STOLL | KEENON | & | PARK | LLP

300 WEST VINE STREET | SUITE 2100 | LEXINGTON, KENTUCKY 40507-1801
(859) 231-3000 PHONE | (859) 253-1093 FAX | WWW.SKP.COM

ROBERT M. WATT, III
859-231-3043
watt@skp.com

August 26, 2005

Hon. Elizabeth A. O'Donnell
Executive Director
Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, Kentucky 40601

Re: Louisville Gas and Electric Company
Kentucky Utilities Company
Case No. 2005-00142

Dear Ms. O'Donnell:

We enclose for filing an original and ten copies of the Post-hearing Brief of Louisville Gas and Electric Company and Kentucky Utilities Company in the above-captioned case. Best regards.

Sincerely,

Robert M. Watt, III

Rmw
Encl.
Cc: Parties of Record (w/encl.)

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 THE CONSTRUCTION OF TRANSMISSION FACILITIES IN JEFFERSON, BULLITT, MEADE AND HARDIN COUNTIES, KENTUCKY	)	**CASE NO. 2005-00142**

* * * * * * * * * * *

POST-HEARING BRIEF OF LOUISVILLE GAS AND ELECTRIC COMPANY AND KENTUCKY UTILITIES COMPANY

Respectfully submitted,

J. Gregory Cornett
Ogden Newell & Welch PLLC
1700 PNC Plaza
500 West Jefferson Street
Louisville, Kentucky 40202
Telephone: (502) 582-1601

Robert M. Watt, III
Lindsey W. Ingram, III
Stoll, Keenon & Park, LLP
300 West Vine Street, Suite 2100
Lexington, Kentucky 40507
Telephone: (859) 231-3000

Elizabeth L. Cocanougher
Senior Regulatory Counsel
Louisville Gas and Electric Company
220 West Main Street
Post Office Box 32010
Louisville, Kentucky 40232
Telephone: (502) 627-4850

Counsel for Louisville Gas and Electric Company and Kentucky Utilities Company

Table of Contents

Page

INTRODUCTION

This case involves the Joint Application of Louisville Gas and Electric Company ("LG&E") and Kentucky Utilities Company ("KU") (collectively, the "Companies") for a Certificate of Public Convenience and Necessity ("CCN") for the construction of approximately 41.9 miles of 345 kV transmission line from LG&E's Mill Creek substation in Jefferson County, through Meade and Bullitt Counties, to KU's Hardin County substation in Hardin County ("Joint Application"). The Companies have a need for the new transmission facilities, and the construction proposed herein does not constitute wasteful duplication and is the best method for meeting that need. The proposed construction will allow the Companies to deliver the additional electric power produced at the proposed new generating unit ("TC2") at the Companies' Trimble County Generating Station (the "Trimble Station") and maintain the stability of the Companies' transmission system. The proposed transmission facilities, together with the expansion of the Trimble Station, will allow the Companies to continue providing low-cost, reliable power for their native customers into the future. Accordingly, and for all of the reasons set forth below, the Joint Application should be granted.

PROCEDURAL HISTORY

The Companies gave notice of the filing of their Joint Application on April 8, 2005.[1] In order to provide information about the proposed project to interested persons in advance of the filing of the Joint Application, the Companies held an informational meeting on April 19, 2005, at the Tourism & Convention Bureau in Elizabethtown, Kentucky. The Joint Application, together with supporting testimony and exhibits, was

[1] The notice was withdrawn and a new notice was filed on April 11, 2005.

filed on May 11, 2005. The Kentucky Public Service Commission (the "Commission") issued a no deficiency letter on May 17, 2005.[2]

On May 18, 2005, the Commission granted limited intervention to Betty Coyle and Samuel Coyle. On June 9, 2005, the Commission granted full intervention to Robert Kiefer and to Dennis and Cathy Cunningham (the "Cunninghams"). Mr. Kiefer did not participate in the case after his motion for intervention was granted. The Commission retained The Liberty Consulting Group ("Liberty") pursuant to KRS 278.020(8) to evaluate the Companies' proposal and to issue a report to the Commission. That report was issued on June 15, 2005, in which Liberty recommended that the Commission approve the construction of a 345 kV transmission line from LG&E's Mill Creek substation to KU's Hardin County substation. Pursuant to KRS 278.020(8), the Commission held a meeting for public comment at the Pritchard Community Center in Elizabethtown, Kentucky, on July 12, 2005.

Pursuant to the Commission's procedural schedule, which had been established by order dated May 23, 2005,[3] the Companies, the Commission Staff and the Cunninghams engaged in discovery. On July 15, 2005, the Cunninghams filed the direct testimony of Geoffrey M. Young. The Cunninghams requested an extension of time to file their own direct testimony and motions to supplement their discovery responses. They also moved to dismiss the Joint Application on the grounds that four landowners had not received notice of the proceeding and that the Joint Application is premature in that a CCN has not yet been granted for TC2. The Commission denied the motion to

[2] May 17, 2005, letter from Elizabeth O'Donnell.
[3] The procedural schedule was amended on June 15, 2005, to schedule dates for the local hearing and the formal hearing.

dismiss on July 20, 2005. The Cunninghams filed the direct testimony of Cathy Cunningham on July 21, 2005.

On July 20, 2005, the Companies filed a motion to strike hearsay portions of Mr. Young's direct testimony and on July 22, 2005, they filed a motion to strike hearsay portions of Cathy Cunningham's testimony. On July 25, 2005, the evening before the formal hearing, the Cunninghams filed their second motion to dismiss the Joint Application, this one on the ground that the Companies should have obtained other regulatory approvals before filing the Joint Application. At the outset of the hearing on July 26, the Commission heard oral arguments on the second motion to dismiss. Because the second motion to dismiss had been served on the Companies at approximately 5:00 p.m. on the preceding evening, the Commission ruled that a response to the second motion to dismiss could be included in the Companies' post-hearing brief.[4]

The evidentiary hearing was scheduled for July 26, 2005, the same day on which the Commission scheduled the evidentiary hearings for Case Nos. 2005-00154 and 2005-00155, CCN proceedings for other segments of transmission lines to be built in connection with the construction of TC2. After hearing arguments on the second motion to dismiss, the Commission commenced the hearing in Case No. 2005-00154. That morning, the Cunninghams served the Companies with their responses to the motions to strike testimony, with a third motion to dismiss and with notice, for the first time, that they intended to call Leslie E. Barras as a witness.[5] The grounds for the third motion to dismiss were that the Companies had filed incomplete responses to certain of the

[4] Such response appears below.
[5] Ms. Barras' affidavit was attached to the testimony of Cathy Cunningham and was one of the subjects of the Companies' Motion to Strike.

Cunninghams' data requests and that the Cunninghams had not had sufficient time to employ an expert witness.

The Commission heard oral arguments on the two motions to strike and the third motion to dismiss on July 27, 2005, at the commencement of the formal hearing in this proceeding. The motions to strike were denied and the Commission did not rule on the third motion to dismiss. Thereafter, the formal hearing proceeded and was concluded that day. There were no post-hearing data requests. This brief is filed pursuant to the schedule established at the conclusion of the Commission's formal hearing.

OVERVIEW OF PROPOSED PROJECT

The Companies have proposed construction of approximately 41.9 miles of 345kV transmission facilities from LG&E's Mill Creek Substation in Jefferson County, across the Fort Knox Military Reservation, passing through Meade and Bullitt Counties, to KU's Hardin County Substation in Hardin County.[6] These transmission facilities, together with other lines to be constructed in Woodford, Anderson, Franklin and Trimble Counties[7], are needed to accommodate the addition of TC2 to the Companies' generation fleet and allow the Companies to continue to provide low-cost, reliable service to their native load customers[8], as well as to relieve voltage problems in the Elizabethtown area.[9] The expected cost of construction of these transmission facilities is approximately $59.1 million.[10]

The need for the additional baseload capacity is the subject of Case No. 2004-00507. There the Companies have stated that their load forecasts demonstrate a need for

---

[6] Direct Testimony of J. Nate Mullins ("Mullins Direct") at 1-2.
[7] These projects are the subject of Case Nos. 2005-00154 and 2005-00155.
[8] Direct Testimony of Mark S. Johnson ("Johnson Direct") at 3.
[9] Companies' Response to Commission Staff's First Data Request, No. 11, Attachment page 2.
[10] Mullins Direct at 3.

a new baseload generating unit by 2010.[11] A Resource Assessment performed by the Companies demonstrates that the addition of TC2, which is a 750 MW nominal net rating (732 MW net summer rating) super-critical pulverized-coal unit to be located adjacent to the existing operating unit ("TC1") at the Trimble Station, is needed to meet the forecast load.[12]

The Companies analyzed the facts leading to the decision to propose construction of these transmission facilities on three basic levels. The first level of analysis was of the need for additional generating capacity. That analysis is the subject of Case No. 2004-00507. The second level of analysis was of the transmission system to decide whether new transmission facilities are needed to accommodate the addition of generating capacity to the Companies' generating fleet. The third level of analysis was to determine proposed corridors in which the transmission facilities might be constructed.

