

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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In the Matter of:

PUBLIC SERVICE
COMMISSION

JOINT APPLICATION OF)
LOUISVILLE GAS AND ELECTRIC)
COMPANY AND KENTUCKY UTILITES)
COMPANY FOR THE CONSTRUCTION) CASE NO.
OF TRANSMISSION FACILITIES IN) 2005-00467
JEFFERSON, BULLITT, MEADE, AND)
HARDIN COUNTIES, KENTUCKY)

JOINT APPLICATION OF)
LOUISVILLE GAS AND ELECTRIC)
COMPANY AND KENTUCKY UTILITIES)
COMPANY FOR THE CONSTRUCTION) CASE NO.
OF ALTERNATIVE TRANSMISSION) 2005-00472
FACILITIES IN JEFFERSON,)
BULLITT, MEADE, AND HARDIN)
COUNTIES, KENTUCKY)

RESPONSE TO MOTION
FOR ORDER LIMITING SCOPE OF HEARING

Come Intervenors, Dennis L. Cunningham and Cathy L. Cunningham, CDH Preserve, LLC, Lisa Harrison and Jennifer Hardin, (hereinafter "Cunninghams" or "Intervenors") by and through counsel, and, for their Response To Motion For Order Limiting The Scope Of Hearing, state as follows:

Cunninghams have previously filed their Motion To Include The Complete Record In Case No. 2005-00142, wherein they noted facts and law in support of that motion that are also relevant to this Response, including the following:

The Joint Applicants, Louisville Gas and Electric Company and Kentucky Utilities ("LG&E/KU") and the

Cunninghams, as Intervenors, were parties in Case No. 2005-00142. The Route #1, now before the PSC in Case No. 2005-467, is virtually identical to the route sought by LG&E/KU in Case No 2005-00142, except for a small dogleg through the Cunningham property around their lake. The earlier proceeding is clearly relevant and material to this proceeding.

LG&E/KU has now filed a Motion For Order Limiting Scope Of Hearing. As Background, the Companies note the currently pending applications for a 345 kV transmission line from Jefferson County to the Hardin County Substation. The Companies then cite to the PSC order of September 8, 2005, admitting that said order denied LG&E/KU the application sought for the virtually identical transmission line as described as Route #1 in this proceeding. LG&E/KU refer to two other portions of the September 8, 2005 order which included "a determination of a particular fact in favor of the party against whom the judgment [was] rendered [which] is clearly not essential to support the judgment..."

First, LG&E/KU cite to the finding that LG&E/KU met the burden to establish a need for the new transmission line to issue a Certificate of Public Convenience and Necessity ("CPCN"). Second, LG&E/KU cite to the ruling by the PSC concerning the timing of environmental, historical and cultural studies when a CPCN is sought.

LG&E/KU anticipate (correctly) that Cunninghams will seek to introduce proof on these issues and seek to persuade the PSC to reach a different result in this proceeding. The Companies argue that Cunninghams are precluded from seeking to re-litigate these issues. This motion is based upon the doctrine of *res judicata*. The Companies cite to Yeoman, M.D. et al v. Commonwealth of Kentucky, Health Policy Board, et. al., 983 S.W. 2d 459, 464 (Ky., 1998), Williamson V. Pub. Serv. Comm'n, 174 S.W. 2d 526, 529 (Ky., 1943), and Bank of Shelbyville v. Peoples Bank of Bagdad, 551 S.W. 2d 234, 236 (Ky., 1977).

LG&E/KU argue that a final judgment is conclusive of the facts and issues as to those parties in that tribunal or tribunal of concurrent jurisdiction, that the doctrine applies to administrative tribunals acting within their jurisdiction, and that, "The purpose of the *res judicata* doctrine is to avoid protracted, repeated litigation of issues already decided." Motion, page 4.

LG&E/KU then argue that a subdivision of *res judicata*, called collateral estoppel or issue preclusion bars the re-litigation of issues litigated and decided in an earlier action. LG&E/KU cite as authority Revenue Cabinet, Commonwealth of Kentucky v. Samani, 757 S.W. 2d 199, 201 (Ky. App., 1988), Napier v. Jones, 925 S.W. 2d 193, 195 (Ky. App. 1996), Newman v. Newman, 451 S.W. 2d 417 (Ky,

1970), and In The Matter of: The Joint Petition of Kentucky American Water Company, Thames Water Aqua Holdings GmbH, TWE Aktiengesellschaft, Thames Water Aqua U.S. Holdings, Inc, Apollo Acquisition Company and American Water Works Company, Inc For Approval of a Change of Control of Kentucky-American Water Company, Case No. 2002-00317 (Order of October 16, 2002), citing 46 AmJur. 2d Judgments, Sec. 514.

LG&E/KU argue that the PSC should find that the parties to this action are identical to those in 2005-00142 based upon the claim that where there is not identity, the concept of privity reaches the same legal result, citing BTC Leasing, Inc. v. Martin, 685 S.W. 2d 191, 198 (Ky., 1984).

CUNNINGHAM FIRST RESPONSE: RES JUDICATA DOES APPLY AND BARS THE COMPANIES FROM RE-LITIGATING THE DENIAL OF A CPCN FOR ROUTE #1 ACROSS THE CDH PRESERVE LLC.

