



STOLL · KEENON · OGDEN
PLLC

2000 PNC PLAZA
500 WEST JEFFERSON STREET
LOUISVILLE, KENTUCKY 40202-2828
502-333-6000
FAX: 502-333-6099
WWW.SKOFIRM.COM

J. GREGORY CORNETT
DIRECT DIAL 502-560-4210
DIRECT FAX 502-627-8710
greg.cornett@skofirm.com

January 3, 2007

VIA HAND DELIVERY

Elizabeth O'Donnell
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, KY 40601

RECEIVED

JAN 03 2007

PUBLIC SERVICE
COMMISSION

**Re: In the Matter of Cumberland Valley Electric, Inc. v. Kentucky Utilities
Company
Case No. 2006-00148
Our File No.: 400001/122720**

Dear Ms. O'Donnell:

Enclosed please find and accept for filing the original and ten (10) copies of Kentucky Utilities Company's Rebuttal Testimony of F. Howard Bush II in the above-referenced matter. Please confirm your receipt of this filing by placing the stamp of your Office with the date received on the additional copy provided and return it to me.

Should you have any questions or need any additional information, please contact me at your convenience.

Very truly yours,

J. Gregory Cornett

JGC/cja
Enclosures
cc: Parties of Record

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

IN THE MATTER OF:

JAN 03 2007

CUMBERLAND VALLEY ELECTRIC, INC.)

PUBLIC SERVICE
COMMISSION

COMPLAINANT)

v.)

CASE NO. 2006-00148

KENTUCKY UTILITIES COMPANY)

DEFENDANT)

_____)

REBUTTAL TESTIMONY OF
F. HOWARD BUSH, II
MANAGER, TARIFFS AND SPECIAL CONTRACTS

Filed: January 3, 2007

1 **Q. Please state your name, position, and business address.**

2 A. My name is F. Howard Bush, II. I am the Manager of Tariffs and Special Contracts for
3 E.ON U.S. LLC, providing service to Kentucky Utilities Company (“KU”). My business address
4 is 220 West Main Street, Louisville, KY 40202.

5 **Q. Have you previously offered testimony to the Kentucky Public Service Commission**
6 **(the “Commission”) in this proceeding?**

7 A. Yes. I filed direct testimony on October 6, 2006.

8 **Q. Do you have any corrections or additions to your previously-filed direct testimony?**

9 A. Yes. I have some of both. First, the reference to approximately \$41,000 on page 17, line
10 22 of my direct testimony should be corrected to read approximately \$42,000 as set forth in
11 KU’s Response to CVE’s Initial Data Request No. 14, which response was filed on November 1,
12 2006. Second, as set forth in KU’s Response to CVE’s Initial Data Request No. 5, also filed on
13 November 1, 2006, my past testimonial experience set forth on page 1, lines 11-16 of my direct
14 testimony should be supplemented to reflect my testimony in Case No. 2003-00226. That
15 testimony involved territorial issues on behalf of KU.

16 **Q. What is the purpose of your rebuttal testimony?**

17 A. The purpose of this rebuttal is to clarify the issues in this case, in light of the discovery
18 that has occurred, and to discuss those issues in light of all the evidence now of record.

19 **Q. Much of the discovery directed to KU in this proceeding has revolved around KU’s**
20 **position that the mining operations at Stillhouse Mine No. 2 (“Stillhouse #2”) do not**
21 **constitute a new electric consuming facility (“ECF”). Please provide some context for that**
22 **position in this proceeding as a whole.**

1 A. Certainly. It is important for the Commission to recognize that the issue of whether
2 Stillhouse #2 is a new ECF is only one of the issues presented in this case. It is KU's position
3 that the Commission could analyze this case under three different mechanism, but that no matter
4 how the case is analyzed the clear weight of the evidence leads to a conclusion that KU is the
5 proper and lawful supplier of electricity for the mining operation at issue here. First, the
6 Commission could determine that KU's sale of electricity is consistent with the Certified
7 Territories Act because it occurs at the Lynch Substation, well within KU's certified territory,
8 and there has been no effort to circumvent the Act through placement of that point of delivery.
9 Second, the Commission could find that Stillhouse #2 is merely an expansion of an existing ECF
10 which has been served by KU since before the Certified Territories Act was enacted, and
11 therefore KU is entitled to continue providing that service pursuant to KRS 278.018 (4). Third,
12 and finally, the Commission could determine that Stillhouse #2 is a new ECF and apply the
13 criteria set forth in KRS 278.017 (3), which criteria all favor KU. Thus, no matter how the
14 Commission analyzes this dispute, I believe KU is entitled to continue providing service to
15 Stillhouse #2.