The Companies analyzed the need for the subject transmission facilities in conjunction with Midwest Independent Transmission System Operator, Inc. ("MISO").[13] MISO performed three studies: (i) a Transmission Service System Impact Study ("System Impact Study"); (ii) a Generation Interconnection Evaluation Study ("Interconnection Study") and (iii) a Facility Study Report.[14] In the System Impact Study, MISO identified constraints in the MISO transmission footprint system and in adjacent non-MISO systems that might limit the delivery of power from TC2.[15] In the Interconnection Study, MISO determined the impact of a TC2 interconnection on power

[11] Johnson Direct at 3.
[12] *Id.*
[13] *Id.* The Companies also conducted their own initial study to determine what transmission facilities might be required to support the integration of TC2. Response to PSC Staff Data Request No. 10 (1), Attachment pp. 1-7.
[14] The System Impact Study, Interconnection Study and Facility Study Reports are Exhibits MSJ-1, MSJ-2 and MSJ-3 respectively.
[15] Johnson Direct at 4.

system stability, short circuit interruption requirements and potential contingency cascading problems.[16] In the Facility Study Report, MISO evaluated the options identified in the System Impact Study.[17] In addition to providing input to MISO so that it could conduct the studies, the Companies reviewed MISO's reports and concurred with its findings.[18]

The transmission facilities proposed to be constructed in this proceeding are described in MISO's fourth option in the System Impact Study. The Companies chose to pursue that option because it would alleviate thermal problems related to the addition of TC2 and was the least cost option.[19]

The transmission line design engineering functions, including route selection, were performed by the Companies' Transmission Line Services personnel and described in the testimony of J. Nate Mullins.[20] Once the decision was made to construct new transmission facilities between the Mill Creek substation and the Hardin County substation, Mr. Mullins and his staff undertook the consideration of possible routes. The Companies retained the services of Photo Science Geospatial Solutions, which utilized the Electric Power Research Institute ("EPRI") Standardized Method of Siting Overhead Transmission Lines, to determine possible routes. The EPRI methodology utilizes a numerical scoring system in the identification of constraints and the quantification of the preferred route. The resulting preferred route balances the proposed line's impact on the built environment, the natural environment and cost.[21]

---

[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.* at 5.
[20] Mullins Direct at 3.
[21] *Id.* at 5.

The preferred route is identified as the West Route.[22] The proposed transmission line will cross the Fort Knox Military Reservation shortly after it leaves the Mill Creek substation and go to the Tip Top substation, where the line will be built generally in a southerly direction following cross-country routes, road routes and existing transmission line routes to the Hardin County substation.[23] The West Route was chosen as the preferred route using EPRI siting methodology, detailed maps and aerial photographs and ancillary data.[24]

The Companies have begun environmental and cultural resource studies in areas where they have existing easements and on the Fort Knox Military Reservation.[25] They have been in contact with relevant environmental and historic preservation agencies to ensure that they will comply with all applicable requirements.[26] In areas where easements must be acquired, the Companies, and Photo Science, will conduct environmental and cultural studies once they have received permission to go on the land.[27]

Once a CCN has been issued for this project, the Companies will obtain all other necessary permits or approvals and then begin the acquisition of easements, right-of-way clearing, final design, material acquisition and construction.[28] This schedule will allow the Companies to obtain any necessary permitting required by other state and federal

---

[22] *Id.* at 7.
[23] *Id.* at 6.
[24] *Id.* at 7.
[25] *Id.* at 2.
[26] Transcript of Evidence from July 27, 2005, hearing ("TE") at 80-81, 97, 104, 137-138, 218-222, 235.
[27] Mullins Direct at 2-3.
[28] *Id.* at 3.

agencies and to complete the construction of the proposed facilities so that they will be available when TC2 is scheduled to begin commercial operation in the spring of 2010.[29]

ARGUMENT

I. THE CUNNINGHAMS' MOTIONS TO DISMISS SHOULD BE DENIED.

On the evening before the scheduled first day of the evidentiary hearing in this matter, the Cunninghams filed their second motion to dismiss this case. Although the Commission heard oral argument on the motion to dismiss from counsel for the Cunninghams and from counsel for the Companies at the July 26, 2005, evidentiary hearing in Case No. 2005-00154, the Commission permitted the Companies to respond in writing to the motion to dismiss within this post-hearing brief. Therefore, in accordance with the Commission's permission, the Companies hereby respond in writing to the Cunninghams' second motion to dismiss.

In their motion to dismiss, the Cunninghams argue that this case is not ripe for a decision from the Commission. Their argument is that, because various federal laws possibly require the Companies to obtain permits or approvals before constructing the transmission line in question, the question before the Commission in this case — whether the Companies' proposal is required by the public convenience and necessity — is not ripe. In other words, the Cunninghams argue that, until those other permits or approvals have been obtained, the Commission cannot properly rule in this case.

The Cunninghams argue that the Companies' proposal invokes the permitting authority of the U.S. Army Corps of Engineers, and triggers obligations under the Endangered Species Act, Section 106 of the National Historic Preservation Act, and the

[29] TE at 55.

National Environmental Policy Act. As is evident from a reading of the Cunninghams' second motion to dismiss, there is a well established process for addressing each of the environmental and historic preservation issues they raise. With respect to the specific wetlands, endangered species, and historic preservation issues raised by the Cunninghams, those administrative processes are administered by the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, and the State Historic Preservation Officer ("SHPO") within a framework established under federal laws and regulations.

The Cunninghams submitted three letters from those agencies[30] and have attempted to argue that the Companies have somehow ignored the requirements of those laws and that the Commission should withhold action in this proceeding until they are satisfied that the Companies have complied with the statutes and regulations. However, the Companies made it clear that they are currently working with each of those agencies to address the relevant environmental and historic preservation issues in accordance with applicable laws and regulations.[31]

The letter submitted by the Cunninghams from the Corps of Engineers indicates that the Corps has made a "preliminary determination" that wetlands are located on the Cunningham property and that a Section 404 permit would be required for discharge of dredged or fill material into those waters.[32] However, the requirement for a Section 404 permit is not applicable when transmissions poles and other facilities are located on areas of the Cunninghams' property that do not constitute wetlands. The proposed

[30] See, Dennis and Cathy Cunningham's Supplemental Response to Louisville Gas and Electric Company and Kentucky Utilities Company Request for Data filed on July 26, 2005 ("Cunninghams' Supplemental Response").
[31] TE at 80-81; 97; 104; 137-138; 218-222; 235.
[32] Cunninghams' Supplemental Response.

transmission line will not require Section 404 dredge and fill permits because the Companies have not proposed construction of poles or other facilities in wetlands areas.[33]

The Cunninghams also submitted a July 20, 2005, letter from the U.S. Fish and Wildlife Service indicating that a pond on the Cunningham property had apparently been used in the early spring of 2005 as a stop-over feeding and resting area for a single migrating whooping crane, a species listed under the Endangered Species Act.[34] However, the same letter states that "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."[35] There is nothing in the letter to suggest that the U.S. Fish and Wildlife Service has any objection as to the Companies' handling of the matter.

