COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

APPLICATION OF KENTUCKY UTILITIES COMPANIES FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR THE CONSTRUCTION OF TRANSMISSION FACILITIES IN FRANKLIN, WOODFORD AND ANDERSON COUNTIES, KENTUCKY

CASE NO. 2005-00154

CITIZENS MOTION TO DISMISS

COME the Concerned Citizens Against the Power Line Extension ("Citizens"), by counsel, and move this Commission dismiss the Application of Kentucky Utilities Companies ("KU"), case number 2005-00154. In support hereof, the Citizens state as follows:

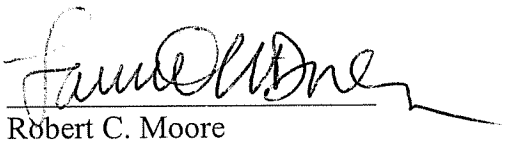
On July 25, 2005, Intervenors Cathy L. Cunningham and Dennis Cunningham filed a Motion to Dismiss in case number 2005-00142 and a Memorandum in Support of said Motion. That Memorandum in Support is attached hereto as Exhibit "A". The basis for said Motion is that KU has failed to satisfy federal permitting requirements prior to filing its respective applications in Docket Nos. 2004-00507, 2005-00154, 2005-00155 and 2005-00142. By virtue of the relation of these cases, the Citizens adopt herein by reference the argument contained in the Motion to Dismiss and Memorandum in Support filed by Intervenors, Cathy L. Cunningham and Dennis Cunningham, as if set forth fully herein.

In brief summary, the proposed West Frankfort to Tyrone transmission line is a fraction of a much larger transmission line project to expand the generation of power in this region of the state with the construction of a 750 MW nominal coal-fired base load generating unit in Trimble County.

In this proceeding, the Applicants ask this Commission to approve its application for a proposed transmission line that could be substantially altered at any time upon the Applicants' satisfaction of federal environmental law. Because the Applicants have failed to satisfy the federal permitting requirements, the route of the line could be altered *after* a decision by the Commission in this case.

Wherefore, the Citizens respectfully request that the Commission dismiss this application for the reasons set forth herein.

Respectfully submitted,



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CERTIFICATE OF SERVICE AND FILING

Undersigned counsel certifies that an original and ten photocopies of this Motion to Dismiss were served and filed by hand delivery upon Elizabeth O'Donnell, Executive Director, Kentucky Public Service Commission, 211 Sower Boulevard, Frankfort, Kentucky 40601; furthermore, it was served by mailing a true and correct copy of the same, first class postage prepaid to the following counsel for Kentucky Utilities Company, by first class mail, postage prepaid, as follows:

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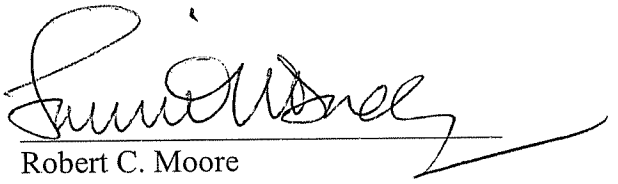
All on this the 26th day of July, 2005.



Robert C. Moore
Laurie K. Dudgeon

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

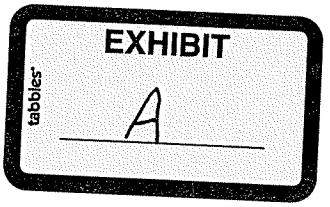
JOINT APPLICATION OF LOUISVILLE	)
GAS AND ELECTRIC COMPANY AND	)
KENTUCKY UTILITIES COMPANY FOR	)
A CERTIFICATE OF PUBLIC CONVENIENCE	)**DOCKET NO.**
AND NECESSITY FOR CONSTRUCTION	)**2005-00142**
OF TRANSMISSION FACILITIES IN	)
JEFFERSON, BULLITT, MEADE AND	)
HARDIN COUNTIES, KENTUCKY	)