16 **Q. With regard to that first mechanism you listed, CVE has implied that consideration**
17 **of the metering point in this case might somehow circumvent the Certified Territories Act.**
18 **Do you agree?**

19 A. No, I do not, for two reasons. First, as cited in KU's motion to dismiss, there is legal
20 precedent for the position that a sale of electricity occurs at the point of metering. Second, KU is
21 not advocating a blind adherence to a "point of delivery" or "point of sale" analysis. While an
22 intentional placement of a meter just inside the edge of one service territory, for the sole purpose
23 of delivering power to be used in the territory of another retail electric supplier, might well

1 constitute impermissible “gerrymandering” inconsistent with the Act, such is not the situation
2 here. To the contrary, it is undisputed that KU is delivering power at the same location it has
3 delivered power for mining operations in this area for over seventy years. Those operations have
4 simply expanded over time so that a part thereof is now located partially within the territory of
5 CVE, although much of the operations remain well within KU’s territory. Those facts, taken
6 together with the convenience and economic benefits that certain customers can enjoy through
7 use of their own distribution networks, leads me to the conclusion that KU’s delivery of power
8 here, and the customer’s further distribution by its own private network, is entirely consistent
9 with the Certified Territories Act.

10 **Q. CVE also claims that is was improper for the customer-owned line to be extended**
11 **into CVE’s territory without Commission approval. Is there merit in that claim?**

12 A. No. As I understand it, the Commission’s jurisdiction under KRS 278 only extends to
13 utilities, and the customer here is not acting as a utility. I am aware of no other statute or
14 regulation which would require Commission approval before the customer could extend its own
15 facilities for its own use or the use of its affiliates.

16 **Q. CVE similarly continues to claim, or at least imply, that KU has violated the law by**
17 **providing service to Stillhouse #2, which service is delivered via a customer-owned**
18 **distribution network. Is there any merit in that position?**

19 A. No, there is not. As I explained in my direct testimony, KU is merely continuing to
20 provide service in the same manner as it has done since 1931, KU has no control over a
21 customer-owned distribution line, and KU had no legal basis to refuse to deliver service to a
22 customer at a point of delivery located well within KU’s territory. Moreover, under the best of
23 scenarios for CVE, this case could only be considered one in which an ECF is located in the

1 territories of both KU and CVE. Although KU did not know that Stillhouse #2 was operational
2 until this dispute arose, there is nothing unlawful about KU's service under these facts.
3 Specifically, there is nothing in the law which prohibits a utility from serving a split-territory
4 ECF absent a finding by the Commission that service should be provided by another utility.

5 **Q. Moving now to the second mechanism for analysis that you have listed, has**
6 **discovery revealed any facts which change KU's position on the issue of whether Stillhouse**
7 **#2 should be considered a new ECF?**

8 A. No. In fact, to the contrary, discovery has revealed evidence which further supports
9 KU's position that the operations at Stillhouse #2 are merely an expansion of an existing ECF.
10 Specifically, as set forth in the November 29, 2006 Response of Black Mountain Resources LLC
11 and Stillhouse Mining LLC to CVE's Supplemental Request Nos. 5, 6 and 8, we now know that
12 that the reserves permitted to Stillhouse #2 overlap reserves previously permitted to Arch, a
13 predecessor mining company, which conducted mining activities in this same area and
14 distributed power to those operations via the private distribution system now used to serve
15 Stillhouse #2. In fact, as explained in KU's Response to CVE's Initial Data Request No. 16,
16 which response was filed on November 1, 2006, Arch had a ventilation fan located only a few
17 hundred feet from the location of the current Stillhouse #2 portal. This is further evidence
18 connecting the operations at Stillhouse #2 to mining operations conducted by predecessors in
19 interest in the past. While the exact location and number of these mines has varied over the
20 years, along with the identities of the owners / operators, all such operations have been served by
21 KU through a single metering point at the KU Lynch Substation. In my lay opinion, that
22 situation is very similar to the oil wells at issue in *In the Matter of: Henderson Union Rural*

1 *Electric Coop. Corp. v. Kentucky Utilities Co.*, Case No. 9454 (PSC Order of July 8, 1986), in
2 which the Commission found a single ECF to exist as discussed in my direct testimony.

3 **Q. CVE has claimed that it has served other customers on or near the U.S. Steel**
4 **Property in the past. How does that affect the issue of whether Stillhouse #2 is a new ECF?**

5 A. To begin with, I note that CVE has provided no hard evidence supporting its claim that
6 such customers were in fact on the U.S. Steel Property. However, even accepting that claim as
7 true for purposes of argument, I do not believe it in any way affects the issue of whether
8 Stillhouse #2 is a new ECF. KU is not claiming that everything on the U.S. Steel Property, or all
9 mining operations in Harlan County, constitutes a single ECF. Rather, KU's position is simply
10 that those mining operations conducted by U.S. Steel and its successors in interest on the U.S.
11 Steel Property in Harlan County, which have all been served through a common metering point
12 at the KU Lynch Substation, and have all utilized a privately-owned distribution system, are
13 sufficiently related – legally, physically, geographically and logically – to constitute a single
14 ECF. The fact that there have been other customers in the area, none of which have been related
15 to the aforementioned mining activities or utilized the referenced point of delivery and private
16 distribution line, is simply not relevant to the issue at hand.

