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PUBLIC SERVICE
COMMISSION

April 30, 2007

Ms. Elizabeth O'Donnell
Executive Director
Kentucky Public Service Commission
P.O. Box 615
Frankfort, Kentucky 40602-0615

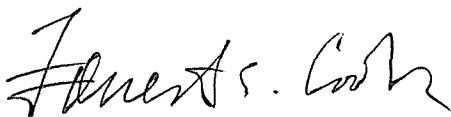
Re: In the Matter of Cumberland Valley Electric, Inc. versus Kentucky Utilities Company, Case No. 2006-00148

Dear Ms. O'Donnell:

Enclosed please find and accept for filing the original and ten (10) copies of the **Post-Hearing Brief** of Black Mountain Resources LLC and Stillhouse Mining LLC.

Should you have questions concerning the enclosed items, please advise.

Sincerely,



Forrest E. Cook

FEC/bjg

Enclosures

cc: Parties of Record

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

APR 30 2007

PUBLIC SERVICE
COMMISSION

In the Matter of:

CUMBERLAND VALLEY ELECTRIC, INC.)
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COMPLAINANT)
)
v.)
)
)
KENTUCKY UTILITIES COMPANY)
)
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)
)
DEFENDANT)

CASE NO. 2006-00148

POST-HEARING BRIEF OF BLACK MOUNTAIN RESOURCES LLC
AND STILLHOUSE MINING LLC

Black Mountain Resources LLC and Stillhouse Mining LLC¹ submit the following post-hearing brief. As more fully set forth below, the intervening parties submit that the Complaint of Cumberland Valley Electric, Inc. ("CVE") should be dismissed.

FACTS

This dispute involves the provision of retail electric service to Stillhouse #2, an underground mining operation licensed and operated by Stillhouse Mining LLC, a subsidiary of Black Mountain Resources LLC ("BMR").² Stillhouse #2 is one of several portals that have been used to access a contiguous permitted boundary³ of the Harlan coal seam within what is sometimes referred to as the U.S. Steel property, a large boundary of "fee" property. BMR purchases retail

¹ Granted full intervention status by Order of the Public Service Commission, entered September 13, 2006.

² Direct Testimony of Richard Matda ("Matda Direct"), p. 1, lines 17-19, and p. 2, lines 15-16.

³ Transcript, p. 186, line 21 to p. 187, line 4; p. 215, lines 2-3.

electric service (69 kV power) from the Kentucky Utilities Company ("KU").⁴ Electricity is then distributed to various subsidiary or affiliate operations located on the U.S. Steel Property, including Stillhouse #2, which is one of nine (9) deep and surface mining operations located south of Looney Creek in Harlan County, Kentucky.

Owners of the U.S. Steel Property have been purchasing retail electric service from KU since 1931.⁵ The electrical distribution system was in use long before that date. The U.S. Steel Coal and Coke Co. built a privately owned power plant and distribution system *circa* 1917.⁶ The plant, itself, was closed in 1931. Thereafter, the distribution system remained in service with retail electrical service being provided by KU. This service (69 kV power) is connected to the BMR-U.S. Steel substation immediately adjacent to the KU Lynch substation. The private distribution system serves to distribute power to the U.S. Steel property.⁷ Although the property has changed owners over the years, all owners have relied on the private distribution system for electrical service. It continues in place to the present date. It was acquired, as a separate asset, at the time of the 1998 acquisition from Arch Minerals ("Arch") (the successor in interest to U.S. Steel's mining operations in the area), The customer has relied on the use of this asset in its planning, development and licensing of mines on the property.⁸

Stillhouse Mining LLC began coal removal operations through the Stillhouse # 2 portal in 2005.⁹ Although the portal is located in CVE's certified territory, the reserves to be mined underlie the territories of both KU and CVE.¹⁰ While the Stillhouse # 2 portal itself is only about two years old, it is but one access point to reserves that have been mined for decades. U.S. Steel,

⁴ Direct Testimony of Ronald Willhite ("Willhite Direct"), p. 6, lines 20-21.

⁵ Direct Testimony of Howard Bush ("Bush Direct"), p. 4, lines 17-21.

⁶ Direct Testimony of Richard Matda ("Matda Direct"), p. 3, lines 7-10, 15-16.

⁷ Matda Direct, p. 3, lines 16-22.

⁸ Matda Direct, p. 3, lines 18-21; p. 4, lines 1-4.

⁹ Matda Direct, p. 4, line 8.

