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March 21, 2006

RECEIVED

MAR 21 2006

PUBLIC SERVICE  
COMMISSION

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

**Re: Application of Louisville Gas and Electric Company and Kentucky Utilities Company for a Certificate of Public Convenience and Necessity for the Construction of Transmission Facilities in Jefferson, Bullitt, Meade and Hardin Counties, Kentucky**  
**Case Nos. 2005-00467 and 2005-00472 ✓**  
**Our File No.: 400001/358725**

Dear Ms. O'Donnell:

Enclosed please find and accept for filing the original and ten (10) copies of Louisville Gas and Electric Company's and Kentucky Utilities Company's Motion for Order Limiting Scope of Hearing in the above-referenced cases. Please confirm your receipt of this filing by placing the stamp of your Office with the date received on the two enclosed additional copies and return them to me in the enclosed self-addressed stamped envelope.

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

Very truly yours,



J. Gregory Cornett

JGC/  
Enclosures  
cc: Parties of Record

**COMMONWEALTH OF KENTUCKY**  
**BEFORE THE PUBLIC SERVICE COMMISSION**

**In the Matter of:**

<b>APPLICATION OF LOUISVILLE</b>	)	
<b>GAS AND ELECTRIC COMPANY AND</b>	)	
<b>KENTUCKY UTILITIES COMPANY FOR</b>	)	
<b>A CERTIFICATE OF PUBLIC CONVENIENCE</b>	)	<b>CASE NO.</b>
<b>AND NECESSITY FOR THE CONSTRUCTION</b>	)	<b>2005-00467</b>
<b>OF TRANSMISSION FACILITIES IN</b>	)	
<b>JEFFERSON, BULLITT, MEADE AND</b>	)	
<b>HARDIN COUNTIES, KENTUCKY</b>	)	

**In the Matter of:**

<b>APPLICATION OF LOUISVILLE</b>	)	
<b>GAS AND ELECTRIC COMPANY AND</b>	)	
<b>KENTUCKY UTILITIES COMPANY FOR</b>	)	
<b>A CERTIFICATE OF PUBLIC CONVENIENCE</b>	)	<b>CASE NO.</b>
<b>AND NECESSITY FOR THE CONSTRUCTION</b>	)	<b>2005-00472</b>
<b>OF ALTERNATIVE TRANSMISSION FACILITIES</b>	)	
<b>IN JEFFERSON, BULLITT, MEADE AND</b>	)	
<b>HARDIN COUNTIES, KENTUCKY</b>	)	

**MOTION FOR ORDER LIMITING SCOPE OF HEARING**

The Joint Applicants, Louisville Gas and Electric Company and Kentucky Utilities Company (collectively the "Companies"), hereby move the Kentucky Public Service Commission ("Commission") to enter an order limiting the scope of the upcoming evidentiary hearing in this matter to prevent matters already decided, or beyond the scope of the Commission's jurisdiction, from being injected into the hearing, resulting in an inefficient use of time and resources. In support of this motion, the Companies state as follows:

## **BACKGROUND**

As the Commission is aware, the applications in these consolidated proceedings were filed in December, 2005 seeking a certificate of public convenience and necessity (“CPCN”) for a new 345 kV transmission line from the Mill Creek Generating Station in Jefferson County to the Hardin County Substation in Hardin County. The proposed line is needed to support the integration of a new baseload generating unit at the Trimble County Generating Station (“TC2”) which was recently certificated by the Commission.

The applications here followed the Commission’s September 8, 2005 order in Case No. 2005-00142, which case also involved a requested CPCN for a 345 kV transmission line, between the Mill Creek Generating Station and the Hardin County Substation, associated with TC2. Although the Commission denied the CPCN sought in Case No. 2005-00142, it did make a final determination that a new 345 kV transmission line between the Mill Creek Generating Station and the Hardin County Substation will in fact be needed when TC2 becomes operational in 2010. Specifically, at page 6 of its September 8 Order, the Commission stated:

Based on the testimony and other record evidence, the Commission finds that the need for the proposed line has been established and will be required upon commencement of operations at TC2.

