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March 9, 2007

Ms. Beth O'Donnell
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Public Service Commission
PO Box 615
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Frankfort, KY 40602-0615

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MAR 9 2007

PUBLIC SERVICE
COMMISSION

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 Sur-rebuttal Testimony of Cumberland Valley Electric, Inc. in the above-styled case. I have this day caused to be served a copy of the Testimony 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.

Cc: Attached Service List [w/enclosure]

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

MAR 9 2007

PUBLIC SERVICE
COMMISSION

In the Matter of:

CUMBERLAND VALLEY ELECTRIC, INC.)

COMPLAINANT)

vs.)

KENTUCKY UTILITIES COMPANY)

DEFENDANT)

CASE NO. 2006-00148

SUR-REBUTTAL TESTIMONY

OF

RONALD L. WILLHITE

FILED: March 9, 2007

1
2
3
INTRODUCTION

4 **Q. Have you previously testified in this proceeding?**

5 A. Yes. I submitted Direct Testimony on April 7, 2006 and Rebuttal Testimony on
6 January 3, 2007.

7
8 **Q. What is the purpose of your Sur-rebuttal Testimony?**

9 A. The purpose of my Sur-rebuttal Testimony is to respond to 1) KU's claims in its
10 rebuttal testimony that Stillhouse Mine No. 2 is merely an expansion of an
11 existing ECF in light of the factual history relating to the ARCH No. 37 Mine
12 provided by the Opinion of the United States Court of Appeals for the Sixth
13 Circuit in Case No. 01-6584, International Union, United Mine Workers of
14 America v. Apogee Coal Co., Arch Coal, Inc., and Ark Land Co., 330 F. 3d 740,
15 2003 FED App. 0179P(6th Cir.), (2003); and ARCH Coal, Inc.'s 10-Q of March
16 31, 1998 and 2) KU's incorrect recognition of BMR facilities in applying the
17 criteria of KRS 278.017(3).

18
19 **THE ECF ISSUE**

20 **Q. Before proceeding to discuss the Sixth Circuit Opinion please state CVE's**
21 **position regarding whether Stillhouse Mine No. 2 is a new ECF.**

22 A. It was clear to CVE before reviewing the Opinion that Stillhouse Mine No. 2 is a
23 new ECF. CVE confirmed its conclusion based on the transmittal letter of
24 Stillhouse Mining, LLC to the Kentucky Department of Mines and Minerals

1 providing the Mine License Map for Stillhouse Mine No.2 which clearly states
2 that the map purpose is a “New Mine” and the additional reasons presented in my
3 testimony including the “Mine Closure Final Map” for the adjacent Mine No. 37.
4 The Court of Appeals Opinion clearly corroborates and confirms CVE’s position
5 that Stillhouse Mine No. 2 is a new ECF.

6

7 **Q. Please describe the Sixth Circuit Opinion in Case No. 01-6584.**

8 A. The Sixth Circuit of the US Court of Appeals entered an Opinion on June 3, 2003
9 in response to a suit filed by the International Union, United Mine Workers of
10 America, versus Apogee Coal Co., ARCH Coal Inc., and Ark Land Co. which
11 involved issues associated with operations and facilities on the former US Steel
12 Property that had been transferred to ARCH and its subsidiaries in 1984. (ARCH
13 was the parent of Apogee and Ark Land Co.) A copy of this Opinion was
14 provided by Counsel for CVE by letter of February 20, 2007 to the Commission
15 and the parties of record.

16

17 Section I of the Opinion provides a detailed history relating to mining activity on
18 the US Steel Property. This recitation is much more detailed than the history
19 provided by Mr. Matda of BMR in his testimony and data responses. Of particular
20 significance is the Opinion’s description of specific actions taken by Apogee in
21 1998 relative to Mine No. 37 and why such actions were taken. The Opinion
22 clarifies for this proceeding information that was previously incomplete and
23 eliminates any need for speculation by the parties relative to the closing of

1 facilities by Apogee. The Opinion affirms the fact that Apogee permanently
2 closed its Mine No. 37 in January 1998 and laid-off all employees as it was
3 unable to develop a profitable business plan.

