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June 26, 2006

RECEIVED

JUN 26 2006

**PUBLIC SERVICE
COMMISSION**

Hon. Elizabeth O'Donnell
Executive Director
Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, Kentucky 40602-0615

Re: Kentucky Utilities Company
Louisville Gas and Electric Company
Case No. 2005-00467
Case No. 2005-00472

Dear Ms. O'Donnell:

We enclose for filing an original and ten copies of the Response of Louisville Gas and Electric Company and Kentucky Utilities Company to the Application for Rehearing of Cunningham, CDH Preserve, LLC, Harrison and Hardin in the above-captioned case. We would appreciate your placing it in the record of the case and bringing it to the attention of the Commission. Thank you for your assistance.

Sincerely,

Robert M. Watt, III

Rmw

Cc: Parties of Record (w/encl.)

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

JUN 26 2006

PUBLIC SERVICE
COMMISSION

In the Matter of:

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

and

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

RESPONSE OF LOUISVILLE GAS AND ELECTRIC COMPANY AND
KENTUCKY UTILITIES COMPANY TO CUNNINGHAM, CDH
PRESERVE, LLC, HARRISON AND HARDIN
APPLICATION FOR REHEARING

Louisville Gas and Electric Company (“LG&E”) and Kentucky Utilities Company (“KU”) (collectively the “Companies”) respectfully submit this response to the Application for Rehearing (“Application”) filed herein on June 16, 2006, by Intervenors, Dennis L. Cunningham, Cathy Cunningham, CDH Preserve, LLC, Lisa Harrison and Jennifer Hardin (collectively the “Cunninghams”) by and through their counsel. The Cunninghams raise no issues in their Application suggesting that the final order entered herein on May 26, 2006, should be modified in any way or that rehearing should be granted to consider further such proposed modification. In addition, the Cunninghams’

request that the Commission should stay the Order of May 26, 2006, should be denied because the Cunninghams have offered no valid justification for such drastic action.

The Application consists of three parts: the first one seeks findings and conclusions on the issue of the Companies' response to the public comments; the second seeks a statement of the factual or legal basis for denying the Cunninghams the protection of the doctrine of res judicata and the third seeks a stay of the Order of May 26. The relief sought in the first two parts of the Application should be denied because the Order of May 26 is legally sufficient in all respects and needs no modification.

KRS 278.370 sets forth the manner in which orders of the Commission should be issued and maintained: "Every order, finding, authorization or certificate issued or approved by the commission under any of the preceding provisions of this chapter shall be in writing and entered on the records of the commission." There is no requirement that the Commission's orders contain findings of fact or conclusions of law, either in the statutes, regulations or case law, although the Commission has sometimes issued findings and conclusions. There is also no requirement that the Commission's orders set forth factual or legal bases for denying requests or motions to dismiss proceedings. Thus, the Order of May 26 contains all the information it needs to be in compliance with applicable legal standards.

The Cunninghams argue in their Application that the Order of May 26 should have set forth in detail the statements of those who spoke at the local public hearing in this matter on March 6, 2006, in Elizabethtown, Kentucky. A record of their statements is set forth in the Commission's Intra-Agency Memorandum dated March 14, 2006. At the evidentiary hearing in this case, the Commission's Staff Counsel confirmed that the

Intra-Agency Memorandum is part of the record of this proceeding.¹ The videotape of the local public hearing is also part of the record. In addition, all three Commissioners were present at the local public hearing when the comments were made and heard the public comments and considered them in making their decision. Thus, there is no need to include those comments in the final order in this case.

Even when findings of fact and conclusions of law are required in court proceedings in Kentucky, there is no requirement to include the information requested by the Cunninghams in their Application. CR 52 requires the inclusion of findings and conclusions in certain instances in court proceedings. A leading commentator gives the following guidance regarding the sufficiency of a court's findings of fact:

Findings of fact are sufficient if they indicate the factual basis for the court's general conclusion as to ultimate facts and are broad enough to cover all material issues. The exclusion of certain testimony from the findings is not necessarily an error. **A trial court is not a dictating machine, and its findings do not have to discuss evidence supporting every possible viewpoint. Nor need the trial court make findings as to every detail.** It is sufficient if the findings cover in clear, definite and concise language the contested issue or issues in the case.² (Emphasis added)

Thus, the Cunninghams' proposed modification of the Order of May 26 would not be necessary even if findings and conclusions were required.