Finally, the Cunninghams submitted a letter from the SHPO that cites regulations promulgated pursuant to Section 106 of the National Historic Preservation Act and describes obligations to perform various assessments and to consult with the SHPO to avoid or mitigate adverse impacts on historic properties. The SHPO states that "the applicants have yet to complete the Section 106 process, and that as a result of this process the proposed route may have to be substantially altered."[36] However, issues such as visibility impacts are easily addressed through simple but effective measures such as lowering the height of a transmission pole so that it is no longer visible in the area of an

---

[33] TE at 83.
[34] It should be noted that the letter went on to state that the particular whooping crane reported on the Cunningham property was part of an established Non-essential Experimental Population and was not entitled to full Endangered Species Act protection. Cunninghams' Supplemental Response.
[35] *Id.*
[36] *Id.*

historic structure. In any event, those issues will be resolved as the Companies proceed with the required studies and consultation with the SHPO.

Even assuming that the Cunninghams are correct that the Companies' proposal triggers requirements for various federal permits or approvals, there is no basis for the proposition that any such obligations must be met *before* the Commission can rule in this case. To the extent the Companies are required to obtain any permits from any governmental agency, there is no requirement in KRS 278.020 that those permits must be obtained or applied for prior to obtaining a CCN from the Commission. Indeed, the only part of KRS 278.020 that addresses the order in which regulatory approvals are to be obtained calls for the CCN to be obtained first.[37]

The Court of Appeals, in Western Kraft Paper Group v. Dept. for Natural Resources and Environmental Protection,[38] addressed the timing of environmental permitting vis a vis a CCN for construction of a power plant and held that a utility *may* apply for an environmental permit prior to obtaining a CCN. It did not hold that it is *required* to apply for the environmental permit prior to obtaining a CCN from the Commission. Thus, the thrust of the motion to dismiss — that other permits *must* be obtained first — is not supported by the wording of KRS 278.020 nor the only authority construing it in this context. For this reason alone, the motion to dismiss must be overruled.

The lynchpin of the Cunninghams' argument that this Commission must give due consideration to the requirements of the National Environmental Policy Act, the National Historic Preservation Act and the Endangered Species Act is the allegation that federal

[37] KRS 278.020(4).
[38] 632 S.W.2d 454 (Ky. App. 1982).

permit or approval requirements will necessarily call such statutes into play. The Cunninghams maintain that the Companies will need to seek a permit from the Army Corps of Engineers before it can discharge dredged or fill material into rivers. Even if such a permit would be required,[39] the Cunninghams' argument that this Commission must withhold any consideration of the application for the CCN until any required permits are obtained is completely unsupportable under federal law.

The fact the Companies might be required to obtain permits has no effect on the Commission's jurisdiction or consideration of this case. The Cunninghams cited a handful of federal cases[40] for the proposition that the Commission must consider "all factors bearing on the public interest" in considering the Companies' proposal. But none of those cases say anything about prohibiting a utility from obtaining a CCN until federal permitting obligations are met and KRS 278.020 does not either.

The federal statute governing permits for dredged or fill material is found in 33 U.S.C. § 1344. Nowhere in that statute is there an indication that a state agency must await direction from the Army Corps of Engineers before exercising its jurisdiction over an application for a certificate of convenience and necessity. The Army Corps of Engineers' regulations governing the issuance of permits in fact suggest the opposite conclusion. Some types of permits will not be issued by the Army Corps of Engineers until after the state review. See 33 C.F.R. § 350.4 (h) ("No permit will be issued to a non-federal applicant until certification has been provided that the proposed activity

[39] Such a permit will not be required because the Companies are not proposing to place any structures in bodies of water or wetlands. TE at 83.

[40] On page 5 of their Motion to Dismiss, the Cunninghams rely on Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1 (1961), United States v. Detroit & Cleveland Navigation Co., 326 U.S. 236 (1945), Cascade Natural Gas Corp. v. Federal Energy Regulatory Comm'n, 955 F.2d 1412 (10th Cir. 1992) and Henry v. Federal Power Comm'n, 513 F.2d 395 (D.C. Cir. 1975) for the statement that "the Commission cannot issue a Certificate of Public Convenience that is not supported by a full consideration of all of the environmental impacts of the proposed project."

complies with the coastal zone management program and the appropriate state agency has concurred with the certification or has waived its right to do so."); 33 C.F.R. § 350.4 (j)(4)("In the absence of overriding national factors of the public interest that may be revealed during the evaluation of the permit application, a permit will generally be issued following receipt of a favorable state determination provided the concern, policies, goals, and requirements as expressed in 33 CFR parts 320-324, and the applicable statutes have been considered and followed . . ."). The general rule, if not otherwise specified in the governing regulation, is that the permit process "will proceed concurrently with the processing of other required Federal, state, and/or local authorizations or certifications." 33 C.F.R. § 320.4(j)(1).

The argument presented in the motion to dismiss that these proceedings must necessarily grind to a halt because of the policies of the National Historic Preservation Act, the National Environmental Policy Act, the Endangered Species Act and federal permit requirements which might render such policies applicable is accordingly premised upon a false assumption. Regardless of the applicability of any or all of the federal provisions, there is neither a state nor a federal statute which requires this Commission to abstain from exercising its jurisdiction over these proceedings.

It is instructive that the recently enacted Energy Policy Act of 2005 amended portions of the Federal Power Act to address the siting of interstate electric transmission facilities by adding a new Section 216.[41] The amendment provides that the review by federal and state agencies of proposed transmission facilities, including environmental reviews, will be coordinated and expedited. There is no requirement that state CCN consideration must await federal agency review. The clearly stated policy is to encourage

[41] § 1221, Energy Policy Act of 2005.

the prompt regulatory approval of the construction of interstate electric transmission facilities.

Finally, when the Commission heard oral argument on the motion to dismiss at the July 26, 2005, evidentiary hearing, Chairman Goss went straight to the heart of the matter by asking whether there is any authority for the notion that the Commission is barred from considering this case until federal permitting requirements are met.[42] Counsel for the Cunninghams was unable to respond to that question with any applicable authority. Instead, counsel for the Cunninghams could only offer the federal cases cited in the motion to dismiss. As stated, those cases say *nothing* about a pre-CCN permitting requirement. Chairman Goss' pointed question and the lack of an answer speak volumes. Moreover, the state and federal authorities cited above demonstrate that there is no authority to support the Cunninghams' argument. The second motion to dismiss must be denied.

On the morning of July 26, 2005, the Cunninghams filed and served their third motion to dismiss. They alleged that the Companies had not fully responded to data requests submitted by the Cunninghams and that they had not had sufficient time to employ an expert witness. As to the portion of the motion relating to allegedly incomplete data request responses, counsel for the Cunninghams, during the oral argument on their motion, advised the Commission as follows:

> We don't wish to be heard on it. We want the Commission to know that we have this motion pending, and we will be asking for the existence of reports during the examination and asking why we haven't been provided them, and, if it turns out that we were right, that there are reports out there

[42] Transcript of Evidence of July 26, 2005, hearing in Case No. 2005-00154, at 38 – 42.

> that have not been provided, we will then ask the court to make – the Commission to make the appropriate ruling.[43]

Thereafter, at several points during the cross-examination of Mr. Johnson and Mr. Mullins, counsel for the Cunninghams asked if there were any other reports or other information responsive to the data requests that had not been produced. They were consistently told that there were not any such reports or information.[44] At the conclusion of the evidentiary hearing on July 27, 2005, counsel for the Cunninghams advised the Commission as follows:

> At the beginning of this proceeding, I called attention to my Motion to Dismiss, because we believe that there were reports that existed that we've not been provided. You've heard testimony about studies and reports that may have existed and a report that may have been typed over and it no longer exists. What I would like to do is submit our Motion to Dismiss, because we don't feel like we've been given things that once existed, and we think may still exist, if there's a diligent search, but we have not been able to identify actual reports at this point that have been withheld from us. So I think we should submit the motion to you and abide by the ruling that you've made. That was my effort to protect against reports that were being withheld, that we thought were out there, and we're still not satisfied, but have to live with the testimony that we've heard.[45]

Thus, counsel for the Cunninghams has acknowledged that the testimony demonstrates that there are no reports in existence that have not been produced. The reference to a "report that may have been typed over" is to a preliminary Excel spreadsheet utilized to compile scores of alternative routes, not to a "report."[46] As is customary, as the analysis progressed, old versions of the spreadsheet no longer existed after new versions of the same document were saved. All information responsive to the data requests from the

---

[43] TE at 23.
[44] See, for example, TE at 62, 64, 91, 185, 202, 211, 212, 219.
[45] TE at 268.
[46] TE at 241-242.

