

RENDERED: JANUARY 10, 2020; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2019-CA-000393-MR

MARY JANE DIEBOLD, INDIVIDUALLY  
AND AS SUCCESSOR ADMINISTRATRIX  
OF THE ESTATE OF THOMAS C. DIEBOLD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE MITCH PERRY, JUDGE  
ACTION NO. 18-CI-001223

LOUISVILLE GAS AND ELECTRIC  
COMPANY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: ACREE, COMBS, AND MAZE, JUDGES.

ACREE, JUDGE: Appellant, Mary Jane Diebold, appeals the Jefferson Circuit Court's February 19, 2019 interlocutory judgment allowing Appellee, Louisville Gas and Electric (LG&E), to condemn thirty feet of her property to construct a new gas pipeline. Finding no error, we affirm.

## **BACKGROUND**

LG&E is an electric and gas utility company servicing approximately 320,000 customers in the Louisville, Kentucky area. In one service area, known as Crestwood/Simpsonville, approximately 22,000 customers were experiencing low natural gas pressure. LG&E concluded the problem could be solved by installing an additional 8-inch diameter pipeline approximately 3 miles along Aiken Road to service Crestwood/Simpsonville customers. Diebold owns approximately 220 acres along the proposed route.

LG&E would install the proposed pipeline using the horizontal directional drilling (HDD) process. With this process there is no disturbance of the surface of the land because the excavation takes place at a depth of between 35 and 70 feet.

For six months, LG&E sought to purchase from Diebold a permanent easement of approximately 0.5 acres and 0.3 acres for a temporary construction easement. LG&E's final offer was \$20,000. Ultimately, Diebold rejected the offer and demanded \$3 million dollars for the easement. This prompted LG&E to initiate a condemnation action against Diebold pursuant to the Eminent Domain Act of Kentucky.

The circuit court held an evidentiary hearing on June 28, 2018. After the hearing, the circuit court ruled in LG&E's favor, granting it an interlocutory judgment. This appeal followed.

### **STANDARD OF REVIEW**

An interlocutory order on the condemnor's right to take is immediately appealable. *Ratliff v. Fiscal Court of Caldwell Cty., Kentucky*, 617 S.W.2d 36, 39 (Ky. 1981). The authority to condemn is subject to the constitutional restriction that the taking be for "public use" and the condemnee receive "just compensation[.]" See Ky. Const. § 13. "Generally, the condemning body has broad discretion in exercising its eminent domain authority including the amount of land to be taken." *God's Ctr. Found., Inc. v. Lexington Fayette Urban Cty. Gov't*, 125 S.W.3d 295, 299 (Ky. App. 2002). "Although the factors of necessity and public use associated with condemnation are ultimately legal issues, resolution of those issues encompasses factual matters subject to deferential review on appeal." *Id.* at 300. Therefore, courts will not interfere with a decision to condemn, unless "there has been such a clear and gross abuse of discretion as to violate Section 2 of the Constitution of Kentucky, which section is a guaranty against the exercise of arbitrary power." *Commonwealth Dep't of Highways v. Vandertoll*, 388 S.W.2d 358, 360 (Ky. 1964). This Court reviews a lower court's determination under a clearly erroneous standard and will uphold its ruling if

supported by substantial evidence. *Clark v. Bd. of Regents of W. Ky. Univ.*, 311 S.W.3d 726, 731 (Ky. App. 2010).

### ANALYSIS

Diebold argues LG&E failed to meet the “public use” test and the “necessity” test. We address each concern in turn.

#### Public Use Test

Diebold argues there is a difference between public use and public purpose, and that LG&E’s pipeline does not qualify as a public use. We do not agree. The Kentucky Legislature has determined that the transportation of natural gas by a common carrier is in the public service. KRS<sup>1</sup> 416.675(2)(d) (declaring that “[t]he use of the property for the . . . operation of public utilities or common carriers” is a public use for the purpose of condemnation); *see also Milam v. Viking Energy Holdings, LLC*, 370 S.W.3d 530, 533-35 (Ky. App. 2012) (holding a common carrier that transported natural gas for public consumption was operating in the “public service” under KRS 278.502).

Furthermore, an unambiguous statute grants LG&E authority to exercise the power of eminent domain. KRS 278.502 provides:

Any corporation or partnership organized for the purpose of, and any individual engaged in or proposing to engage in, constructing, maintaining, or operating oil or gas wells or **pipelines for transporting or delivering oil or**

---

<sup>1</sup> Kentucky Revised Statutes.