MEMORANDUM OF INTERVENORS CATHY L. CUNNINGHAM AND DENNIS L. CUNNINGHAM IN SUPPORT OF THEIR MOTION TO DISMISS

I. Introduction

This proceeding involves Louisville Gas and Electric Company's and Kentucky Utilities Company's (the "Applicants") application for a Certificate of Public Convenience and Necessity to construct a 345 kV transmission line, approximately 41.9 miles in length, running from LG&E's Mill Creek Substation through Jefferson, Bullitt, Meade, and Hardin Counties to KU's Hardin County Substation near Elizabethtown, Kentucky. The proposed transmission line is a fraction of a much larger transmission line project to expand the generation of power in this region of the state with the construction of a 750 MW nominal coal-fired base load generating unit in Trimble County. *See* Docket Nos. 2004-507, 2005-154 and 2005-155. In this proceeding, the Applicants ask this Commission to approve its application for a proposed transmission line that could be substantially altered at any time upon the Applicants' satisfaction of federal environmental law.

As discussed below, the Applicants' proposal invokes the permitting obligations of the United States Army Corps of Engineers, the Endangered Species Act, Section 106 of the National Historic Preservation Act, and the National Environmental Policy Act. The Applicants'



response to the Intervenors' First Data Request makes it clear that the Applicants have yet to satisfy with the requirements of these federal laws. Yet satisfaction of these requirements may require the proposed route to be substantially altered. As a result, the proposal is not ripe for review until the Applicants satisfy their federal law obligations. Indeed, as the application currently stands, the Commission has no authority to approve it. Therefore, the application must be dismissed.

II. Facts

In their application for a Certificate of Public Convenience and Necessity, the Applicants submitted documentation of engineering, system impact, interconnection, and facility studies. The Applicants explain that they "determine[d] the need for the proposed transmission line" based on the results of a Transmission Service System Impact Study, which addressed system limitations on the delivery of power; a Generation Interconnection Evaluation Study, which addressed power system stability; and a Facility Study Report, which considered the engineering alternatives recommended in the System Impact Study. *See* Application, Testimony of Mark S. Johnson, at 3-4.

Based on these studies, the Applicants identified route options. *See* Application, Testimony of Nate Mullins, at 4-5. The Applicants state that they then "statistically compare[d] route alternatives based on their relative impacts to the built environment, including relocating residences, proximity to residences, proposed developments, proximity to commercial and industrial buildings, schools, day care centers, churches, cemeteries and parks; relative impacts to the natural environment including natural forests, stream and river crossings, wetlands, and flood plains; and engineering criteria including miles of rebuild of existing transmission lines, miles of co-location with existing utilities and roads, and total project cost." *Id.* at 5.

The Applicants state that the route of their proposed transmission line is designed to serve the projected load "with as little negative impact as can be reasonably afforded." Application ¶ 6. The Applicants state that, in addition to these studies, they chose their "final route" after "conducting field surveys, evaluating the topography and geology along the routes considered and adjusting the route as appropriate, consistent with sound engineering principles." *Id.* The Applicants attest that they chose the proposed route because it "balances the impact to people, the natural environment and cost." *Id.*

The application suggests that the Applicants have considered the environmental impacts of the proposed route, conducted field studies of their proposed route and route alternatives, or chose the proposed route for its balance to people, the natural environment, and cost. Yet the Applicants have provided no documentation or any assessments of those impacts or studies. In fact, in response to Question Number 2 of Intervenors' First Data Request, requesting the Applicants to "provide a copy of any studies, including any environmental impact statement or environmental assessment . . . evaluating the environmental impacts of the proposed transmission facilities and alternatives and of the proposed TC2 . . . [and] that provide a basis for the claim . . . that the proposed transmission facilities will have 'as little negative impact as can be reasonably afforded,'" the Applicants stated that they "plan to complete an environmental study once permission to conduct field surveys has been obtained from landowners." Response to Dennis and Cathy Cunningham's First Data Request Dated: June 30, 2005, Question No. 2. The Applicants have yet to request permission from the Cunninghams to conduct any field surveys. In response to Question Number 9 of Intervenors' First Data Request, requesting the Applicants to "provide a copy of any studies conducted of historical and cultural resources that will be impacted by the proposed transmission facilities or by the proposed TC2," the Applicants