17 **Q. Please shift now to the final component of KU's position in this case – that even if**
18 **Stillhouse #2 were considered to be a new ECF, KU would still be entitled to continue**
19 **serving that ECF. Has discovery revealed anything that changes KU's position in that**
20 **regard?**

21 A. Not at all. Discovery has merely solidified the evidence in that regard, as I discussed at
22 length in my direct testimony. Although CVE has refused to concede the point in discovery, it

1 has produced absolutely no evidence which would allow it to prevail if the customer's facilities
2 are considered by the Commission.

3 **Q. Please provide an overview of the evidence under the four factors set forth in KRS**
4 **278.017(3), as fully developed through discovery.**

5 A. It is clear that, should the Commission determine to analyze this case as one involving a
6 new ECF located in the adjacent territories of KU and CVE, then the outcome of the analysis
7 under KRS 278.017(3) will hinge largely, if not entirely, on whether or not the customer's lines
8 are considered (as KU and the customer urge) or not (as CVE urges). If those facilities are
9 indeed considered, the evidence is overwhelmingly in KU's favor. KU is using, and will
10 continue to use, its Lynch Substation to serve Stillhouse #2, which is immediately adjacent to the
11 customer's point of delivery. The age of those facilities, and the date of KU's first service in the
12 area, date back to 1931. KU's facilities, as already configured, are capable of continuing to
13 provide dependable, high quality retail service to Stillhouse #2 and to the customer's other
14 mining operations, as they have done for many years, and no new facilities would be required.
15 On the other hand, CVE's facilities are nearly ½ mile away from any point of delivery to
16 Stillhouse #2, and its facilities and service in the area date back only to 1949. In order to serve
17 Stillhouse #2, CVE's facilities would have to be extended through construction of a 2300 foot
18 line extension – in the area where the customer's own line already exists – and the addition of a
19 transformer bank, all at a cost of approximately \$40,000.

20 **Q. Has CVE produced any evidence which should lead the Commission to ignore the**
21 **existence of the customer's distribution network here?**

22 A. No, it has not. CVE merely continues to claim that it is inconsistent with the Certified
23 Territories Act to "attribute" customer-owned lines to any utility in resolving a territorial dispute.

1 However, that argument mischaracterizes KU's position and is without either factual or legal
2 support. KU is not asking the Commission to "attribute" the customer's distribution network to
3 KU, as if it were a KU facility. Instead, KU is simply asking that the Commission acknowledge
4 the existence of those facilities and the fact that, in light of the existence of those facilities, KU
5 and CVE can serve the Stillhouse #2 load through different points of delivery – KU at the Lynch
6 Substation, and CVE near the area of the mine portal. Such a result is entirely consistent with
7 past Commission precedent, and would further the express intent of the Certified Territories Act,
8 as I explained in detail in my direct testimony.

9 **Q. Commission Staff has inquired in discovery about the timeframe in which mining at**
10 **Stillhouse #2 will be conducted in the respective territories of KU and CVE. Should that**
11 **timing bear on the Commission's decision in this case?**

12 A. Not at all. The Commission has previously held that so long as reserves to be mined are
13 in both utilities' territories, the factors set forth in KRS 278.017 (3) must be applied (assuming
14 the case presents a situation involving a new ECF). *In the Matter of: Kentucky Utilities*
15 *Company v. Henderson-Union Rural Electric Cooperative Corporation*, Case No 89-349 (PSC
16 Order of July 2, 1990). Moreover, in the past the Commission has given no weight to the timing
17 of planned mining activities that were to take place in the territories of two neighboring utilities.
18 *In the Matter of: Henderson-Union Rural Electric Cooperative Corporation*, Case No. 93-211
19 (PSC Order of March 3, 1994); *In the Matter of: Kenergy Corporation v. Kentucky Utilities*
20 *Company*, Case No. 2002-00008 (PSC Order of October 18, 2002).

21 **Q. Finally, Mr. Bush, have your recommendations to this Commission changed since**
22 **the filing of your direct testimony?**

1 A. No, they have not. My recommendations remain the same as set forth in that earlier
2 testimony.

3 **Q. Does this conclude your rebuttal testimony?**

4 A. Yes it does.