4 In 1984 United States Steel Corporation sold its interest in the Lynch Mining
5 complex to ARCH and coal reserves to Ark Land. U.S. Steel Mining sold the coal
6 mining operations to Apogee. By September 1995 Apogee had closed all of these
7 operations, Mine Nos. 32 and 33, the Lynch loadout facility and the Corbin
8 preparation plant, with the exception the Perkins Branch Surface Mine and Mine
9 No. 37. The Surface Mine ceased operations in December 1997 following
10 complete mining of the reserves. Regarding Mine No. 37 the Opinion stated, "In a
11 letter dated January 30, 1998 , Apogee informed UMWA-represented employees
12 that production had ceased and that the facility closure was permanent."

13
14 With respect to the closing of Arch Mine No. 37, ARCH stated the following in
15 its June 30, 1997 10 -Q:

16 "Net income for the quarter ended March 31, 1998, was \$15.8 million, compared
17 to net income of \$10.4 million for the quarter ended March 31, 1997. The
18 results for the first quarter of 1998 were impacted by the previously
19 announced expiration of the high margin contract with Georgia Power at the end
20 of 1997 and the depletion of the longwall reserves at the Company's Mine
21 No. 37 in eastern Kentucky in September 1997. The current quarter's results
22 were also adversely affected by the January closing of Mine No. 37 which had
23 an operating loss of approximately \$5.3 million during the quarter,
24 including termination benefits totaling \$1.3 million. The Company decided
25 to close the mine primarily due to poor geologic conditions. In addition, the
26 current quarter's results were negatively affected by reduced shipments on a high
27 margin contract and severe snow storms in West Virginia [emphasis added]."
28 Arch Coal, Inc. 10-Q, March 31, 1998; at pg. 8 of 19, available online at
29 <http://www.sec.gov/Archives/edgar/data/1037676/0001037676-98-000018.txt>
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The Sixth Circuit Opinion further found that in September 1998 Apogee sold its mining permits, equipment, and rights to mine coal under lease with Ark Land to RDL, the owner of BMR and Stillhouse. Only the Cave Branch preparation plant still had active employees who had been retained by Apogee to process and load previously mined coal.

Q. Please explain the significance of the permanent closing of Mine No. 37.

A. KU is contending that Stillhouse Mine No. 2 is an expansion of an existing operation and that the permitted reserves overlap reserves previously mined by Mine No. 37. KU's contention is wrong as the Mine No. 37 was not in existence in July 2005 when the Stillhouse Mine No. 2 portal was opened in CVE's territory, for the facility was permanently closed in 1998. In fact, "All equipment was moved out of Mine No. 37, and the power and ventilation were both cut off. By June 1998, all deep mine portals associated with any of the mines held, operated, or developed by Apogee in and around the Lynch mining complex had been sealed." *Sixth Circuit Opinion page 5*. In fact, all employees had been laid-off by that time with the exception of a few employees to retrieve and remove salvageable equipment from Mine No. 37. Clearly, Apogee did what it intended and permanently closed Mine No. 37. Therefore, it is factually wrong and unreasonable for KU to assert that Stillhouse Mine No. 2 is an expansion of an existing facility. The facility closure was permanent. You cannot expand something that does not exist. When Apogee permanently closed Mine No. 37 and

1 removed all the equipment and laid-off all employees there was no operation or
2 facility to transfer or expand.

3
4 The Sixth Circuit affirmed the District Court's finding that "Apogee's actions in
5 transferring its mining permits, equipment, and its lease to RDL did not constitute
6 the transfer of operations." *Sixth Circuit Opinion page 7*. Clearly you cannot
7 transfer or expand something that is not operating. There was no equipment to
8 consume electric energy and employees to operate the equipment.