In Part II of their Application, the Cunninghams request that the Commission include the factual or legal basis for denying the Cunninghams the protection of the doctrine of res judicata. This issue was addressed at page 4 of the Order of May 26 and the language there is virtually identical to the language set forth on page 5 of the

¹ TE, Vol. III, pp. 30-31.

² 7 Philipps, Kramer, Burleigh, *Kentucky Practice*, CR 52.01 at 277 (2005).

Cunninghams' Proposed Order submitted herein on May 12, 2006. If the Cunninghams wanted different treatment of that issue, they should have suggested it in their Proposed Order. The Cunninghams' claim (at page 5 of the Application) that they filed a motion to dismiss Case No. 2005-00467 on res judicata grounds is not accurate. When they argued in opposition to the Companies' Motion for an Order Limiting the Scope of the Hearing, they included a section in their papers stating that the case should be dismissed on res judicata grounds, but no motion was ever filed. It is, therefore, difficult to understand why the Commission should be required to set forth the factual or legal basis for rejecting an argument that is set forth only in a response to a properly filed motion. Moreover, even if the Cunninghams had filed a motion to dismiss on res judicata grounds, there is no requirement that an order denying their motion needs to set forth the factual or legal basis for the action. Indeed, CR 52.01 specifically exempts decisions on CR 12 or 56 motions from the requirement that findings and conclusions be issued by a court. As stated above, the requirements for the form of Commission orders is less exacting than the Civil Rules.

In the second half of Part II of the Application, the Cunninghams revisit their initial argument and assert that the Order of May 26 should be modified to include an analysis of the Companies' response to the public comments about the proposed transmission line. While the responsiveness of a utility to public concerns is important to both the Commission and to the utilities under its jurisdiction (including the Companies), the adequacy of a utility's response to public comments is not a specific component of the decision whether to grant or deny a certificate of public convenience and necessity for

a transmission line under KRS 278.020 or the decision of the Court of Appeals in Kentucky Utilities Company v. Public Service Commission, 252 S.W.2d 885 (Ky. 1952).

The Cunninghams argue that the decision of the Court of Appeals in American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Com'r., 379 S.W.2d 450 (Ky. 1964) supports the proposition that “the PSC Order must provide the factual basis in the record that supports such conclusion [regarding the Companies’ response to the public comments].”³ The Cunninghams mischaracterize the American Beauty Homes decision. That decision does not address the contents of any orders; it simply states that an administrative agency’s conclusion must be supported by substantial evidence.⁴

The record in this proceeding is replete with evidence detailing the Companies’ full and prompt response to every landowner affected by the proposed transmission line and to every person who spoke at the local public hearing. Indeed, Kathleen Slay presented to the Commission a detailed spreadsheet setting forth minute details about the Companies’ contacts with some 75 landowners affected by the proposed transmission line.⁵ A summary of the overwhelming response by the Companies to the affected landowners and public comments is set forth at pages 27-30 of the Companies’ Proposed Order submitted herein on May 12, 2006.⁶ Given that the record is complete on this issue and that the issue is not essential to the decision of whether to grant or deny the

³ Application at p. 7.

⁴ American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Com'r., supra at 456.

⁵ TE, Vol. III, Exhibit 14.

⁶ Rather than analyze the Companies’ response to public comments in their Proposed Order, the Cunninghams argued that the Companies’ should have utilized a totally different route selection methodology that was based largely on some sort of plebiscite that would place a transmission line along a route where all the property owners either wanted the line on their property or already had a line on their property. Unfortunately, such a methodology is not realistic.

certificate of public convenience and necessity, there is no need to include an analysis in the final order. If the Commission is inclined to include such analysis, then the analysis submitted by the Companies in their Proposed Order should be used.

Finally, the Cunninghams argue that the Commission should modify the Order of May 26 to stay the effect of such order pending judicial review. There are several reasons for rejection of this argument. First, such course of action is prohibited by KRS 278.020(8), which requires the Commission to issue its decision in transmission line certificate cases within a maximum of 120 days after the utility's application is filed. An order that nullifies a final decision that was made within the 120 day limit has the effect of circumventing the 120 day limit. Since more than 120 days have passed since the Companies' application was administratively complete, it would violate the spirit of the statute for the Commission to stay the effect of the May 26 Order.

