COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

JOINT APPLICATION OF LOUISVILLE GAS AND ELECTRIC COMPANY AND KENTUCKY UTILITIES COMPANY FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR CONSTRUCTION OF TRANSMISSION FACILITIES IN JEFFERSON, BULLITT, MEADE AND HARDIN COUNTIES, KENTUCKY	)	**DOCKET NO. 2005-00142**

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POST HEARING BRIEF
OF INTERVENORS CATHY L. CUNNINGHAM AND
DENNIS L. CUNNINGHAM

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Come Cathy L. Cunningham and Dennis L. Cunningham, Interveners, ("Cunninghams") by and through counsel, and submit the following POST HEARING BRIEF, as per the orders of the Public Service Commission ("PSC"), at the close of the hearing on this matter, on July 27, 2005. See Transcript of Evidence ("TE"), pages 276, 277.

STATEMENT OF THE CASE

This matter comes before the Public Service Commission on the joint application ("Application") of Louisville Gas and Electric Company and Kentucky Utilities ("LG&E/KU") for a Certificate of Public Convenience and Necessity ("Certificate" or "CPCN"), filed May 11, 2005, to construct electrical transmission facilities to be located in Jefferson, Bullitt,

Meade and Hardin Counties, Kentucky. Per Application, paragraph 3, LG&E/KU seek to construct a 345 kV transmission line approximately 41.9 miles long from the LG&E Mill Creek Substation in Jefferson County to the KU Hardin County Substation. This Application was filed pursuant to KRS 278.020 et seq., 807 KAR 5:001 and 807 KAR 5:120.

The Application, paragraph 5, offers the following Statement of Necessity, "The proposed transmission facilities will be utilized to transmit electric power required by the projected load that will be served from the proposed 750 MW nominal net (732 MW summer rating) supercritical pulverized coal fired base load generating unit to be located at Trimble County Generating Station ("TC2") as well as base load that will be served from other sources." That paragraph referred to the direct testimony of Mark Johnson as providing a basis for the claimed need for the project.

The Application, paragraph 6, offers the statement of convenience, asserting that the transmission line is designed to serve the projected load "with as little negative impact as can reasonably be afforded." That paragraph referred to the direct testimony of Nate Mullins as providing a basis for the claimed convenience of the project.

The Application, paragraph 7, asserts that the applicants, LG&E/KU, have not obtained any permits from any public

authorities, and none were submitted with the application. However, the applicants conceded that "FAA, highway and railroad crossing permits as well as certain environmental and construction-related permits..." may be required. Copies of these permits, as obtained, were offered to be filed with the PSC as required by law or as requested by the PSC.

Cathy L. Cunningham and Dennis L. Cunningham were among the property owners receiving notice of this application, as described in the Application, paragraph 12, pursuant to 807 KAR 5:120, Section 2(3) and Section 2(4), and attended the public information meeting sponsored by the applicants on April 19, 2005, in Elizabethtown, Kentucky. Thereafter, the Cunninghams communicated directly with both the applicants and the PSC to express their objection to the proposed route for the transmission lines through their property in Hardin County.

The Cunninghams, along with a number of other property owners, requested a local public hearing pursuant to KRS 278.020(8), which request was granted and a local public hearing was held on July 12, 2005 in Elizabethtown. Approximately 200 people attended the local public hearing and approximately 29 people spoke in opposition to the proposed route through Hardin and Meade Counties, through what is now open farmland, woodlands, wetlands and residential properties. The public

hearing generated newspaper coverage about the public opposition to the proposed route.

The Cunninghams moved the PSC to be allowed formal intervention pursuant to KRS 278.020(8), which request was granted. The Cunninghams submitted a data request to LG&E/KU and answered the data request received from LG&E/KU. The Cunninghams also reviewed the Liberty Consulting Group Final Report to the PSC, dated June 14, 2005, prepared by the consultants retained by the PSC pursuant to KRS 278.255 ("Liberty Report").

A. CUNNINGHAM'S FIRST MOTION TO DIMISS

Based upon the LG&E/KU response to data request and the Liberty Report, Cunninghams moved to dismiss the LG&E/KU application because it was premature. Cunninghams argued that the proposed new generation at TC2 has not yet been given a Certificate of public convenience and necessity; that the hearing on that application, PSC Case No. 2004-00507, was held on June 28, 2005; that this application was strongly contested by the Office of the Attorney General of Kentucky, based upon the argument that LG&E/LU had failed to meet their burden of proof concerning the need for TC2 at this time, and that the PSC had made no decision, making the consideration of transmission lines for such proposed additional power generation too early.

The Cunninghams also argued that LG&E/KU has acknowledged some softness in their claimed need for TC2 where, in 2005, they revised their 2002 integrated medium and long-term energy forecasts, by about 3 percent, which allowed LG&E/KU to defer the TC2 generation schedule from 2007 to 2010. See Liberty Consulting Group Final Report ("Liberty") to PSC, page II-12. Cunninghams argued that the Applicants, LG&E, and their supporting study by MISO, Midwest Independent System Operator, and Liberty appear to agree that the Mill Creek to Hardin County transmission line that is the subject of this application is not needed for TC2 when it comes on line, but that it is predicted to be needed to meet an upcoming voltage problem "within 5 to 8 years after TC2 began commercial operation...." Liberty, page III-4. Liberty continues: "At some point in the future, this 345 kV line from Mill Creek to Hardin County (Liberty Facility #G) will be needed." Liberty, page III-4.

The Cunninghams argued that LG&E/KU nor MISO, nor Liberty had conducted an evaluation of the "upcoming voltage problems" in Hardin County from the perspective of whether other utilities, such as East Kentucky Power Cooperative/Big Rivers Electric or Warren RECC/East Kentucky Power or Peabody Coal/Thoroughbred will or may construct facilities that will address the "upcoming voltage problems." The Cunninghams argued that there may be other "ancillary service" options that may

address the "upcoming voltage problems" that deserve to be investigated fully before the Public Service Commission should take action that would approve this transmission line.

The Cunningham motion was overruled on July 19, 2005.

B. CUNNINGHAM'S SECOND AND THIRD MOTIONS TO DISMISS

Prior to the commencement of the formal hearing on this application on July 26, 2005, the Cunninghams made a second motion to dismiss, supported by letters from the US Army Corps of Engineers, the US Fish & Wildlife Service, and from the Kentucky Heritage Council. The Cunninghams argued that the LG&E/KU must demonstrate that they have complied with certain laws relating to protecting the environment and protecting cultural and historic resources prior to seeking a Certificate from the PSC, and that where none of these permitting and consultation requirements had been complied with, it was premature to consider this application. Counsel for the Cunninghams made the same argument in a related LG&E/KU case involving proposed transmission lines from Woodford, Anderson to Franklin Counties, Case 2005-00154. This motion was argued prior to the formal hearing and taken under consideration by the PSC.

The Cunninghams made a third motion to dismiss based upon their complaint that LG&E/KU failed to provide a complete response to their data request, with particular reference to all

reports and studies concerning alternative routes for the proposed transmission lines and concerning environmental and cultural/historic studies and regarding federal agency applications, communications and permits and approvals. This motion was submitted for the record but not argued.

