

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
CIVIL ACTION NO. 21-CI-_____

LEXINGTON-FAYETTE URBAN COUNTY
GOVERNMENT

PLAINTIFF

v.

KENTUCKY UTILITIES COMPANY,

DEFENDANT

SERVE:

Allyson K. Sturgeon
Senior Corporate Attorney
LG&E and KU Energy LLC
220 West Main Street
Louisville, Kentucky 40202
(per agreement)

**VERIFIED COMPLAINT AND PETITION FOR DECLARATORY JUDGMENT,
INJUNCTIVE, AND OTHER RELIEF**

Plaintiff Lexington-Fayette Urban County Government (“LFUCG”) by and through counsel, and for its Verified Complaint and Petition for Declaratory Judgment in this civil action pursuant to KRS 418.040, et seq., states as follows:

The Parties

1. LFUCG is an urban county government established under KRS Chapter 67A. Its address is 200 East Main Street, Lexington, Kentucky 40507.

2. Defendant Kentucky Utilities Company (“Kentucky Utilities”) is a corporation organized under the laws of the Commonwealth of Kentucky. It owns and operates an electric distribution and transmission system in Lexington-Fayette County. Kentucky Utilities’ principal place of business is One Quality Street, Lexington, Kentucky 40507.

Jurisdiction and Venue

1. This Court has subject matter jurisdiction over Plaintiff's action seeking declaratory judgment against Defendant under KRS 418.040, *et seq.* as there is an actual, justifiable controversy between the parties and seeking damages in excess of the minimum jurisdictional amount.

2. Venue is proper in this court because all of the events giving rise to this action occurred and will occur in Fayette County, Kentucky.

Pertinent Facts

3. Kentucky Utilities engages in unlawful and unreasonable vegetation management practices with respect to its transmission lines in Lexington-Fayette County.

4. For more than a year, LFUCG has attempted to work with Kentucky Utilities in hopes of having Kentucky Utilities responsibly modify its practice, but those efforts have been unsuccessful.

5. On November 29, 2021, Kentucky Utilities began clearcutting any tree that will stand more than 15-feet tall at maturity and that is located under and within certain zones on each side its transmission lines along the Lansdowne Road right-of-way in Lexington-Fayette County. Lansdowne Road is an LFUCG road in a residential area.

6. On November 30, 2021, Kentucky Utilities began clearcutting trees along a section of its transmission line near Richmond Road on the backside of the Fairways at Lakeside. The Fairways at Lakeside has 92 single-family homes.

7. Kentucky Utilities has removed numerous trees across Lexington-Fayette County over the last two years. In 2020, Kentucky Utilities similarly removed trees near Southpoint Drive

without prior notice to LFUCG. In 2019, Kentucky Utilities removed trees at Raven Run Nature Sanctuary without prior notice to LFUCG.

8. This policy of clearcutting virtually all trees with a mature height of 15 feet or more is a departure from Kentucky Utilities' prior practice. In 2007, Kentucky Utilities indicated that it would allow trees to grow within a 25-foot vertical clearance, meaning that trees could grow as tall as 30 feet high under a transmission line that was 55 feet above the ground. At that time, Kentucky Utilities provided a group of landowners with approximately \$30,000 to re-establish vegetation that was being destroyed as a result of Kentucky Utilities' replacement of transmission structures. Kentucky Utilities now seeks to remove much of the vegetation that was planted at that time.

9. Kentucky Utilities has indicated that it plans to engage in the same type of clearcutting vegetation management for over 13 miles of transmission lines in Fayette County in 2022.

10. Kentucky Utilities' practice of clearcutting trees under transmission lines throughout Lexington-Fayette County is unnecessary, as many or most of the existing trees do not pose an immediate or long-term threat to Kentucky Utilities' electric service.

11. Less drastic tree trimming practices could be utilized that would protect Kentucky Utilities' electric service while also protecting Lexington-Fayette County's urban forest and the public's benefit of that urban forest.

12. Kentucky Utilities provides minimal notification to the Lexington-Fayette Urban County Government and impacted residents prior to clearcutting trees within the Lexington-Fayette Urban County right-of-way and does not meaningfully consider any feedback provided by the government or other parties regarding alternative measures.

13. Kentucky Utilities' current mitigation practices are insufficient and do not adequately compensate LFUCG for the damage, economic or otherwise, caused by the company's clearcutting of trees posing no immediate threat to electric service.

14. Urban forests positively contribute to a locality's economy by making urban retail more appealing; increasing consumer's willingness to pay higher prices for retail goods; raising home values; providing sound barriers; offsetting urban infrastructure costs; and improving residents' health and safety.