In that same order, the Commission also denied an argument that the Companies should have obtained other approvals relating to environmental, historical and cultural issues before seeking a CPCN from the Commission. At pages 3-4 of its Order, the Commission said:

[T]he Cunninghams argue that the application is premature because all environmental, historical, and other required assessments are not complete. They argue that the Commission should not consider this application until the Company has obtained all other necessary permits....

The Commission likewise finds no support in KRS 278.020 for this position. Statutes that require a particular agency or

application to be the ‘last stop’ are easy to draft; they simply state that the application for a specific permit shall not be filed until all other necessary permits are already in hand... The absence of such a provision in KRS 278.020 is significant.

In the end, the order in which they choose to apply for the different approvals is at the discretion of the utilities.

No appeal was taken from the Commission’s final order in Case No. 2005-00142.

In another recent order in a different proceeding, Case No. 2005-00207, the Commission also addressed an intervenor’s claims that a failure to conduct a complete survey of properties that might be subject to the National Historic Preservation Act ("NHPA"), and to establish full compliance with the National Environmental Policy Act ("NEPA"), should be grounds for denying a utility’s application for a CPCN for transmission facilities.<sup>1</sup> The Commission found that such issues were beyond its jurisdiction, stating:

The Commission will consider all issues subject to its jurisdiction in deciding this case, but it cannot decide issues not subject to its jurisdiction.<sup>2</sup>

Despite those rulings, however, intervenors Cunningham, CDH, Harrison and Hardin have indicated an intent to revisit the need for the proposed transmission line between the Mill Creek Generating Station and the Hardin County Substation, and to challenge issues relating to other regulatory approvals and actions taken by the Companies to achieve compliance with NHPA. Specifically, counsel for these parties expressly stated that intent at the local public hearing in this matter (although they acknowledged the Commission's past rulings), a substantial portion of the data requests issued to the Companies concerned need, timing of other permits or

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<sup>1</sup> That intervenor in Case No. 2005-00207 was represented by Robert W. Griffith, the same counsel who is now co-counsel for intervenors Dennis and Cathy Cunningham, CDH Preserve LLC, Lisa Harrison, and Jennifer Hardin (“Cunningham, CDH, Harrison and Hardin”).

<sup>2</sup> In the Matter of: The Application of East Kentucky Power Cooperative, Inc. for a Certificate of Public Convenience and Necessity to Construct a 161 kV Transmission Line in Barren, Warren, Butler, and Ohio Counties, Kentucky, Case No. 2005-00207 (Order of October 31, 2005).

approvals, and environmental, historical and related issues, and testimony has been filed on behalf of Cunningham, CDH, Harrison and Hardin addressing need and environmental, historical and related issues.<sup>3</sup>

For all of the reasons set forth below, the Commission should enter an order limiting the scope of the evidentiary hearing in this matter, to preclude attempts to further challenge conclusively settled issues relating to need, except to inquire of any change in circumstances since the Commission made its previous determination on need, and to exclude any arguments, questioning of witnesses, or tender of other evidence relating to the timing of other approvals and environmental, historical, cultural and / or archaeological matters.

### ARGUMENT

#### **I. CUNNINGHAM, CDH, HARRISON AND HARDIN ARE PRECLUDED FROM ATTEMPTING TO RELITIGATE THE NEED FOR THE PROPOSED TRANSMISSION FACILITIES.**

The doctrine of *res judicata* provides that a final judgment, rendered on the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of facts and issues litigated as to the parties and their privies in all subsequent actions in the same tribunal or a tribunal of concurrent jurisdiction.<sup>4</sup> Kentucky courts have long held that the doctrine applies to quasi-judicial acts of "public, executives, or administrative officers, and boards acting within their jurisdiction"<sup>5</sup> as long as there has not been a significant change of circumstances between the two successive administrative hearings.<sup>6</sup> The purpose of the *res judicata* doctrine is to avoid protracted, repeated litigation of issues already decided.<sup>7</sup>

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<sup>3</sup>Response of LG&E and KU to Data Requests of Intervenors Dennis and Cathy Cunningham; CDH Preserve, LLC; Harrison and Hardin, Request Nos. 2, 4, 5, 6, 8, 9, 10, 11, 12, 16, 17 and 19; Direct Testimony of Dennis and Cathy Cunningham; Direct Testimony of Lisa Harrison and Jennifer Hardin; Direct Testimony of Geoffrey M. Young.