C. RELEVANT TESTIMONY AT THE FORMAL HEARING

When cross examined concerning the need for the proposed transmission line through Meade and Hardin Counties, the LG&E/KU witness, Mark Johnson admitted:

1. **The application for a certificate for TC2 has not been decided. TE: page 52, line 7.**
2. **That the application for TC2 was opposed: TE: page 52, line 25.**
3. **That the basis for the opposition was lack of need until 2012, if then. TE page 54, line 17, 18.**
4. **That if the PSC denied the TC2 application based upon lack of present need or related reason, the proceeding for this transmission line would be moot. TE page 55, line 2.**
5. **That LG&E/KU had revised their in service date for TC2 from 2007 to 2010. TE page 57, line 16.**
6. **That to meet the needs of transmission from TC2 at the time it comes on line - and for some years thereafter (say 5 to 8 years), the option selected by LG&E/KU (MISO Option 4,**

with the Mill Creek - Hardin Co line) was not the least cost option. TE, pages 66-68, ending with line 14.

7. That TC2 is not a current need, but that it is a future need. TE page 69:

l. 17: Q: I'm asking what are the immediate needs of LG&E/KU. What is needed now?

l. 19: A: TC2 is not required for today…

l. 24: Q: So then TC2 itself is a future need?

l. 25: A: That is correct.

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l. 1: Q: And the Mill Creek to Hardin County line is future beyond that future?

l. 3: A. In general, I would agree with that statement, but, again, when we plan we plan for the long term, not the short term.

8. Yet, where this line is not needed until 2015 -2018 at the earliest based upon the LG&E/KU estimates, which are in dispute, the applicants want to start right of way acquisition as soon as the PSC grants approval.

TE page 74, lines 15-17 - through TE page 78, line 25:

A. "As soon as possible; yes."

And when the PSC approves the transmission line, that centerline will not be moved no matter what the environmental impacts that route may cause, because LG&E/KU representatives do not believe they have authority to vary that centerline.

TE page 254

l. 2: Q. Okay. So your answer still is that you do not believe, once a certificate is issued, that you are authorized to move the centerline; is that correct?

l. 5: A. That's my impression.

Mr. Johnson was asked to clarify testimony in the LG&E/KU data response to the PSC, Response to Question 11. TE page 105, lines 9 through 15. He was asked about the statement, "The Elizabethtown areas only EHV source is the Brown-Hardin Co-Smith 345 kV line." He first answered, "That's essentially identifying one source." Line 18. On further cross examination, he admitted:

l. 24: Q: "So there are two EHV sources…"

l. 25: A: "Actually, two yes."

Mr. Johnson was asked about the statement that appears of Data Response to PSC Question 10, page 3 of 7, "This area of the LG&E transmission system is expected to potentially have marginal voltage problems in the future." He defined "potential" as, "[T]hat there is a possibility that there could be could be voltage issues in the future." TE page 121, lines 2 through 4. The witness agreed that the word "marginal" would describe the magnitude of the problem from an engineering standpoint. Lines 8 through 10.

Mr. Johnson agreed that of the four options described in the MISO reports that address the issue of thermal overloads

that would be anticipated when TC2 comes on line, Option 3, which does not include the Mill Creek to Hardin County line, is about $7 million dollars cheaper than Option 4, which does include the Mill Creek to Hardin County line. TE page 122, lines 14 through page 123, line 3. That witness was then asked - in some detail - if LG&E/KU considered other options to address the "potential" "marginal" voltage problems in Hardin County other than building a new 345 kV transmission line from Mill Creek, that might cost less than the $7 million difference between the Option 3 and Option 4, and Mr. Johnson conceded that no other studies of alternatives that could address the thermal issues from TC2 and the Hardin County voltage issue had been done. TE page 123, line 4 through page 127, line 16.

Subsequently, Mr. Johnson was asked to compare the cost differential between Option 3 (without the Mill Creek to Hardin County Line) to Option 4 (with that line). He agreed that in the first study, the LG&E/KU screening study, MISO Option 3 cost $40.6 million, and MISO Option 4 cost $59 million ($19 million difference); that another MISO analysis estimated the cost of Option 3 at $46 million and Option 4 at $56 million ($10 million difference). TE page 128, line 20 through page 130, line 21.

The Cunninghams called Geoffrey Young, who testified that there were a number of alternatives that should be investigated by the applicants that could make the 345 kV transmission line

from Mill Creek to Hardin County unnecessary, but that these alternatives had not been investigated according to the information filed with the application and the LG&E/KU data response. See Geoffrey Young direct testimony.

Cathy Cunningham testified about the property that she and her husband, Dennis Cunningham, own in Hardin County, where they have constructed a five acre lake adjacent to a wooded wetland, that has become a resting area for migratory birds, including a flock of sand hill cranes with a "nested" endangered whooping crane. She testified about her communications with the United States Fish and Wildlife to seek their assistance in protecting her wildlife habitat, and her communication and meeting with the Corps, to confirm the presence of a jurisdictional wetland on her property. Letters from these federal agencies were filed as part of the Cunningham data response along with a video tape showing birds on her lake.

Subsequently, Mr. Nate Mullins testified about alternative routes for the Mill Creek to Hardin County line. He was asked about the "Far East Route" as shown in the Photo Science power-point presentation, and the green line that appears to be another route considered but not scored or costed out in the materials provided by LG&E/KU. TE page 242, lines 5 through 8. He was asked why this green route was rejected, and he answered,

"I don't know. I do not know." He was then asked if this route followed the route of an existing transmission line:

l. 18: A: "For portions of it, it certainly is."

l. 19: Q: "Well, isn't it almost, literally, almost 99 percent of it on an existing route?

l. 21: A: "I don't know what percentage it is, but there's a transmission line down there that we - that was fully evaluated."

At TE, page 243, Mr. Mullins was asked to agree that there were already an existing transmission lines that went from Mill Creek substation all the way to the Hardin County substation.

l. 21: Q: "So there are existing lines from Mill Creek all the way to the substation?"

l. 23: A: "Yes."

The hearing established that LG&E/KU has not obtained any permits or approvals from any other public agency, nor completed any environmental impact analysis prior to filing this application. Mark Johnson described the LG&E/KU approach as follows: "One of the things we are doing in parallel is having preliminary discussions with a number of different parties, such as the Army Corps of Engineers, as well as those individuals that are associated wit historical preservation, and things of that nature...." TE, pages 80, 81.

Mr. Johnson testified that as of the date of the hearing, LG&E/KY was not sure what permits they would need from the Army Corps of Engineers ("Corps"). TE, page 94, lines 2 through 11. Mr. Johnson knew a Corps permit would be required to cross the Ohio River for the Trimble County segment (Case 2005-00155), and to cross the Kentucky for the Woodford, Anderson to Franklin County segment, as well as the Salt River for the Mill Creek to Hardin County segment, that is the subject of this proceeding. TE, page 94-96. None of these permits have been applied for. TE, page 97, line 6.

Mr. Johnson admitted that LG&E/KU was aware that the Corps permitting process would also require compliance with NEPA, the National Environmental Policy Act. TE, page 97, line 11. He then testified, "[B]ut we have not submitted an application and do not intend to do so until after the disposition of this particular proceeding has concluded." TE page 97, lines 16 through 19.

Mr. Johnson did not know whether this application by LG&E/KU would require compliance with Section 106 of the National Historic Preservation Act. TE, pages 98-99.

Mr. Johnson admitted that LG&E/KU has had discussions with the Department of Defense at Fort Knox about routing the transmission line through that federal facility. TE page 104, line 15 through 19.

ARGUMENT

I. STANDARD OF REVIEW

The issues to be decided in a hearing conducted under KRS 278.020 before the Public Service Commission on an application for a Certificate of Public Convenience and Necessity to construct facilities are two-fold: (1) whether the facilities are needed and (2) whether the proposed construction will result in a wasteful duplication of facilities. The criteria for determining convenience and necessity have been established in case law over the past five decades, and have been supplemented by Senate Bill 246, which resulted in the 2004 amendments to the statute governing these proceedings.

