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September 5, 2013

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Jeff R. Derouen
Executive Director
Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, Kentucky 40602-0615

Re: Case No. 2012-00224

Dear Mr. Derouen:

Please find enclosed and accept for filing Kentucky Power Company's Post-Hearing Brief.

A copy of this brief is being served on counsel for Grayson RECC along with a copy of this letter.

Very truly yours,

STITES & HARBISON, PLLC


R. Benjamin Crittenden

cc: W. Jeffrey Scott

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION AND COMPLAINT OF KENTUCKY)
POWER COMPANY FOR A DECLARATION OF)
ITS EXCLUSIVE RIGHT PURSUANT TO KRS)
278.018(1) TO SERVE THOSE PORTIONS OF)
THE SAND GAP ESTATES IN GREENUP)
COUNTY, KENTUCKY LYING WITHIN ITS)
CERTIFIED TERRITORY IN LIEU OF)
GRAYSON RURAL ELECTRIC COOPERATIVE)
CORPORATION)

CASE NO. 2012-00224

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SEP 05 2013

PUBLIC SERVICE
COMMISSION

POST-HEARING BRIEF OF KENTUCKY POWER COMPANY

The June 1, 2012 petition of Kentucky Power Company (“Kentucky Power” or “Company”) seeks a declaration that Kentucky Power possesses the exclusive right to provide retail electric service to the residences located at 414 Sand Gap Road and 397 Olivia Boulevard, which are located within the Sand Gap Estates subdivision in Greenup County, Kentucky. The undisputed evidence offered into the record of this proceeding establishes that the two residences are located within Kentucky Power. Grayson Rural Electric Cooperative Corporation (“Grayson RECC”) insists that it should be entitled to serve the two residences pursuant to an alleged agreement between the parties. Kentucky Power denies that it entered into such an agreement with Grayson RECC and it is undisputed that no agreement was reduced to writing or approved by the Kentucky Public Service Commission (“Commission”). Accordingly, the Commission should declare that Kentucky Power possesses the exclusive right to serve the residences at issue.

I.
BACKGROUND

This proceeding arose from a dispute between Kentucky Power and Grayson RECC over the right to provide retail electric service to residential customers located near the boundary line

that defines the territories of the two utilities. The area in dispute is located in Greenup County, Kentucky and is roughly bounded by KY 67 (“Industrial Parkway”) on the east and an old mining road on the west.¹ The Industrial Parkway was constructed in 2000, and it was at that time that a “C”-shaped tract was delineated for residential development.² Four residences have been constructed in or near the disputed area since 2005, including those at issue in this proceeding located at 414 Sand Gap Road and 397 Olivia Boulevard.³ The area has been subdivided, and it is anticipated that additional residences will be constructed in the future.⁴

Beginning in 2010, representatives of Kentucky Power became aware that the residence was under construction at 397 Olivia Boulevard because the lot is visible from the Industrial Parkway.⁵ Kentucky Power understood that the residence was located within its certified territory, but it never received an application for service from the owner.⁶ Kentucky Power investigated the Sand Gap Estates subdivision and discovered that Grayson RECC was providing retail electric service to all four of the existing residences.⁷ The Company reviewed the official Boundary Map and determined that the residences located at 414 Sand Gap Road and 397 Olivia Boulevard are clearly located within Kentucky Power’s certified territory.⁸ The Company

¹ Borden Direct Testimony at 4.

² *Id.*

³ *Id.*

⁴ Indeed, on or about August 5, 2013 Grayson RECC submitted a Notice of Filing in which it stated that an Application for Membership had been submitted by James Hammond “for service at a location located next to Wes Breeding at the Sand Gap Estates area that is the subject of the within action.” Because Mr. Hammond’s planned residence will be located within the area in dispute, Grayson RECC moved the Commission to determine whether it falls within the exclusive territory of Grayson RECC or Kentucky Power. Kentucky Power does not object to Grayson RECC’s request. Testimony on this issue was offered at the hearing conducted on August 6, 2013 and it is clear that no determination is possible at this time. The boundary line between the Grayson RECC and Kentucky Power territories bisects Mr. Hammond’s lot, and the location of his residence on the lot will likely determine the utility that is entitled to provide the retail electric service. However, if the Commission confirms the location of the boundary line in this proceeding then it should be possible for the utilities to determine whether Grayson RECC or Kentucky Power is entitled to provide the service once the residence is constructed.

