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April 30, 2007

Ms. Beth O'Donnell
Executive Director
Public Service Commission
PO Box 615
211 Sower Blvd.
Frankfort, KY 40602-0615

Re: Cumberland Valley Electric, Inc. v. Kentucky Utilities, Inc.
Case No. 2006-00148

Hand – Delivered

Dear Ms. O'Donnell:

Attached are the original and eight copies of the Brief of Cumberland Valley Electric, Inc. in the above-styled case. I have this day caused to be served a copy of the Brief by first class mail on the parties named on the attached service list.

Please call if you have any questions concerning this filing. Thank you.

Sincerely,

Anthony G. Martin

Attorney for Cumberland Valley Electric, Inc.

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COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

CUMBERLAND VALLEY ELECTRIC, INC.	)	
	)	
COMPLAINANT	)	
	)	
vs.	)	**CASE NO. 2006-00148**
	)	
KENTUCKY UTILITIES COMPANY	)	
	)	
DEFENDANT	)	

BRIEF ON BEHALF OF COMPLAINANT CUMBERLAND VALLEY ELECTRIC, INC.

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This case involves a complaint by Cumberland Valley Electric, Inc. (CVE) seeking a determination pursuant to KRS278.016-018, commonly known as the Territorial Act ("the Act"), that CVE is the appropriate retail electric supplier to provide retail electric service for use in a mine known as Stillhouse Mine No. 2 ("SM2") in Harlan County. Defendant Kentucky Utilities Company ("KU") has provided electric service for use at SM2 since the summer of 2005.

CVE filed its complaint, with verified testimony supporting the Complaint, on April 7, 2006. KU filed an Answer and a Motion to Dismiss on April 21, 2006. On April 26, 2007, Black Mountain Resources, Inc. and its subsidiary operator of SM2, Stillhouse LLC (collectively "BMR") filed a Motion to intervene as parties.

Following CVE's Response to KU's Motion to Dismiss and KU's Reply Brief in further support of its Motion, the Commission issued an Order denying KU's Motion to Dismiss, denying initial relief sought by CVE, setting a procedural schedule and granting BMR's Motion to Intervene on September 13, 2006. Pursuant to this Order, KU and BMR filed direct testimony on October 6, 2006. Following two rounds of discovery, both CVE and KU filed rebuttal testimony on January 3, 2007. On March 9, 2007, both CVE and KU filed sur-rebuttal testimony. On March 14, 2007, the Commission conducted a hearing for the purpose of cross examining witnesses. At the close of that hearing, the Commission established a date of April 30, 2007 for the filing of simultaneous briefs.

II. FACTUAL BACKGROUND PRIOR TO COMPLAINT

In approximately January or February, 2005, BMR began preparations to open a new mining operation that became known as SM2. BMR (or its parent) owns an electric distribution system that receives electric power in bulk from KU at KU's Lynch substation on what is familiarly known as the U.S. Steel property. BMR then distributes this power through its own distribution system to a number of electric mining operations in a number of different coal seams[1], some operated directly by BMR or its affiliates and some operated by BMR

[1] Transcript at pg. 201

contractors[2]. In order to provide power to the mining operation at SM2, BMR extended its own distribution line some 1048 feet to a new mine portal, and repaired and in some instances reconductored[3] an existing but deenergized BMR line that extends some 2.75 miles from BMR's Cloverlick substation to the new line extended to serve SM2. This line was constructed in 1984, and had been deenergized since 1998. In total, the BMR line running from the delivery point at KU's Lynch substation for KU bulk power to BMR's distribution system to the portal of SM2 is a distance of approximately 7.5 miles.

Operations at SM2 are stated to have begun in June of 2005. Due to the terrain surrounding the mine portal, the SM2 portal is not visible from the highway. CVE was unaware of the existence of the new mine operation until late summer of 2005. At that time, CVE employees noticed a new telephone line and poles running some 3000 feet to the new mine portal of SM2. This telephone line was installed solely for the use of the new SM2[4]. Upon determining that the portal for SM2 was within the exclusive service territory of CVE[5], CVE informed BMR that the new mine portal had located within CVE's service territory, and that CVE believed that it was the rightful supplier for the new mine under the Act. CVE met with BMR officials on October 6, 2005[6], and while BMR officials agreed

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[2] Transcript at pg. 182.
[3] Transcript at pg. 194.
[4] Transcript at pp. 182-183.
[5] The portal is located some 7000 feet within CVE's exclusive service territory. Transcript at pp. 90-91.
[6] Willhite Direct Testimony at pg. 6.

that the portal was within CVE territory, they disagreed that CVE was the rightful retail electric supplier for the new mining operation.

After meeting with BMR, CVE contacted KU by letter dated October 13, 2005[7], to meet to discuss this matter. At a meeting on November 11, 2005, KU agreed that the mine portal for SM2 was in CVE's territory, and informed CVE that it was unaware of the new mine operation until CVE brought the matter to the attention of BMR. KU's position was that it had no control over a customer extension of lines, that the new mine was a continuation of an existing operation, and that the service to SM2 was proper and lawful.

CVE contacted KU again by letter dated January 9, 2006, and requested that KU and CVE meet to develop an Agreed Statement of Facts to expedite a Commission review. By return letter dated January 27, 2006, KU reiterated its position that its service to SM2 was lawful and that BMR's extension of lines into CVE's service territory to use KU power were "acts of an entity over which it has no control."[8]

By letter dated February 13, 2006, CVE again asked KU to meet to develop an Agreed Statement of Facts. An Agreed Statement of Facts was developed and attached as Willhite Exhibit No. 1 to CVE's Complaint.

In January, 2006, BMR contacted CVE to provide service to a water pump used in the operations of SM2. This was the first service requested by BMR with

[7] All correspondence between CVE and KU referred to in this paragraph was provided as part of CVE's Response to Commission Staff's First Data Request, No. 1.
[8] KU Letter of January 27, 2007, attached to CVE Response to Commission Staff's First Data Request, No. 1.

respect to the new mining operation at SM2 from either KU or CVE. Service to the pump was extended by CVE as requested on or about January 26, 2006.[9]

III. CVE COMPLAINT

CVE filed its Complaint on April 7, 2006. Despite the complexity of the defenses that have been offered by KU in this case, the issues before the Commission are in fact quite straightforward, as will be demonstrated below.

A. New Electric Consuming Facility

CVE's Complaint alleges that SM2 is a new electric consuming facility ("ECF") that is located in adjacent territories. The record in this case fully supports this position -- SM2 is both a separate ECF and a new ECF.[10]

SM2 began operations in June, 2005.[11] The Map Transmittal Letter for this mine[12] , which was filed and approved prior to anyone being aware that a controversy might exist with respect to this operation, clearly designates SM2 to be a "New Mine". As stated by BMR, the License Map "gives you a Mine License

[9] Willhite Direct Testimony at pg. 8.
[10] Willhite Direct Testimony at pp. 7-10.
[11] BMR Response to PSC Staff's First Data Request, No. 1.
[12] Attached to CVE's Complaint as Agreed Statement of Facts, Item 2.

to actually go in and extract those reserves."[13] No mine operation with the designation of Stillhouse Mine No. 2 has ever been licensed to operate in Kentucky prior to this date. The same Mine License Map indicates that there are no existing mines above or below the area licensed for SM2. The reserves to be mined at Stillhouse Mine No 2 in the next five years include reserves that are not part of any other approved and licensed mine plan.[14] SM2 operates with a separate name, Kentucky permit number and mine designation. It has telephone service as a separate operation from any other BMR operation. Indeed, the telephone line to provide service exclusively to SM2 did not exist prior to SM2, as it was constructed to serve the new mine.[15] Further, BMR extended a separate line of some 1048 feet to serve SM2, and indeed has 2.75 miles of electric distribution line whose only purpose is to provide service to the separate mining operation at SM2.[16] This service line is either new or partially reconstructed[17],

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[13] Transcript at pg. 206. Although BMR would claim at the hearing that SM2 and other mines are part of the same "permit", BMR admits that permit deals only with "surface effects" of mining (Transcript at pg. 206). It is not a permit approving specific underground mining operations or a permit to mine specific reserves. See further discussion below, Section IV(C) and ftnt. 60.

[14] While BMR and KU claim that some mineable reserves from a prior mine, Arch No. 37 are included in the permit boundary for SM2, the prior mine was permanently closed in 1998 and Stillhouse Mine No 2 is a new and very different operation. BMR admits that SM2 includes reserves to be mined that were never part of the permit boundary for Arch Mine No. 37. Transcript at pg. 182. The prior Arch 37 reserves are shown on Exhibit Matda-3, "to the right of the active Stillhouse Mine No. 2." Transcript at pg. 206. The reserves to be mined in the five year plan for Stillhouse Mine No. 2 clearly involve very little, if any, mining in the old reserves of Arch Mine No. 37. See also CVE Response to KU Second Requests No. 13. Neither BMR nor KU has provided any information to support a claim that any reserves remaining from the Arch Mine No. 37 licensed reserves are a significant part of the current SM2 mining operation.

[15] Transcript at pp. 182-183.

[16] Matda Direct Testimony at pg. 5.

[17] Transcript at pg. 194 – BMR had to replace poles and reconductor part of the existing line in addition to constructing the new extension to SM2.

and had served nothing for seven years prior to serving SM2 – it was either deenergized or non-existent.