In *Kentucky Utilities Co. v. Public Service Com'n*, 252 S.W.2d 885 (Ky., 1952), the Court of Appeals reviewed a challenge to the grant of a CPCN to East Kentucky Power (EKPC) brought by KU, LG&E, and Union Power, competing utilities. EKPC was seeking PSC authorization for the first phase of a multi-stage project to provide adequate electric service to the distribution systems of local rural electric cooperatives across the state. The Court upheld the finding of necessity by the PSC, but remanded the case for a further hearing on the issue of duplication "from the standpoint of an excessive investment in

relation to efficiency, and from the standpoint of inconvenience to the public generally, and economic loss through interference with normal uses of the land, that may result from multiple sets of right of ways, and a cluttering of the land with poles and wires". *Id* at 892. The case provided an opportunity for the Court to elaborate on the elements required in a PSC inquiry. On the question of necessity, the applicant must first show a substantial inadequacy of existing service, that is, a demonstration that a market exists sufficient to support the new service proposed, and that that inadequacy is ". . . due either to a substantial deficiency of service facilities, beyond what could be supplied in the normal course of business; or to indifference, poor management or disregard of the rights of consumers, persisting over such a period of time as to establish an inability or unwillingness to render adequate service." *Id* at 890. Furthermore, the Court of Appeals found that the need for service should be balanced against the need to avoid wasteful duplication that unnecessary multiplicity of physical properties cited *supra*. In remanding the case for further hearings, the Court was clearly concerned with duplication of transmission facilities; the PSC was ordered to determine which of EKPC's proposed lines would parallel existing lines owned by other utilities to prevent harmful duplication in contravention of the public interest.

The case of *Kentucky Utilities Co. v. Public Service Com'n*, 390 S.W.2d 168 (Ky., 1965) reaffirms this dual inquiry required in a CPCN hearing. In that case KU and other utilities opposed the PSC's grant of a certificate of convenience and necessity to Big Rivers Rural Electric based primarily on an argument that no inadequacy of service existed, that KU had long-range plans to expand its existing service instead. The Court determined that KU's own eight-year expansion plan proved that existing service was inadequate, and the massive project envisioned by KU was clearly not 'normal improvements in the ordinary course of business'. Big Rivers had properly projected a deficiency in the "immediately foreseeable needs" of the region and its application to construct a steam generating plant and transmission lines to supply a portion of Western Kentucky's energy needs where KU lacked current capacity was appropriate. The Court added that, ". . . in view of the long range planning necessary in the public utility field, an anticipation in 1966 of the needs of 1969 is not too remote". *Id* at 172.

The Court also rejected KU's argument that allowing construction of the Big Rivers plant would result in 'wasteful duplication' as defined in the East Kentucky case cited above, because new transmission lines would be required regardless of which company supplied the energy. Moreover, KU's theory that economic waste would result was in error as there was no

evidence that Big Rivers' proposal would result in any serious rate disadvantage to consumers of the existing utilities. The PSC's grant of a CPCN was upheld based on the two-prong test described above, (1) an inadequacy of existing facilities to supply immediately foreseeable needs and (2)no wasteful duplication where the proposal is capable of supplying that needed service at reasonable rates.

II. LG&E/KU FAILED TO MEET THEIR BURDEN OF PROOF TO OBTAIN A CERTIFICATE OF PUBLIC CONVENENIENCE AND NECESSITY FOR THE MILL CREEK TO HARDIN COUNTY TRANSMISSION LINE UNDER ESTABLISHED CASE LAW.

A. The Applicants, LG&E/KU Failed To Meet Their Burden To Obtain A Certificate Of Public Convenience And Necessity Under The Law Before The 2004 Amendments To KRS 278.020, By Failing To Establish A Present Need.

The Kentucky General Assembly added two new sections to KRS 278.020 that changed the law in Kentucky that applies to construction of electrical transmission lines. These sections will be discussed below. However, these new sections are not without some precedent in the Kentucky case law governing the construction of transmission lines. As discussed above under standard of review, since *Kentucky Utilities v. Public Service Commission,* 252 S.W.885 (Ky. 1952), the traditional PSC considerations of duplication of facilities, of excessive investment in relation to efficiency, of inconvenience to the public generally, and of economic loss through interference with

the uses of land, were all proper considerations of the PSC when faced with applications that may result in multiple sets of right of ways, "and a cluttering of the land with poles and wires."

Similarly, the PSC has traditionally been tasked to consider an application for a Certificate of Public Convenience and Necessity by evaluating the adequacy of the existing service. Recognizing that a major electrical service facility may require a substantial period of time to construct and place in operation, the measurement of a deficiency of service does not relate only to the needs of the particular instant, but to the "immediately foreseeable needs" as discussed in *Kentucky Utilities Co. Public Service Com'n,* 390 S.W.2d 168 (Ky. 1965).

Based upon the un-contradicted testimony of Mark Johnson, the applicants failed to prove a present need and failed to prove an "immediately foreseeable need" for the Mill Creek to Hardin County transmission line. The applicants' words were "future" and "possible" and "marginal" need. The Cunninghams are not complaining about what Mr. Johnson described as long term planning - unless that long range planning is used to justify immediate right of way acquisition, condemnation and construction, as LG&E/KU clearly admit is their intent.

On August 9, 2005, the PCS decided the matter of East Kentucky Power Cooperative, Inc. application for a certificate

to construct a 138 kV line through Rowan County, Case No. 2005-00089, where it determined that the application raised two issues: (1) whether the facilities are needed, and (2) whether the construction will result in duplication of facilities. That opinion cited the above 1952 Kentucky Utilities case. The PSC found the first issue to be uncontested. The PSC had evidence of present local reliability-driven problems. Two lines were found to be overloaded. These problems would be exacerbated by future load growth. The intervener, Doerrfeld, did not contest this need.

The situation before the PSC in the East Kentucky-Rowan County application is very different from the situation described in the LG&E/KU application herein.

The PSC must find that the applicants, LG&E/KU failed to meet their burden to prove a present need or an "immediately foreseeable need" and, on this basis, as well as the additional reasons below, the application should be denied.

B. The Applicants, LG&E/KU Failed To Meet Their Burden To Obtain A Certificate Of Public Convenience And Necessity Under The Law Before The 2004 Amendments To KRS 278.020, By Failing To Establish That The Proposed Mill Creek To Hardin County Line Was Not Wasteful Duplication Of Facilities.

In addition, under the traditional PSC considerations of excessive investment in relation to efficiency, and inconvenience to the public and interference with the normal use

of land, the PSC has compelling testimony that provides added reasons to disapprove the application. The testimony of Geoffrey Young helps establish that the word "efficiency" has a much broader meaning today than it may have had in 1952. Where our land has become even more cluttered with poles and wires than it was 50 years ago, consideration of non-structural means and decentralized structural means of meeting electricity needs must be included in determining what is the most efficient use of rate payer funds.

The above-referenced East Kentucky-Rowan County decision by the PSC sheds clear light on the meaning of the terms used in *Kentucky Utilities (1952)*. The PSC found that the standards set forth in *Kentucky Utilities (1952)* were violated and that there would be wasteful duplication where East Kentucky sought to construct a new line through the Daniel Boone National Forest, but where East Kentucky did not adequately consider the use of existing right-of-way and transmission lines and corridors. "The Commission does caution East Kentucky Power and all other electrical utilities, however, the future applications should comprehensively consider the use of existing corridors in planning future transmission."