15. LFUCG is the oldest Tree City USA in Kentucky and has proudly held this designation for over 30 years. One of the Tree City USA requirements is to have the Street Tree ordinance found in Chapter 17B of LFUCG's Code of Ordinances.

16. Kentucky Utilities' extreme and unilateral tree removal practice of clearcutting trees within Lexington-Fayette County's urban forest and the right-of-way that pose no immediate threat to electric service results in economic damage to Lexington-Fayette County and its citizens.

17. Kentucky Utilities' removal of trees also creates risks for stormwater management in Lexington-Fayette County. Trees can provide significant stormwater quantity and rate control benefits through storage, interception, and evapotranspiration. LFUCG strives to improve stormwater issues for the betterment of the community, as shown by its diligent commitment to the remedial efforts performed in relation to its Consent Decree that was executed with the EPA in 2011. Kentucky Utilities' actions jeopardize the progress made by LFUCG when Kentucky Utilities does not study the environmental concerns when it removes trees in Lexington-Fayette County.

18. On November 12, 2020, the Urban County Council adopted Resolution 531-2020 condemning Kentucky Utilities' practice of clearcutting trees.

19. On July 6, 2021, the Urban County Council adopted Resolution 382-2021, by which it authorized the Mayor to negotiate an agreement with Kentucky Utilities pertaining to regulating the practice of clearcutting or removing trees in certain areas of Lexington-Fayette County.

20. On November 18, 2021, the Urban County Council adopted Resolution 654-2021 requesting that Kentucky Utilities immediately cease all clearcutting of trees under transmission lines in Lexington-Fayette County until such time as Kentucky Utilities has adequately addressed the concerns previously raised by LFUCG.

21. Although Kentucky Utilities has agreed to certain remedial efforts (such as re-planting, a privacy fence, and extended notification periods), Kentucky Utilities has refused to agree to reconsider its decision to clearcut trees in Lexington-Fayette County.

22. Kentucky Utilities' actions in clearcutting trees along Lansdowne Road and Richmond Road invade on the property rights of LFUCG and its residents.

23. As stated by the Kentucky Supreme Court in the case of *Farmer v. Kentucky Utilities Co.*, 642 S.W.2d 579, 581 (Ky. 1982), "It is evident, however, that the Kentucky Utilities Company is limited in the manner and extent of its usage of the servient estate in that only so much thereof may be encroached upon as is necessary to the natural and reasonable use of its primary easement."

24. The *Farmer* Court's statement is consistent with the explicit provisions of many easements held by Kentucky Utilities.

COUNT I – TRESPASS

25. Plaintiff repeats and realleges each and every averment set forth in Paragraphs 1 through 25 of this Verified Complaint as if fully set forth herein.

26. Kentucky Utilities’ actions in clearcutting trees in Lexington-Fayette County extend far beyond that which is necessary to the natural and reasonable use of Kentucky Utilities’ easement and occupancy of LFUCG’s right-of-way.

27. As a result, Kentucky Utilities caused LFUCG and its residents to suffer great damage, which is in an amount in excess of the minimum amount necessary to establish the jurisdiction of this court.

28. Accordingly, Kentucky Utilities is liable for trespass.

COUNT II – DECLARATION OF RIGHTS

29. Plaintiff repeats and realleges each and every averment set forth in Paragraphs 1 through 29 of this Verified Complaint as if fully set forth herein.

30. For the reasons above, LFUCG is entitled to a declaration from this Court under KRS 418.040 that Kentucky Utilities’ policy and procedures related to clearcutting trees that are taller than 15 feet and that are under transmission lines extends beyond that which is necessary to the natural and reasonable use of Kentucky Utilities’ limited property interests.

COUNT III – INJUNCTIVE RELIEF

31. Plaintiff repeats and realleges each and every averment set forth in Paragraphs 1 through 31 of this Verified Complaint as if fully set forth herein.

32. If not immediately restrained from continued unreasonable and unlawful destruction of property based on its actions, Kentucky Utilities will continue to cause irreparable harm to LFUCG and its residents.

33. If not immediately restrained from continued unreasonable and unlawful destruction of property based on its actions, Kentucky Utilities will continue to cause jeopardy to the public welfare.

34. Kentucky Utilities should be enjoined—both temporarily and permanently—from its clearcutting practices for transmission lines in Lexington-Fayette County until it revises its policies so as to avoid its unlawful use of easements and rights-of-way, as well as appropriately address environmental concerns.