KRS278.010 defines "electric consuming facilities" as "everything that utilizes electric energy from a central station source". The statute does not define what is meant by the term "central station source". Consistent with accepted principles of statutory construction, the singular "electric consuming facility" is included within the plural "electric consuming facilities", and logically refers to "something that utilizes energy from a central station source". [18] SM2 is clearly a separate mining operation among many conducted by BMR in various seams of coal, and as such is properly defined as an electric consuming facility – it is a separate mining operation that consumes electric power from a central station source, however defined, and will consume electric power from a central station source if served by CVE as well.

If a new ECF such as SM2 is located in adjacent service territories, then the Commission has the specific authority pursuant to KRS278.018(1) to determine which retail electric supplier should serve the new ECF. The statute specifically provides that such a determination shall be "based on criteria in KRS278.017(3)." These criteria were those put in place to review initial challenges to territorial lines that were drawn in 1972.

In past mining cases, the Commission has interpreted the Act to hold that the location of a mining portal is not dispositive as to whether a mining ECF is

[18] Willhite Rebuttal Testimony at pg. 10.

located in adjacent territories, and that if mining reserves are located in two adjacent territories, the Commission will consider the ECF to be located in adjacent territories for purposes of determining whether KRS278.017(3) applies.[19] As the reserves to be mined at SM2 have been clearly established by a five year mining plan to be in the territories of both CVE and KU[20], the proper resolution of this case is for the Commission to apply the four factors contained in KRS278.017(3) to the relevant facts of this case.

B. Application of the Four Factors

The proper application of the four factors in this case produces a very clear result. As noted in Mr. Willhite's Testimony at pp. 11-14, CVE prevails on each of the four factors.

KRS278.017(a) relates to the proximity of existing distribution facilities. CVE has a 25 kv three-phase distribution line approximately 2300 linear feet from the portal at SM2, from which power is used by BMR for operations at SM2.[21] KU's nearest three-phase distribution facilities are approximately 2 miles (over 10,000 feet) away at Cloverlick.[22] CVE is not merely in closer proximity to SM2,

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[19] See, Willhite Direct Testimony at page 10, with citation to prior Commission decisions on this point.

[20] The determination of reserves is based on reserves to be mined upon commencement of commercial mining operation. In the Matter of: Matrix Energy, LLC for Determination of Retail Electric Supplier, Case No. 2003-00228, Order of May 3, 2004 at pg. 2.

[21] Proximity of retail electric lines to the mine portal was the measurement of proximity used in the Matrix order. The mine portal is also the terminus of the phone distribution line constructed entirely for phone service to SM2.

[22] Willhite Direct Testimony at page 11; Agreed Statement of Facts, Items 1, 7 and 8.

but is in much closer proximity.[23] In fact, CVE is actually far closer to the actual ECF at SM2, as the water pump being served by CVE is only 312 feet from CVE's 25 kv circuit along U.S. 119.[24] The pump is an integral part of the mining operation at SM2.[25] Under either measurement, CVE's facilities are significantly closer to SM2 than are KU's facilities.

KRS278.017(3)(b) relates to which supplier was first furnishing retail electric service , and the age of existing facilities in the area. CVE has been providing service in the immediate vicinity of the portal for SM2 and south of old US 119 since at least 1949.[26] When asked to provide its first date of service in the area as part of the Agreed Statement of Facts, KU stated only that its first service in the area was in 1931, to a point some 7.5 miles away from SM2 at its Lynch substation,[27] but has not shown any service actually in or near the area of SM2 that predates, or is even nearly contemporary with, CVE's service in the area.

CVE has had a feeder along old US 119 since 1949. This feeder was converted from 13.2 kv to 24.5 kv in 1974. CVE has recently completed, pursuant to approval from the Commission, relocation and upgrade of this line along US 119, and will be migrating customers from this line to the new line and

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[23] Indeed, the actual KU facility providing service to SM2 is 7.5 miles away from its point of use at the SM2 portal.
[24] Willhite Rebuttal Testimony at pg. 16.
[25] In the Matter of: Henderson-Union RECC v. Kentucky Utilities, Case No. 93-211, Order on Rehearing dated July 29, 1994.
[26] See CVE Responses to KU First Requests, Nos. 2, 3, and 4; and CVE Responses to KU's Second Requests, Nos. 12,16,17 for further discussion of prior CVE service in the immediate area.
[27] Willhite Direct Testimony at pg. 11; Agreed Statement of Facts – Items 1, 10 and 11.

removing the old line in the due course of business.[28] KU's existing three-phase 4 kv distribution facilities nearest the mine opening at Cloverlick were constructed in 1976. [29]

KRS278.017(3)(c) relates to the adequacy and dependability of existing distribution lines to provide dependable, high quality retail service at reasonable costs. CVE has only to construct a 2300 foot[30] extension[31] and place a 25/12 kv distribution transformer bank at the mine opening at a line cost of approximately $37,000.[32] As noted above, CVE facilities that would be used to provide service to SM2 should the Commission so order are completely upgraded, and are located along new US 119 where they are more accessible and less exposed to outages. The loading on the 11.2/14 MVA Chad Substation is currently 65 percent.[33] KU on the other hand has no 12 kv three-phase service currently available in the area. KU would likely have to tap a 69 kv transmission line north of US 119, construct a 69/12 distribution substation, and construct at minimum a 3500 foot 12 kv line to SM2. KU has declined to provide a cost estimate for such

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[28] Although KU has attempted to make an issue of the completion date for CVE's modernized facility, in fact all operations SM2 could have been served from the existing line prior to the new line.
[29] Willhite Direct Testimony at pp. 11-12, Agreed Statement of Facts – Items 1, 12 and 13.
[30] Map scaled feet – actual distance would be somewhat longer to account for variations in terrain. Transcript at pg. 121.
[31] Agreed Statement of Facts - Item 7
[32] Response to KU Second Requests, No. 24.
[33] Agreed Statement of Facts – Item 14. While KU claimed during the hearing that the Chad substation is overloaded, its analysis failed to recognize that Chad has 14 MVA capability, not merely the bottom rating of 11.2 MVA.

a substation and line. CVE's facilities are dependable and its cost to extend its lines to serve SM2 is substantially less than the cost for KU to do so.[34]

KRS278.017(3)(d) relates to the elimination and prevention of duplication of electric lines and facilities supplying such territory. If CVE supplies the electricity to SM2, there will be no duplication of facilities to serve SM2, as the only retail electric supplier line or facility currently located within the permit boundary for SM2 is the CVE line serving the water pump. KU would have to construct a substation to serve SM2, as well as a substantially longer line extension than would be required for CVE to serve SM2. It would also have to duplicate at least a portion of an existing CVE line that serves a water pump used at SM2.[35] Had BMR been cognizant of the duplication occasioned by the separate telephone and electric lines they could have combined the use of right-of-way by constructing or having constructed by CVE an approximately 3000 foot single pole line from the water pump that contained both the telephone and electric lines. KU's needs exceed CVE's needs both in extent of facilities required and in KU's need to duplicate an existing CVE line.[36]

[34] See Willhite Direct Testimony at pp. 12-13 for discussion of this factor.
[35] CVE serves this pump at the request of BMR. No other service for SM2 has ever been requested by BMR from either CVE or KU.
[36] Willhite Direct Testimony at pp. 13-14.

In summary, CVE prevails under all four factors.[37] Indeed, KU does not even dispute that CVE prevails under the statutory analysis of retail electric supplier facilities and capabilities. This is a simple, straightforward boundary dispute proceeding involving a new ECF in adjacent territories, and the clear result of a statutorily-mandated analysis that is limited to the comparison of the facilities and capabilities of the involved utilities is that CVE is the appropriate retail electric supplier for SM2.

IV. KU DEFENSES

KU has raised a number of defenses that all involve service to SM2 taking place not at the mine site, but rather at a location some 7.5 miles away from the mine site at Lynch. As much (if not most) of the extensive record in this case, including all of KU's various testimonies, relates to these defenses, they will be reviewed below in some detail.

A. KU Position Prior to Complaint

KU has consistently stated that it has no control over a customer's use of power after that power passes through a meter to the customer.[38] It has also argued that the Commission has no control over a customer's construction of

[37] Willhite Direct Testimony at pg. 14.
[38] This position is consistent with KU's response to the Commission Staff's First Request, No. 1.

distribution lines, and therefore there is no basis for KU to refuse to provide such power in this case. Even after CVE formally informed both BMR and KU that KU's power was being used in an operation in CVE 's territory, KU apparently never advised BMR that this issue should be resolved by the PSC if it could not be resolved by agreement. There is no evidence that KU ever considered seeking Commission approval itself or advising BMR to do so. Instead, both BMR and KU left no option but for CVE to file a complaint to protect its territory.

In its initial responses to CVE, KU denied that SM2 was a new ECF, and stated that it was merely providing continuing service to BMR as it had to its predecessor companies.[39] This claim was developed further in KU's Answer to CVE's Complaint and its Motion to Dismiss CVE's Complaint.