That guidance applies with equal force in this proceeding. Mr. Mullins admitted that there were existing transmission lines -and right of ways - from the Mill Creek substation all the way

to the Hardin County substation; that there is some evidence that this route was studied; but that there is no documentation - other than an unexplained green line in a power-point presentation - that reveals the results of such consideration. Based upon the order of the PSC in Case No. 2005-00089, the LG&E/KU application must be denied, and LG&E/KU should receive the same instruction concerning the standards set out in *Kentucky Utilities (1952)*.

III. KRS 278.020, AS AMENDED IN 2004, CLEARLY REQUIRES THAT LG&E/KU COMPLETE THE ENVIRONMENTAL INVESTIGATING AND PERMITTING REQUIREMENTS ELSEWHERE SET OUT BEFORE OBTAINING THE PSC CERTIFICATE TO COMMENCE CONSTRUCTION.

A. The Commission Must Consider the Environmental Impacts of the Proposed Project in Deciding Whether to Issue a Certificate of Public Convenience and Necessity

Issuance of a Certificate of Public Convenience and Necessity is now governed by the requirements of Senate Bill 246, which was enacted by the 2004 General Assembly to provide a forum for the consideration of the environmental impacts of proposed transmission line facilities and to empower local communities and landowners that might be affected by the location of proposed transmission lines. Pursuant to Senate Bill 246, now KRS 278.020(2) and (8) ("the 2004 Amendments"), the construction of transmission lines carrying 138 or more kVs for more than 1 mile in length, formerly matters of extension that were considered to be "in the usual course of business,"

became through legislative action matters requiring a Certificate of Public Convenience and Necessity. The clear intent of the statute was to allow for public scrutiny of such line constructions and to require the Commission to consider the resulting impacts on private and public landowners in the corridors.

The creation of a right to a local public hearing, and the requirement that a Certificate of Public Convenience and Necessity be issued for construction of more than 1 mile of 138 kV line, was in response to several controversial line construction projects in which the absence of such a forum at the state level led to frustration of local residents and antagonism towards the local public utilities. Sponsored by investor-owned utilities and concurred in by publicly-owned electric cooperatives, the 2004 Amendments were intended to provide a public forum for evaluation of the impacts and alternatives in construction of transmission lines. To relieve the public's frustration and to ensure that electrical cooperatives adequately considered the impacts and alternatives, the 2004 Kentucky General Assembly created a new process for issuance of a Certificate of Public Convenience and Necessity.

1. The 2004 Amendments Modify Pre-Existing Agency Practice Concerning Review and Approval of Transmission Lines by Requiring Consideration of Impacts on Landowners and the Public

The 2004 Amendments were intended to enlarge the scope of issues and concerns considered by the Commission in reviewing the construction of certain transmission lines, by creating both a prior right of agency and public review and a corresponding obligation on the utility to justify the new line, and by enfranchising those interested in the proposed lines, including property owners over whose lands the lines would be located. Where formerly the Commission confined itself to issues of electrical necessity and duplication of services, the 2004 Amendments reflect a clear legislative intent that the concerns of landowners and other interested parties regarding the adverse effects of the routing and construction of these lines be evaluated in determining whether and under what conditions to approve the request for construction.

The amendments were not intended to ratify the earlier judicial interpretations of KRS 278.020 as it applied to review and approval of electric transmission lines, but instead to supersede and to reverse what had been the state of Kentucky law concerning the rights of landowners who might be adversely affected by the siting of transmission lines. Among former law was the case of *Satterwhite v. Public Service Commission*, 474 S.W.2d 387 (Ky. 1971), where the Court considered and rejected the request of landowners over whose lands an easement had been condemned by Kentucky Utilities for location of a transmission

line that a Certificate issued to Kentucky Utilities be set aside and that the matter be reconsidered at a new hearing in which the petitioners be entitled to participate. The Court rejected the proposition of the landowners that they were "parties interested" within the meaning of the provision of KRS 278.020, concluding that

> [t]he trouble with this contention is that the question of what particular lands the proposed transmission line would cross was not in issue before the Public Service Commission. The application included a map showing the general course and direction of the proposed lines, but the specific paths the lines might follow were not indicated or suggested, and the order granting the certificate did not purport to fix the specific paths for the lines. The Public Service Commission was not concerned with that detail because it was not relevant to the issue of convenience and necessity. The considerations on that issue were the adequacy of existing service, the economic feasibility of the proposed facilities, the avoidance of wasteful duplication, and the financial ability of the appellant.

Satterwhite, 474 S.W.2d at 387.

The 2004 Amendments enfranchised those landowners that the *Satterwhite* Court determined to be outside the scope of agency consideration. Specifically, KRS 278.020(8) provides "any interested person including a person over whose property the proposed transmission line will cross" the right to intervene and to request a public hearing. By explicitly including landowners in the review process and by requiring that utilities

identify the transmission line route, KRS 278.020(8) nullifies the holding in *Satterwhite*.

It is equally apparent that the General Assembly, in amending KRS 278.020(2) and (8), sought to nullify the effect of *Duerson v. East Kentucky Power Cooperative*, 843 S.W.2d 340 (Ky.Ct.App 1992). In *Duerson*, landowners challenged the right of East Kentucky Power Cooperative to condemn rights-of-way for the siting of a transmission line, arguing that East Kentucky Power could not condemn unless it first obtained a Certificate of Public Convenience and Necessity from the Public Service Commission. Rejecting this challenge, the Court concluded:

> [T]he transmission lines are extensions in the ordinary course of business and, under [KRS 278.020(1)], do not require a certificate of convenience and necessity. The statute provides for two exceptions: retail service connections and ordinary course of business extensions. It is our view that a correct interpretation of the statute requires that the latter exception applies to all utilities. There is nothing in the wording to dictate otherwise. As such, the power lines under consideration clearly fall within this latter exception.
>
> In an effort to comply with the statute, the Commission has adopted a regulation defining extensions in the ordinary course of business. That regulation (807 KAR 5:001, § 9(3)) reads as follows:

> (3) Extensions in the ordinary course of business. No certificate of public convenience and necessity will be required for extensions that do not create wasteful duplication of plant, equipment, property or facilities, or conflict with the existing certificates or service of other utilities operating in the same area and under the jurisdiction of the commission that are in the general area in which the utility renders service or contiguous thereto, and that do not involve sufficient capital outlay to materially affect the existing financial condition of the utility involved, or will not result in increased charges to its customers.
>
> We are of the opinion that the foregoing statute and regulation are designed to protect the public against exorbitant utility rates emanating from unnecessary and duplicitous power facilities. We think it unreasonable to conclude that their purpose lies in protecting landowners from eminent domain.
>
> As we examine the record, there is more than ample evidence supporting the fact that the transmission lines in question comport with the regulation and statute. For that reason, we conclude that the defense that appellee has not obtained as a precondition to condemnation a certificate of convenience and necessity has no merit.

Duerson, 843 S.W.2d at 342.

The 2004 Amendments remove electric transmission line construction from the category of "ordinary extensions of existing systems in the usual course of business." The Amendments require the utility to obtain a Certificate of Public Convenience and Necessity and explicitly involve affected landowners and other interested parties in the public review

process. In so doing, the Amendments strip the application of *Satterwhite* and *Duerson* from this Commission's purview.