Cunninghams was produced. Testimony at the hearing did not demonstrate otherwise and counsel for the Cunninghams conceded that point.

As to the claim that the Cunninghams did not have sufficient time to employ an expert witness, the facts and circumstances demonstrate otherwise. The Cunninghams were sent written notice of this proceeding before it was filed pursuant to 807 KAR 5:120, Section 2(3).[47] Mrs. Cunningham testified that she received the notice.[48] She also testified that she attended the Companies' information meeting on April 19, 2005, in Elizabethtown.[49] Thereafter, according to the docket for this case, the Cunninghams sent letters or other documents to the Commission on April 22, April 27, May 11, May 18, June 3, June 6, June 7, and June 21. Their motion for full intervention was granted on June 9, 2005. Their first two attorneys entered their appearance on June 30, 2005, and their third attorney entered his appearance on July 21, 2005. At the Commission's public comment hearing in Elizabethtown on July 12, 2005, Mr. Cunningham, Mrs. Cunningham, two of their attorneys and one of their witnesses, Leslie Barras, all made oral presentations to the Commission.[50] The Cunninghams submitted the prepared direct testimony of Geoffrey M. Young, which contained numerous excerpts from publications that Mr. Young characterized as having been written by experts, and an affidavit by Leslie Barras, who purported to offer her expertise on the National Historic Preservation Act. In fact, the Commission granted the Cunninghams a six day extension of time to permit the filing of Mrs. Cunningham's testimony to which Ms. Barras' affidavit was attached. Their claim that they did not have sufficient time to hire an expert witness is

[47] Application, ¶ 12, Exhibit 3.
[48] TE at 261.
[49] *Id.*
[50] TE at 262-263.

groundless. For all of these reasons, the Cunninghams' third motion to dismiss should be denied.

II. THE COMPANIES' REQUEST FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY SHOULD BE GRANTED.

KRS 278.020(2) provides as follows:

> For purposes of this section, construction of any electric transmission line of one hundred thirty-eight (138) kilovolts or more and of more than five thousand two hundred eighty (5,280) feet in length shall not be considered an ordinary extension of an existing system in the usual course of business and shall require a certificate of public convenience and necessity.

The statutory requirement for certificates of public convenience and necessity is contained in KRS 278.020(1) and states as follows:

> No person, partnership, public or private corporation, or any combination thereof shall . . . begin the construction of any plant, equipment, property or facility for furnishing to the public any of the services enumerated in KRS 278.010 . . . until that person has obtained from the Public Service Commission a certificate that public convenience and necessity require the service or construction. . . .

Kentucky's highest court has construed "public convenience and necessity" to mean: (1) there is a need for the proposed facility or service; and (2) the new facility or service will not create wasteful duplication.[51]

A finding of "need" is supported where there has been a showing of "a substantial inadequacy of existing service" due to a deficiency of service facilities beyond what could be supplied by normal improvements in the ordinary course of business.[52] However, it is important to recognize that "substantial inadequacy of existing service" is not required to be a currently-existing deficiency, but rather may be a deficiency expected

[51] Kentucky Utilities Co. v. Public Service Commission, 252 S.W.2d 885, 890 (Ky. 1952).
[52] *Id.*

a number of years into the future "in view of the long range planning necessary in the public utility field."[53] The prevention of "wasteful duplication" has been interpreted to mean not only a physical multiplicity of facilities, which includes a review of whether the use of existing utility corridors was analyzed, but also an avoidance of "excessive investment in relation to productivity or efficiency."[54] Here, as explained in detail below, the Companies have demonstrated the need for the Mill Creek to Hardin County Line in order to support the integration of TC2 into its system beginning in 2010, and have established that a CCN is needed now in order to meet a commercial operation date in 2010. Similarly, the Companies have established that the proposed construction, which uses a mix of existing and new utility corridors, will not constitute a wasteful duplication of facilities. For all of those reasons, the requested CCN should be granted.

A. The Mill Creek to Hardin County Line Is Needed to Allow the Companies to Integrate TC2 into Their Generation Fleet.

The Companies have demonstrated in Case No. 2004-00507 that TC2 must be in commercial operation by the spring of 2010 in order to permit the Companies to continue to provide low-cost, reliable service to their native load customers. The Mill Creek to Hardin County 345kV transmission line is needed to integrate TC2 into the Companies' generation fleet. In addition, the line will relieve voltage problems in the Elizabethtown area. The Companies do not contend that the Mill Creek to Hardin County Line is presently needed absent the Commission's granting a CCN for TC2, and agrees that, if a

[53] Kentucky Utilities Co. v. Public Service Commission, 390 S.W.2d 168, 171 (Ky. 1965).
[54] Kentucky Utilities Co., 252 S.W.2d at 890.

CCN is issued in this proceeding before a final order is issued in Case No. 2004-00507, it would be appropriate to issue that CCN contingent upon the award of a CCN for TC2.[55]

As indicated in the Overview of the Proposed Project, above, the Companies conducted a high level study of their transmission needs, and then provided input to MISO which, in turn, performed three detailed studies of the options for the integration of TC2 into the Companies' transmission system, as well as into adjacent non-MISO systems. Those studies are identified as the System Impact Study, the Interconnection Study and the Facility Study Report and are attached to the testimony of Mr. Johnson as Exhibits MSJ-1, MSJ-2 and MSJ-3, respectively. Mr. Johnson described the results of the studies by MISO as follows:

> The System Impact Study identified four transmission facility expansion options to alleviate thermal issues related to the delivery of power from TC2. The Companies then assessed those four options and decided to pursue the fourth option presented by MISO. The Interconnection Study concluded that: three of the four options presented in the System Impact Study, including the option ultimately chosen by the Companies, resulted in continued system stability with the addition of TC2; the addition of TC2 would result in the increase of fault currents in a number of breakers in the system, but those increased currents were expected to be within the breaker current interruption capabilities; and the addition of TC2 would not create any new cascading outages in the system. The Facility Study Report sets forth key events in the construction timelines for the four options identified in the System Impact Study.[56]

[55] However, as Mr. Johnson noted in his direct testimony, if the CCN for TC2 is not approved, the Companies will have to meet their baseload capacity needs in some other manner, which likely would still require additional transmission facilities. Johnson Direct at 5.
[56] Johnson Direct at 4-5.

Mr. Johnson went on to testify that the Companies chose the fourth option because it would alleviate the thermal issues and was the least cost option.[57] Mr. Johnson also testified that the construction of the Mill Creek to Hardin County Line would not result in any unnecessary duplication of facilities. He said that MISO studied this issue and reported on it in the System Impact Study. MISO reviewed the adequacy of existing lines, including the possibility of upgrades to those lines, and determined that those lines were not adequate and that additional lines were needed to support the integration of TC2.[58]

During the hearing, counsel for the Cunninghams suggested that MISO Option 4, which the Companies chose, was not in fact the least cost option and that they should have chosen MISO Option 3. MISO Option 3 called for the construction of transmission facilities from the West Frankfort substation to the E.W. Brown generating station instead of from Mill Creek to Hardin County.[59] However, Mr. Johnson pointed out that if the Companies pursued Option 3, they would still be required to construct the Mill Creek to Hardin County Line within five to eight years thereafter. Thus, Option 4 was the least cost option taking into account the total cost of the two options. The following exchange took place between counsel for the Cunninghams and Mr. Johnson:

> Q. Option 4 is more expensive than the cheapest option to address the transmission line needs of TC2 and the thermal issues associated with it; isn't it?

---

[57] *Id.* at 5.

[58] *Id.* At various times in this proceeding, Counsel for the Cunninghams has argued that the proposed line is not needed until years after TC2 becomes operational, and has implied that the Companies agree with that argument. Counsel is flatly incorrect, however. The evidence is clear that the proposed facilities will be needed to support the integration of TC2 in 2010, and the Companies have never said otherwise. It was necessary for the Companies to file their Joint Application this year to allow for adequate time to secure any other necessary approvals, acquire right-of-way and materials, and construct the line to be ready when needed in 2010.

[59] Exhibit MSJ-1 at 8.

A. It is short-term, but not long-term, and, when we look at least-cost option, we not only plan for just our immediate needs, and in this case 2010, but we look at whether or not there are any other additional upgrades that might be required in the future, and what we chose was the least-cost total option for our consumers and our customers.