B. KU Answer and Motion to Dismiss

In its answer to CVE's complaint, KU among other claims asserted that it was entitled to serve SM2 because the mining operation at SM2 was merely a continuation of operations in a much larger ECF, which in KU's view encompassed the entire Harlan seam. Indeed KU sought relief "that the Commission amend the territorial boundary between KU and CVE to recognize

[39] Letter to CVE from KU dated January 27, 2006, attached to CVE Response to PSC Staff First Requests No. 1. See also, KU's Response to PSC Staff First Requests No. 1.

that KU has the right to serve **all mining operations in the Harlan seam** [emphasis added"].[40]

The Harlan seam is a very large seam of coal that extends into the service territories of several regulated PSC entities, and indeed into the Commonwealth of Virginia.[41] The fact that KU sought to use this case as a vehicle to foreclose any territorial claims by any of the other utilities whose service territories would be involved in new mine operations in the Harlan Seam, even if the permitted reserves had no other relation to KU's service territory, should be noted. KU was seeking to expand the focus of this case away from the obvious new ECF at SM2 to a new, super-ECF of the entire Harlan seam.

Certainly one question is why would KU be so confident that it would prevail on such a claim, when this is so obviously a case that involves a limited new ECF. The answer is apparent from KU's concurrent pleading, its Motion to Dismiss.

KU's Motion to Dismiss argued that CVE had convinced the Commission back in 1979 to adopt a rule that service to operations takes place at the metering point for a customer, and not at the actual point of use for a particular mining operation. Citing an Order dated February 22, 1977 in Case No. 6637 ("Jellico"), involving Jellico Electric System[42] and CVE, KU alleged that CVE had convinced the Commission to adopt this rule, and that CVE should be bound by

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[40] KU Answer, Paragraph 3 on page 7.
[41] KU Response to PSC Staff Second Request, No. 1.
[42] A municipal utility system

this rule – "precedent established by CVE at its own urging"[43] – and that CVE's Complaint should be dismissed because of this controlling "precedent".

KU submitted a FAX version of this Order as an attachment to its Motion that apparently had been in KU's possession since at least April 25, 1990. While KU apparently relied on this Order in its responses to CVE prior to the filing of CVE's complaint, and certainly relied upon it as the basis for dismissing CVE's Complaint. KU was unaware due to inadequate research that its claim was fallacious.

In response to KU's Motion to Dismiss, CVE determined from the Commission's own files that the controlling "precedent" supposedly established at CVE's urging was an Order that was set aside by both the Franklin Circuit Court and the Court of Appeals – indeed, the Court of Appeals found with great specificity that the "rule" cited by KU as having been established in the Jellico case was wrong, and that the point of metering was not the point of service in boundary dispute cases. [44]

KU admitted (albeit only in a footnote) that it was simply unaware of the fact that the Order it cited had been twice set aside by two different courts.[45] However, this failure to adequately research the basis for its claims was also presumably a large part of the basis for KU thinking that it did not need to make

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[43] KU Motion to Dismiss at pg. 6

[44] The Orders of the Franklin Circuit Court and the Court of Appeals in the Jellico case were attached as Exhibits to CVE's Response dated May 1, 2006, and this point was argued at length in that pleading, which is incorporated herein by reference.

[45] KU Reply Brief in Further Support of its Motion to Dismiss, dated May 12, 2006, at pg. 6, ftnt. 28.

any reasonable effort to either resolve CVE's claim at SM2 or to seek PSC approval for continuing to serve SM2.

KU sought to rationalize its Jellico theory even after being informed of the Court of Appeals' opinion. It dismissed the Court of Appeals' clear direction with respect to the point of metering issue as a mere "thought", and argued exactly the opposite of what it had argued in its Motion to Dismiss – that the PSC finding with respect to the point of metering wasn't even necessary to the PSC's finding. KU did not distinguish how a finding could have been so central as to be a controlling precedent in its Motion to Dismiss, but have been so unnecessary as to be merely a passing thought in the Court of Appeals Order. However, any reasonable analysis of the Opinion must conclude that the Court of Appeals was aware of the significance of this point, and went out of its way to find that the conclusion that the point of metering is the point of service was incorrect. Indeed, had the Court of Appeals concluded otherwise, that the point of metering controlled, then there would have been no reason for a remand to the Commission for hearings on the adequacy of Jellico's service, because the point of metering would have equally and independently supported CVE's providing the service to the mine in the Jellico case. This finding was necessary, and is simply unequivocal. The Commission should certainly reject KU's suggestion that the Commission ignore the Court of Appeals' clear finding on this point.

Further, KU has successfully opposed the very principle that it is trying to establish in this case, that the point of delivery is the relevant consideration in a

boundary dispute. KU also operates in Virginia, right across the border from its Kentucky operations[46]. In two separate proceedings in Virginia in the late 1990's, KU successfully convinced the Virginia State Corporation Commission that a "point of delivery" test was the worst possible policy in boundary dispute cases. In Case No. PUE960295, Prince George Electric Cooperative and Petition of RGC (USA) Mineral Sands, Inc. ("RGC")[47], the Virginia Commission reviewed the Chief Hearing Examiner's determination on a "threshold question" of whether the Virginia Commission should define territorial boundaries by "point of delivery or point of use". [48] The Hearing Examiner concluded that "Virginia Power has the right and, indeed, the obligation to provide service to RGC's metering point located within Virginia Power's service territory." [49] This finding adopted the "point of delivery" view that KU would have this Commission adopt in this proceeding.

In reviewing the Hearing Examiner's findings, the Virginia Commission stated the positions taken by the parties to the case on this central point. It noted that KU, which was not even a party to the case, "filed comments requesting that the Commission adopt the point of use analysis for resolving disputes between electric suppliers under the Utility Facilities Act".[50] It also

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[46] Indeed, the Harlan seam that KU has tried to capture in this proceeding extends into Virginia.
[47] Decision reported at 1998 Va. PUC LEXIS 266, June 25, 1998; decision also available at the Va. SCC website, www.scc.virginia.gov, see http://www.scc.virginia.gov/caseinfo/pue/case/e960295.pdf.
[48] Order, Va. SCC site at pg. 5.
[49] Order, Va, SCC site at pg. 6 – KU makes a very similar argument in the current case.
[50] Order of June 28, 1997 at pg. 13 (Va. SCC web site page)

quoted KU as stating that the point of delivery test is "seriously flawed".[51] The Virginia Commission accepted KU's recommendation and rejected the "point of delivery" test, finding little support in any jurisdiction for the point of delivery test.[52]

KU implies that the laws in Virginia and Kentucky are not exactly the same, and that therefore its position in Virginia might be different than its position in Kentucky.[53] This argument is undercut by the following finding in the June 28, 1997 Order:

> KU contends that adoption of the point of delivery test would limit the Commission to considering only the location of the meter in territorial disputes, a matter that could be manipulated by the customer. It asserts that the Commission should base its decision in these disputes on facts that cannot be manipulated by the customer, such as the **proximity of existing distribution lines to the area to be served, which supplier was first serving the area, the age, adequacy and dependability of existing facilities, and the prevention of duplication of facilities supplying service to the area** [emphasis added]. [54]

In arguing <u>against</u> the point of delivery approach that it supports in Case No. 2006-00148, KU urged the Virginia Commission to base its decisions on <u>exactly the same four factors as are contained in Kentucky's Act at KRS278.017(3)</u> . It told the Virginia Commission that the four factors in KRS278.017(3) preclude the point of delivery test. It now tells this Commission that the statutory factors need not be applied because Kentucky should adopt the point of delivery test. Further, while KU's position in Virginia is fully

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[51] Order of June 28, 1997, ibid at pg 14.
[52] Order of June 28, 1997, ibid at pg. 17. There is no indication that KU or any other party cited to the Jellico case.
[53] Transcript at pg. 19.
[54] Order of June 28, 1997, ibid at pg. 14.

supportive of the Court of Appeals determination in the Jellico case that the point of delivery is not the determinative factor under Kentucky law, KU continues to propose its own interpretation and to urge that this Commission treat the Court of Appeals' explicit finding in the Jellico case as a mere suggestion.

As noted above, KU did not merely convince the Virginia Commission on this point in one case. In Case No. PUE960303, Petition of Kentucky Utilities Company d/b/a Old Dominion Power Company,[55] (hereinafter referred to as "Sigmon", as it involved Sigmon Coal Company) KU's affiliate Old Dominion Power (ODP) again argued successfully to the Virginia Commission that a point of delivery test was not the appropriate measure in a territorial boundary dispute. In that case, the cooperative that KU opposed made precisely the same arguments being made by KU in this case:

> PVEC [Powell Valley Electric Cooperative] argues that its service to Sigmon is valid under each of the three recognized tests for deciding service territory disputes between two adjacent utilities. First, PVEC states that its service to Sigmon satisfies the point of delivery test because the delivery point is clearly within PVEC's service territory. Second, PVEC also claims that its service to Sigmon satisfies the point of use test. In support of this claim, PVEC points out that, although Sigmon's mining operations are located in three different service territories, Sigmon distributes its power across these service territories by means of its own distribution system. Finally, PVEC maintains that its service to Sigmon satisfies the geographic load center test because the majority of Sigmon's current and future electric load in Lee County Virginia lies within the territory assigned to PVEC. [56]

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[55] Opinion of Hearing Examiner of October 19, 1998 is reported at 1998 Va. PUC LEXIS 249, and is also available on the Virginia State Commerce Commission web site at www.scc.virginia.gov; Opinion available at http://www.scc.virginia.gov/caseinfo/pue/case/e960303.pdf

[56] Opinion of Hearing Examiner at pg. 7, (Va. SCC web site page)

KU successfully opposed each of these contentions in the Sigmon case. With respect to the third point, KU presented testimony that mining operations such as the Sigmon operations are not "a single, integrated mining operation", but rather "the mines are separate and distinct".

