line and whether various aspects of the Complainant's requested relief (e.g., the removal of the towers between the currently proposed tie station site and the initially proposed tie station site) should be granted.

The Commission agrees with Duke that requests for damages for diminution in property value are not properly before the Commission. However, the Commission does not agree that Duke is entitled to summary judgment on this issue. Rather, as the Public Staff argued, the Commission may hear complaints regarding whether Duke acted in a reasonable and appropriate manner in its siting and construction of the transmission line upgrade.

Although the Dixon complaint was denied, the Commission stated in its October 26, 2004 order:

The Commission acknowledges that any public utility which intends to construct a transmission line does not have to seek a certificate of construction from the Commission if the transmission line is less than 161 kilovolts. G.S. 62-101. However, this does not mean that the size of the transmission line dictates whether the public utility's actions are necessarily outside the Commission's jurisdiction.

In an earlier transmission line complaint case cited in Dixon, In re State ex rel. Utils. Comm'n V. Mountain Elec. Coop., 108 N.C. App. 283, 423. S.E.2d 516 (1992) (affirming denial of electric utility's motion to dismiss for lack of jurisdiction), the Commission had found after an evidentiary hearing that the utility had negotiated with the complainant during the siting process and relocated a pole that was originally designed to be set in his yard to a location across the street onto property already belonging to the utility. A hearing was also held in Crohn v. Duke Power Co., 78 N.C.U.C. 213, Docket No. E-7, Sub 430 (1988), in which Duke proposed to construct a 100-kV transmission line within 60 feet of a residence. See also Camp Gwynn Valley v. Duke Power Co., 78 N.C.U.C. 186, Docket No. E-7, Sub 414 (1988); Kirkman v. Duke Power Co., 64 N.C.U.C. 89, Docket No. E-7, Sub 152 (1974). In Kirkman, although the complaint was also ultimately dismissed after an evidentiary hearing was held, the Commission stated:

The gravamen of the complaint in this matter is that the Defendant, Duke Power Company, has acted or proposed to act in an unreasonable and arbitrary manner to the detriment and damage of the complainants, and contrary to and in contravention of the laws and statutes of the State. ... This complaint proceedings [sic] viewed further in the light of the broad grant of regulatory authority and duty stated in Chapter 62, indicates that the acts and activities of public utilities in North Carolina are generally subject to the review and judgment of this Commission as those acts and activities relate to the furnishing to individual consumers and the public at large of their services which are affected with a public interest, the franchise for which has been granted by the State to the utility. ... It is therefore basic law in this State that the grant of franchise to a public utility carries with it the requirement of reasonable conduct in the discharge of its business functions. No public utility may, under the cloak of franchise, act arbitrarily and unreasonably in the conduct of its business and in the providing of its service to the public without being answerable to the law or the jurisdiction. Assuming such arbitrary and unreasonable acts on the part of the public utility in the providing of its service to the public or to individual citizens, the proper forum for the consideration of such matters may be either this Commission or the General Court of Justice, depending upon the nature of the complaint and the relief sought in this matter. The nature of this complaint is that the Defendant, Duke Power Company, has acted or proposes to act in an unreasonable and arbitrary manner in the

construction of an electric transmission line, the purpose of which is to provide electric service to individual citizens and the public in general in North Carolina, and the relief sought is an order to alter the plans of Duke Power Company for the construction of said line and to require that the proposed transmission line be constructed in a different manner and particularly in a different place. This is the proper forum for the consideration of such a complaint.

In Camp Gwynn Valley, the Commission found after an evidentiary hearing that the proposed route for a 44-kV transmission line would have a significant environmental impact upon the purpose of the camp and its activities, and ordered Duke to make further investigation into alternate routes. In numerous other transmission line siting cases, the utility has been directed or agreed to work with affected landowners to minimize the impact of the transmission line project to their property. See, e.g., Order Issuing Certificate of Environmental Compatibility and Public Convenience and Necessity, Docket No. E-2, Sub 803 (2002); Final Order Overruling Exceptions and Affirming Recommended Order, Docket No. E-2, Sub 796 (2002); see also, Order Issuing Certificate of Environmental Compatibility and Public Convenience and Necessity, Docket No. E-2, Sub 920 (2008).

The Commission, therefore, denies summary judgment for Duke on the issues regarding whether Duke acted in a reasonable and appropriate manner in its siting and construction of the transmission line upgrade. Such issues would include the complaints about the need for and impacts of the transmission line upgrade, including the differences from the existing line and towers and the removal of towers alleged to be no longer necessary because of the relocation of the tie station.

Conclusion

The Commission, therefore, concludes that Duke is entitled to summary judgment regarding the need for a CPCN for the tie station and the transmission line upgrade, but that Duke should not be granted summary judgment regarding whether it acted in a reasonable and appropriate manner in its siting and construction of the transmission line upgrade. The Commission denies summary judgment for Duke regarding the location of the tie station and will hold this issue in abeyance until Duke has completed construction of the tie station. Lastly, the Commission denies Complainant's cross-motions for summary judgment.

The Commission will schedule an evidentiary hearing to allow Complainant to proceed on the issues regarding whether Duke acted in a reasonable and appropriate manner in its siting and construction of the transmission line upgrade. In order to most efficiently use the parties' and Commission's time, Complainant will be required to prefile the direct testimony and exhibits of all of its witnesses. The Commission asks that the Public Staff continue to participate in this proceeding and to appear at the public hearing.

IT IS, THEREFORE, ORDERED as follows:

1. That Duke's Motion for Summary Judgment is granted, in part, because it is not required to obtain a CPCN prior to construction of the tie station or upgrade of the Wests Mill transmission line;
2. That Duke's Motion for Summary Judgment is denied, in part, on the issues regarding whether Duke acted in a reasonable and appropriate manner in its siting and construction of the transmission line upgrade because these issues are properly before the Commission upon complaint;
3. That Complainant's cross-motions for summary judgment are denied;
4. That an evidentiary hearing shall be, and hereby is, scheduled for Tuesday, August 2, 2011, at 9:30 a.m., in Swain County Courthouse, District Courtroom, 101 Mitchell Street, Bryson City, North Carolina, on the remaining issues in this Complaint;
5. That Complainant shall file the direct testimony and exhibits of all of its witnesses on or before Friday, May 27, 2011;
6. That Duke shall file the direct testimony and exhibits of its witnesses on or before Friday, July 8, 2011; and
7. That Complainant may file rebuttal testimony and exhibits no later than Friday, July 22, 2011.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 13th day of April, 2011.

NORTH CAROLINA UTILITIES COMMISSION



Patricia Swenson, Deputy Clerk