The Commission acknowledged as much in its regulations implementing the 2004 Amendments. In the Statement of Consideration relating to 807 KAR 5:120, filed with the Legislative Research Commission on October 15, 2004, the Commission rejected the contention of Big Rivers that the only issues in the case "are whether there is a need and demand for the service and whether [the line] construction would be a wasteful duplication of facilities." The agency responded that: The [Commission] believes that the legislative intent demonstrates that the views of Big Rivers and EKPC are far too limited. This issue in Kentucky has previously been guided by judicial decision. The key cases are *Satterwhite v. Public Service Commission*, 474 S.W.2d 387 (Ky. 1972), and *Duerson v. East Kentucky Power Cooperative, Inc.*, 843 S.W.2d 340 (Ky. Ct. App. 1992). *Satterwhite* decided two issues: (1) that individual landowners whose land was to be crossed by the transmission line are not interested persons and thus are not entitled to intervene because (2) the only issues were whether there is a need and demand for the service and whether its construction would be a wasteful duplication of facilities. In *Duerson*, the court ruled that all transmission lines are extensions in the ordinary course of business and thus, under

the exception of KRS 278.010, do not require a certificate. In requiring utilities to file a certificate case for transmission lines of a certain size and length, Chapter 75 (Senate Bill 246) directly overruled *Duerson*. The provision specifying that individually-affected landowners are interested persons who may intervene likewise directly overruled the contrary result in *Satterwhite*. Moreover, the latter provision expanded the issues the PSC may consider when such a landowner intervenes. If the only issues the landowner could raise were the ones delineated in Big Rivers' comments and in *Satterwhite*, allowing individual landowner intervention would make no sense. In fact, the legislative debate confirms a contrary intent. For example, in his comments in this rulemaking proceeding, Scott Hagan specifically talked about his testimony in committee on Senate Bill 246, and he pointed out, "Every legislator who spoke that day in committee indicated that the passage of this bill was intended for me and every property owner like me who deserves a hearing and an opportunity for an independent body (the Public Service Commission) to review the need for such a dramatic investment and the wisdom of its placement in the community. (Emphasis original). PSC Staff was present and heard similar testimony and legislators' comments indicating intent to overrule the limited issue requirement in *Satterwhite*.

> The PSC believes the proposed regulation allowing individual landowners to intervene and raise their property-specific issues in a transmission certificate case is in furtherance of the legislative intent of the new statutory provisions.

Statement of Consideration Relating To 807 KAR 5:120, 4 (October 15, 2004).

Indeed, the Commission recently denied East Kentucky Power's proposal to construct a 6.9 mile 138 kV transmission line upon recognition of the impact of the proposed line on Daniel Boone National Forest and Sheltowee Trace Trail. *See* Order In the Matter of The Application of East Kentucky Power Cooperative, Inc., For A Certificate of Public Convenience and Necessity to Construct a 138 kV Transmission Line in Rowan County, Kentucky, Case No. 2005-00089 ("Order, Case No. 2005-00089"). In executing its duty to guard against the "cluttering of the land with poles and lines," the Commission acknowledged that the degree of "cluttering" depends in large part of what unique characteristics the land contains. *Id.* at 7. Where the proposed route runs along a highway, for example, the cluttering is more manageable. In that instance, cluttering is a relatively weak factor in the evaluation of an application. Where, on the other hand, the proposed route runs through a National Forest or, say, endangered species habitat, wetlands, prime farmland, and historically-registered and protected properties, the cluttering is especially unreasonable. In

those cases, as the Commission acknowledged in Order, Case No. 2005-00089, certification is *wholly* subject to the cluttering prohibition. *Id.* at 5 ("East Kentucky Power's proposed route would cut through a part of the Forest that is not now host to any other lines. In addition . . . the proposed route would also cross the Sheltowee Trace Trail. These unique characteristics make the Commission *especially sensitive* to the location of the proposed transmission line.") (emphasis added). Because East Kentucky Power could choose an alternative route that avoided cluttering the Forest with poles and lines, the Commission refused to certify the proposal. In this way, the Commission now accounts for the unique characteristics of the land, and guards against the "cluttering of the land with poles and wires." *See* Order, Case No. 2005-00089, at 7 ("We must recognize the impact to the Forest that this application presents and weigh that impact against the minimally increased cost of an alternative line that would avoid all of most of the Forest and the Sheltowee Trace Trail.").

Clearly, the 2004 Amendments reformed the Commission's certification procedures. According to its own Orders, the Commission has adopted the position that *Duerson* and *Satterwhite* are no longer controlling after the legislative amendments to KRS 278.020(2) and (8), and that a broader range of physical and ecological concerns are to be included in determining whether to

issue a Certificate. The Commission must apply the required scope of consideration in this case.

2. The Commission Must Carry Out the Legislative Intent

The 2004 Amendments were adopted with a specific legislative intent, and it is the obligation of the Commission to give effect to that intent. Kentucky courts, time and again, have upheld the established rules of statutory construction, which "presume that the legislature is aware of the state of the law at the time it enacts a statute," *Shewmaker v. Commonwealth*, 30 S.W.3d 807, 809 (Ky. Ct.App. 2000), including judicial construction of prior enactments. *Button v. Hikes*, 176 S.W.2d 112, 117 (Ky. 1943) ("It is presumed that the legislature is acquainted with the law; that it has knowledge of the state of it upon subjects upon which it legislates; that it is informed of previous legislation, and the construction it has received."); *St. Clair v. Commonwealth*, 140 S.W.3d 510, 570 (Ky. 2004); see *also Haven Point Enterprises, Inc. v. United Kentucky Bank*, 690 S.W.2d 393 (Ky. 1985); *Commonwealth v. Fox*, 48 S.W.3d 24 (Ky. 2001). Also, the General Assembly has codified the common law principle at KRS 446.080(1) that all statutes are to be liberally construed with a view "to promote their objects and carry out the intent of the legislature. . . ." The Commission must view the 2004 Amendments in light of these established rules.

As a result, the historical policy factors considered in determining whether to issue a Certificate of Public Convenience and Necessity---such as the adequacy of existing service, the economic feasibility of the proposed facilities, the avoidance of wasteful duplication, and the financial ability of the utility---must now be evaluated alongside public interest factors, including non-electrical impacts. Only by giving equal weight to the historical and public interest factors can the Commission execute its statutory duty to evaluate the "public convenience and necessity" of the proposed transmission line.

To do otherwise would render the 2004 Amendments meaningless, in contradiction of Kentucky law. In *Scoenbachler v. Minyard*, Ky., 110 S.W.3d 776, 783 (2003), the Supreme Court implied into the statute at issue an obligation to file an income statement for domestic support purposes, reasoning that while not explicitly required,

> [n]o rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that significance and effect shall, if possible, be accorded to every part of the Act. Additionally, [a]ll statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature[].... And, it is axiomatic that, when interpreting a provision of a statute, a court should not, if possible, adopt a construction that renders a provision meaningless or ineffectual or interpret a provision in a manner that brings about an absurd or unreasonable result.

Id. at 783. Similarly, were the Commission to fail to give due consideration to the public interest factors, it would render meaningless and ineffectual the 2004 Amendments, bringing about an absurd result. To construe KRS 278.020(2) and (8) as leaving unaffected the scope of inquiry in the issuance of the Certificate is to presume that the legislature intended to create a sham procedural right in which the public, particularly affected landowners, could participate and voice their concerns, but that those concerns would not be considered relevant to the decision on the certificate. This unreasonable interpretation, in light of the Court's holding in *Scoenbachler*, could not be supported.

3. The Commission Must Determine Whether Public Convenience and Necessity, i.e., Public Interest, *Require* the Proposed Project.