The congruence between the Sigmon case and Case No. 2006-00148 is startling, as is the absolute disconnect between KU's position and arguments in the Sigmon case versus the SM2 case now pending before this Commission. Like PVEC in the Sigmon case, KU now argues that its service to BMR satisfies the point of delivery test, because the delivery point is in its service territory. Like PVEC, KU now argues that although BMR's mining operations are in at least two service territories, BMR distributes its power across those service territories by means of its own distribution system. Like PVEC, KU now argues that all of BMR's operations (at least in whatever configuration KU is arguing at any point is the correct one for its interests, including a reference to Harlan County similar to PVEC's reference to Lee County, Virginia[57]) comprise a single, contiguous mining operation.

KU's position in Virginia on the point of delivery test was sound and correct, and should be applied by the Commission in this proceeding as well. A rational review of the record demonstrates that SM2 is a separate, new mining operation, not a part of some larger ECF. Rejecting KU's Kentucky point of delivery theory ends the absurdity of stating that service to SM2 takes place at a

[57] KU's shifting definition of the relevant area will be discussed further below.

point some 7.5 miles from SM2. Rejecting the point of delivery test as inconsistent with Kentucky law (as argued by KU in the RGC case) results in a rational and reasonable determination that service to the mining operation at SM2 takes place at SM2. Further, rejecting KU's arguments means that the Commission does not have to administratively rewrite the Act to include customer actions that not only affect, but completely reverse, the determinations required by the Act as written. As KRS278.018(1) specifically states, furnishing service "for use" in the service territory of another utility is prohibited, absent a specific statutory exception. Kentucky's statutory scheme is clearly related to the point of use, not the point of delivery.[58]

C. KU's Grandfathering Argument

KU also contends that its service to SM2 is sanctioned under KRS278.018(4), as service to an electric consuming facility being served by KU prior to June 16, 1972. This argument presents the same flawed analysis that KU has some hereditary right to serve the entire Harlan seam, since it served some unspecified operation in part of the Harlan seam, or U.S. Steel property, or in Harlan County, or south of Looney Creek, prior to 1972.

SM2 was permitted in 2005. Operations began in 2005. KU did not provide service for use at SM2 prior to 2005, because SM2 did not exist.

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[58] See also Willhite Rebuttal Testimony at pp. 6-7, and Matrix, Case No. 2003-00226, supra – proximity of lines is measured to the mine opening, not to the point of delivery to a customer.

SM2 is not, as implied by KU and BMR, a continuation of Arch Mine No 37. Arch Mine No. 37 was permanently closed in 1998.[59] This is evidenced by the "Mine Closure Final Map" for Arch Mine No. 37.[60] It is evidenced by Arch's disclosures in its 10-Q of March 31, 1998, concerning the Arch Mine 37 closing to the United States Securities and Exchange Commission in 1998.[61] It is convincingly and undeniably evidenced by the specific findings of the Sixth Circuit Court of Appeals that the closing of Arch Mine 37 was permanent, that no operations were transferred, and that "the **facility** closure was permanent [emphasis added]."[62] SM2 is not a mere continuation of Arch 37.[63]

In addition to the clear and convincing evidence that Arch Mine No. 37 was permanently closed in 1998, CVE has already reviewed above the clear and convincing evidence that SM2 is a new ECF, not a continuation of any other operation, including Arch 37, or the entire Harlan seam, or the entire U.S. Steel

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[59] BMR's sworn testimony at pg. 4 states that service to Arch Mine No. 37 began in 1981. BMR admits that it has no detailed knowledge of underground mining in the area prior to 1981. BMR Response to CVE First Requests, No. 55. At the hearing, KU encouraged BMR to speculate as to this date. Transcript at pg. 186. KU has no documentation on this point. KU Response to CVE 1st Requests, No. 16. However, Arch Mine No. 37 was regardless permanently abandoned in 1998.
[60] Agreed Statement of Facts – Item 6. KU attempted to establish at the hearing that for SM2, Arch Mine No. 37, and Stillhouse Mine No. 1 "all of those mining operations are covered by the same permit", namely a federal "surface effects" permit that is alleged to include a number of operations. Transcript at pp. 71-72. BMR explained that this federal permit governs the surface effects of underground mining, while the License Map "gives you a mine license to actually go in and extract those reserves." Transcript at pg. 206. As such, the License Map delineates and approves a specific underground mining operation. As noted, SM2 has its own License Map. This permit argument is simply a red herring. The record clearly shows that SM2 is a new mining operation, with its own mine license as a new operation, and not a part of a larger ECF.
[61] Willhite Sur-rebuttal Testimony at pp. 3-4.
[62] Willhite Sur-rebuttal Testimony at pp. 3-7; citing International Union, United Mine Workers of America v. Apogee Coal Co., Arch Coal, Inc., and Ark Land Co. , 330 F.3d 740, 2003 FED App. 0179P(6th Cir.), 2003. The use of the term "facility" by the court in referring to Arch No. 37 as a separate "facility" is obviously highly relevant evidence that each of the separate mining operations is a separate "facility", and thus a separate ECF by any practical standard.
[63] See also footnote 12 on page 6 of this brief.

property, or all selected mines south of Looney Creek in Harlan County, or any subset of these attempted larger ECF's proffered at various times by KU during the course of this proceeding. Service to SM2 began in 2005, not prior to 1972. Service was extended in 2005, not prior to 1972. While some part of the BMR distribution system existed prior to 1972, KU admits that it has no idea what parts existed then, and which parts didn't.[64] Even the line used to serve a fan at Arch 37 was not constructed until 1984; was deenergized for years; and required an unknown number of both upgrades and replacements to be serviceable to serve SM2.[65] KU's argument with respect to KRS278.018(4) simply fails under the weight of the evidence in this case, and should be rejected by the Commission.

KU also attempted to find precedent in a previous Commission Order for its contention with respect to prior service.[66] In Case No. 9454, the Commission determined that service to oil wells that had been in existence since 1951 constituted service to an ECF that had commenced prior to the Act, and that Henderson RECC was entitled to continue service on that basis.

While KU attempts to analogize the current case to this decision, the Commission in Case No. 9454 specifically distinguished cases where a customer's load had grown from one service territory into another, and cases

[64] Transcript at pp. 158-159; BMR also admits that it has no detailed knowledge of underground mining activity in the area prior to 1981. BMR Response to CVE First Requests, No. 55.
[65] Transcript at pg. 194.
[66] In the Matter of: Henderson Union Rural Electric Coop. Corp. v. Kentucky Utilities Co., Case No. 9454 (PSC Order of July 8, 1986); cited in Bush Direct Testimony at pp. 6-7.

where "a customer's load had migrated from one utility's service territory into another" from the oil wells situation.[67]

Surprisingly, KU admits that this case involves exactly the situation distinguished by the Commission in Case No. 9454. KU stated the following in its direct testimony:

> It is clear that the location of the customer owned facilities here, and the mining operations that they serve, originally started solely in KU's territory, but over time **migrated** to a portion of the U. S. Steel property which is in the territory of both KU and CVE [emphasis added].[68]

As KU has here admitted that the current case was specifically determined by the Commission in Case No. 9454 to be distinguishable from the oil well situation, there is no further need for the Commission to pursue this particular red herring.

D. KU's Continuation of an Existing ECF Argument

KU's continuation argument is obviously related to its "service prior to the Act argument" in many ways. It is equally flawed, as the evidence of record clearly demonstrates.

KU's first definition of the ECF in this proceeding was the entire Harlan seam.[69] As the lack of merit to this claim became more apparent over time, KU

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[67] Case No. 9454, Orders of January 3, 1986, and July 8, 1986; see discussion in Willhite Rebuttal Testimony at pp. 13-15.
[68] Bush Direct Testimony at pg. 16, lines 8-11.
[69] KU Answer, paragraph 3 at page 7.

began to refine its definition of the larger ECF of which SM2 was allegedly a part. In its direct testimony, KU revised this claim to be everything that utilizes service from the Lynch substation, including "all of the mining operations served from BMR's private distribution system". [70] The KU Lynch station is a transmission switching station from which three 69 kv transmission lines converge and from which the US Steel station is connected and the EKPC line to serve BMR's North Fork operation originates. The clear fallacy of this definition was that significant load, in addition to US Steel including CVE service to BMR at North Fork and CVE's Chad Substation is served from Lynch.

