

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

IN THE MATTER OF:

AUG 29 2005


PUBLIC SERVICE  
COMMISSION

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

**MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM AND  
AFFIDAVIT IN SUPPORT OF INTERVENORS' THIRD MOTION TO DISMISS**

Intervenors Dennis and Cathy Cunningham request leave to file the attached Supplemental Memorandum and Affidavit in Support of Intervenors' Third Motion to Dismiss the application of Louisville Gas and Electric Company and Kentucky Utilities Company ("Applicants"). Leave should be granted because new evidence was discovered on Friday, August 26, 2005, that, as set forth in the Supplemental Memorandum, the Applicants have withheld a significant environmental study from this Commission's review. This evidence provides further support for Intervenors' Third Motion to Dismiss.

Respectfully submitted,



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*Co-Counsel for Intervenors  
Cathy and Dennis Cunningham*

**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:

Hon. A. W. Turner  
Public Service Commission  
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P.O. Box 615  
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Attorney General Greg Stumbo  
Office of the Attorney General  
State Capitol, Suite 118  
Frankfort, Kentucky 40601

This the 29<sup>th</sup> day of August, 2005.

  
\_\_\_\_\_  
Co-counsel for Intervenors

CL017:00CL1:473530:1:LOUISVILLE

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<b>HARDIN COUNTIES, KENTUCKY</b>	)

**SUPPLEMENTAL MEMORANDUM AND AFFIDAVIT IN SUPPORT OF  
INTERVENORS' THIRD MOTION TO DISMISS**

**I. Introduction**

On July 26, 2005, Intervenors Dennis and Cathy Cunningham ("Intervenors") moved to dismiss the application of Louisville Gas and Electric Company and Kentucky Utilities Company ("Applicants") based on the Applicants' failure to respond to Intervenors' data requests. As stated in Intervenors' Third Motion to Dismiss, the Applicants' response was untimely and nonresponsive. New evidence, which was discovered on August 26, 2005, now provides further reason for the Commission to dismiss the application.

**II. Argument**

Intervenors submitted a Data Request to the Applicants on June 30, 2005. Intervenors requested studies that would provide any insight into the Applicants' decision to choose the particular route that it proposes. Data Request Number 1 requested a copy of any studies that have been undertaken or commissioned by the Applicants concerning alternative routes. Data Request Number 2 requested all environmental studies. *See* Intervenors' First Data Request,

June 30, 2005. In response, the Applicants provided cursory remarks, conclusory statements, and two documents that do not constitute a study under any accurate definition of that term.

The only responsive document provided by the Applicants in their response to Intervenors' data request was untimely and utterly nonresponsive. On July 19, 2005, well after the Commission's deadline, the Applicants filed what they described as "the complete Photo Science Geospatial Solutions report on the routes for the proposed transmission lines. . . ." The Applicants admit that this report had not been filed previously. Certainly it was not filed by the Commission's deadline. Yet, as the Applicants acknowledge, "[t]he procedural schedule in this case has been in existence and known to all parties since May 23, 2005." Response of Louisville Gas and Electric Company and Kentucky Utilities Company to Dennis and Cathy Cunningham's Motion for Extension of Time, p. 2, n. 2 (July 18, 2005). By failing to meet the deadline, the Applicants effectively placed Intervenors at a significant disadvantage in reviewing the application.

Moreover, the Photo Science "report," a Power Point presentation, is merely a compilation of maps and spreadsheets containing only pre-selected data and no narrative or analysis whatsoever. It identifies the top four alternative routes, but contains no text to explain how the "other routes studied" were discounted. It contains no citations to analyses or reviews that would give insight into the decision to choose the proposed route over other possible routes. It is not a "report" at all.

This was acknowledged by the Applicants' own witness. On cross-examination, Nate Mullins was asked, "Is there anything in this exhibit which indicates to somebody who is trying to figure out what these people did that would explain what these segments are?" Mr. Mullins responded, "Not in this document. There's nothing in there." Mullins Testimony, at 192.

Further, Mr. Mullins was asked, “Is there anything in your testimony that you’ve provided that would explain what these segments are?” He responded, “I don’t think I provided anything.” *Id.* Because the Applicants failed to produce any meaningful documentation, one simply cannot evaluate the Applicants’ route selection.