<sup>4</sup>*Yeoman, M.D. et al., v. Commonwealth of Kentucky, Health Policy Board, et al.*, 983 S.W.2d 459, 464 (Ky. 1998).

<sup>5</sup>*Williamson v. Pub. Serv. Comm'n*, 174 S.W.2d 526, 529 (Ky. 1943).

<sup>6</sup>*Bank of Shelbyville v. Peoples Bank of Bagdad*, 551 S.W.2d 234, 236 (Ky. 1977).

<sup>7</sup>46 Am. Jr. 2d *Judgments* § 539.

Collateral estoppel, or issue preclusion, is viewed as a subdivision of *res judicata* in Kentucky.<sup>8</sup> Issue preclusion bars parties from re-litigating issues litigated and decided upon in an earlier action.<sup>9</sup> Although collateral estoppel and *res judicata* are cut from the same cloth, the two concepts are distinguishable:

... under the doctrine of *res judicata*, a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit on the same cause of action. Under the doctrine of collateral estoppel on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit.<sup>10</sup>

Issue preclusion will bar re-litigation of issues when: 1) the issues in the two proceedings are the same, 2) a final decision on the merits was reached in the previous proceeding 3) the estopped party had a fair opportunity to litigate the issue and 4) the issue in the prior action was necessary to the final decision.<sup>11</sup> This Commission has applied the doctrine of issue preclusion to “bar[] the adjudication of issues that have already been litigated or should have been litigated in a prior case between the same or similar parties.”<sup>12</sup> Here, all of the elements to justify issue preclusion exist as to the question of need, and any inquiry on that topic, beyond an examination of whether there has been any significant change of circumstances since need was determined, should be precluded.

First, the relevant issue in Case No. 2005-00142 is the same as in these consolidated proceedings. In deciding whether to grant a CPCN the Commission must determine whether a

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<sup>8</sup> *Revenue Cabinet, Commonwealth of Kentucky v. Samani*, 757 S.W.2d 199, 201 (Ky. App. 1988); *Yeoman*, 983 S.W.2d at 464.

<sup>9</sup> *Id.* at 465.

<sup>10</sup> *Napier v. Jones*, 925 S.W.2d 193, 195 (Ky. App. 1996).

<sup>11</sup> *Newman v. Newman*, 451 S.W.2d 417 (Ky. 1970).

<sup>12</sup> *In the matter of: The Joint Petition of Kentucky American Water Company, Thames Water Aqua Holdings GmbH, TWE Aktiengesellschaft, Thames Water Aqua US Holdings, Inc., Apollo Acquisition Company and American Water Works Company, Inc. For Approval of A change of Control of Kentucky-American Water Company*, Case No. 2002-00317 (Order of October 16, 2002), citing 46 Am.Jur.2d *Judgments* § 514.

need for the proposed facilities exists and whether the construction of such facilities will result in unnecessary duplication of facilities.<sup>13</sup> Thus, the establishment of need is at issue in any decision to approve or deny a CPCN. More specifically, the issue of the need for a new 345 kV transmission line between the Mill Creek Generating Station and the Hardin County Substation was addressed in the Application in Case No. 2005-00142, and in the Applications in each of these now-consolidated cases.<sup>14</sup>

Second, a final decision was clearly reached on the merits of whether there is in fact a need for additional 345 kV facilities between the Mill Creek Generating Station and the Hardin County Substation in Case No. 2005-00142.<sup>15</sup> Specifically, after developing and reviewing the evidence of record and conducting both a local and evidentiary hearing in that case, the Commission issued an Order on September 8, 2005 establishing that a need for the proposed facilities exists, stating:

Based on the testimony and other record evidence, the Commission finds that the need for the proposed line has been established and will be required upon commencement of operations at TC2.<sup>16</sup>

As to the third element, whether the estopped parties had a fair opportunity to litigate the issue, while Mr. and Mrs. Cunningham were parties to Case No. 2005-00142, CDH, Harrison and Hardin did not seek intervention in that case. However, the third element for issue preclusion is still satisfied here because of the substantial identity of interest among these intervenors. Kentucky, like courts across the country, will apply issue preclusion in a subsequent action not only to those who were parties to the previous action (such as the Cunninghams here),

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<sup>13</sup> *Kentucky Utilities Co. v. Pub. Serv. Comm'n*, 252 S.W.2d 885, 890 (Ky. 1952).