Q. On the date TC2 comes on line – let's say that is year 2010 – the thermal needs or the transmission needs at that point in time can be satisfied with an alternative that is cheaper than the alternative you selected; isn't that true?

A. And, if you're referring to . . .

Q. Option 3.

A. . . . an additional 345 line from West Frankfort, perhaps, and I forgot the locations, but Option 3, as far as near term, would probably – not probably – it would satisfy, at least for a period of X years – and I think the range is anywhere from five to eight years – the integration of TC2, but then we would have to come back and build the Mill Creek to Hardin County line at that point in time.[60]

It clearly is more reasonable to proceed with the Mill Creek to Hardin County Line now rather than build another transmission line and then be required to build the Mill Creek to Hardin County Line within five to eight years thereafter.

The choice of Option 3 would also have run counter to the direction of the Commission in the August 19, 2005, order in Case No. 2005-00089[61] regarding duplication of facilities. Had the Companies chosen to pursue Option 3, they would have been required to construct more transmission facilities and acquire more right-of-way

[60] TE at 66-67.
[61] *In the Matter of: The Application of East Kentucky Power Cooperative, Inc. for Certificate of Public Convenience and Necessity to Construct a 138 kV Transmission Line in Rowan County, Kentucky.*

than is required for Option 4. Thus, the selection of Option 4 is consistent with the recent order in Case No. 2005-00089.

Significantly, The Liberty Consulting Group ("Liberty") agreed with the Companies' decision to pursue the Mill Creek to Hardin County Line rather any of the other options considered by MISO and the Companies. As the Commission is aware, Liberty was retained by the Commission pursuant to KRS 278.020(8) to perform a focused Need Review of documentation associated with the Mill Creek to Hardin County Line. Liberty examined reports and studies and interviewed persons from both the Companies and MISO in connection with its Need Review. It conducted a technical need review and evaluated alternatives considered by the Companies.[62]

As to the Companies' decision to pursue MISO Option 4, which includes the Mill Creek to Hardin County Line, Liberty analyzed the issue as follows:

> Liberty did not identify any additional facilities that could be upgraded in capacity that would have eliminated the need for the new facilities. . . .
>
> Liberty did not identify additional existing facilities that could be upgraded in voltage that would eliminate the need for the new facilities. . . .
>
> . . . Thus, under MISO Option #3 the new Mill Creek to Hardin County 345 kV line would still be needed 5 to 8 years after the installation of TC2 in 2010.
>
> Liberty agrees that the Mill Creek to Hardin County 345 kV line is needed to provide for future load growth and voltage support in the Elizabethtown area, where no local base load generation is present or planned. In addition, under MISO Option #4, the line is needed for system loads related to the connection of TC2 to the transmission system. Therefore, considering the deferred in-service date

[62] Final Report, Focused Review of Documentation, Filed by LG&E/KU, For a Proposed 345kV Transmission Line Within Kentucky, Case No. 2005-00142, dated June 14, 2005, ("Liberty Report") at I-1-I-3.

> of TC2, MISO Option #4, which includes the construction of the Mill Creek to Hardin County 345 kV line, remains more economical than MISO Option #3. On a present value basis, considering long-term project costs, MISO Option #4 is approximately $20 million less expensive than MISO Option #3.
>
> Liberty found that no additional upgrades, other than those already identified by LG&E/KU, could replace the need for the new facilities.
>
> Liberty found that the economic analysis performed by LG&E/KU was comprehensive, adequate, and reasonable and that the relative economic relationship of the alternatives remains intact even with the delay of the TC2 in service date to 2010.[63]

Liberty also analyzed whether the addition of generation and power factor improvement or wheeling were better alternatives than the construction of the Mill Creek to Hardin County Line. As to the first issue, Liberty said, "Liberty found that the installation of local generation, series or shunt capacitors, or other new technology reactive devices were not viable alternatives for the facilities requesting siting approval."[64] As to wheeling, Liberty said,

> Liberty found that the only viable interconnection or wheeling opportunity for the integration of TC2 into the transmission system was included in MISO Option #4. This was the tapping of the Ghent to Speed 345 kV line. Thus, LG&E/KU's selection of this option was appropriate.[65]

Thus, the Commission's own consultant conducted an in-depth analysis of the Companies' proposed construction and concluded that it was the most reasonable way to integrate TC2 into the generation fleet.

---

[63] *Id.* at III-5-III-6.
[64] *Id.* at III-7.
[65] *Id.*

While the Cunninghams did not offer any evidence that contradicted Mr. Johnson's testimony or the Liberty Report, they did offer the testimony of Geoffrey M. Young. Mr. Young's testimony consisted largely of the quotation of excerpts of articles, books and press releases about issues in the electric industry and alternative technologies for addressing those issues. While it appeared that Mr. Young was offering those technologies as alternatives to the construction of the Mill Creek to Hardin County Line, he stated on cross-examination that he was not. Mr. Young testified as follows:

> Let me be clear. I am not recommending technologies A, B, C, and D instead of building the power line that is being proposed here. Nowhere in my testimony do I state that these alternatives necessarily are preferable or should be installed in preference to your proposed power line. What I'm stating is that numerous alternatives exist or are now under development that might provide the same or better services, and those need to be investigated, analyzed, and assessed.[66]

The construction of the Mill Creek to Hardin County Line provides the best, least-cost solution to the Companies' need to integrate TC2 into their generation fleet. It also relieves voltage problems in the Elizabethtown area. Therefore, the Commission should find that the line is needed and accept the Companies' recommendation that the line be constructed.

B. The Companies' Proposal to Construct the Mill Creek to Hardin County Line Along the West Route is Reasonable and Should Be Approved.

After the decision was made to construct a transmission line from the Mill Creek substation to the Hardin County substation, the Companies' Transmission Line Services personnel undertook the task of determining the route for the line. They utilized a highly sophisticated methodology known as the EPRI Standardized Method of Siting Overhead

[66] TE at 173-174.

Transmission Lines and worked with a consulting firm called Photo Science Geospatial Solutions to develop alternatives and to choose the preferred route.[67] The preferred route, the West Route, is the best balance of minimizing impact to the built environment, the natural environment and engineering considerations, such as cost and design issues.[68]

Mr. Mullins described the route selection methodology in detail in his direct testimony and explained it in detail on cross-examination. The process began in the summer of 2003 when Photo Science, on behalf of the Companies, conducted a macro corridor analysis using a land cover map prepared by the United States Geological Survey.[69] Photo Science utilized the EPRI methodology, which calls for the assignment of suitability values to land cover types, and applied a least cost path algorithm to generate a map that illustrates the corridors of least resistance between the start and end points.[70] Examples of land cover types are residences, proposed developments, commercial buildings, industrial buildings, schools, day care centers, churches, cemeteries, parks, National Register of Historic Places listed structures and districts, natural forests, stream/river crossings, wetland areas, woodplain areas and floodplain areas.[71] The Companies tried to utilize existing linear facilities, of a similar type to the proposed line and oriented in the same direction, as opportunities for co-location of the proposed facilities when it could.[72]

---

[67] Mullins Direct at 2, 5.
[68] *Id.* at 5.
[69] *Id.*
[70] *Id.*
[71] Companies' Response to Cunninghams' First Data Request, Question No. 1. As part of that process, the Companies were able to identify, among other things, any buildings of historical or cultural relevance that might be impacted by the alternative routes, and those factors were taken into account in selecting the proposed alternative.
[72] Mullins Direct at 6.