9
10 **Q. What is your recommendation to the Commission?**

11 A. The Commission should reject KU's assertions that "Those operations have
12 simply expanded over time so that a part thereof is now located partially within
13 the territory of CVE" and "the operations at Stillhouse Mine #2 are merely an
14 expansion of an existing ECF". The Commission should particularly note that
15 BMR has not made such an assertion. On the other hand, CVE's position from the
16 onset has been that Stillhouse Mine No. 2 is a new ECF and is not as KU asserts
17 an expansion of an existing ECF.

18
19 In my opinion the facts support no other conclusion than that Stillhouse Mine No.
20 2 is a new ECF. The Sixth Circuit Opinion while addressing a labor issue clearly
21 provides a complete factual history and an independent assessment of
22 circumstances surrounding the permanent closing of the Arch/Apogee operations
23 and the initiation of new operations by RDL/BMR/Stillhouse. The history

1 provided by the Court Opinion unquestionably eliminates any doubt that the
2 Stillhouse Mine No. 2 is anything other than a new ECF.

3
4 **THE BMR FACILITIES AND KRS 278.017(3)**

5 **Q. Do you concur with KU that CVE has produced absolutely no evidence if**
6 **BMR's facilities are considered in applying the criteria of KRS 278.0147(3)?**

7 A. No. The evidence of record and my Rebuttal clearly shows that CVE would
8 prevail even if BMR's facilities were considered. However, customer-owned
9 facilities should not be attributed to either CVE or KU and that the appropriate
10 analysis under KRS 278.017(3) is as provided in my Direct Testimony. KU now
11 agrees that customer-owned facilities should not be attributable to either CVE or
12 KU: "KU is not asking the Commission to "attribute" the customer's distribution
13 network to KU, as if it were a KU facility"

14
15 KU also agrees that it cannot prevail under the appropriate application of the
16 criteria if customer-owned lines are not considered; "It is clear that, should the
17 Commission determine to analyze this case as one involving a new ECF located
18 in the adjacent territories of KU and CVE, then the outcome of the analysis under
19 KRS 278.017(3) will hinge largely, if not entirely, on whether or not the
20 customer's lines are considered (as KU and the customer urge) or not (as CVE
21 urges)". I disagree with KU's contention that the evidence is overwhelmingly in
22 KU's favor if BMR's facilities are considered. The correct analysis presented in
23 my Rebuttal Testimony and pursuant to KRS 278.017(3) considering the BMR

1 facilities shows just the opposite. Therefore, whether the criteria of KRS
2 278.017(3) is applied considering BMR's facilities or appropriately considering
3 only the facilities of the retail electric suppliers, CVE and KU, CVE prevails.
4

5 **Q. What is KU's position as to how the BMR lines should be considered?**

6 A. KU wants the Commission to "acknowledge the existence of those facilities" and
7 that KU can serve Stillhouse Mine No. 2 at Lynch and that CVE can serve at an
8 area near the mine portal. However, that is not what the Act requires. KRS
9 278.018 (1) states: "In the event that a new ECF should locate in two or more
10 adjacent certified territories, the commission shall determine which retail electric
11 supplier shall serve said facility based on the criteria of KRS 278.017(3)." KU's
12 claim appears to be that if Stillhouse Mine No. 2 is a new ECF then the ECF
13 extends to the Lynch Substation. As I explain in my Rebuttal Testimony,
14 consistent with prior Commission Orders, the new ECF is the Stillhouse Mine No.
15 2 operation that is comprised of the mining equipment that will be used to mine
16 the reserves as presented to the Kentucky Department of Mines and Minerals on
17 the Stillhouse Mine No. 2 Mine License Map, and the water pumping equipment
18 above and below the portal. The criteria of KRS 278.017(3) are appropriately
19 applied relative to the boundaries of the ECF, not some vague area or location. I
20 applied the criteria as directed and provided that analysis in my Direct Testimony.
21 There is absolutely no question that CVE is the rightful provider under the Act.