<sup>14</sup> Application in Case No. 2005-00142 at ¶ 5; Application in Case No. 2005-00467 at ¶ 5; Application in Case No. 2005-00472 at ¶ 5.

<sup>15</sup> No appeal was taken from the Commission's final order in Case No. 2005-00142.

<sup>16</sup> *In the Matter of: Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company For a Certificate of Public Convenience and Necessity For the Construction of Transmission Facilities in Jefferson, Bullitt, Meade and Hardin Counties, Kentucky*, Case No. 2005-00142 (Order of September 8, 2005).

but also to those who were not parties to the previous action so long as they are in "privity" with those who were parties to the previous action.

In determining whether privity exists, courts generally make a case by case examination of the circumstances of the case and the rights and interests of the parties to be held in privity.<sup>17</sup>

However, it is generally said that privity exists when there is a sufficient identity of interest:

While the concept of privity defies a precise, inflexible definition, a key consideration for its existence is the sharing of the same legal right by the parties allegedly in privity. This is to ensure that the interests of the party against whom *res judicata* has been asserted have been adequately represented by his purported privy at the initial trial of the cause of action.<sup>18</sup>

Stated differently, privity exists where the interests of those not a party to the previous action were "adequately represented" in the earlier proceeding.<sup>19</sup> The Commission has recognized the notion that strict identity of parties is not required, stating that issue preclusion bars relitigation of decided issues "between the same *or similar* parties."<sup>20</sup>

Here, it is clear that Mr. and Mrs. Cunningham, who were granted full intervenor status in Case No. 2005-00142, engaged in discovery and were present and represented by counsel at the evidentiary hearing, had ample opportunity to, and did, fully contest the very same issue of need that they now seek to relitigate. It is also clear that CDH,<sup>21</sup> Harrison and Hardin are in privity with Mr. and Mrs. Cunningham for purposes of issue preclusion. All of these parties

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<sup>17</sup> 47 Am. Jur. 2d *Judgments* § 663.

<sup>18</sup> *BTC Leasing Inc. v. Martin*, 685 S.W.2d 191, 198 (Ky. 1984). See also *Daigle v. City of Portsmouth*, 534 A.2d 689 (N.H. 1987) (stating that privity is a functional, not formal, relationship in which the interests of the nonparty were protected in the prior litigation); *McFadden v. McFadden*, 396 P.2d 202 (Or. 1964) (stating that the requirements for privity in applying issue preclusion are satisfied if the first proceeding provided substantial protection of the rights and interests of the parties to be precluded in the subsequent litigation).

<sup>19</sup> *Sanders Confectionary Prod., Inc. v. Heller Financial, Inc.*, 973 F.2d 474, 480 (6th Cir. 1994).

<sup>20</sup> *In the matter of: The Joint Petition of Kentucky American Water Company, Thames Water Aqua Holdings GmbH, TWE Aktiengesellschaft, Thames Water Aqua US Holdings, Inc., Apollo Acquisition Company and American Water Works Company, Inc. For Approval of A change of Control of Kentucky-American Water Company*, Case No. 2002-00317 (Order of October 16, 2002).