As it became apparent over time that even this definition was unsustainable, KU began to retreat even further. Indeed, BMR had claimed as early as its first information responses that any requested information "not pertaining to the U.S. Steel Property, south of Looney Creek, within Harlan County, Kentucky and affiliates with operations on that property" was irrelevant to this proceeding.[71] BMR made no effort to justify this designation of the relevant area, but KU began moving towards the BMR definition in its rebuttal testimony, when it stated that "KU is not claiming that everything on the U.S. Steel property, or all mining operations in Harlan County, constitutes a single ECF." KU offered no explanation for this revision to its claimed larger ECF. It did,

[70] Bush Direct Testimony at pp. 5-6.
[71] See, for example, BMR Responses to CVE First Information Requests Nos. 1, 7, 9, 11, and 26.

however, agree that any other mining operation not included as a part of its ECF was "simply not relevant to the issue at hand".[72]

KU's position was revised again in its sur-rebuttal testimony, filed three business days prior to the hearing, when it fully adopted BMR's position with respect to what constituted the "relevant" ECF in this proceeding. KU finally admitted that "KU is not contending that any and all mining within the Harlan Seam should be considered part of the same ECF."[73] KU narrowed its latest definition to all mining operations on the U.S. Steel Property in Harlan County, south of Looney Creek, as depicted on KU's Exhibit LEB-1.[74] KU also offered another formulation of this ECF as reserves on the U.S. Steel controlled by BMR and its affiliates, or someone working under a contract by BMR that includes all mining activities on that property in Harlan County, south of Looney Creek, and served through a common point of delivery at the Lynch substation.[75] KU offers no real explanation for this shift from the entire Harlan Seam to operations in multiple seams by unrelated (except by contract) operators south of a particular creek in a particular county. However, CVE respectfully submits that the Commission and its staff should also appreciate the difficulty of trying to focus on, and respond to, KU's shifting target throughout this proceeding.

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[72] Bush Rebuttal Testimony at pg. 5. Presumably Mr. Bush comments with respect to relevance were offered in his role as a regulatory witness and not as a legal conclusion. KU's position on this point would shift again at the hearing, as will be discussed below.
[73] Bush Sur-rebuttal Testimony at pg. 4, lines 9-11.
[74] Bush Sur-rebuttal Testimony at pg.3.
[75] Bush Sur-rebuttal Testimony at pp. 4-5.

KU's latest formulation of a larger ECF is significant because KU now states that eight or nine mining operations in different seams of coal constitute a single ECF. However, even at the hearing on this matter, KU apparently did not realize that it was postulating an ECF that included operations in different seams.[76] KU's latest ECF was stated as follows:

CHAIRMAN GOSS:

Are you saying that, in your company's opinion, all of BMR's operations in this area are one ECF?

A. Everything bound by the operations in the Harlan Seam south of Looney Creek, connected to that same distribution system, is all part of a single ECF.[77]

KU's shifting definition has finally caught up with it. Even its expert does not understand that it is now defining an ECF that includes mining operations in a number of different seams. Indeed, KU had criticized Mr. Willhite at the hearing for citing KU's own testimony in the Sigmon case in Virginia, because KU's testimony in that case stated that one of the factors in determining whether an operation is a single mine rather than a continuous operation "is that they were actually mining in different seams" in Virginia.[78] KU went on to claim that "a big part of his opinion was based on the fact that they were in different seams of coal, **which is not the case here** [emphasis added]."[79]

KU clearly misunderstood that the final ECF that it proposed involves mining operations in different seams, not merely one seam. Contrary to KU's

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[76] Transcript at pg. 201 – BMR testified that the operations that are part of KU's "south of Looney Creek" ECF are in separate seams.
[77] Transcript at pg. 142.
[78] Transcript at pg. 24, lines 19-24.
[79] Transcript at pg. 26, lines 9-12.

claim, this criterion in fact supports the conclusion that SM2 is a separate mining operation, not part of a larger, continuous operation.[80]

KU's continued revision of its position as to what constitutes the ECF is crucial in understanding the record in this case. After KU's Jellico theory fell apart, and as various theories as to the scope of KU's ECF have fallen by the wayside, others have been proposed to take their place. By way of contrast, CVE has stayed firmly with the only reasonable theory under the evidence of record – that SM2 is a new ECF in adjacent territories, and that a straightforward application of the four factors in KRS278.017(3) clearly requires a finding that CVE is the proper retail electric supplier for SM2.

After all of the evidence has been reasonably evaluated, this case does not involve a super-ECF, but only a single new ECF located in adjacent territories. KU's latest definition of the ECF at issue involves multiple coal seams, county lines, fictitious property designations (the U.S. Steel property), creek beds and the equally fanciful argument that nine separate mining operations separated by miles are in fact one single operation.

With respect to the latter argument, KU claims again Commission precedent that nine mines, miles apart, with separate names, permits, operators and in different seams are in fact one mine. Its claimed precedent again falls short of its promise. KU claims that the Commission found in Case No. 93-211[81] (the "Peyton" case) that more than one mining operation can constitute a single

[80] Other criteria recommended by Mr. Palmer are discussed at Transcript at pp. 87-88.
[81] In the Matter of: Henderson-Union RECC v. Kentucky Utilities, Case No. 93-211, Order on Rehearing dated July 29, 1994.

ECF. However, in the Peyton case, the issue was merely whether a coal washing facility that was integral to a single mining operation was part of a single ECF, not whether separate mining operations are a single ECF.[82] Peyton certainly does not support a finding that nine mining operations separated by miles and operating in different seams under different permits with different operators constitute a single ECF. Indeed, the total lack of any precedent for KU's claim of a larger ECF is found inadvertently in KU's sur-rebuttal testimony, where KU urges the Commission to ignore CVE's testimony because none of the cases cited by CVE involve precisely the ECF claimed here by KU.[83] Quite simply, no prior case has come anywhere close to accepting KU's overblown claim of a larger ECF in this case. It is also worth noting that KU in its sur-rebuttal testimony again changes its definition of relevance in this claim – stating that the relevant issue here is "decades of mining operations within a single seam of coal"[84], while on the very next page claiming that the relevant ECF here is a number of mining operations that in fact mine multiple coal seams[85]. It is not surprising that KU's shifting position has ended in complete confusion, but there should be no confusion that KU's claims as to a larger ECF than SM2 are simply without merit.

E. KRS 278.017(3) – Impact of Customer Lines

[82] As, for instance, the water pump for SM2 is an integral part of the SM2 ECF.
[83] KU Sur-rebuttal Testimony at pg. 1.
[84] KU Sur-rebuttal Testimony at pp. 1-2
[85] Transcript at pg 201; only two of the mines included on LEB-1 mine coal and claimed to be part of a single ECF mine coal from the Harlan Seam.

KU's final argument is to claim that even if SM2 is a new ECF in adjacent territories, BMR's privately owned lines should control in the application of the four factors of KRS278.017(3). KU clearly understands that unless the Commission reads into the Act a fifth factor that customer lines will be considered, it simply loses this case hands down. While CVE has filed testimony demonstrating in detail that even with customer lines considered it should prevail under this case[86], there is certainly no question that KU **cannot** prevail unless the statute is administratively amended to include consideration of customer lines under the four factors, and unless the lines are then considered as requested by KU.

The Act contains no reference to customer owned lines. The Act, in order to implement the purposes stated in KRS278.016, establishes the mechanism of exclusive certified territories. While the reasons for taking this action are described at length in KRS278.016, the actual mechanism to accomplish the stated goals is as follows:

> It is hereby declared to be in the public interest that ... the state be divided into geographical areas, establishing the areas within which each retail electric supplier is to provide the retail electric service as provided in KRS267.016 to 278.020 and, except as other wise provided, no retail electric supplier shall furnish retail electric service in the certified territory of another retail electric supplier.

While the reasons why the legislature chose to adopt this mechanism to accomplish its goals are of course important, exclusive service territories are the

[86] Willhite Rebuttal Testimony at pp. 15-22.

mechanism chosen to accomplish these goals by the legislature, and this choice must be respected. Indeed, Kentucky's highest Court has weighed in with specificity with respect to this purpose:

> The Territorial Law was enacted to protect each KPSC-regulated utility in its certified territory against invasion or competition by another KPSC-regulated utility.[87]

The Act was clearly never intended to make territorial invasions easy – only exceptions expressly provided for in the Act may suffice to allow one retail electric supplier to furnish service for use in the territory of another provider. There is no indication in the Act or in the Supreme Court's recitation of the purpose of the Act of an intent to allow for the creation of loopholes to meet a particular customer's preferred choice of supplier for a particular facility.

The Act refers repeatedly to "retail electric suppliers" and "retail electric service". For instance, the Act established initial service territories for each retail electric supplier based on "**its existing distribution lines** and the **nearest existing distribution lines of any other retail electric supplier** [emphasis added]" and results in a certified territory for each retail electric supplier that is "in closer proximity to one of **its existing distribution lines** than to the **nearest existing distribution line of any other retail electric supplier** emphasis added]." [88] The factors in KRS278.017(3) were adopted in case any

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[87] Grayson Rural Electric Corporation and East Kentucky Power Cooperative, Inc., Appellants, v. City of Vanceburg; Electric Plant Board of the City of Vanceburg; Kentucky Power Company, Appellees , 4 S.W. 3d 526, 528 (Ky., 1999).

[88] KRS278.017(1)

retail electric supplier claimed that the lines were improperly drawn pursuant to this mechanism based entirely on retail electric supplier facilities, and not on any privately owned distribution lines.