⁵ Borden Direct Testimony at 8.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

attempted to resolve this issue with Grayson RECC through a request that the service to the residences be transferred to Kentucky Power, but Grayson RECC continues to provide and charge for service to the two residences.⁹ Accordingly, Kentucky Power was left with no choice but to bring this action to enforce its right to provide exclusive service to residences located within its territory.

II.
KENTUCKY POWER POSSESSES THE EXCLUSIVE RIGHT TO SERVE
THE RESIDENCES AT ISSUE IN THIS PROCEEDING PURSUANT TO
KENTUCKY'S CERTIFIED TERRITORY LAW

The 1972 Kentucky General Assembly enacted Kentucky's Certified Territory Law, which is codified at KRS 278.016 through KRS 278.018 ("Certified Territory Law"). The General Assembly provided the following description of the purpose and intent of the Certified Territory Law:

It is hereby declared to be in the public interest that, in order 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 which may result in inconvenience, diminished efficiency and higher costs in serving the consumer, the state be divided into geographical areas, establishing the areas within which each retail electric supplier is to provide the retail electric service as provided in KRS 278.016 to 278.020 and, except as otherwise provided, **no retail electric supplier shall furnish retail electric service in the certified territory of another retail electric supplier.**¹⁰

Pursuant to KRS 278.017(2), retail electric suppliers were required to file with the Commission maps showing the location of their then-existing distribution lines. These maps were filed on or about June 16, 1972. Based upon the location of the existing distribution lines, the Commission

⁹ *Id.* at 9.

¹⁰ KRS 278.016 (Emphasis added).

prepared maps of the certified territories of each retail electric supplier providing service to customers in the Commonwealth.¹¹ By law, the boundary lines were drawn substantially equidistant between the existing distribution lines of adjacent retail electric suppliers.¹² Once the boundary lines were drawn by the Commission, retail electric suppliers were granted the exclusive right to provide service within their certified territories.¹³

A. Established Boundary Maps Confirm that the Residences at Issue in this Proceeding are Located within Kentucky Power's Certified Territory.

The process set forth in KRS 278.017 for establishing the boundaries of certified areas was followed to set the boundary between the certified territories of Kentucky Power and Grayson RECC.¹⁴ Specifically, the boundary was established on the USGS Argillite Quadrangle Map dated 1972 ("Boundary Map").¹⁵ The Boundary Map was signed by representative of Grayson RECC on May 14, 1982 and representatives of Kentucky Power on May 21, 1982.¹⁶ The boundary between the certified territories of Kentucky Power and Grayson RECC has not been amended subsequently.¹⁷ A review of the Boundary Map confirms that the residences located at 414 Sand Gap Road and 397 Olivia Boulevard are within Kentucky Power's certified territory.

Recognizing that the Sand Gap Estates subdivision is located near the boundary between the certified territories of Kentucky Power and Grayson RECC, the Company retained the

¹¹ KRS 278.017(2).

¹² KRS 278.017(1).

¹³ KRS 278.018(1) ("Except as otherwise provided herein, each retail electric supplier shall have the exclusive right to furnish retail electric service to all electric-consuming facilities located within its certified territory, and shall not furnish, make available, render or extend its retail electric service to a consumer for use in electric-consuming facilities located within the certified territory of another retail electric supplier; provided that any retail electric supplier may extend its facilities through the certified territory of another retail electric supplier, if such extension is necessary for such supplier to connect any of its facilities or to serve its consumers within its own certified territory.").