Cunninghams do not dispute the argument that *res judicata* applies to prevent a losing litigant from a second independent action based upon the same facts and grounds as raised the first time. See Happy Coal Co. v. Hartbarger, 251 Ky. 779, 782; 65 S.W.2d 977 (1933), as follows:

If it were otherwise, a movant desiring compensation before the board having charge of the administration of such acts would never be concluded, and could perpetually harass his adversary from day to day, as well as the board,

with successive motions based upon the same facts, until the time expired under the law for making them. Such a procedure is in direct conflict with the cherished rule that "there should be a finality to litigation," and to that end the law disallows to the losing litigant, or claimant, a second independent cause of action or complaint based upon the same facts and upon the same grounds of his former lost one.

See the more recent discussion in Moore v. Commonwealth, Cabinet for Human Resources, 954 S.W.2d (Ky. 1997), where the Kentucky Supreme Court described the situation where *res judicata* and issue preclusion would be apply:

Thus, the Court abandoned the mutuality requirement of *res judicata* in adopting non-mutual collateral estoppel, applicable when at least the party to be bound is the same party in the prior action. The essential elements of collateral estoppel to be gathered from *Sedley* are as follows:

- (1) identity of issues;
- (2) a final decision or judgment on the merits;
- (3) a necessary issue with the estopped party given a full and fair opportunity to litigate;
- (4) a prior losing litigant.

Significantly, the Companies fail to make specific reference to the 4th essential element as discussed in Moore and Happy Coal, that *res judicata* and issue preclusion act as a bar to the party who lost the prior action - they do not act as a bar to the party that won the prior action.

The reasoning for this distinction is simple and compelling. The party that won the prior action has no incentive - and no right - to appeal. Only the party that lost the prior action has the right to and the incentive to appeal.

The discussion of *res judicata* at 46 Am Jur 2d, Judgments, Section 546 *Nonessential or immaterial matters*. Explains this distinction as follows: "Where the determination of a particular fact is in favor of the party against whom the judgment is rendered, it is clearly not essential to support the judgment, and the general rule is that the judgment does not operate as *res judicata* with respect to such fact, but the contrary view has been taken." The Kentucky cases of Moore and Happy Coal, and others, clearly put Kentucky courts within the general rule.

Many other Kentucky courts have recognized the purpose of the rule is to provide an end to litigation and to prevent harassment by losing litigants who would otherwise file repeated applications for the same relief. See Jefferson County v. Ogden, 556 S.W.2d 899 (Ky. App., 1977), as follows:

The matter of *res judicata* in zoning matters is a serious and vexing problem. The textbook writers indicate that there is a division of authority in the application of *res judicata* to rezoning requests. Certainly, the people affected by

repeated and harassing rezoning applications are entitled to protection. There should be some safety for the public at large.

Where the Companies had the opportunity to make the case that they were entitled to a transmission line routed across the Cunninghams property, and where they failed to carry their burden of proof and that request was denied, because of the insufficiency of the Companies proof, and where that is now a final decision because it was not appealed - *res judicata* applies and bars the same losing litigants in Case No. 2005 -000142 from bringing virtually the same claim against the Cunninghams. The Cunninghams are entitled to be left alone. They won relief in Case No. 2005-0000142, and the doctrine of *res judicata* protects them from this repeated threat.

ALTERNATIVELY, WITH WAIVING THE FOREGOING, BASED UPON THE AUTHORITY CITED BY THE COMPANIES, AND BASED UPON THE ORDER IN CASE NO 2004-000507, RES JUDICATA DOES NOT APPLY.

In the alternative, and without waiving the foregoing, the PSC should OVERRULE the LG&E/KU motions based upon several factors. First, the LG&E/KU claim that need is an issue that has been finally decided is contrary to the clear reading of the Order of the PSC in Case No. 2004-000507, where a CPCN was granted to the construct the TC2 facility, but that decision was qualified by requiring

continuing monitoring of the energy forecasts by the Companies to permits the PSC to prevent premature or unneeded construction.

Second, the case cited by the Companies recognizes that the doctrine is to be applied in the interest of justice. It is not used to cut off a litigant from having his day in court. It only prevents those who have lost previously from harassing re-litigation. If this proceeding is seen as a new application, then the Cunninghams are entitled to raise all available defense in the cause of protecting their land and their welfare.

Finally, there is no basis to claim that all other property owners are in privity with the Cunninghams. LG7E/KU authority does not support that claim.

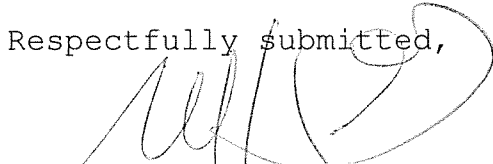
WHEREFORE, Intervenors, Dennis L. and Cathy L. Cunningham, CDH Preserve, LLC, Lisa Harrison and Jennifer Hardin, RESPOND to the Companies Motion in the alternative:

1. The LG&E/KU Motion must be OVERRULED where res judicata and issue preclusion do not apply to the party who prevailed in the prior action because the findings relied upon by LG7E/KU were not essential to the Order denying a CPCP, but the res judicata does apply to bar the LG&E/KU from re-litigating the virtually identical claim that they previously lost;

res judicata entitles the Cunninghams to peace from further threats from these Companies

2. Alternatively, the res judicata does not apply because the matter of need is a matter that in within the continuing jurisdiction of the PSC based upon the Order in Case 2004-000507, and in the interest of justice. The Motion must be OVERRULED.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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

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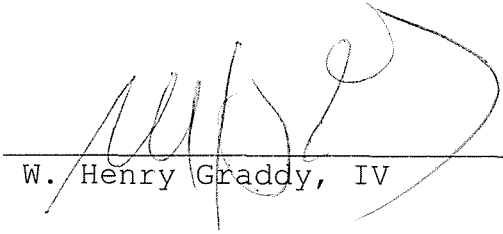
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This the 27th day of March, 2006.



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