<sup>21</sup> CDH is an LLC organized and managed by the Cunninghams.



represent the same legal interest -- the interest of landowners who may be affected by the proposed line -- and there can be no question but that the interests of CDH, Harrison and Hardin were adequately represented in Case No. 2005-00142, where the issue of need was the subject of extensive cross-examination and the presentation of expert testimony on behalf of the Cunninghams.<sup>22</sup> The conclusion that all of these parties are in privity is bolstered by the fact that they are all here represented by the same counsel who represented the Cunninghams in Case No. 2005-00142.<sup>23</sup> Moreover, the identity of the parties' interest as to need is made clear by their recently-filed testimony, in which Harrison and Hardin make only a passing reference to need and instead rely on the Cunningham testimony, and the testimony of Geoffrey Young (who gave testimony on these same issues in Case No. 2005-00142), to contest need.<sup>24</sup>

None of these parties have offered anything new relating to need, but instead are attempting to relitigate that issue by offering the same type of testimony considered and ruled on by the Commission in Case No. 2005-00142. Moreover, there is not so much as a claim that anything has significantly changed since the Commission made its finding of need on September 8, 2005. The proper mechanism for further contesting need was by way of a motion for rehearing following the September 8 order, pursuant to KRS 278.400, or by appeal, pursuant to KRS 278.410, but none of those steps were taken. Instead, the intervenors are attempting to collaterally attack the finding of need in this proceeding, an approach which is clearly improper.

Fourth, and finally, the Commission's finding of need for the proposed facilities in Case No. 2005-00142 was necessary to its ultimate decision in that case. As noted above, it is settled law that in deciding whether to grant or deny an application for a CPCN, the Commission first

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<sup>22</sup> See Transcript of Evidence in Case No. 2005-00142, pp. 105-127; 151-174. Indeed, that expert, Geoffrey Young, is again offered on the very same subject matter in this proceeding.

<sup>23</sup> *Petit v. Chicago*, 766 F.Supp 607 (N.D. Ill. 1991).

<sup>24</sup> Testimony of Lisa Harrison and Jennifer Hardin, p. 6, lines 10-11; Testimony of Dennis and Cathy Cunningham, p. 9, line 3 to p. 10, line 13; Testimony of Geoffrey M. Young.

determines whether a need exists and, if so, then determines whether the proposed construction will result in unnecessary duplication of facilities.<sup>25</sup> Therefore, when the Commission followed that standard by first evaluating the Companies' Application in Case No. 2005-00142 by determining that there is a need for a new 345 kV transmission line between the Mill Creek Generating Station and the Hardin County Substation, that decision was necessary to the Commission's ultimate decision on whether to grant or deny the Companies' Application.<sup>26</sup>

Because all of the elements for issue preclusion exist as to the need for the proposed transmission facilities, the Commission's analysis of need in this proceeding is limited to a consideration of whether any "significant change of circumstances" regarding need since its Order of September 8, 2005.<sup>27</sup> Accordingly, the Commission should enter an order precluding Cunningham, CDH, Harrison and Hardin from offering any direct testimony, cross-examination, or other evidence on the issue of need except as it relates to that question of any significant change in circumstances.

**II. ISSUES RELATING TO TIMING OF OTHER APPROVALS AND TO ENVIRONMENTAL, HISTORICAL, AND CULTURAL MATTERS ARE SETTLED UNDER THIS COMMISSION'S PREVIOUS RULINGS AND SHOULD BE EXCLUDED FROM THE EVIDENCE HERE.**

As noted above, Cunningham, CDH, Harrison and Hardin have also indicated an intent to address issues regarding the timing of other permits or regulatory approvals that have been or may be sought by the Companies, and regarding a number of environmental, historical and cultural issues (including compliance with the National Historic Preservation Act ("NHPA") and the National Environmental Policy Act ("NEPA")). Those issues are not new to the

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<sup>25</sup> *Id.* at 5; *Kentucky Utilities Co. v. Pub. Serv. Comm'n*, 252 S.W.2d 885, 890 (Ky. 1952).

<sup>26</sup> *In the matter of: Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company For a Certificate of Public Convenience and Necessity For the Construction of Transmission Facilities in Jefferson, Bullitt, Meade and Hardin Counties, Kentucky*, Case No. 2005-00142 (Order of September 8, 2005), at 5-6.

<sup>27</sup> *Bank of Shelbyville v. Peoples Bank of Bagdad*, 551 S.W.2d 234, 236 (Ky. 1977). The Companies have addressed the issue of whether any change of circumstances has occurred in the Direct Testimony of Michael Toll and John Wolfram.