¹⁴ Borden Direct Testimony at 7.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

services of Richard L. Howerton to survey the area and offer his expert opinion about the location of the boundary line. Mr. Howerton prepared a map of the Sand Gap Estates Subdivision that shows the location of the boundary line from the Boundary Map, and confirms that the residences located at 414 Sand Gap Road and 397 Olivia Boulevard are located within Kentucky Power's certified territory.¹⁸ The margin of error for the location of the boundary line is, at most, +/- forty feet,¹⁹ and both of the residences at issue are clearly within Kentucky Power's certified territory even accounting for this potential error.²⁰ Grayson RECC offered no evidence to dispute the testimony and survey results offered by Mr. Howerton in this proceeding. Accordingly, the only evidence before the Commission is that the two residences at issue are located within Kentucky Power's certified territory.

B. Kentucky Power has Distribution Facilities Located Near the Residences at Issue in this Proceeding and it is Prepared to Provide Retail Electric Service to the Residences.

Kentucky Power is prepared to provide retail electric service to the residences at issue in this proceeding. Kentucky Power provides retail electric service to Sand Gap United Baptist Church, which is located approximately 1,807 feet north of the residence located at 414 Sand Gap Road.²¹ Kentucky Power has been providing service to Sand Gap United Baptist Church since March 27, 1990.²² The distribution facilities in the area are adequate and dependable, and the Company can extend them to provide reliable service to the residences at issue.²³ Indeed, Kentucky Power has provided the Commission with a detailed description of how it intends to

¹⁸ Howerton Direct Testimony at 7-8 and Exhibit RLH-1.

¹⁹ *Id.* at 9. Indeed, it is Mr. Howerton's expert professional opinion that the actual margin of error for his survey is only +/- five feet. This opinion was not challenged by Grayson RECC or rebutted with any evidence to the contrary.

²⁰ *Id.* and Exhibit RLH-6.

²¹ Borden Direct Testimony at 5. As acknowledged by Grayson RECC, this distance is closer to the residences at issue than Grayson RECC's closest facilities prior to the time Grayson RECC extended its facilities into the Sand Gap Estates subdivision.

²² *Id.*

²³ *Id.*

run its facilities into the Sand Gap Estates subdivision to serve the residences at issue and any additional residences that might be constructed in Kentucky Power's service territory.²⁴ This is not a situation where Kentucky Power is incapable of providing retail electric service to the residences at issue or where doing so will prove to be unduly burdensome for the Company. Kentucky Power is able and willing to provide the service. Moreover, pursuant to KRS 278.016 and KRS 278.018(1), Kentucky Power possesses the exclusive right to serve these residences.

III.
THERE IS NO AGREEMENT BETWEEN THE PARTIES THAT AUTHORIZES
GRAYSON RECC TO SERVE THE RESIDENCES AT ISSUE.

Implicitly acknowledging that the residences located at 414 Sand Gap Road and 397 Olivia Boulevard are located within Kentucky Power's certified territory, Grayson RECC focuses on convincing the Commission that it has entered into an agreement with Kentucky Power whereby the Company purportedly has authorized Grayson RECC to serve all of the Sand Gap Estates subdivision, and all other territory located to the west of the Industrial Parkway. No such agreement exists. Even if it did, it would not be enforceable by the Commission because the requirements set forth in KRS 278.018(6) have not been satisfied.

KRS 278.018(6) authorizes retail electric suppliers to enter into agreements to serve customers outside of their certified territories, and it sets forth certain requirements that govern the process:

Notwithstanding the effectuation of certified territories established by or pursuant to KRS 278.016 to 278.020, and the exclusive right to service within such territory, a retail electric supplier may contract with another retail electric supplier for the purpose of allocating territories and consumers between such retail electric suppliers and designating which territories and consumers are to be served by which of said electric suppliers. Notwithstanding any other provisions of law, a contract between retail electric suppliers

²⁴ Kentucky Power's Response to Item No. 1 from the Commission Staff's June 26, 2013 Informal Conference Data Requests.

as herein provided when approved by the commission shall be valid and enforceable. The commission shall approve such a contract if it finds that the contract will promote the purposes of KRS 278.016 and will provide adequate and reasonable service to all areas and consumers affected thereby.

The statute makes it clear that two requirements must be met for an electric supplier to provide service to a customer located in another electric supplier's certified territory: (1) there must be a contract between the electric suppliers; and (2) the contract must be approved by the Commission. Neither prerequisite has been satisfied in this instance.