WHEREFORE, Plaintiff respectfully requests judgment on its Verified Complaint and Petition for Declaratory, Injunctive and Other Relief as follows: (a) a judgment awarding monetary damages caused by Kentucky Utilities’ unlawful acts, (b) a declaratory judgment pursuant to KRS 418.040 as described in Count II, (c) all forms of injunctive relief pursuant to Rule 65 of the Kentucky Rules of Civil Procedure, (d) a speedy hearing, as authorized by Rule 57 of the Kentucky Rules of Civil Procedure; (e) a trial by jury on all Counts so triable, (f) LFUCG’s recovery of costs and attorneys’ fees associated with this litigation; and (g) all other equitable or legal relief to which LFUCG is entitled.

Respectfully submitted,

STURGILL, TURNER, BARKER
& MOLONEY, PLLC

BY:  _____

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MOTION AND MEMORANDUM OF LAW FOR TEMPORARY INJUNCTION

Plaintiff Lexington-Fayette Urban County Government (“LFUCG”), by and through counsel, and pursuant to Kentucky Rules of Civil Procedure 65.04, respectfully moves this Court to temporarily enjoin Defendant Kentucky Utilities Company (“Kentucky Utilities”) from continuing its clearcutting practices of tree removal for transmission lines in Lexington-Fayette County until it revises its policies so as to avoid its unlawful use of easements and rights-of-way, as well as appropriately address environmental concerns. In support of this motion, LFUCG states as follows:

Kentucky Utilities is removing trees in Lexington-Fayette County that do not pose an immediate or long-term threat to Kentucky Utilities’ electric service. Kentucky Utilities’ actions create risk of environmental harm, as well as invade on the property rights of LFUCG and its residents. Accordingly, LFUCG has filed a Verified Complaint and Petition for Declaratory, Injunctive and Other Relief (“Verified Complaint”) to stop Kentucky Utilities’ unlawful and unreasonable actions. Accordingly, Kentucky Utilities’ actions must be enjoined.

STANDARD OF REVIEW

Rule 65 of the Kentucky Rules of Civil Procedure governs injunctive relief in Kentucky.

See CR 65.01. Under CR 65.04, a temporary injunction may be granted during the pendency of an action:

if it is clearly shown by verified complaint, affidavit, or other evidence that the movant's right are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss, or damage pending a final judgment in the action, or the acts of the adverse party will tend to render such final judgment ineffectual.

CR 65.04(1).

A circuit court may grant injunctive relief when it finds “(1) that the movant’s position presents ‘a substantial question’ on the underlying merits of the case, i.e. that there is a substantial possibility that the movant will ultimately prevail; (2) that the movant’s remedy will be irreparably impaired absent the extraordinary relief; and (3) that an injunction will not be inequitable, i.e. will not unduly harm other parties or disserve the public.” *Price v. Paintsville Tourism Comm’n*, 261 S.W.3d 482, 484 (Ky. 2008) (citations omitted). Because these elements “must often be tempered by the equities of any situation, injunctive relief is basically addressed to the sound discretion of the trial court.” *Maupin v. Stansbury*, 575 S.W.2d 695, 697- 98 (Ky. 1978). However, “[i]f the party requesting relief has shown a probability of irreparable injury, presented a substantial question as to the merits, and the equities are in favor of issuance, the temporary injunction should be awarded.” *Id.* at 699.

It is important to note that LFUCG’s request for a Temporary Injunction is not intended to obtain a final remedy for the Kentucky Utilities actions, but rather is intended to forestall irreparable injury to LFUCG and its residents until the merits are ultimately decided. In other words, LFUCG seeks herein “to preserve [its] rights pending a trial of the merits.” *Maupin*, 575

S.W.2d at 698; *see also Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) (noting that “preserv[ing] the relative positions of the parties until a trial on the merits can be held” is precisely the purpose of a preliminary injunction under similar Fed. R. Civ. P. 65).

As set forth below, LFUCG has demonstrated each of the requirements for the issuance of a Temporary Injunction directing Kentucky Utilities to maintain the status quo and refrain from continuing its clearcutting practices of tree removal for transmission lines in Lexington-Fayette County until it revises its policies so as to avoid its unlawful use of easements and rights-of-way, as well as appropriately address environmental concerns.¹

ANALYSIS

I. LFUCG’s position presents ‘a substantial question’ on the underlying merits of the case.

With respect to the first element mentioned by the *Price* Court, the Kentucky Supreme Court has stated that a movant does not have to show a substantial likelihood or probability of success on the merits. *Maupin v. Stansbury*, 575 S.W.2d 695, 699 (Ky. 1978). Again, all that must be shown is that a substantial question exists that tends to create a “substantial possibility” that the movant will ultimately prevail on the merits. *See Price*, 261 S.W.3d at 484. LFUCG has presented a substantial question that tends to create a “substantial possibility” that it will ultimately prevail on the merits.