¹⁰ Willhite Direct, p. 5, lines 6-8; p. 8, lines 7-8; p. 10, lines 7-12; Transcript, p. 15, line 21 to p. 16, line 4.

and later Arch, began deep mining in the immediate vicinity and in the same reserves via Mine # 37, *circa* 1970 or 1971.¹¹ The portal, identified herein as Stillhouse # 2, is extracting coal from the same area of reserves previously mined through Mine # 37, and Stillhouse # 2 is covered by the same Department for Surface Mining Reclamation and Enforcement (“DSMRE”) permit that authorized Mine # 37.¹²

Electrical service to Mine #37 was provided through the same distribution system. Sometime in 1980 or 1981, Arch extended that distribution system to serve a ventilation fan for Mine # 37, some 700 feet in distance from the current Stillhouse # 2 portal.¹³ According to testimony at the March 14, 2007, hearing, the Mine #37 fan placement was within CVE's certified territory.¹⁴

In 2005, BMR extended the existing distribution line approximately 1000 feet from the site of the Mine #37 fan to provide electricity to the new Stillhouse # 2 portal.¹⁵ The company had no knowledge of the Certified Territories Act¹⁶ and was unaware that the new opening was within CVE's territory. Construction of the new portal was simply the most flexible and economical option to mine the reserves.¹⁷

ARGUMENT

A. KU should continue to be the retail supplier to the electric-consuming facility (“ECF”), to which retail electric service was being provided by KU on June 16, 1972.¹⁸

¹¹ Transcript, p. 186, lines 13-20.

¹² Transcript, p. 186, line 21 to p. 187, line 4; p. 215, lines 2-3.

¹³ Transcript, p. 192, lines 6-23.

¹⁴ Transcript, p. 72, lines 19-24; p. 62, line 24 to p. 63, line 16; p. 101, line 21 to p. 102, line 5.

¹⁵ Transcript, p. 192, line 12 to p. 193, line 17.

¹⁶ KRS 278.016 to 278.020.

¹⁷ Transcript, p. 194, lines 19-22; Matda Direct, p. 5, lines 1-4.

¹⁸ See KRS 278.018 (4).

B. Assuming *arguendo* that Stillhouse #2 is a new ECF, it is located in two adjacent service territories and KU should continue to supply retail electric service to the customer based on the statutory criteria enumerated in KRS 278.017(3).

I. CONTINUANCE OF KU SERVICE IS LAWFUL AND PROPER AS THE EXISTING ECF PREDATES THE TERRITORIES ACT

The Certified Territories Act, at KRS 278.018 (4), recognizes that service "lawfully furnished" on June 16, 1972, is not to be the subject of competition between suppliers. I.e.,

(N)o retail electric supplier shall furnish, make available, render or extend retail electric service to any electric-consuming facility to which such service is being lawfully furnished by another retail electric supplier on June 16, 1972....

"Electric-consuming facility" is not defined by the Act but KRS 278.010 (8) states that "electric-consuming facilities" means "everything that utilizes electric energy from a central station source". The Commission, in a previous territorial dispute¹⁹, used this definition for "electric-consuming facility",

The Act contains no reference to "customer". Rather, it refers exclusively to a new "electric consuming facility", which is defined as "everything that utilizes electric energy from a central station source".

"Central station source" is also not defined by the Act, but prior decisions have found a substation at which service is rendered can be a central station source.²⁰ The private distribution system is fed by the Lynch substation of KU. The service is metered and connected to the

¹⁹ *In the Matter of: Inter-County RECC v. Kentucky Utilities Company*, Case No 94-326 (PSC Order of March 14, 1996, at page 5, citing KRS 278.010(8)).

²⁰ *In the Matter of: Kentucky Utilities Company v. Henderson Union RECC*, Case No. 89-349 (PSC Order of May 23, 1990, at p. 8): "A new electric consuming facility is created whenever a new central source station is required. In the instant case, a substation will be built to serve the Poplar Ridge Mining Site"; *Owen Co. RECC v. Public Service Commission*, 689 S.W.2d 599, at 602 (Ky. App. 1985): "The definition does not limit a facility to being a building. The definition is broad enough for the PSC to reasonably interpret it to mean the entire industrial park, which will be served from the central station source."

customer owned system at the customer's substation located adjacent to the KU substation. No other meter is in use for the distribution system.

KU has been the retail electric supplier for the U.S. Steel property south of Looney Creek since 1931.²¹ And, beginning in 1970 or 1971, KU served operations of U.S. Steel, and later Arch, at Mine # 37 in the same seam of coal, and same physical area of reserves, now being mined and removed through the Stillhouse # 2 portal.²² Significantly, the operations of Mine # 37 and Stillhouse # 2 are authorized by the same DSMRE permit, now in its 17th revision.²³ All of Mine # 37's operations, like those of Stillhouse # 2, were served by a central station source. Simply put, Stillhouse #2 is a continuation of the ECF that was being lawfully served by KU on June 16, 1972.

Simply put, this boundary of Harlan Seam coal reserves on the U.S. Steel Property south of Looney Creek in Harlan County was being served by KU as of the effective date of the Act and, for that reason, KU is entitled to continue serving Stillhouse # 2.

II. THE STATUTORY CRITERIA APPLICABLE TO A NEW ECF FAVOR KU AS THE RETAIL ELECTRIC SERVICE PROVIDER

Assuming *arguendo* that the Stillhouse # 2 portal is a new ECF, the parties do not dispute that the reserves to be mined are within the territories of both KU and CVE.²⁴ Prior decisions of the Commission have looked to the location of coal reserves as determinative of whether a new ECF involves two or more adjacent territories.²⁵

²¹ Bush Direct, p. 6, lines 1-9; p. 8, lines 19-21; Transcript, p. 37, lines 1-9.