KU's claims would require that, in order to meet KU's version of the intent of the Act, the Commission should administratively amend the Act, and find that the factors contained in KRS278.017(3) were intended to include customer owned lines. There is simply no basis in this statute for such a conclusion. Indeed, this request undermines the action of the legislature in establishing certified territories, and limiting challenges to those specific instances permitted by the Act. Certainly the legislature could have instructed the Commission to consider existing or new customer lines as a fifth factor (or as part of the existing factors) in deciding cases involving a new ECF in adjacent territories, but it did not do so. It limited the Commission to the same factors as were involved in establishing the territorial lines to begin with, which are clearly related to the distribution facilities of retail electric suppliers and not customers.[89]

Even if the Act could somehow be read to countenance the possibility of considering customer lines as some part of the four factor analysis, the Commission should reject any consideration of customer lines that impacts the analysis required in an adjacent territory case as very unsound public policy. The legislature has already declared that strong utility service territories are in the public interest. Even if the Commission does not directly have any jurisdiction

[89] KU admits that the original territorial lines under the Act were drawn pursuant to retail electric distributor lines, not customer lines. Transcript at pp. 158-159.

over the construction of large scale distribution systems by customers for their own use[90], it can and should prevent such customers from affecting their territorial supplier by their own voluntary actions or those of their predecessors in interest. It certainly should not encourage having customers affect the territorial boundaries by their actions, particularly where the customers' lines physically extend across territorial boundaries and result in service from one utility being furnished for use in the service territory of another utility.

KU argues in this proceeding that it is not necessarily suggesting that there are no limits on customer actions. However, its testimony suggests otherwise. KU has from the beginning stated that it has no control over what a customer does with purchased power once that power passes the customer's meter. It has stated that the Commission has no jurisdiction over customer lines, even if it affects a territorial dispute, unless perhaps a utility whose territory is invaded can somehow prove bad intent on the part of a customer.[91] It then demonstrates how hard such an allegation would be to prove by saying that any customer extension that is for a "legitimate business purpose" would be acceptable[92], and that the only limitations on such extensions are the

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[90] As noted in its sur-rebuttal testimony, Willhite Sur-rebuttal at pg. 9, CVE does not necessarily agree that the BMR system is not operating to some extent as a public utility, in that it purchases bulk power from KU and distributes it over its distribution system to operations run by non-affiliates as well as affiliates. However, for purposes of this argument, it is assumed that the PSC has no direct control over the BMR distribution system or similar systems.

[91] Transcript at pg. 162.

[92] Transcript at pp. 162-163. KU admits that the Act does not contain any "legitimate business purpose" exception to allowing customer lines to affect the Act.

technological constraints on how far a distribution line can be extended.[93] This case provides a truly compelling illustration of why a bright line rule is absolutely needed on this issue – whatever customers may be entitled to do with respect to extending their own lines, there should be no weight given to any such facilities, no matter by whom or when constructed or for what alleged purpose, in resolving a territorial dispute.

It is worth noting that with the consideration of customer lines as suggested by KU, it is still necessary to accept KU's assertion that the metering point is the point of service. Otherwise, one must accept that the new ECF at SM2 consists of the mine portal, the reserves, and 7.5 miles of distribution line from the Lynch substation, which is obviously not part of the ECF but merely a distribution facility used to transport power to the new ECF.[94]

While KU argues that its service to BMR at Lynch has superior reliability over the service that would be provided by CVE, KU ignores for this purpose the fact that its service to SM2 is transmitted over a 7.5 mile distribution system that is subject to a single point outage at any point along the line. The BMR system is of unknown reliability, and the Commission has no authority over its reliability or even its safety. By way of contrast, CVE service to the SM2 mine opening would require an extension of approximately ½ mile, and would be subject to the Commission's jurisdiction to remedy any problems that might possibly arise.

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[93] Transcript at pg. 176. Although KU's proposal for acceptable customer line extensions includes a condition that the customer should own the land over which it is extending, it offers no statutory basis for this rule, or any explanation as to why a right of way or easement or lease would not be equally acceptable.

[94] Willhite Sur-rebuttal Testimony at pg. 8, lines 11-13

KU argues that CVE would incur a cost to serve SM2, while KU merely uses the current bulk power meter at the Lynch substation and would incur no such cost. However, the BMR extension to SM2 was not free, and if BMR's facilities are considered, the cost of the entire extension, or certainly at least that section whose only use and purpose is to serve SM2, must be considered. BMR testified that it spent an estimated $10,000 to extend 1048 feet of line to the SM2 portal. BMR has no estimate as to how much was required to refurbish the de-energized line from its Cloverlick substation, but it does know that pole replacements, reconductoring and other improvements were required. It is appropriate to consider the cost of the entire 2.75 mile extension to be a cost of KU serving SM2, and at BMR's estimated cost of $10 per foot for line extensions, the current cost of the entire 2.75 mile extension that is used only to serve SM2 is at least $145,200. In addition, BMR bears the cost of maintaining this line.

One benefit to BMR of extending its own system to serve SM2 is that it purchases power at a bulk rate from KU, and thereby receives a lower rate when it distributes this centrally purchased power to its affiliated and contract non-affiliated mining operations. This arrangement, although the details are uncertain since BMR would not provide agreements for the mining operations, appears to be inconsistent with 807KAR5:041, Section 9(2), which prohibits master metering service to more than one place of business to obtain a lower rate. KU's analysis fails to recognize that the amount of its claimed rate discrepancy is affected by this unusual master metering arrangement for nine separate mining operations,

some of which are not even affiliated with BMR. Further, KU's calculation does not recognize that BMR must maintain its own facilities under this master metering arrangement, while CVE would be responsible for maintaining any CVE line extended to provide service to SM2. While BMR complains that its investment in its distribution system will be wasted if CVE serves SM2, it will incur no additional cost for a CVE extension per CVE's commitment in this case.

It is also clear from the evidence in this proceeding that BMR's distribution system does not limit the encumbrance of the landscape, it increases it. BMR has numerous lines in this area that have been de-energized[95], although KU's map LEB-1 conveniently omits these unused lines from its rendition of BMR's distribution facilities. Whether and when these lines will serve any purpose is unknown. While CVE could have extended any service required by BMR or its predecessor for those lines that have been extended into CVE's territory for either the Arch 37 fan or SM2 with a far shorter extension that the 2.75 miles which has been built, it was never given this opportunity. It is simply incontrovertible that the Commission is being asked to find that 2.75 miles of line necessary for KU to serve SM2 is less of an encumbrance of the landscape than is approximately .5 miles of line.

As long as there are no consequences if customers extend their own lines, and indeed are rewarded for prior extensions that should never have occurred, KU can be expected to continue to be indifferent to the physical extension of

[95] Transcript at pp. 96-97.

customer lines into other utility companies' territory. This case illustrates that there is currently simply no certain consequence to ignoring such extensions. This is not simply a case where service to a mine site within KU's territory may also involve some reserves in another territory. This case involves the actual physical extension of lines to furnish retail electric service from one utility "for use" in the service territory of another utility. KU has furnished retail electric service to SM2 for almost two years without consequence, and the Commission has determined that it has no jurisdiction to remedy this fact. Indeed, by taking no action itself even when specifically informed of this problem, KU has apparently been successful in shifting the burden of proof to CVE in this proceeding.[96] Any other remedy for CVE with respect to the two years of service that has already been provided will involve additional time, expense and resources for CVE to pursue.

The Commission is obviously concerned that a distribution line that has been in existence for a number of years must be disregarded if the statutory criteria are properly applied. However, the alternative is worse. Whatever Arch's intention may have been in extending a line 2.75 miles to serve a fan located in CVE's territory, under KU's theory its action will affect the Act for new service to SM2. The continuing impact of such extensions results in what could be characterized as a rolling service boundary, with each extension resulting in yet another claim that disregarding the latest customer extension is unfair and

[96] This issue is also addressed in Section V of this brief.

ignores existing facilities. If the Commission considers a prior line constructed by a customer, then that line affects all subsequent decisions.[97] There is nothing in the Act that even suggests that such a result was intended, regardless of whether a private actor was operating pursuant to a legitimate business interest or another motive. Further, KU has already received the revenues from serving the SM2 operation for 2 years as a result of this extension.

Any argument that BMR is unfairly burdened if the Act is applied as written is simply untenable. BMR has the right, like any other customer, to receive adequate electric service at a reasonable rate from the proper retail electric service provider as determined pursuant to the Act. It has no special rights or privileges under the Act that are not afforded to those customers which do not have the ability to extend their lines and affect territorial boundaries. Indeed, such a special privilege would be very unfair to other customers, and to the utilities which need to construct facilities to serve anticipated load.

KU cites the Matrix[98] decision as support for its position that the Commission should consider the impact of customer owned facilities in this case. In Matrix, the first factor analysis demonstrated that the nearest 69 kv line owned by Big Sandy's transmission supplier was three times as far from the mine entrance as Kentucky Power's nearest 69 kv line.[99] It is clear from the Matrix

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[97] Transcript at pp. 44, 104, 107-108.

[98] In the Matter of: Matrix Energy, LLC for Determination of Retail Electric Supplier, Case No. 2003-00228, Order of May 3, 2004.

[99] Order of May 3, 2004 at pg. 8; Kentucky Power's nearest 69 kv line was 1.6 miles away from the mine entrance; the nearest 69 kv line owned by EKPC was 5 miles away. Kentucky Power Brief at pp. 5 and 7. Either utility would incur a very large cost to serve the new mine relative to

Order that the Commission measured proximity using retail electric distribution lines, not customer owned lines, as measured to the actual mine operation. As the Commission noted, "Kentucky Power's 69 kv facilities needed to provide service are in much closer proximity to the Matrix mine". [100]

The contrast with this case is clear. CVE is in much closer proximity to the mine opening than KU.[101] Using the Matrix analysis, CVE has a 25 kv three phase distribution line approximately 2300 map feet from the mine opening, while KU's nearest three phase distribution facilities are approximately two miles (over 10,000 feet) away at Cloverlick.[102] In this case, CVE is more than four times closer under the Matrix analysis. Indeed, if KU's facilities are considered to be where the actual service for SM2 would come from, the Lynch substation some 7.5 miles from the SM2 mine opening, CVE is 17 times closer than KU. While KU purports to approve of the Matrix analysis, it completely ignores the Matrix proximity method, and continues to claim that KU is closer to SM2 because it serves a point of delivery 7.5 miles away.[103]

Big Sandy clearly had little chance to prevail in the Matrix case in light of the Commission's determination that Kentucky Power's relevant lines were in so

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the cost of extending service to SM2, and the Commission was very focused on that issue in the Matrix case.