Second, a review of recent Commission cases reveals that the Commission has been reluctant to stay its orders pursuant to KRS 278.390, as requested by the Cunninghams here. In *In the Matter of: The Application of Kentucky Power Company d/b/a American Electric Power to Assess a Surcharge Under KRS 278.183 to Recover Costs of Compliance With the Clean Air Act and Those Environmental Requirements Which Apply To Coal Combustion Wastes and By-Products*,⁷ the Commission denied the motion of Kentucky Power to stay a portion of an order in the case requiring the filing of a tariff. In so doing, the Commission said, "Neither a utility's nor an intervenor's dissatisfaction with a Commission decision is sufficient cause to suspend the decision

⁷ Case No. 96-489, Order dated June 20, 1997.

pending further administrative proceedings or implement future modifications on a retroactive basis.”⁸

Third, a stay is a form of injunctive relief. It may be granted only in extraordinary circumstances,⁹ which do not exist here. The Cunninghams seek a stay of the effectiveness of an order that resulted from the production of several gigabytes of data, a local public hearing during which the Commission and its Staff could hear first-hand the concerns of the public, three days of cross-examination hearings, and a full opportunity for briefing. The Cunninghams had full opportunity to make every point they wanted to make and to ask every question they wanted to ask. In those circumstances, a stay, which is in the nature of a temporary injunction, should not issue.

The Kentucky Court of Appeals, in Maupin v. Stansbury,¹⁰ enunciated the standard for the issuance of such extraordinary relief. The first requirement is a showing by the movant of irreparable injury.¹¹ The Cunninghams have neither alleged nor can they prove that they will suffer irreparable injury if the effectiveness of the Order of May 26 is not stayed. It is true that they have stated that do not want the subject transmission line on their property. But its presence on their property will not cause them irreparable harm.

The second requirement is a balancing of the equities involved, which includes such things as possible detriment to the public interest, harm to the party opposing the injunction and whether the injunction will merely preserve the status quo.¹² The Cunninghams cannot prevail under this inquiry because the possible detriment to the

⁸ Id. at 2-3.

⁹ Maupin v. Stansbury, 575 S.W.2d 695, 697 (Ky. App. 1978).

¹⁰ 575 S.W.2d 695 (Ky. App. 1978).

¹¹ Id. at 699.

¹² Id.

public interest as a result of a stay is significant. Any delay in the construction of the subject transmission line will cause a delay in the integration of the Trimble County No. 2 Generating Station (“TC2”) in the transmission grid. In five separate proceedings, this Commission has found that there is a need to bring that generating station on line in the Spring of 2010.¹³ The need identified in those cases is for the public, which includes all inhabitants of Kentucky from Catlettsburg to Fulton and from Covington to Franklin, not just the Companies and their customers. In addition, the Companies and their customers will suffer damage if any delay results in a delay in the construction of TC2.¹⁴ Any consideration of a possible stay in the effectiveness of the Order of May 26 must include consideration of the Cunninghams’ posting a substantial bond with surety to protect the Companies against any damage that might occur as a result of the stay.

Finally, the request for a stay should be evaluated to see whether a substantial question has been presented.¹⁵ As indicated above, there is no reason to implement the modifications proposed to the Order of May 26 and, thus, no substantial question has been presented. Even if the Commission were inclined to modify the Order of May 26, it can do so without issuing a stay because the request for the modification and the request for the stay are in the same pleading. The Commission cannot possibly determine whether the Cunninghams will present a substantial question for judicial review since their grounds for a possible appeal are not set forth in the Application. Thus, the Cunninghams have not demonstrated and cannot demonstrate that they have presented a substantial question justifying a stay pending judicial review.

¹³ Case Nos. 2004-00507, 2005-00142, 2005-00154, 2005-00155 and 2005-00467, as well as Case no. 2005-00152 before the Kentucky State Board on Electric Generation and Transmission Siting.

¹⁴ The order in Case No. 2004-00507 states that the estimated cost of construction of TC2 is \$1.1 billion. Delays in the TC2 construction schedule could substantially increase the cost of the project to the Companies’ customers.

¹⁵ Maupin v. Stansbury, supra at 699.

For all of the foregoing reasons, it is respectfully submitted that the Cunninghams Application for Rehearing, including the request for a stay pending judicial review, must be denied.

Dated: June 26, 2006

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was mailed by first class, prepaid postage to the following this 26th day of June 2006:

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