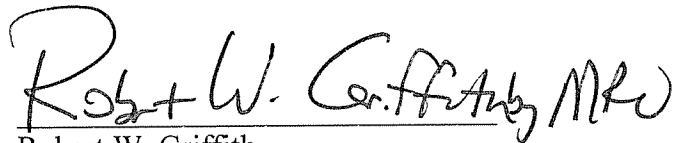
Now, Intervenors have learned that the Applicants are withholding at least one environmental study from this Commission. On August 26, 2005, a Fort Knox document clerk informed counsel for Intervenors that the Applicants provided to Fort Knox a study, commissioned by LG&E, entitled “Biological Field Survey Report, Proposed Electric Utility Easement, June 2005.” *See* Memorandum For Installation FOIA Advisor, attached as Exhibit 1. This study existed prior to the Applicants’ filing of their response to Intervenors’ data requests, yet it was withheld from that response.

Discovery is essential to preparation for any contested matter. When an opponent’s failure to produce responsive and timely discovery causes undue prejudice, as the Applicants’ failure has in this case, the rightful decision of the case is threatened. Indeed, the Applicants’ failure to be timely and responsive and their willful withholding of pertinent documents have threatened Intervenors’ ability to fairly review the proposal. If this were a trial, such conduct would justify not only a dismissal of the application but also the imposition of sanctions under Federal Rule of Civil Procedure 37. Fed. R. Civ. P. 37(b)(2)(C); *Bass v. Jostens, Inc.* 71 F.3d 237, 241 (6th Cir. 1995); *Bank One of Cleveland, N.A. v. Abbe*, 916 F.2d 1067, 1073 (6th Cir. 1990)). In this arena, dismissal of the application is appropriate. Indeed, because the parties and the Commission cannot meaningfully evaluate the Applicants’ proposal, dismissal is necessary.

### III. Conclusion

In response to Intervenor's data request, the Applicants filed an untimely and utterly nonresponsive "report," which is merely a compilation of maps and spreadsheets containing only pre-selected detail and no narrative or analysis whatsoever. The Applicants withheld from their response an environmental study that they provided to Fort Knox. By failing to file timely, responsive, and complete answers to Intervenor's data request, the Applicants have placed Intervenor and the Commission at a significant disadvantage; at this point, a meaningful evaluation of the application cannot be made. The Applicants' deliberate efforts to manipulate these proceedings compels this Commission to dismiss their application.

Respectfully submitted,



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Attorney General Greg Stumbo  
Office of the Attorney General  
State Capitol, Suite 118  
Frankfort, Kentucky 40601

This the 29<sup>th</sup> day of August, 2005.

  
Counsel for Intervenors





NOTARY PUBLIC

My commission expires: DECEMBER 11, 2007

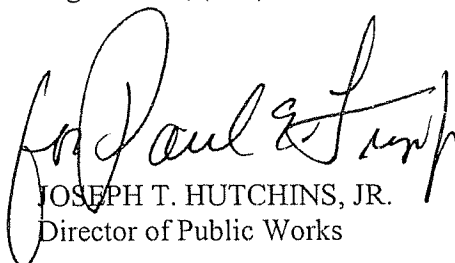
CL017:00CL1:473494:1:LOUISVILLE

25 August 2005

MEMORANDUM FOR Installation FOIA Advisor, DOIM, ATTN: IMSE-KNX-IM

SUBJECT: Freedom of Information Act (FOIA) Request No. FA-05-0101

1. Reference memo, IMSE-KNX-IM, 11 Aug 05, SAB.
2. On 19 Aug 05 Bill Hickok, GS-11, DPW Real Property Officer, performed a mental and physical search for records identified in subject request. A total of 10 minutes was spent searching for the records in the DPW Real Property Office. The only records that exist are five aerial maps provided to this office by LG&E and a copy of a study commissioned by LG&E entitled *Biological Field Survey Report, Proposed Electric Utility Easement, June 2005*. The study was prepared by Jordan, Jones & Goulding, 6801 Governors Lake Parkway, Norcross, Georgia 30071, (770) 455-8555, Fax (770) 445-7391, [www.jjg.com](http://www.jjg.com).

  
JOSEPH T. HUTCHINS, JR.  
Director of Public Works