[100] Matrix, supra, at pg. 8.

[101] As noted above, CVE is even closer to the water pump that is an integral part of the SM2 ECF.

[102] Willhite Direct Testimony at pg. 11.

[103] See Bush Direct Testimony at pg. 17; Bush Rebuttal Testimony at pg. 6; Bush Sur-rebuttal Testimony at pg. 6. KU also ignores the Matrix approach with respect to the first service in the area standard, which also analyses retail electric utility service from utility facilities in the area, not 7.5 miles away. See also, Willhite Rebuttal Testimony, which addresses how this standard "clearly points out why it is inappropriate" to use customer owned facilities "in any of the conditions".

much closer proximity to the mine opening than Big Sandy's.[104] In this case, the treatment of customer owned facilities is squarely before the Commission for the first time in a case where the inclusion or exclusion of those facilities is claimed by KU to have a dramatic impact on the result.[105] In this case, a utility whose facilities are much farther from the mine opening (KU) argues that it should prevail as the retail electric supplier over the utility that is in close proximity to the mine opening (CVE), only because of the impact of customer owned lines. Unlike Matrix, where Kentucky Power was much closer to the mine site anyway, in this case the issue of inclusion of customer owned facilities has been fully argued, and is an issue that KU argues will drastically alter the outcome.[106]

In the Matrix case, any discussion of customer owned facilities would only reinforce the fact that the most proximate (by a large margin) utility should serve the mine. In this case, the inclusion of customer owned facilities is being used as an argument to bring a utility which is not by any standard in close proximity to the new ECF much closer to the mine opening, and to try to defeat the claim of the utility that is right next door to the mine opening.

In Matrix, the "customer owned facility" was in fact a substation that had been constructed by Kentucky Power for its own use. It was bought by Matrix or its affiliate in the mid-1990's, but was constructed and operated for over two

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[104] There is no evidence from the Matrix Order that the issue of the legality of including customer lines in a KRS278.017(3) analysis was even addressed in that proceeding.
[105] The Commission had noted in discussing a claim of included customer facilities in the Peyton case that such facilities "neither benefited nor prejudiced" Henderson-Union.
[106] For KU's position as to the impact of customer lines in this case, see KU Rebuttal Testimony at pg. 6. It should be noted, however, that CVE clearly prevails on the proximity standard by a wide margin under the Matrix approach.

decades entirely as a retail electric facility of Kentucky Power.[107] Indeed, Kentucky Power retained ownership of three 69 kv switches at the Pevler substation even after the substation was sold.[108] There is no evidence that KU ever had any involvement with the construction or operation of BMR's distribution system, or that any part of the BMR distribution system ever met the definition of a retail electric facility – quite the contrary, KU has gone to great lengths to assert its distance from anything to do with BMR's distribution system. While Kentucky Power asserted that Matrix' facilities should be considered to be Kentucky Power's facilities, KU has painstakingly asserted that BMR's facilities should not be attributed to KU or treated as KU facilities.

CVE prevails under the facts of this case even if customer lines are considered.[109] However, CVE respectfully submits that the Commission's proper course is to recognize that the Act was never intended to incorporate private unregulated distribution systems into the standards of KRS278.017(3), and determine that any such private actions have no impact whatsoever on the determination of the proper retail electric supplier under the Act. This finding will not in any way interfere with the extension of lines by private customers, except to prevent such actions from effectively amending the Act. Any other finding is clearly inconsistent with the Act, and also invites potential manipulation. CVE will propose in its recommended findings a clear standard that will guide utilities in

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[107] The Pevler station was established in 1971. Kentucky Power Brief, Case No. 2003-00228 at pg. 7. It was sold to Czar, an affiliate of Matrix, in 1995, but Kentucky Power retained ownership of three 69 kv switches and metering. Kentucky Power brief, Case No. 2003-00228 at pg. 8.
[108] Matrix, Order of May 3, 2004 at pg. 2.
[109] Willhite Rebuttal Testimony at pp. 15-22.

any future operations involving customer lines that incorporates this principle. It should of course be clear that such a finding would apply to both CVE and KU, and all circumstances, and could as easily benefit KU in future cases as CVE or any other utility given the facts of a particular case. Such a finding is of particular significance where, as here, the customer or its predecessor has actually physically extended its lines into another utility's exclusive service territory, and that extension is then bootstrapped into an argument that the first utility should prevail as to every new ECF in the area, although its own facilities provide no such reasonable argument.

V. BURDEN OF PROOF

In this proceeding, although KU and BMR were made aware of an actual controversy as to the provision of service to SM2, neither BMR nor KU took any action to either resolve this controversy or seek resolution by the Commission.[110] Given this inaction by KU and BMR, the only way for this dispute to be brought to the Commission for resolution was for CVE to file a complaint. Under the Commission's regulations, a party bringing a complaint bears the burden of proving the case set forth in its complaint, and the Commission has proceeded

[110] Although KU met, after two requests, with CVE to formulate an Agreed Statement of Facts, KU asserted from the beginning that it believed that its service to SM2 was proper and lawful, and it took no action to resolve this dispute either by agreement or by seeking Commission resolution. BMR also took no action, apparently in reliance on advice from KU that KU was the proper retail electric supplier.

with this understanding that CVE bears the burden of proving that it is the proper retail electric supplier to SM2.

As the evidence of record clearly demonstrates, CVE has more than met any level of burden to establish that it is the proper retail electric supplier for SM2. However, in the event that the burden of proof nonetheless becomes an issue in this proceeding, CVE respectfully disagrees that it bears the burden of proof in this proceeding with respect to determining the proper retail electric supplier because it was forced to file a complaint to seek a Commission determination. As noted above, proceedings such as this are based on the four criteria in KRS278.017(3). KRS278.017(3)(d) provides that in the event of a protest involving the four criteria, "neither party shall bear the burden of proof". As the territorial boundary will be redrawn for SM2 for whichever party prevails in this proceeding, neither party should bear the burden of proof under the criteria as to a determination of the appropriate retail electric supplier under the four factors. CVE has already met its burden of going forward with this proceeding, and it should not bear an additional burden when the statute intended that such disputes be resolved without imposing a burden of proof on either party.

VI. SERVICE TO OTHER BMR MINES

This case involves a determination of the proper retail electric supplier for service to SM2. However, KU raised an issue with respect to service to another BMR mine, referred to by KU as the "Timbertree" mine, which precipitated much discussion at the hearing about service to this mine and the comparability of the two operations.

BMR first approached CVE about service to a new BMR operation near Blair in approximately August, 2006. At this time, KU's Motion to Dismiss CVE's Complaint was still pending, and KU was still claiming that the entire Harlan Seam should be assigned to KU's service territory. BMR approached CVE because CVE was obviously the logical utility to serve its new mining operation. As BMR testified at this proceeding, it had investigated running its own lines from KU's Lynch substation, and concluded that service from its KU source was not feasible:

Q. Last Wednesday, and can you - do you know why the decision was made to go to CVE to provide the service to this mine rather than extending BMR's line?

A. In order to connect Timbertree to the Black Mountain distribution system would involve probably a couple of miles of construction over extremely steep and treacherous terrain and would be very expensive for us to do.[111]

BMR further explained as follows:

It was all going to be new construction for us, and Cumberland Valley had a power line at the foot of the hill, and so that's what drove that decision.[112]

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[111] Transcript at pg. 195.
[112] Transcript at pg. 201.

CVE was informed by BMR that BMR was concerned about CVE using service to a new mining operation in this area against BMR's interest in the SM2 case. This concern was initiated by BMR, not CVE.[113] CVE agreed at BMR's request that service to the new mine would not be used against the interests of any party in SM2 case, unless the issue was raised by a party other than BMR or CVE.

In questioning BMR's witness at the hearing , KU mischaracterized this agreement as being that CVE and BMR had agreed not to "disclose that service to KU because Black Mountain had asked him not to."[114] Neither BMR nor CVE agreed to keep service to a mining operation at Blair secret, and CVE never made a demand that BMR keep this operation secret from KU, the Commission, or anyone else. Indeed, in response to KU's First Requests, No. 2 on November 1, 2006, CVE stated that:

> "CVE is currently providing service per BMR's request to a new mine at Blair located about 1.5 miles north of Benham on the south-side of US 119 in the Harlan County portion of the U.S. Steel Property. The service was made active on September 19, 2006. CVE has not provided a copy of the service agreement or billing records for the mine as requested, as such a response would provide sensitive customer specific information without the permission of the customer. As BMR is a party to this case, the request for documentation, if necessary and relevant for this proceeding, **should be directed to BMR** [emphasis added]."