There can be little doubt that Kentucky Utilities’ clearcutting practices extend beyond that which is necessary to the natural and reasonable use of Kentucky Utilities’ limited property interests to the easement and rights-of-way. In fact, the Kentucky Supreme Court has explained how Kentucky Utilities does not have unilateral and unfettered rights in cutting down trees, stating:

¹ LFUCG recognizes that some trees may raise legitimate concerns of safety and reliability, such that it is necessary for Kentucky Utilities to reasonably address those legitimate concerns. But Kentucky Utilities’ one-size-fits-all approach is overly broad, unreasonable, and unlawful.

“It is evident, however, that the Kentucky Utilities Company is limited in the manner and extent of its usage of the servient estate in that only so much thereof may be encroached upon as is necessary to the natural and reasonable use of its primary easement.” *Farmer v. Kentucky Utilities Co.*, 642 S.W.2d 579, 581 (Ky. 1982). That case was decided nearly 40 years ago, and yet, Kentucky Utilities is now engaging in that practice again, as demonstrated by the Verified Complaint. As such, LFUCG has demonstrated a “substantial possibility” that it will ultimately prevail on the merits in this matter.

II. LFUCG’s remedy will be irreparably impaired absent a temporary injunction.

The Verified Complaint confirms that LFUCG and its residents will suffer irreparable injury if a temporary injunction is not issued. Irreparable injury requires “something of a ruinous nature,” *Bender v. Eaton*, 343 S.W.2d 799, 801 (Ky. 1961)., or “incalculable damage to the applicant.” *Powell v. Graham*, 185 S.W.3d 624, 629 (Ky. 2006) (quoting *Litteral v. Woods*, 223 Ky. 582, 4 S.W.2d 395, 397 (1928)).

The unreasonable and unlawful removal of trees is clearly ruinous. Once removed, that tree—and the sentimental value of that tree held by the residents—cannot be comparably replaced. As mentioned in the Verified Complaint, some of the trees that Kentucky Utilities seeks to remove have been in place for decades.

Equally important, removal of trees can create environmental issues, such as negative impacts to stormwater flow. Similarly, urban forests positively contribute to a variety of other intangible and incalculable benefits, such as providing sound barriers, offsetting urban infrastructure costs, and improving residents’ health and safety.” As such, Kentucky Utilities’ actions in unreasonably and unlawfully removing trees in Lexington-Fayette County will irreparably injure LFUCG and its residents.

III. The equities weigh in favor of an injunction

With respect to the third element mentioned above, *Maupin* requires the trial court to evaluate “various equitable considerations.” *Maupin*, 575 S.W.2d at 698. This means the trial court should waive the “relative benefits and detriments” of granting preliminary relief. *Id.* Proper considerations include “the possible detriment to the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo.” *Id.* at 699.

LFUCG’s request for a temporary injunction merely seeks to preserve the status quo. It is asking that the Court enjoin Kentucky Utilities from continuing its clearcutting practices of tree removal for transmission lines in Lexington-Fayette County until Kentucky Utilities revises its policies so as to avoid its unlawful use of easements and rights-of-way, as well as appropriately address environmental concerns. Most importantly, during the pendency of the injunction, trees that do not pose an immediate threat to the safety and reliability of Kentucky Utilities’ transmission lines will remain standing, as will the benefits—environmental and others—of those trees.

This proposed injunction will not harm Kentucky Utilities or the public. For trees that pose an immediate threat to the safety and reliability of the transmission lines, LFUCG acknowledges that Kentucky Utilities should be permitted to take reasonable measures to protect the transmission lines. Beyond those trees, Kentucky Utilities and the public will not be harmed by a temporary halt of its current practices. In fact, a temporary injunction will provide environmental and other benefits to the public.

CONCLUSION

Ultimately, LFUCG has demonstrated (1) that its position presents a substantial question on the underlying merits of the case; (2) that LFUCG’s remedy will be irreparably impaired absent a temporary injunction; and (3) that a temporary injunction will not be inequitable. Accordingly,

the Court should temporarily enjoin Kentucky Utilities from continuing its clearcutting practices of tree removal for transmission lines in Lexington-Fayette County until it revises its policies so as to avoid its unlawful use of easements and rights-of-way, as well as appropriately address environmental concerns.

NOTICE OF HEARING

Due to the urgent nature of the underlying matter and this motion, counsel will request an expedited hearing date and time from the Court upon assignment of the division.

Respectfully submitted,

STURGILL, TURNER, BARKER
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BY:  _____

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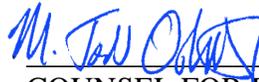
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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been sent, by U.S. Mail postage prepaid, and electronic mail, on this the 1st day of December, 2021, to the following:

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COUNSEL FOR PLAINTIFF