In giving equal consideration to the historical and public interest factors involved in the Applicants' proposal, the Commission is charged with determining whether public convenience and necessity *require* the service or construction proposed. KRS § 278.020(1) (emphasis added). The Commission has no authority to issue the Certificate absent a showing that there "is a demand and need for the service sought to be rendered." KRS § 278.020(4). And any determination as to "convenience and necessity" of and "demand and need" for this project requires consideration of all factors bearing on the

public interest. *See, e.g., Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 8 (1961) (emphasizing that the duty "to evaluate all factors bearing on the public interest," is part of the "accepted meaning" of the term "public convenience and necessity."); *United States v. Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945) ("The [Interstate Commerce] Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. . . . Its function . . . [includes a determination] from its analysis of the total situation on which side of the controversy the public interest lies."); *Cascade Natural Gas Corp. v. Federal Energy Regulatory Comm'n*, 955 F.2d 1412, 1421 (10th Cir. 1992) (When making its public convenience and necessity determination, "the Commission must consider all factors bearing on the public interest, not simply those immediately relating to the objects of its jurisdiction.").

Factors bearing on the public interest include the environmental impacts of the proposed project. *See Henry v. Federal Power Comm'n*, 513 F.2d 395, 406-07 (D.C. Cir. 1975) ("The FPC's concern in a proceeding to certify [for public convenience and necessity] the critical interconnection facilities, will encompass an evaluation of all the elements of the gasification project. The burden of environmental damage

from that overall project is an important part of this total evaluation."). One significant public interest factor bearing on this application is the public's interest in avoiding, where possible, adverse environmental impacts. As one example of the factors discussed in more detail below, due consideration is required in this case under Section 106 of the National Historic Preservation Act, which is "designed to ensure that Federal agencies take into account the effect of Federal or Federally-assisted programs on historic places as part of the planning process for those properties." *Morris County Trust for Historic Preservation v. Pierce*, 714 F.2d 271, 278-79 (3d Cir. 1983). Congress has declared that "the historical and cultural foundations of the Nation should be preserved" and that the preservation of historic resources "is in the public interest." 16 U.S.C. § 470(b). It follows that, for an application that completely lacks due consideration of the environmental impacts, no Certificate can issue.

4. The Commission's Standard of Review, Which is the Ordinary Standard For Administrative Agencies, Guards Against the Risk That it Would Certify an Unqualified Project.

The Commission's standard of review, which is the ordinary standard for administrative agencies, guards against the risk that it would certify such an unqualified proposal. The standard requires the Commission to explain the basis of its decision. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S.

402, 416 (1971). For projects affecting the environment, the decision must be "reached procedurally without individualized consideration and [with a] balancing of environmental factors - conducted fully and in good faith...." *Calvert Cliffs' Coord. Comm. v. AEC*, 449 F.2d 1109, 1115 (1971). Without documentation of the environmental impacts, there is no basis on which the Commission could support an explanation of the convenience and necessity of the project. It is impossible to know whether the decision "was based on a consideration of relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park*, 401 U.S. at 416 (1971); *SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943). Were the Commission to approve the application without considering the environmental impacts of the proposed project, the Commission would violate its primary responsibility to explain the basis of any decision to issue a Certificate of Public Convenience and Necessity. Such explanation is a cornerstone of administrative law.

Particularly in cases involving the National Environmental Protection Act, the applicant, and the Commission in its review of the application, must take a "hard look at environmental consequences," in reaching a decision. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976). The Commission's decision must be "reached procedurally without individualized consideration and balancing of environmental factors - conducted fully and in

good faith...." *Calvert Cliffs'*, 449 F.2d at 1115 (1971). The Commission cannot clearly state the basis for its approval or denial of this application without having any environmental predicate. As a result, the application must be dismissed.

B. The Applicants Have Failed to Consider the Unique Characteristics of Properties Along the Proposed Route, and, Therefore, Its Application is Premature

The proposed project will affect wetlands under the jurisdiction of the United States Army Corps of Engineers, flyways used by migratory birds and endangered species, and properties listed on the National Register of Historic Places. As a result, the Applicants are required, under the laws discussed herein, to assess the potential environmental impacts, provide documentation to the Commission of their assessments, and consult with federal agencies regarding those impacts. As a consequence of their assessments and consultation, the Applicants may be required to substantially alter the route of their proposed project. Because the application is currently in violation of federal environmental laws, and because the proposed project may be re-routed upon satisfaction of those laws, the application is entirely premature.

1. Application of the Permitting Requirements of the United States Army Corps of Engineers

In a letter to Cathy L. Cunningham, attached to this motion as Exhibit A, a United States Army Corps of Engineers ("Corps") Regulatory Branch Biologist stated the following:

> Based on a site visit conducted on June 6, 2005, [the Corps] has made a preliminary determination that the referenced property contains jurisdictional "waters of the United States (U.S.)", including jurisdictional wetlands. This determination is based on the presence of wetlands adjacent to navigable or interstate waters, or that eventually drain or flow into navigable or interstate waters through a tributary system that may include man-made conveyances such as ditches or channelized streams and one or more tributaries (stream channels, man-made conveyances, lakes, ponds, rivers) that eventually drain or flow into navigable or interstate waters. A [D]epartment of the Army permit would be required for the discharge of dredged or fill material into these waters.

The Corps' decision whether to issue a dredge or fill permit is based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity on the public interest. 33 C.F.R. § 320.4(a). Where there is a practicable alternative that will have less adverse impact on wetlands, the Corps *shall not* issue a dredge or fill permit. 40 C.F.R. § 230.10(a) (emphasis added). It follows that the proposed route could be prohibited, or required to be substantially altered, by the Corps' decision. Yet the Applicants submitted this application without engaging in any consultation with the Corps or making any analysis of the impact of the proposed project on

wetlands. Given the uncertainty of the proposed project, the application is premature.

2. Application of Section 7 of the Endangered Species Act

In a July 20, 2005, letter to Cathy L. Cunningham from the United States Fish and Wildlife Service, attached to this motion as Exhibit B, Field Supervisor Virgil Lee Andrews, Jr., stated:

> [A] pond on your property had been used in early spring 2005 as a stop-over feeding and resting area for a flock of migrating sandbill cranes (*Grus canadensis*) that also contained a whooping crane (*Grus americana*).As you are aware, whooping cranes are federally listed under the authority of the Endangered Species Act (ESA) as an endangered species. Having the opportunity to observe one in the wild is a rare occasion not afforded to most people. The whooping crane is known for being the tallest bird in North America standing 5 feet tall. The species nests in marshy areas among bulrushes, cattails, and sedges that provide protection from predators. When migrating, whooping cranes stop along the way to roost and feed in a variety of wetlands and croplands, just like the whooping crane did at your pond. Based on the information you provided us, we confirmed that the whooping crane documented on your property was part of an established Non-essential Experimental Population (NEP) of whooping cranes that migrates from Wisconsin to Florida every fall. . . .W]e have emphasized to LG&E the importance of providing habitat for these birds, because it would improve the species' changes to be recovered (i.e., removed from the list of threatened and endangered species) in the long-term. Because we know that suitable habitat for the whooping crane exists on your property, and likely at other locations on and near the proposed right-of-

> way for the proposed LG&E powerline, we have strongly encouraged LG&E to make every effort to avoid transmission line construction in areas that may provide suitable habitat for whooping cranes. The Service and the Kentucky Department for Fish and Wildlife Resources have met with LG&E staff and are currently working with LG&E to address fish- and wildlife-related concerns associated with the proposed powerline. This coordination has included specific discussions regarding potential impacts to whooping cranes, other federally listed species (e.g., Indiana bats), and federal trust resources (e.g., migratory birds) and potential ways to avoid and minimize these potential impacts. We hope that this . . . coordination will influence LG&E's placement of the proposed powerline in such a way that impacts to these important fish and wildlife resources are avoided and minimized as much as possible.