Commission. In fact, the Commission has previously ruled that such issues are not properly raised in proceedings involving the application for a transmission line CPCN.

In Case No. 2005-00142, the Commission squarely addressed a claim that the Companies should have obtained other state or federal approvals relating to environmental, historical and cultural issues before seeking a CPCN from the Commission. At pages 3-4 of its Order, the Commission rejected that claim, stating:

[T]he Cunninghams argue that the application is premature because all environmental, historical, and other required assessments are not complete. They argue that the Commission should not consider this application until the Company has obtained all other necessary permits....

The Commission likewise finds no support in KRS 278.020 for this position. Statutes that require a particular agency or application to be the 'last stop' are easy to draft; they simply state that the application for a specific permit shall not be filed until all other necessary permits are already in hand. The absence of such a provision in KRS 278.020 is significant.

In the end, the order in which they choose to apply for the different approvals is at the discretion of the utilities.<sup>28</sup>

That ruling was reaffirmed by the Commission in another proceeding a month later.<sup>29</sup>

The Commission has also addressed an intervenor's claims that matters of environmental, historical and cultural significance (including compliance with NHPA and NEPA) should be considered by the Commission in transmission line CPCN proceedings. The Commission found that such issues were beyond its jurisdiction, stating:

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<sup>28</sup> *In the Matter of: Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company For a Certificate of Public Convenience and Necessity For the Construction of Transmission Facilities in Jefferson, Bullitt, Meade and Hardin Counties, Kentucky*, Case No. 2005-00142 (Order of September 8, 2005).

<sup>29</sup> *In the Matter of: The Application of East Kentucky Power Cooperative, Inc. for a Certificate of Public Convenience and Necessity to Construct a 161 kV Transmission Line in Barren, Warren, Butler, and Ohio Counties, Kentucky*, Case No. 2005-00207 (Order of October 31, 2005).

The Commission will consider all issues subject to its jurisdiction in deciding this case, but it cannot decide issues not subject to its jurisdiction.<sup>30</sup>

This Commission, like other quasi-judicial bodies and courts, follows precedent from its previous orders and those of courts of law in making its decisions. The Commission has previously ruled that issues relating to the timing of other approvals and regarding environmental, historical and cultural matters have been ruled to be beyond the scope of these types of proceedings, and those rulings should be followed here. The Commission should enter an order limiting the legal arguments and evidence at the hearing in these consolidated proceedings accordingly.

### **CONCLUSION**

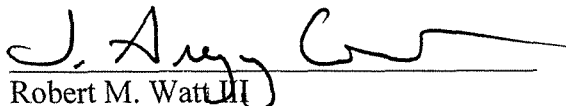
For all of the reasons set forth above, the Commission should enter an order limiting the scope of the evidentiary hearing in this matter, to preclude attempts to further challenge the conclusively settled issue of the need for the subject transmission facilities, except to the extent of an inquiry into any significant change in circumstances since need was established, and to exclude any arguments, questioning of witnesses, or tender of other evidence relating to environmental, historical or cultural matters or the timing of other permits or approvals.

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<sup>30</sup> *Id.*

Dated: March 21, 2006

Respectfully submitted,



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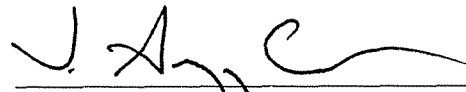
Counsel for Louisville Gas and  
Electric Company and Kentucky  
Utilities Company

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing was mailed by first class, postage prepaid to the following this 21st day of March, 2006.

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Mary S. Estes 538 Yates Chapel Road Cecilia, KY 42724	Bobby N. Estes 538 Yates Chapel Road Cecilia, KY 42724
Todd Estes 2684 Bethlehem Academy Road Cecilia, KY 42724	James K. and Sandy Thompson 2162 Bethlehem Academy Road Cecilia, KY 42724
Marion French 933 Blueball Church Road Elizabethtown, KY 42701	Milissa French 933 Blueball Church Road Elizabeth, KY 42701
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