First, Kentucky Power did not enter into a contract with Grayson RECC authorizing Grayson RECC to serve the residences at 414 Sand Gap Road and 397 Olivia Boulevard.²⁵ Grayson RECC alleges that an agreement was reached whereby "Grayson would serve the South West Quadrant, bordered on the North by Sand Gap Road and on the East by the Industrial Parkway, coming off Turkey Lick," an area that includes the residences at issue in this proceeding.²⁶ However, Grayson RECC acknowledges that the alleged agreement was not reduced to writing, that it is uncertain about the exact date the alleged agreement was reached, and that it cannot even identify who executed the agreement on behalf of Kentucky Power.²⁷ While uncertain of the specifics, Grayson RECC suggests that it was an unnamed "field engineer" who reached the agreement on behalf of Kentucky Power. Grayson's allegations should be rejected by the Commission for numerous reasons: (1) Grayson RECC's inability to provide pertinent details about the terms of the alleged agreement and the manner in which it was executed precludes enforcement; (2) Kentucky Power field representatives do not possess the authority to enter into oral or written agreements authorizing other electric utilities to provide

²⁵ Borden Direct Testimony at 10.

²⁶ Grayson RECC Response to Kentucky Power Data Request Item No. 1. Grayson RECC describes this as a "Gentleman's Agreement" acknowledges that there was no financial consideration.

²⁷ *Id.*

service to customers located within the Company's certified territory; and (3) It would have been grossly unreasonable for Grayson RECC to rely upon a purported oral agreement with a Kentucky Power field representative on a matter of significance involving territorial boundaries.

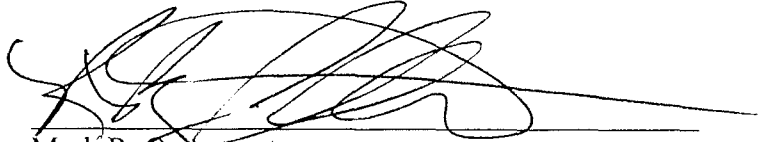
Second, it is undisputed that the alleged agreement was never approved by the Commission or submitted to the Commission for approval.²⁸ The General Assembly recognized that the Commission should have regulatory oversight over territorial issues involving retail electric suppliers, and included within the Certified Territory Law the requirement that agreements such as the one alleged to have been made in this case must receive the Commission's approval to be valid and enforceable. No such approval was obtained for the purported agreement authorizing Grayson RECC to serve customers located within Kentucky Power's certified territory. Accordingly, Grayson RECC has no right to provide retail electric service to the residences at issue.

IV. CONCLUSION

Kentucky Power has established that the residences located at 414 Sand Gap Road and 397 Olivia Boulevard are located within its certified territory and that Grayson RECC has no legal right to provide retail electric service to those residences. Accordingly, Kentucky Power respectfully requests that the Commission enter an Order granting the Company the relief requested in its petition filed on June 1, 2012.

²⁸ *Id.*

Respectfully submitted,



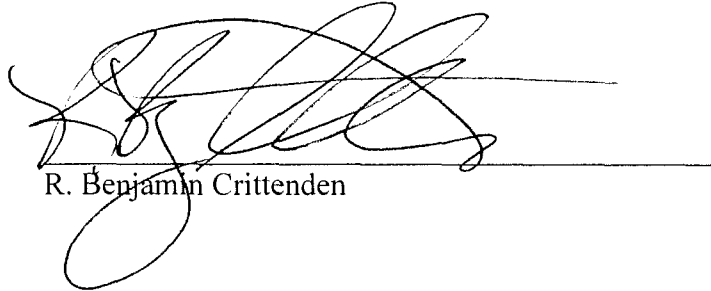
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COUNSEL FOR
KENTUCKY POWER COMPANY

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served by United States First Class Mail, postage prepaid, on this 5th day of September, 2013 upon:

W. Jeffrey Scott
311 West Main Street
Grayson, Kentucky 41143



R. Benjamin Crittenden