The consultation that Field Supervisor Andrews refers to is required under Sections 7(a)(1) and 7(a)(4) of the Endangered Species Act, 16 U.S.C. §§ 1531-1544. Section 7(a)(4) requires LG&E to confer with the Service on actions that are likely to jeopardize the continued existence of a species proposed for listing. If the Fish and Wildlife Service determines that this proposed project is likely to jeopardize the continued existence of the species, the agency may prohibit construction or require re-routing of the project. Thus, the application clearly is premature.

3. Application of Section 106 of the National Historic Preservation Act

As stated above, the proposed project will affect properties listed on the National Register of Historic Places. As a result, the Applicants are required, under the laws discussed herein, to assess the potential environmental impacts, provide documentation to the Commission of the assessments, and consult with federal agencies regarding the impacts. Only then can the Commission satisfy the scope of consideration required in evaluating whether to issue a Certificate of Public Convenience and Necessity.

Instead, the Applicants chose the route for its proposed transmission line without first inviting the comments and participation of Consulting Parties (see definition below), as required by Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470 et seq. ("Section 106"). In fact, the Applicants chose the route of its proposed transmission line without first identifying historic properties that would be affected by this undertaking. Indeed, the Applicants indicated that they will initiate an environmental review process, in which they may modify their selected route depending on what potential adverse effects are located during the application process. In effect, the Applicants presume to satisfy Section 106 in reverse. Such decision making is contrary to the requirements of Section 106.

i. Section 106 Applies In This Case

Section 106 requires federal agencies to examine the adverse effects of the proposed "undertaking" on sites on or eligible for the National Register of Historic Places, and afford the federal Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to the undertaking before the Commission may approve their application. 16 U.S.C. § 470f. The Section 106 regulations, 36 C.F.R. Part 800, define "undertaking" as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; those requiring a Federal permit, license or approval; and those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency." 36 C.F.R.§ 800.16(y). The Applicants are required to obtain "a Federal permit, license or approval" from the United States Army Corps of Engineers and the Fish and Wildlife Service for construction of the proposed project. Thus, the proposed project, as the Applicants have indicated by their initiation of the Section 106 process, is an "undertaking" subject to the requirements of Section 106.

ii. Section 106 Obligates the Applicants to Perform Assessments and Consultation

The Section 106 regulations require the Applicants to determine the area of potential effect (APE), *id.* § 800.4(a)(1); identify, through consultation, the National Register-listed or eligible historic properties within the APE, *id.* § 800.4(b); determine whether the undertaking will adversely affect any identified historic properties, *id.* § 800.5; and resolve those adverse effects through avoidance or mitigation as documented in a Memorandum of Agreement. *Id.* § 800.6(b). In accordance with the regulations, "[a]n adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association." *Id.* § 800.5(a)(1).

The Advisory Council rules implementing Section 106 require that Consulting Parties be identified and given an opportunity to participate in consultation with the private applicant, other Consulting Parties, the State Historic Preservation Officer, the Advisory Council, and the public during each step of the Section 106 process. *Id.* § 800.3(f). "Consulting Parties" include "individuals and organizations with a demonstrated interest in

the undertaking [who] may participate [in the Section 106 process] due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties." *Id.* § 800.2.

The Section 106 regulations state how the Applicants can satisfy the consultation requirements:

> The applicant "shall involve consulting parties" in "findings and determinations made during the section 106 process." 36 C.F.R. § 800.2(a)4.
>
> The applicant "should plan consultations appropriate to the scale of the undertakings and the scope of Federal involvement and coordinate with other requirements of other statutes, as applicable, such as the National Environmental Policy Act." *Id.*
>
> The applicant must, "except where appropriate to protect confidentiality concerns of affected parties, provide the public with information about an undertaking and its effects on historic properties and seek public comment and input." 36 C.F.R. § 800.2(d)(2).
>
> The applicant "shall consult with the SHPO/THPO [State and Tribal Historic Preservation Officers] and other consulting parties to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties." 36 C.F.R. § 800.6.
>
> The applicant "shall provide to all consulting parties the documentation specified in Sec. 800.11(e), subject to the confidentiality provisions of Sec. 800.11(c) and such other documentation as may be developed during the consultation to resolve adverse effects." 36 C.F.R. § 800.6(a)(3).

> State Historic Preservation Officers, "other consulting parties, and organizations and individuals who may be concerned with the possible effects of an agency action on historic properties should be prepared to consult with agencies early in the NEPA process, when the purpose of and need for the proposed action as well as the widest possible range of alternatives are under consideration." 36 C.F.R. § 800.8(a)(2).
>
> The applicant "should ensure that preparation of . . . an Environmental Impact Statement . . . includes appropriate scoping, identification of historic properties, assessment of effects upon them, and consultation leading to resolution of any adverse effects." 36 C.F.R. § 800.8(a)(3).
>
> The applicant "shall ensure that a determination, finding, or agreement under the procedures in this subpart is supported by sufficient documentation to enable any reviewing parties to understand its basis." 36 C.F.R. § 800.11(a).

Thus, in order to satisfy the consulting requirements of Section 106, the Applicants must provide Consulting Parties with factual information and data necessary to provide for meaningful comment on the Section 106 determinations. Necessary factual information and data include, but may not be limited to:

> A map of the APE with supporting data on how the proposed APE was derived (e.g., direct impact corridor, viewshed analyses, footprint for construction)
>
> Aesthetic and visual quality documentation, including viewshed maps;
>
> Federal prime and unique farmlands analysis;
>
> Report on the elements of community character;

Report on listed or eligible properties identified within the APE, including boundaries of properties, such as historic farms.

Report on any other utilities that may have to be relocated during construction;

An alternatives analysis providing documentation of why corridors have been eliminated from consideration;

Information regarding indirect and cumulative effects on historic properties and resources; and

Information that would allow the Consulting Parties to respond to the scope and adequacy of the archaeological resources evaluation.

All of this information is necessary to provide meaningful comment on the APE, identification of historic properties within the APE, potential effects upon those properties, and proposed measures to resolve (mitigate or avoid) any adverse effects.

At the very least, the Applicants should have engaged the Consulting Parties prior to and in furtherance of their evaluation of alternatives to the proposed transmission line, including alternative corridors. Upon consultation in this case, it is highly like that the Applicants will have to substantially alter the proposed transmission line to accommodate historical structures. Thus, the application is premature.

4. The National Environmental Policy Act Obligates the Applicants to Perform Assessments and Consider Alternatives

The National Environmental Protection Act, 42 U.S.C. § 4321 et seq. ("NEPA"), requires that federal agencies take a "hard look" at the environmental consequences of all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989). While the statute applies only to federal actions and imposes obligations only on federal entities, it is well-settled that "federal involvement in a non-federal project may be sufficient to federalize the project for purposes of NEPA." *Macht v. Skinner*, 916 F.2d 13, 18 (D.C. Cir. 1990); *see also Envtl. Rights Coalition, Inc. v. Austin*, 780 F. Supp. 584, 594 (S.D. Ind. 1991) ("NEPA does not provide authority for constraining, restraining, or detaining non-federal entities pursuant to NEPA unless those entities are in a partnership or joint venture with or otherwise closely associated with a federal agency."); *Don't Ruin Our Park v. Stone*, 749 F. Supp. 1386, 1387-88 (M.D. Penn. 1990) (observing that a "non-federal entity may be enjoined along with the federal agency pending completion of an EIS" where the former "enters into a partnership or joint venture with the federal government and becomes the recipient of federal funding"). The Applicants, though nonfederal actors must comply with NEPA because the construction of the proposed transmission line requires approval from the United States Army Corps of Engineers

and the Fish and Wildlife Service, *see Found. on Economic Trends v. Heckler*, 756 F.2d 143, 155 (D.C. Cir. 1985) (holding that nonfederal actors may also be enjoined under NEPA if their proposed action cannot proceed without the prior approval of a federal agency); *Biderman v. Morton*, 497 F.2d 1141, 1147 (2nd Cir. 1974) (holding that where nonfederal action cannot lawfully begin or continue without the prior approval of a federal agency, nonfederal actor may be enjoined under NEPA). Thus, the Applicants must satisfy the full scope of requirements of this federal law.