responded simply that "[h]istorical and cultural resource studies are currently in progress. . . [and t]hey will be completed as survey permission is obtained from landowners." *Id.* at Question No. 9. To date, the Applicants have not requested survey permission from the Cunninghams.

The Applicants failed to provide a timely response to Intervenors's Question Number 1 of their First Data Request, requesting the Applicants to "provide a copy of any studies that have been undertaken or commissioned by LG&E or KU concerning alternative routes or alternative configurations for the proposed transmission facilities. . . ." In response, the Applicants provided to no information, referencing the testimony of J. Nate Mullins, objecting the question as irrelevant, and also referencing the testimony of David J. Sinclair. Only later, on July 19, 2005, well after their deadline to file a response to Intervenors' First Data Request, did the Applicants file the "Photo Science Geospatial Solutions Report." This Report constituted a "macrocorridor analysis" and examined the alternative routes for the proposed project by quantifying and comparing relevant factors to achieve a design that would meet the need for power at reasonable cost with minimum impact to the built and natural environments and on existing rights-of-way. This Report was filed so late as to prejudice the Intervenors in their opposition to the Applicants' proposed project. Also, the Report fails to achieve satisfaction of the Applicants' federal law obligations.

III. Argument

A. Standard of Review

This Commission, in reviewing applications for a Certificate of Public Convenience and Necessity, 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 certification absent a showing that there "is a demand and need for the service sought to be rendered." KRS § 278.020(4).

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."). Thus, 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.

The Commission's standard of review, which is the ordinary standard for administrative agencies, guards against this risk by requiring 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).

B. The Applicants Have Failed to Satisfy Their Obligations Under Several Federal Environmental Laws, and, Therefore, Their Application is Premature

The Applicants' 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 altered 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's 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 and its intended use 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 Fish and Wildlife Service 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

The Applicants have chosen the route for their 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 have chosen the route of their proposed transmission line without first identifying historic properties that would be affected by this undertaking. The Applicants have indicated that they are initiating a Section 106 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 decisionmaking 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, attached as Exhibit C, 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 [NEPA]." *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. Application of the National Environmental Policy Act

i. The National Environmental Policy Act Applies In This Case

The Applicants' proposed transmission line constitutes a "major federal action" subject to the requirements of the National Environmental Protection Act, 42 U.S.C. § 4321 et seq. ("NEPA"). 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.

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

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).

The application submitted by the Applicants lacks any appreciation of the environmental significance of the proposed project. It certainly lacks any documentation, environmental assessment, or environmental impact statement quantifying the environmental significance of the proposed project. As such, the application is incomplete.

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

Indeed, 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 intervenor [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.

B. Because the Applicants Have Failed to Satisfy Federal Law, Their Proposal is not Ripe for Review and the Commission is Not Authorized to Consider It

Despite the inevitable questions that arise regarding the environmental impacts of their proposal, the Applicants have not submitted any environmental assessment or any consideration of alternatives to avoid such impacts. The Applicants have also failed to submit any assessment of the impact of their proposal on historic properties, as required under the National Historic Preservation Act, and they have failed to consult with the Fish and Wildlife Service with regard to the proposal's impact on migratory birds and endangered species. Their application, as a consequence, is not ripe for this Commission's consideration.

i. Public Convenience and Necessity, Which Are a Function of Public Interest Factors Including the Environment, Must Require the Proposed Project

The Commission is charged with reviewing proposals to determine whether public convenience and necessity *require* the service or construction proposed. KRS § 278.020(1) (emphasis added). Furthermore, the Commission has no authority to issue the certification absent a showing that there "is a demand and need for the service sought to be rendered." KRS § 278.020(4). 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., Transcontinental Gas Pipe Line Corp.*, 365 U.S. at 8 (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."); *Detroit & Cleveland Navigation Co.*, 326 U.S. at, 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*, 955 F.2d at 1421 (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.").