The analysis resulted in the definition of two major macro corridors: the eastern corridor, which avoids the Fort Knox Military Reservation, and the western corridor, which crosses Fort Knox and utilizes existing transmission lines and pipelines as co-location opportunities.[73] After conducting field research and reviewing the suitability of both corridors, the Companies determined that the West Route was the most suitable due to the relatively gentle topography, lower development density and shorter overall length.[74] Mr. Mullins described the next steps in the route selection process as follows:

> Subsequently Photo Science flew over the study area to collect current aerial photography for the Western Macro Corridor. Utilizing the aerial photographs and ancillary data, alternative routes were identified maximizing the use of existing utility corridors and minimizing impacts on people and the natural environment. Fort Knox Military Reservation representatives were contacted in the alternative route identification process and their input concerning permitting and accepted utility construction and use across the Reservation was considered. Aerial photography was used to map built, environmental, and engineering constraints in proximity to the alternative routes. Field surveys were conducted to identify types of buildings and other important criteria. Route alternatives were also evaluated from helicopter. Detailed cost estimates were completed for the alternatives and they were evaluated using the EPRI siting methodology. The resulting preferred route balances impacts to people, the natural environment and cost. Aerial surveys were performed along the preferred route to create detailed planemetric and topographic maps and aerial photography. County property valuation administrators' data was used to identify property lines along the preferred route. Based on these detailed maps and ancillary data, the preferred route was chosen as the optimum route as recommended by utilizing the EPRI siting methodology.[75]

---

[73] *Id.* Another possible route through Fort Knox was not chosen because it crossed a tank training facility and helicopter flight paths and was, thus, not approved by Fort Knox. TE at 197. Even though Fort Knox's tank training mission has changed, the possible route would still not be suitable because it is in helicopter flight paths. *Id.* at 221.

[74] Mullins Direct at 6-7.

[75] *Id.* at 7. A detailed description of the selected route is set forth at pages 8-9 of the Mullins Direct Testimony and is illustrated on Exhibit JNM-1.

Mr. Mullins testified that the West Route was chosen because it involved fewer constraints, even though it is longer than some of the other routes originally identified. Further, approximately 46% of the West Route is an existing utility corridor, either parallel to, or rebuilding of, existing transmission lines.[76]

During the evidentiary hearing, counsel for the Cunninghams challenged Mr. Mullins on the selection of the West Route instead of the East Route.[77] Counsel for the Cunninghams argued that the East Route followed existing transmission lines much of the way and suggested that it was the preferable route.[78] Mr. Mullins recalled that part of the existing transmission line to which the Cunninghams' counsel referred was 161 kV and double circuit or joint with an existing 345 kV route.[79] But, Mr. Mullins pointed out, in order to get from Mill Creek to Hardin County on the East Route, the line would have to stop on one line and get on another line and eventually work its way to the Hardin County substation.[80] While Mr. Mullins made it clear that the Companies prefer to co-locate in existing transmission line corridors,[81] and thoroughly considered them here, the East Route was not selected because it passes through a "very highly built environment" with too many constraints for a 345 kV line.[82] Mr. Mullins' memory is confirmed by the evaluation matrices of Photo Science, as the East Route scored considerably worse than

[76] *Id.* at 9.
[77] TE at 240-246.
[78] *Id.* at 242.
[79] *Id.* at 243.
[80] *Id.* at 244.
[81] *Id.* at 198, 245.
[82] *Id.* at 246.

the West Route, especially with respect to impact on the built environment and impact on forests, stream/river crossings and floodplain areas.[83]

The Companies have demonstrated that their route selection process was of the highest level and that the route selected is the best option. The Cunninghams offered no evidence on alternative routes, other than Mrs. Cunningham's unsupported testimony that there are already enough transmission lines in the Elizabethtown area.[84] Instead, the Cunninghams' evidence focused on their five acre lake and their concern that the proposed facilities would diminish their enjoyment of it and could possibly be harmful to wildlife.[85] Mr. Johnson testified that the spans on the proposed line will be 600 to 800 feet and further stated, "If we're referring to the specific property, that of the Cunninghams, we are confident that we will not have to locate a structure in the lake or in the wetlands area . . ."[86] In addition, Mr. Mullins testified that the Companies are in a position to provide any mitigation that might be required by the National Environmental Policy Act and the Endangered Species Act.[87]

The Cunninghams offered the affidavit of Leslie Barras, who discussed her concern that the Companies might not comply with the National Historic Preservation Act.[88] Mr. Mullins testified that the Companies are in a position to provide any mitigation that might be required by Section 106 relating to historic structures.[89]

---

[83] Companies' Response to Dennis and Cathy Cunninghams' First Data Request, Question No. 1, Attachment at 7-13.
[84] Direct Testimony of Cathy and Dennis Cunningham ("Cunningham Direct") at 6. Mrs. Cunningham testified on cross-examination that she is neither an engineer nor a transmission system planner. TE at 259.
[85] Cunningham Direct at 2-5.
[86] TE at 82-83.
[87] TE at 248.
[88] Cunningham Direct, Attachment 2.
[89] TE at 248.

The Companies have proposed that any order approving the proposed construction provide the Companies the latitude to make insubstantial modifications to the route without the need for further orders to enable them to accommodate the needs of landowners and any avoidance or mitigation requirements resulting from compliance with federal regulations.[90] This flexibility will allow them to be responsive to concerns like those expressed by the Cunninghams while still maintaining administrative efficiency.

In addition, the Cunninghams offered the cover pages of articles about the possible harm to raptors by contact with power lines.[91] It should be noted that the text of the articles about raptors all focused the concern about harm to raptors on lower voltage distribution lines and not on 345 kV transmission lines. For example, in the *HawkWatch International* article, the author states that the problem of raptor electrocution occurs most commonly on medium voltage distribution lines and that distribution lines around 12.5 kV are frequently involved.[92] The reason that lower voltage lines are more frequently involved is that the line spacing is smaller than with higher voltage lines.[93] Open country raptors are more at risk than forest-dwelling raptors.[94] Mrs. Cunningham testified that her property contains "lots of trees."[95] While the Companies share the Cunninghams' concern about the protection of wildlife, the proposed facilities here do not provide the threat to wildlife that might be implied by a quick look at the cover pages of articles attached to the Cunningham testimony.

---

[90] Mullins Direct at 9-10. See the discussion at Section III below.
[91] *Id.*, Attachment 1.
[92] DeLong, *HawkWatch International*, Raptor Conservation Program, October 2000, at 5.
[93] *Id.*
[94] *Id.* at 5-6.
[95] TE at 260

For all of these reasons, the Commission should find that construction of the proposed line would not create a wasteful duplication of facilities and, in conjunction with the finding of need discussed above, should grant the Companies the CCN requested in their Joint Application.

C. The Commission Should Reject the Cunninghams' Request to Expand Its Jurisdiction and Undertake Regulation Pursuant to Federal Legislation.

At the beginning of the hearing in Case No. 2005-00154 on July 26, 2005, counsel for the Cunninghams argued that this Commission should begin to expand its jurisdiction to review matters of environmental, historical or cultural relevance pursuant to federal law.[96] Specifically, counsel cited to a Tenth Circuit Court of Appeals case as recognizing what counsel labeled "widely-accepted precedent" holding that a "commission must consider all factors bearing on the public interest, not simply those immediately relating to the objects of this jurisdiction" in ruling upon an application for a CCN.[97] However, the "commission" referred to in that case, and in others cited by the Cunninghams, is the Federal Energy Regulatory Commission ("FERC"), not this Commission, and the cited case involved a natural gas line as opposed to a transmission line.[98] Not a single one of the federal cases cited by the Cunninghams in any way deals with the jurisdiction of this Commission.[99] That jurisdiction, of course, is well-defined under state law, and does not in any way authorize the Commission to address environmental, historical or cultural issues in ruling upon whether a proposed project will

---

[96] Transcript of Evidence of July 26, 2005, hearing in Case No. 2005-00154, at 11-12, 18-22.
[97] *Id.* at 20-21. The case being referred to is Cascade Nat. Gas Corp. v. Federal Energy Reg. Commission, 955 F.2d 1412 (10th Cir. 1992).
[98] Cascade, 955 F.2d 1412.
[99] The other cases cited by the Cunninghams are Federal Power Commission v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1 (1961); United States v. Detroit & Cleveland Navigation Co., 326 U.S. 236 (1945); and Henry v. Federal Power Commission, 513 F.2d 395 (D.C. Cir. 1975).

serve the public convenience and necessity.[100] As Chairman Goss stated at the beginning of the hearing for public comment at Elizabethtown in this matter, the Commission has no authority over environmental matters, whether they involve public or private property. The Commission should decline the Cunninghams' invitation to undertake such regulation.