NEPA, 42 U.S.C. § 4331(b)(3), requires the Applicants to "attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences." The Applicants can achieve this goal by satisfying the following requirements. The Applicants must:

> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;
>
> (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality . . ., which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

> (C) include in [its application] a detailed statement by the responsible official on--
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposals be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

NEPA regulations provide guidance on evaluating the significance of an action's impact. *See* 40 C.F.R. § 1508.27. A determination of the significance of an action's impact requires considerations of both context and intensity:

> (a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

> (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
>
> (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
>
> (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

40 C.F.R. § 1508.27. "If the proposed actions are environmentally 'significant' according to *any* of these criteria," then the Applicants erred in failing to prepare an environmental impact statement. *Public Citizen v. Department of Transp.*, 316 F.3d 1002, 1023 (9th Cir. 2003) (emphasis is original) (citing *Nat'l Parks and Conservation Ass'n v. Babbit* , 241 F.3d 722, 731 (9th Cir. 2000).

Without any documents identifying the environmental impacts of the proposed project, the affected landowners can only guess the context and intensity of such impacts. It can be said, without question, that the application lacks any appreciation whatsoever of the environmental significance of the proposed project. The application certainly lacks any documentation, environmental assessment, or environmental impact statement quantifying the environmental significance of the proposed

project. As such, the application is blatantly incomplete and, in fact, wrongfully submitted.

C. Issuance of a Certificate in this Case is Prohibited

Despite the inevitable questions that arise regarding the environmental impacts of its proposal, the Applicants did not submit any environmental assessment or any consideration of alternatives to avoid such impacts. The Applicants also failed to submit any assessment of the impact of their proposal on historic properties, as required under the National Historic Preservation Act. Their application, as a consequence, is wrongfully submitted and not ripe for this Commission's consideration.

1. By Failing to Perform the Required Assessments and Considerations, the Applicants Violated Their Affirmative Obligations Under NEPA

The Applicants violated their affirmative obligation to present the Commission with a proposal that contained a full environmental analysis. This affirmative obligation arises from NEPA's placement of the "primary and non-delegable responsibility" for compliance on the applicant, not the public. *I-291 Why? Ass'n v. Burns*, 517 F.2d 1077, 1081 (2d Cir. 1975). NEPA would lose its action-forcing nature if a complete review were absolutely dependent, as it is in this case, on public intervention at each step in an administrative proceeding. "It is, moreover, unrealistic to assume that there will always be an

intervener [before the agency] with the information, energy and money required" to investigate an environmental issue. *Calvert Cliffs' Coord. Comm., Inc. v. AEC*, 449 F.2d 1109, 118-19 (D.C. Cir. 1971). The Applicants have skirted their obligations under NEPA to affirmatively raise and evaluate environmental alternatives to the proposed construction of the transmission line. By submitting the application without documentation of any environmental assessment, the Applicants failed to satisfy their primary responsibilities.

2. Issuance of a Certificate of Public Convenience and Necessity at this Time Would Constitute an Unlawful Prejudicial Commitment of Resources

Because the Applicants have not already completed the Environmental Assessment or Environmental Impact Statement, the application itself is presently in violation of NEPA. The application constitutes a prejudicial commitment of resources to a particular alternative that is prohibited under the federal regulations. Those regulations state:

> § 1506.1 Limitations on actions during NEPA process.
>
> (a) Until an agency issues a record of decision as provided in § 1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:
>
> (1) Have an adverse environmental impact; or
>
> (2) Limit the choice of reasonable alternatives.

> (b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.
>
> (c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:
>
> (1) Is justified independently of the program;
>
> (2) Is itself accompanied by an adequate environmental impact statement; and
>
> (3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.
>
> (d) This section does not preclude development by applicants of plans or designs or performance of other work necessary to support an application for Federal, State or local permits or assistance.

40 CFR 1506.1. (Emphasis added). The "agency" for these purposes is the applicant, as a result of the federal permits it must receive prior to construction of the transmission line. By submitting the application, the Applicants have taken steps to "limit the choice of reasonable alternatives" to the proposed

route. Such action is prohibited under 40 CFR 1506.1(a). Were the Commission to issue a Certificate at this time, it would sanction unlawful action. Surely, instead, the Commission must dismiss the application.

3. NEPA and Section 106 Prohibit Issuance of the Certificate in This Case

NEPA and Section 106 are, primarily, procedural statutes. Just as NEPA represents a declared congressional policy requiring assessment of environmental concerns, Section 106 represents a declared Congressional policy requiring assessment of concerns relating to historical properties: the "congressional purpose" behind Section 106, "expanding over the years, [is] to make certain that federal agencies give weight to the impact of their activities on historic preservation." *WATCH v. Harris*, 603 F.2d 310, 325 (2nd Cir. 1979). The words of courts addressing the informational concerns of NEPA are equally applicable to Section 106: "The purpose of NEPA is to ensure that government agencies act on full information and that interested groups have access to such information. NEPA thus imposes procedural requirements, but not substantive results" on federal agencies. *Sierra Club v. U.S. Forest*, 46 F.3d 835, 837 N.2 (8th Cir. 1995). In addition, "NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct. . . . Similarly, the

broad dissemination of information mandated by NEPA permits the public and other government agencies to react to the effects of a proposed action at a meaningful time. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371, 109 S. Ct. 1851, 1858, 104 L. Ed. 2d 377 (1989). Though subject to the procedural requirements of NEPA and Section 106, the application lacks any appreciation whatsoever of the environmental significance of the proposed project. The application certainly lacks any documentation, environmental assessment, or environmental impact statement quantifying the environmental significance of the proposed project. In effect, the Applicants, by submitting an incomplete application, can be assured that the public and the Commission cannot react to the application in any meaningful way. Such an absurd result is absolutely contrary to the purpose and spirit of NEPA and Section 106.

As a result, the Commission must dismiss the application with allowance for the Applicants to re-file-upon satisfaction of all necessary assessments, consultations, and documentation requirements. Only then can the public and the Commission fully evaluate the application and its environmental impacts.

IV. CONCLUSION

The 2004 Amendments to KRS 278.020 included what is now Section (8) of that statute. That section contains the following final sentence.

> The issuance by the commission of a certificate that public convenience and necessity require the construction of an electric transmission line shall be deemed to be a determination by the commission that, as of the date of issuance, the construction of the line is a prudent investment.

The applicants, LG&E/KU, have failed to carry their burden to establish that at the present time the construction of the Mill Creek to Hardin County 345 kV transmission line - routed through the Cunningham wildlife sanctuary and wetland - is a prudent investment. The evidence is overwhelmingly to the contrary. Prudence requires careful investigation before construction. Under the requirements of KRS 278.020, and the standards of *Kentucky Utilities (1952)*, and to be consistent with the order of the PSC in Case No 2005-00089, the LG&E/KU application for the Mill Creek to Hardin County transmission line must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was duly served by mailing, first class postage prepaid to the following:

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This the 26 day of August, 2005.

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