Inherently, the convenience and necessity/public interest analysis requires an inquiry into the environmental impacts of the proposed project. *See Henry v. Federal Power Comm'n*, 513 F.2d at 406-07 ("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."). It follows that for an application that lacks proper analysis of the public interest factors bearing on the proposed project, no certificate can issue.

ii. Public Convenience and Need Cannot Be Determined Absent a Site Assessment

The public interest inquiry is not only inherently required. Consideration of public interest factors is required by the regulations authorizing the Commission to review these kinds of proposals. According to KRS 278.216, the Commission must approve a "site assessment," which shall be submitted by an applicant with its proposal, before the Commission can approve the proposal. KRS 278.216 provides:

> (1) ... [N]o utility shall begin construction of a facility for the generation of electricity capable of generating in aggregate more than ten megawatts (10MW) without having first obtained a site compatibility certificate from the commission.
>
> (2) An application for a site compatibility certificate shall include the submission of a site assessment report as prescribed in KRS 278(3) and (4). . . A utility may submit and the commission may accept documentation of compliance with the National Environmental Policy Act (NEPA) rather than a site assessment report.
>
> (3) The commission may deny an application filed pursuant to, and in compliance with, this section. . . .

KRS 278.708 describes the site assessment requirement:

> (3) A completed site assessment report shall include:
>
> (a) A description of the proposed facility that shall include a proposed site development plan that describes:

1. Surrounding land uses for residential, commercial, agricultural, and recreational purposes;

2. The legal boundaries of the proposed site;

3. Proposed access control to the site;

4. The location of facility buildings, transmission lines, and other structures;

5. Location and use of access ways, internal roads, and railways;

6. Existing or proposed utilities to service the facility;

7. Compliance with applicable setback requirements as provided under KRS 278.704(2), (3), or (5); and

8. Evaluation of the noise levels expected to be produced by the facility;

(b) An evaluation of the compatibility of the facility with scenic surroundings;

(c) The potential changes in property values resulting from the siting, construction, and operation of the proposed facility for property owners adjacent to the facility;

(d) Evaluation of anticipated peak and average noise levels associated with the facility's construction and operation at the property boundary; and

(e) The impact of the facility's operation on road and rail traffic to and within the facility, including anticipated levels of fugitive dust created by the traffic and any anticipated degradation of roads and lands in the vicinity of the facility.

(4) The site assessment report shall also suggest any mitigating measures to be implemented by the applicant including planting trees, changing outside lighting, erecting noise barriers, and suppressing fugitive dust.

The site assessment requirement provides clear evidence of the Applicants' duty to submit documentation of the proposed project's environmental impacts and the Commission's duty to consider those impacts prior to approving the proposal. Because the Applicants have not

satisfied even this minimal, threshold requirement, their proposal is not ripe for review and the Commission's approval of the proposal is unauthorized.

iii. Were the Commission to Approve the Application in its Current State, the Commission Would Violate Its Administrative Obligations

Moreover, 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. 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). Particularly in cases involving NEPA, 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.

III. Conclusion

The Applicants have asked this Commission to approve its application for a proposed transmission line that could be substantially altered at any time upon the Applicants' satisfaction of federal environmental law. To date, the Applicants' have failed to satisfy the requirements of

the permitting obligations of the United States Army Corps of Engineers, the consulting requirements of the Endangered Species Act, Section 106 of the National Historic Preservation Act, and the full scope of requirements of the National Environmental Policy Act. Their application, therefore, is incomplete and entirely premature. As a result, the Commission is not authorized to review it. The application must be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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