**gas, including oil and gas products, in public service may, if it is unable to contract or agree with the owner after a good faith effort to do so, condemn the lands and material or the use and occupation of the lands that are necessary for constructing, maintaining, drilling, utilizing, and operating pipelines,** underground oil or gas storage fields, and wells giving access thereto and all necessary machinery, equipment, pumping stations, appliances, and fixtures, including tanks and telephone lines, and other communication facilities, for use in connection therewith, and the necessary rights of ingress and egress to construct, examine, alter, repair, maintain, operate, or remove such pipelines or underground gas storage fields, to drill new wells and utilize existing wells in connection therewith, and remove pipe, casing, equipment, and other facilities relating to such underground storage fields and access wells. The proceedings for condemnation shall be as provided in the Eminent Domain Act of Kentucky.

KRS 278.502 (emphases added). This statute expressly grants LG&E the right to condemn property to construct the pipeline at issue because, as a public carrier, it is providing a public service.

*Necessity Test*

Next, Diebold contends LG&E failed to establish that the route selected was chosen out of necessity. That is to say, she argues LG&E could not justify, as a matter of necessity, that the pipeline could not be laid contiguously to Aiken Road but must, of necessity, traverse her property. We are not persuaded by this argument either.

Courts review the necessity of a taking for arbitrariness or action in excess of the condemnor's authority. *God's Ctr. Found., Inc.*, 125 S.W.3d at 299-300. "[N]ecessity as used in these statutes does not mean absolute necessity, but should be held to cover what is appropriate and convenient to carry into effect the right conferred." *Petroleum Expl. v. Hensley*, 308 Ky. 103, 106, 213 S.W.2d 262, 264 (1948). "[T]he route which [the utility company] select[s], when done in the manner pointed out by the statute, raises a presumption that it is a necessary route." *Id.*

Here, the circuit court found that a legitimate necessity existed because the pipeline would resolve the low gas pressure problems for 22,000 LG&E customers. This is not contested by Diebold. Instead, she chooses to argue the proposed route for the pipeline is merely convenient. This argument failed in our previous jurisprudence and fails again here. For instance, the Court in *Commonwealth, Department of Highways v. Burchett* held that "[i]t makes no difference that the department could have chosen another location or another plan for waste disposal. Probably any highway could be routed some other way." 367 S.W.2d 262, 266 (Ky. 1963) (interpreting eminent domain under KRS 177.081). In fact, the discretion of a condemnor in the selection of the location is broad. On another occasion, the Court found that:

The general rule is well stated in 18 Am. Jur., Eminent Domain, Section 109, page 736, in this language: "The

grantee of the power of eminent domain may ordinarily exercise a large discretion not only in respect of the particular property, but also as to the amount of land to be taken for the public purpose. This discretion is not reviewable by the courts, unless, possibly, where there has been a gross abuse or manifest fraud.”

*Kroger Co. v. Louisville & Jefferson Cty. Air Bd.*, 308 S.W.2d 435, 439 (Ky. 1957). “It is fundamental that a condemning authority may determine without let or hindrance the amount of land necessary for a public purpose.” *Id.* (citing *Davidson v. Com. Ex rel. State Highway Comm’n*, 249 Ky. 568, 61 S.W.2d 34 (1933); *Baxter v. City of Louisville*, 224 Ky. 604, 6 S.W.2d 1074, 1076 (1928); *Henderson v. City of Lexington*, 132 Ky. 390, 111 S.W. 318 (1908)). Additionally, “courts will not interfere with the proposed plans unless there is positive proof of fraud, collusion or a clear abuse of discretion.” *Pike County Board of Education v. Ford*, 279 S.W.2d 245, 248 (Ky. 1955).

Brian Lenhart, LG&E’s project manager, testified that when looking to implement a new pipeline, he first looks for natural corridors or existing utility infrastructure. In this case, the route of the pipeline was chosen for four reasons. First, there was an existing electrical easement, so the area was already cleared of trees and vegetation. Second, it reduced the amount of encumbered property needed from landowners. Third, the route chosen was a shorter and, therefore, less expensive route than if it followed Aiken Road more closely. And fourth, if

LG&E followed Aiken Road, it would have needed to construct the pipeline in the road right-of-way, at significant expense.

Lenhart further testified, and his report showed, he offered two alternatives. However, the option recommended by Lenhart, condemning a portion of Diebold's property, was the better route. Lenhart's report demonstrates the chosen route was prudently and reasonably selected, not induced by fraud or a gross abuse of discretion.

*Bad Faith*

Diebold briefly argues that LG&E acted in bad faith by failing to explore alternative routes. This allegation is not supported by citation to the record. The record reflects Lenhart offered two alternative routes before selecting the route eventually pursued. He prepared a report summarizing these multiple options, and LG&E's Investment Committee ultimately approved the pipeline's route. LG&E properly studied but rejected alternate routes for sound reasons. Based upon the record, we cannot conclude LG&E acted in bad faith.

**CONCLUSION**

Accordingly, the Jefferson Circuit Court's February 19, 2019 interlocutory judgment is affirmed.

ALL CONCUR.



BRIEF FOR APPELLANT:

Charles G. Middleton III  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Monica H. Braun  
Lexington, Kentucky