1 **IS RDL/BMR A UTILITY?**

2 **Q. Do you agree with KU that the customer in this matter is not acting as a**
3 **utility?**

4 A. First of all, I am not sure whether the customer referred is RDL, BMR or
5 Stillhouse. However, based on the facts presented to date in BMR responses to
6 information requests I cannot agree with KU's statement as we do not know the
7 details of the billing and accounting arrangements for the electric energy provided
8 to both affiliates and non-affiliates. In response to CVE Follow-up Questions 1
9 and 2 BMR stated that electric energy costs are assigned to non-affiliates, for
10 instance, but then are not collected from non-affiliates, but rather absorbed by
11 BMR. It is unclear whether these costs are indirectly recovered from non-
12 affiliates, or whether the non-affiliate operations are simply provided with free
13 electric service from BMR.

14
15 **SERVING SPLIT-TERRITORY WITHOUT AUTHORIZATION**

16 **Q. Do you agree with KU that there is nothing in the law that prohibits a utility**
17 **from serving a split-territory ECF absent a finding by the Commission that**
18 **service should be provided by another utility?**

19 A. No. Such a contention is unreasonable, illogical and contradictory to KRS
20 278.018(1) which clearly states that a retail electric supplier shall not furnish,
21 make available, render or extend retail electric service for use in electric-
22 consuming facilities located within the certified territory of another retail electric
23 supplier. In addition, KRS 278.018(3) clearly states that suppliers like CVE and

1 KU can be the only supplier to provide service to an electric-consuming facility in
2 their certified territories unless the Commission finds the service it is rendering or
3 proposes to render is inadequate. Otherwise, the Commission must act when a
4 new electric-consuming facility locates in the territory of two or more suppliers.
5 This is precisely why the General Assembly codified for the Commission the
6 means to adjust the existing certified territory when an adjacent territory matter
7 arises.

8
9 In my opinion utility managers or customers upon becoming aware of adjacent
10 territory possibilities must move quickly to engage the other parties to seek a
11 timely resolution of the matter. If approached in this manner adjacent territories
12 situations can be resolved before a customer requires or uses the service. In the
13 rare instances where service is immediately required then such service can be
14 accommodated by agreement and order facilitating legal service until the matter is
15 resolved. It appears KU agrees unless the customer has extended lines across
16 boundaries as KU stated in Case No. 2006-00214 that it “has no intention of
17 extending its facilities to provide such service to the SuperCenter absent approval
18 to do so from this Commission”.

19
20 **Q. Do you have any final comments?**

21 A. The Commission should rule that Stillhouse Mine No. 2 is a new ECF located in
22 the adjacent territory of CVE and KU. It should move quickly to the step number
23 2 of an adjacent territory matter and rule on the appropriate application of the

1 criteria of KRS 2783.017(3) as it is required to do under the Act. In my opinion
2 the evidence is overwhelmingly in the favor of CVE and thus CVE should be
3 granted authority to provide retail electric to Stillhouse Mine No. 2.

4

5 **Q. Does this conclude your Sur-rebuttal Testimony?**

6 **A. Yes.**

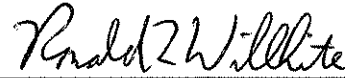
VERIFICATION

STATE OF KENTUCKY

COUNTY OF JEFFERSON

BEFORE ME, the undersigned authority, duly commissioned and qualified in and for the State and County aforesaid, personally came and appeared, Ronald L. Willhite, who, being by me first duly sworn deposed and said that:

He is appearing as a witness on the behalf of Cumberland Valley Electric, Inc., before the Kentucky Public Service Commission in a Complaint filed by Cumberland Valley Electric, and if present before the Commission and duly sworn, his testimony would be set forth in the annexed testimony.



Ronald L. Willhite

SWORN TO AND SUBSCRIBED BEFORE ME this
6th day of March, 2007



NOTARY PUBLIC

Notary Commission
Expires 6/1/09