The Cunninghams suggest that the Companies have failed to comply with the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. ("NEPA") and the National Historic Preservation Act, 16 U.S.C. § 470, et seq. ("NHPA"). Of course, as discussed at page 7, *supra*, the Companies intend to fully comply with federal laws, to the extent required, before commencing construction of the proposed line. Indeed, the Companies have already commenced the process of consulting with the relevant state and federal agencies and undertaking appropriate environmental, historical and cultural studies and related surveys for the proposed line, to the extent such are required.[101] More detailed surveys requiring access to the properties in question will be undertaken after issuance of a CCN.[102] Moreover, it is simply not within the Commission's jurisdiction to hear such a challenge. The Commission has not been empowered either by the General Assembly or the U.S. Congress to enforce either NEPA or NHPA.[103]

Because the Commission is a creature of statute, it cannot act without such empowerment. "The Public Service Commission's powers are purely statutory; like other

---

[100] Kentucky Utilities Co., 252 S.W.2d at 890. The suggestion by the Cunninghams' counsel during oral argument on their second motion to dismiss that the amendment to KRS 278.020 that added subsection 8 expands the Commission's jurisdiction beyond a consideration of convenience and necessity is plainly incorrect. That subsection simply permits interested landowners to request a public hearing and to request intervention, provides for a schedule for the proceeding, permits the Commission to retain a consultant and addresses prudence.

[101] Mullins Direct at 2; TE at 80-81, 97, 104, 137-138, 218-222, 235. .

[102] Mullins Direct at 2-3.

[103] See KRS 278.040; 42 U.S.C. §4331; 16 U.S.C § 470f.

administrative boards and agencies, it has only such powers as are conferred expressly or by necessary or fair implication."[104] "The manifest purpose of a public service commission is to require fair and uniform rates, prevent unjust discrimination and unnecessary duplication of plants, facilities and service and to prevent ruinous competition."[105] Its powers are thus "clearly and unmistakably limited to the regulation of rates and service of utilities."[106] The only statutes which the Commission is empowered to enforce are those found within the provisions of KRS Chapter 278.[107] KRS Chapter 278 contains no delegation of power authorizing the Commission to address either NEPA or NHPA claims.

It is well recognized in other jurisdictions as well that the expressed authority to regulate utility rates and services does not authorize a commission to consider environmental issues such as those which are raised by the Cunninghams.

> The jurisdiction of the P.U.C. is derived from the powers conferred by §16-243 of the General Statutes. That section confers on the P.U.C. exclusive jurisdiction over 'technical matters such as the quality and finish of the materials, wires poles, conductors, fixtures and the method of their use.' (citation omitted). This section does not expressly or by implication require the commission to consider the environmental, recreational or aesthetic impact of its findings and order.[108]

See also Country Place Waste Treatment Co. v. Pennsylvania Public Utility Commission,[109] (Commission had no jurisdiction to address complaint that sewage

---

[104] Croke v. Public Service Commission of Kentucky, 573 S.W.2d 927, 929 (Ky. App. 1978).
[105] City of Olive Hill v. Public Service Commission, 305 Ky. 248, 203 S.W.2d 68, 71 (1947).
[106] Public Service Commission v. Blue Grass Natural Gas Co., 303 Ky. 310, 197 S.W.2d 765, 768 (1946).
[107] See KRS 278.040(1) ("The Public Service Commission shall regulate utilities and enforce the provisions of this chapter"). See also City of Catlettsburg v. Public Service Commission, 486 S.W.2d 62, 63 (Ky. 1992) (Commission has no jurisdiction to determine whether the statutes governing municipalities empower such entities to operate a water system).
[108] City of New Haven v. Public Utilities Commission, 345 A.2d 563, 579 (Conn. 1974).
[109] 654 A.2d 72, 75 (Pa. 1995).

treatment plant was emitting offensive odors); Massachusetts Electric Co. v. Department of Public Utilities[110] ("The department does not have responsibility for the protection of the environment."); Borough of Moosic v. Pennsylvania Public Utility Commission,[111] (Commission is not empowered to consider the environmental impact which might result from permitting a public utility to transfer property to a grantee outside the commission's administrative control); Arippa v. Pennsylvania Public Utility Commission,[112] ("Because any issues regarding emission regulations were for the federal EPA or Pennsylvania's Department of Environmental Protection to determine, the Commission did not err in granting the merger without considering the environmental factors presented by Clean Air and Citizens.").

Likewise, neither NEPA nor NHPA purport to expand the Commission's powers to include a consideration of the federal policies embodied therein. Both statutes are directed at federal agencies and impose no obligations on state utility commissions. In 2001, the Sixth Circuit Court of Appeals declined to enjoin on NEPA grounds a state highway project that required federal authorizations in the form of Section 404 dredge and fill permits and approvals to cross two interstate highways.[113] "NHPA and NEPA, by their very language, impose no duties on the states and operate only upon federal agencies."[114] See also Town of North Hempstead v. Village of North Hills[115] ("NEPA, however, by its express language operates only upon federal agencies, and imposes no duties on the States or on municipalities."); Buda v. Saxbe[116] ("The requirements of

[110] 643 N.E.2d 1029, 1033 (Mass. 1994).
[111] 429 A.2d 1237, 1240 (Pa. 1981).
[112] 792 A.2d 636, 657 (Pa.Cmwlth. 2002).
[113] Southwest Williamson County Community Association, Inc. v. Slater, 243 F.3d 270 (6th Cir. 2001).
[114] Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971).
[115] 482 F. Supp. 900, 903 (E.D. N.Y. 1979).
[116] 406 F. Supp. 399, 402 (E.D. Tenn. 1975).

NEPA are inapplicable to the state. (citation omitted) NEPA has no application to a project unless the action is federal."). "The mandate is directed towards heads of federal agencies and departments, not toward state or municipal officers."[117]

NEPA and NHPA "were designed to assure to the fullest extent possible that the expenditure of federal funds would not despoil the environment or adversely affect property which has been officially designated as historically or architecturally significant."[118] "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." (emphasis in original).[119] The Mill Creek to Hardin County Line does not involve the expenditure of any federal funds. There is therefore no possible argument that the Commission in reviewing this application is acting in partnership with the federal government and thus has been empowered to enforce federal policies. See Department of Transportation v. Blue[120] ("Because no major federal action was involved in TIP R-210, we hold that NEPA was inapplicable to NCDOT, a state agency, in this project. Consequently, defendants are barred from raising alleged violations of NEPA in this action.").

It is likewise outside the Commission's authority to address the Cunninghams' concerns arising out of the Endangered Species Act, 16 U.S.C. § 1531 et seq., ("ESA"). Again, such Act is directed primarily towards federal agencies. It does not purport to impose any obligations upon nor empower this Commission to give any consideration to

---

[117] The Woonsocket Historical Society v. City of Woonsocket, 387 A.2d 530, 532 (R.I. 1978).
[118] Ely v. Velde, 497 F. Supp. 252, 256 (4th Cir. 1974).
[119] The Environmental Rights Coalition, Inc. v. Austin, 780 F. Supp. 584, 594 (S.D. Ind. 1991).
[120] 556 S.E.2d 609, 616 (N.C. App. 2001).

its provisions. In Proffitt v. Department of Interior,[121] the United States District Court for the Western District of Kentucky rejected the challenge that the Kentucky Natural Resources and Environmental Protection Cabinet violated the ESA by failing to enforce the provisions of the statute.

It is also well recognized that Congress would be barred by the Tenth Amendment to the United States Constitution[122] from attempting to impose upon the Commission any obligation to enforce the federal policies set forth in NEPA, NHPA and ESA. See Petersburg Cellular Partnership v. Board of Supervisors of Nottoway County[123] ("The Tenth Amendment categorically bars the federal government from compelling state and local governments to administer a federal regulatory program."); Environmental Defense Center, Inc. v. United States Environmental Protection Agency,[124] ("Under the Tenth Amendment, 'the Federal Government may not compel States to implement, by legislation or executive action, federal regulatory programs.'").

Accordingly, neither Congress nor the General Assembly ever contemplated that the Commission would attempt to review NEPA, NHPA and ESA claims or Corps of Engineering permitting requirements. Nor may the Commission seek to expand its statutory jurisdiction. "As a statutory agency of limited authority, the PSC cannot add to its enumerated powers."[125] This is therefore not the forum to address NEPA, NHPA and ESA claims nor Corps of Engineering permitting requirements.