[113] Transcript at pg. 129 .
[114] Transcript at pg. 190.

As noted, this response specifically referred KU to BMR for further information on this operation. CVE also specifically identified this service in its response to the Commission Staff's Second Request, No 1.[115]

While the service to Timbertree is not at issue to be decided in this proceeding, after KU brought up the issue and precipitated considerable discussion about possible comparisons to SM2, CVE's expert, its engineer, and its manager visited the Timbertree Mine No. 9 site, to assess whether in fact KU had any reasonable basis to claim to be the rightful retail electric supplier for that

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[115] It is important to understand that there was no such entity as the "Timbertree" mine until February, 2007, and indeed there were no actual mining operations at this mine until on or about April 7, 2007. Approval for BMR's mine at Blair was applied for under the name of Stillhouse Mine No. 3 (**not** Timbertree), to be operated Stillhouse Mining LLC as a new mine, and was received by the Division of Mine Licensing on August 2, 2006. All map and documents referenced herein are available at Kentucky's mine maps site, minemaps.ky.gov. This mine was in fact **abandoned** by BMR per a transmittal letter received on January 8, 2007. The only apparent activity of the Stillhouse Mine No. 3 operation was the clearing of the mine site to open a new portal, and not to operate an underground mining operation. Certainly this was the result of this operation, as only surface operations in CVE's territory took place prior to April 7, 2007.

The first apparent mention of "Timbertree" was in a map transmittal letter received by Licensing and Inspection on March 1, 2007. This map transmittal was for approval of a Mine License, but the word "new" was written in, apparently by the licensing division. This operation is designated Timbertree Mine No. 9, and is to be operated not by Stillhouse LLC, but by Parton Brothers Contracting, Inc. This is apparently the operation referred to by KU in its questioning at the hearing, but this operation was unknown to CVE by this designation, and indeed apparently did not even exist until late February or March of 2007.

With respect to mine reserves, BMR stated as follows at the hearing:

"We are required by law to submit, once a year, a new set of maps to the Office of Mine Safety and Licensing that shows what we believe to be our plans for the next five years. I dare say that the maps change every year because of the geology, other factors." Transcript at pg. 205.

The initial and updated filings for Stillhouse Mine No. 2, for instance, include detailed five year mine plans for the mining of specific reserves. Both of the filings related to Stillhouse Mine No. 3 prior to that mine being abandoned indicate that no five year mining plan is attached. Indeed, BMR made it clear that while it had responded to an inquiry from KU in the couple of weeks prior to the hearing about reserves at Timbertree Mine No. 9, it made no effort to talk to CVE about the new Timbertree Mine No. 9. The Timbertree Mine No. 9 filing also indicates that no five year mining plan is attached. In fact, no underground coal was mined at Stillhouse Mine No. 3 at any time prior to the abandonment of the mine. The online reports indicate zero tonnage for Stillhouse Mine No. 3. The first underground mining for Timbertree Mine No. 9 began only a week before the hearing in this case.

mine. In addition to confirming BMR's testimony that an extension from KU's Lynch substation would be extremely expensive and difficult, the CVE site visit confirmed that KU has no facilities in the area that are appropriate for serving a mine that requires 12 kv service. By contrast, CVE is indeed at the "foot of the hill". KU's only facilities are a high voltage 161 kv transmission grid line that traverses the site, and 4 kv three-phase service nearly a mile to the west. Indeed, CVE has previously served a strip mining operation[116] on the very mine site at issue.[117] CVE wrote to KU on April 5, 2007 stating the results of its review, and stating its opinion that CVE was clearly the appropriate retail electric supplier for Timbertree Mine No. 9. CVE asked KU to state if it disagreed with this conclusion, and offered to meet KU for a site visit to discuss this matter further if KU desired.

KU has to date neither accepted CVE's opinion that CVE is the proper retail electric suppler for this mine, nor presented any evidence to challenge that opinion. KU has also not accepted CVE's invitation to meet at the site to discuss CVE's findings.

While both mines have electric service delivered to portals located well within CVE's service territory, the mines are otherwise distinguishable in a number of particulars, including but not necessarily limited to the following:

1. SM2 involves the physical extension of a distribution line into CVE's service territory for the provision of KU service to a facility. No portion of any electric line

[116] CVE Response to Commission Staff Supplemental Requests No. 1.
[117] CVE's experts are prepared to present and support their findings when and if service to Timbertree Mine No. 9 is actually placed at issue.

has been extended into, or even near to, KU territory to provide service to Stillhouse Mine No. 3, Timbertree Mine No. 9, or the prior strip mine operation;

2. BMR requested from CVE service to be established at the site based on the clear understanding that CVE was the only utility with facilities anywhere near the mine that are appropriate for service to the mine, and CVE extended such service completely within its own territory;

3. As noted in sworn testimony from BMR, service from KU's Lynch substation to Timbertree, whether by customer extension or by KU's own extension, is completely impractical and very expensive;

4. CVE's review indicates no other practical method for KU to extend service to the Timbertree Mine;

5. As noted in sworn testimony from BMR, CVE's facilities, which are more than adequate to serve Timbertree, are "at the foot of the hill" in close proximity to the service entrance for the Timbertree operation;

6. CVE previously provided service to a strip mine on the actual site of Timbertree Mine No. 9 as noted in CVE's response to Staff Supplemental No. 1;

7. KU has made no offer of any evidence to demonstrate that it should prevail if a complaint is lodged under KRS278.018(1);

8. A customer's extension of its own distribution lines is not an issue at the Timbertree mine, whereas a customer owned distribution line has been physically extended into CVE's territory in the SM2 case.[118]

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[118] KU described its question to CVE in its Second Information Requests, No. 11 as being about a CVE policy or practice for "trying to determine whether locations were in territories of both

VII. Requested Findings

CVE respectfully recommends that the Commission make the following findings required to resolve the service issue for SM2, as well as for guidance in both this and future cases with respect to underground mining operations:

1. The mining operation known as Stillhouse Mine No. 2 is a new electric consuming facility ("ECF") with reserves in the adjacent territories of CVE and KU;

2. Pursuant to the requirements of KRS278.018(1) and KRS278.017(3), the Commission has determined that CVE prevails with respect to each of the four factors in determining the proper retail electric supplier to serve Stillhouse Mine No. 2;

3. CVE is found to be the proper retail electric supplier to serve Stillhouse Mine No. 2, pursuant to the required statutory analysis;

4. Service to all operations at Stillhouse Mine No. 2 shall be transferred to CVE within 60 days of the date of this Order, and CVE and KU are ordered to complete a plan for the transition and an appropriate revision to the official

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utilities". Transcript at pg. 125. However, the actual question involved a "policy, practice or procedure for inspecting, reviewing or examining **customer owned lines or facilities** [emphasis added]" to determine if they were located in, or delivering power to, another service territory. This situation does not exist at the Blair mine site.

certified territory map within 30 days of this Order and file it with the Commission;

5. CVE will serve any future mining load taking service at a portal within CVE's certified territory and whose associated reserves are located wholly or in part in its certified territory overlapping the US Steel property west of Cumberland;

6. While customers may extend their own distribution lines in an appropriate manner to serve their mining operations, such extensions are not contemplated by the Territorial Act as part of the analysis under KRS278.017(3) when determining the proper retail electric supplier for a new ECF such as Stillhouse Mine No. 2;

7. The Commission will not in any future proceeding consider the presence of customer owned distribution lines in the application of the four factors contained in KRS278.017(3) to the advantage or disadvantage of any retail electric supplier that is affected by such an application; the customer owned facilities will not in any way impact the determination of the proper retail electric supplier for any new ECF located in adjacent territories;

8. Both KU and CVE will timely modify their applicable tariffs for mining operations to include a requirement that such operations will inform or confer with each Company no later than 120 days prior to initiating, expanding or extending mine operations, or if any customer owned line is being extended for service to a new, extended or expanded operation. The mining company will be

responsible for providing each utility with a copy of a designated five year mining plan that clearly and distinctly indicates those reserves to be mined in the first five years of operation of any new, extended or expanded mining operation. The modified tariff will state that service to such a mining operation will be suspended pending an agreement between the affected utilities or a determination by this Commission if this provision is violated;

9. Once the appropriate notice is given to CVE and KU they will promptly determine if the new, extended or expanded mining operation will be locating in adjacent territories of CVE and KU and if so found the two utilities will move diligently to attempt to agree on the proper retail electric supplier for the new operation, in accordance with the findings in this Order. In the event that the parties cannot agree, the parties will advise the customer to seek Commission approval, and if the Company is unwilling to do so, the Companies will either jointly or concurrently file an application seeking a Commission determination as to the appropriate retail electric supplier;

10. CVE and KU will designate and inform the other of a specific contact to address territorial matters;

11. New or expanded mining operations that are located exclusively within the certified service territories of a single utility as to both mine entrance and reserves will be served by that utility unless determined otherwise by the Commission;

12. KU and CVE will initiate discussions with each other upon becoming aware of any existing or planned customer operation that extends across certified territory boundary lines.

VIII. Conclusion

For the reasons stated above, CVE respectfully requests that the Commission find that CVE is the proper retail electric supplier to serve the mining operation known as Stillhouse Mine No. 2, and that service is to be transferred to CVE in accordance with the proposed schedule. CVE also respectfully requests that the Commission adopt the findings recommended by CVE in Section VII above.

Respectfully submitted,

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