---

[121] 825 F. Supp. 159, 164 (W.D. Ky. 1993)

[122] Congress may of course use its spending powers to encourage the state to follow federal programs without violating the Tenth Amendment, West Virginia v. U. S. Department of Health and Human Services, 289 F.3d 281, 296 (4th Cir. 2002), but again no federal funds are at issue here.

[123] 205 F.3d 688, 702 (4th Cir. 2000).

[124] 344 F.3d 832, 847 (9th Cir. 2003), cert. denied, 124 S. Ct. 2811 (2004).

[125] Boone County Water and Sewer District v. Public Service Commission, 949 S.W.2d 588, 591 (Ky. 1997).

It is, therefore, respectfully submitted that this Commission should reject the Cunninghams' request to expand its jurisdiction and undertake regulation pursuant to federal legislation.

III. THE COMMISSION SHOULD ALLOW FOR THE COMPANIES TO MAKE UNSUBSTANTIAL ROUTE ADJUSTMENTS, WITHIN THE CORRIDOR PROPOSED, AS NEEDED DURING FINAL PLANNING AND CONSTRUCTION.

The Companies have presented the Commission with a map outlining the proposed route for the Mill Creek to Hardin County Line.[126] Although they fully intend to construct the line as depicted on that map, they have requested that the Commission provide flexibility in any order granting a CCN for the Mill Creek to Hardin County Line, so that the Companies may "make unsubstantial modifications to the route chosen if conditions justify or compel such modifications without the need for further orders from the Commission."[127]

At the evidentiary hearing, Mr. Mullins explained that the Companies were seeking such flexibility so that they could mitigate problems caused by the terrain.[128] In addition, the requested flexibility would also aid the Companies in working with landowners and other agencies to avoid or mitigate any adverse impacts on the built or natural environment or historic properties which might be identified through the completion of any required environmental and cultural resource studies and related surveys.

---

[126] Exhibit JNM-1.
[127] Mullins Direct at 9-10.
[128] TE at 230-231. Although Mr. Mullins testified that the Companies do not anticipate moving the "centerline," the Companies request that the requested flexibility be provided in connection with moving the line within the corridor of properties identified in the Joint Application, and not be tied to the "centerline" of the proposed construction.

The Companies' request for flexibility is consistent with the Commission's statutory authority over the siting of transmission lines. Although KRS 278.020, as recently amended, is silent with regard to the Commission's authority as to the precise location of a new transmission line, it does require that landowners, over whose property the proposed line would cross, be notified of, and given the opportunity to participate in, transmission CCN proceedings before the Commission. It is, therefore, apparent that the Commission, by necessity or fair implication, has the authority to approve or deny routing of a proposed line within a specific corridor of affected landowners. On the other hand, however, there is nothing within the grant of authority to the Commission which mandates, or even authorizes, approval of a transmission line to a level of absolute precision on any given parcel of affected land.[129]

The Companies acknowledge the need for certainty in the Commission's orders, and concede that, without additional Commission authorization, they would not be able to make any modifications which would result in a routing of the line onto the properties of landowners other than those identified and provided notice of this proceeding as set forth in the Companies' Joint Application.[130] However, it will certainly further the interests of administrative efficiency if the Companies are given flexibility, within the corridor of properties identified in the Joint Application, to make unsubstantial modifications to the proposed line as its design is finalized. For that reason, the requested flexibility should be granted.

---

[129] Croke v. Public Service Commission, 573 S.W.2d 927, 929 (Ky. App. 1978) (recognizing that, as a creature of statute, the PSC "has only such powers as are conferred expressly or by necessary or fair implication").

[130] Joint Application, ¶ 12.

CONCLUSION

There is no dispute that the Companies' existing transmission facilities are inadequate to support the integration of TC2 into the transmission system without the addition of new facilities between Mill Creek and Hardin County, as well as other locations. The Cunninghams object, however, to the construction of transmission facilities that they fear might inhibit their enjoyment of their nature preserve in Hardin County.

The Companies have presented the Commission with detailed studies which establish that the most reasonable method for meeting the need to integrate TC2 is through construction of the Mill Creek to Hardin County Line, and that conclusion is supported by the Commission's consultant in this proceeding. While the Cunninghams, through questions by their counsel, contended that a different route would be less expensive than construction of the Mill Creek to Hardin County Line, the evidence at the hearing demonstrated that, in fact, the proposed route was less expensive than the one promoted by the Cunninghams' counsel. In addition, the selection of the West Route was made utilizing sound practices and represents the best balance of minimizing impact to the built environment, the natural environment and engineering considerations, such as cost and design issues and significant use of existing utility corridors.

It is clear, therefore, that construction of the Mill Creek to Hardin County Line is required by the public convenience and necessity, as set forth in KRS 278.020 and applicable case law, and the requested CCN should be granted for that reason. In addition, in order to provide for greater flexibility in working with landowners and other agencies, and to minimize further administrative proceedings before this Commission, the Companies should be given the authority to make unsubstantial modifications to the route

of the Mill Creek to Hardin County Line as final line design is completed through actual field surveys.

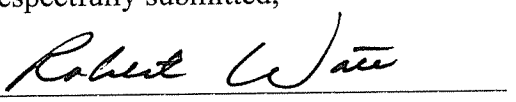
Accordingly, the Companies respectfully request that the Commission enter an order providing the following relief:

1. Finding that a need exists for additional transmission facilities in Jefferson, Bullitt, Meade and Hardin Counties in connection with the addition of a new baseload generating unit at the Trimble County Generating Station ("TC2") beginning in 2010;
2. Finding that construction of a 345 kV transmission line, approximately 41.9 miles in length and running from LG&E's Mill Creek substation, through Jefferson, Bullitt, Meade and Hardin Counties, to KU's Hardin County substation (the "Mill Creek to Hardin County Line") is the most reasonable resource for meeting the Companies' transmission needs in connection with the construction of TC2;
3. Finding that construction of the Mill Creek to Hardin County Line as proposed by the Companies in this proceeding will serve the public convenience and necessity;
4. Granting the Companies a CCN for the Mill Creek to Hardin County Line as proposed in this proceeding; and
5. Allowing the Companies the flexibility to make unsubstantial modifications to the specific route of the Mill Creek to Hardin County Line, within the corridor of properties identified in the Companies' Joint

Application, without the need to seek any further approval from this Commission.

Dated: August 26, 2005

Respectfully submitted,



J. Gregory Cornett
Ogden Newell & Welch PLLC
1700 PNC Plaza
500 West Jefferson Street
Louisville, Kentucky 40202
Telephone: (502) 582-1601

Robert M. Watt, III
Lindsey W. Ingram, III
Stoll, Keenon & Park, LLP
300 West Vine Street, Suite 2100
Lexington, Kentucky 40507
Telephone: (859) 231-3000

Elizabeth L. Cocanougher
Senior Regulatory Counsel
Louisville Gas and Electric Company
220 West Main Street
Post Office Box 32010
Louisville, Kentucky 40232
Telephone: (502) 627-4850

Counsel for Louisville Gas and Electric Company and Kentucky Utilities Company

CERTIFICATE OF SERVICE

This is to certify that the foregoing pleading has been served by mailing a copy of same, postage prepaid to the following persons on this 26th day of August 2005:

Mike Cannata
Senior Consultant
Liberty Consulting Group
65A Ridge Road
Deerfield, NH 03037

Betty Coyle
1171 Blueball Church Road
Elizabethtown, KY 42701

Samuel & Eydie E. Coyle
1481 Blueball Church Road
Elizabethtown, KY 42701

Cathy Cunningham
CDH Preserve LLC
2530 N Hwy 11 SE
Elizabeth, IN 47117

Dennis L. Cunningham
Manager
2530 N Hwy 11 SE
Elizabethtown, IN 47117

Honorable W. Henry Graddy
W. H. Graddy & Associates
P.O. Box 4307
Midway, KY 40347

Robert N. Kiefer
139 Finch Court
Vine Grove, KY 40175

Mark Lautenschlager
Senior Consultant
819 Chipaway Drive
Apollo Beach, FL 33572

Donald T. Spangenberg, Jr.
Project Manager
Liberty Consulting Group
633 Fairfax Street
Denver, CO 80220

Robert W. Griffith, Esq.
Stites & Harbison, PLLC
400 West Market Street, Suite 1800
Louisville, KY 40202-3352

Counsel for Louisville Gas and Electric Company and Kentucky Utilities Company