²² Transcript, p. 186, line 13 to p. 187, line 4.

²³ Transcript, p. 215, lines 2-3.

²⁴ Transcript, p. 16, lines 2-14; Exhibits Matda-1, Matda-2 and Matda-3; Transcript, p. 13, lines 8-23.

²⁵ *In the Matter of: Henderson-Union RECC v. Kentucky Utilities Company*, Case No. 93-211 (PSC Order of March 3, 1994); *In the Matter of: Kentucky Utilities Company v. Henderson-Union RECC*, Case No. 89-349 (PSC Order of May 23, 1990); *In the Matter of: Matrix Energy LLC for Determination of Retail Electric Supplier*, Case No. 2003-00228 (PSC Order of May 3, 2004).

KRS 278.018 (1) directs the Commission to consider four criteria set out in KRS 278.017 (3) in resolving service rights to a new ECF located in the adjacent territories of two retail electric suppliers, viz.:

- (a) the proximity of existing distribution lines to the certified territory;
- (b) which supplier was first furnishing retail electric service, and the age of existing facilities in the area;
- (c) the adequacy and dependability of existing distribution lines to provide dependable, high quality retail electric service at reasonable costs; and
- (d) the elimination and prevention of duplication of electric lines and facilities supplying such territory.

Consideration of these factors clearly favors KU.

As discussed above, the private distribution system has been essential to the development of the U.S. Steel Property.²⁶ The use of customer-owned facilities is not uncommon in the coalfields.²⁷ The Commission has previously considered customer-owned facilities in resolving territorial matters involving similar issues.²⁸

As to the first factor, the proximity of existing distribution lines, the Commission should consider the location of the line that “will actually serve the facility.”²⁹ Given the existence of the BMR-owned facilities, KU is using, and will continue to use, its Lynch Substation, and the lines feeding it, to serve Stillhouse No. 2. Those KU facilities are immediately adjacent to the customer’s point of delivery.³⁰ CVE’s facilities, on the other hand, are nearly one-half (½) mile away from any point of delivery.³¹ The first statutory factor, therefore, favors KU.

²⁶ Matda Direct, p. 4, lines 1-4.

²⁷ Transcript, p. 19, lines 2-4.

²⁸ *In the Matter of: Henderson-Union RECC v. Kentucky Utilities Company*, Case No. 93-211 (PSC Order of March 3, 1994); *In the Matter of: Matrix Energy LLC for Determination of Retail Electric Supplier*, Case No. 2003-00228 (PSC Order of May 3, 2004).

²⁹ *In the Matter of: Inter-County RECC v. Kentucky Utilities Company*, Case No. 94-326 (PSC Order of March 14, 1996); *In the Matter of: Kenenergy Corp. v. Kentucky Utilities Company*, Case No. 2002-00008 (PSC Order of October 18, 2002).

³⁰ Bush Sur-Rebuttal, p. 6, lines 6-14.

³¹ Transcript, p. 48, lines 10-13.

The second factor concerns the age of existing facilities and the date of first service in the area. KU's facilities, and first service, in the area of its KU Lynch substation, where power is delivered to BMR, date back to 1931³². CVE's facilities and service in the area nearest its proposed point of delivery date back to 1949.³³ Thus, the second factor also favors KU.

The third factor to be considered under the Act is the adequacy of existing distribution facilities to provide dependable, high quality service at reasonable costs. The present KU facilities provide dependable, high quality service to the customer and new facilities are not required.³⁴ On the other hand, CVE would have to construct at least 2300 feet of line, where the customer's own line already exists, and add a transformer bank, all at additional costs³⁵ Moreover, CVE acknowledges that the substation used to serve Stillhouse # 2 could be considered "more stable" than the substation CVE would use to provide service.³⁶ And, while KU's substation has more than adequate capacity to serve Stillhouse # 2, CVE's available capacity is less.³⁷ KU is favored under this factor.

The fourth factor addresses elimination and prevention of duplication of facilities. KU would have to construct no additional facilities to continue serving the customer. Continuation of the service maximizes the use of existing facilities and does not duplicate any facilities.³⁸ CVE would have to add a transformer bank and construct a line extension uphill to the area where the customer already has those facilities. This would de-energize the customer's distribution line, duplicate facilities, waste resources and unnecessarily encumber the landscape. If CVE were to serve this mine, it would have to build nearly one-half (½) mile of line at a cost

³² Bush Sur-Rebuttal, p. 6, lines 15-17; Transcript, p. 54, lines 15-24; p. 100, lines 5-13.

³³ Transcript, p. 54, lines 9-14.

³⁴ Bush Sur-Rebuttal, p. 6, lines 20-23; Transcript, p. 39, lines 7-10; p. 60, lines 13-17.

³⁵ Transcript, p. 60, line 18 to p. 61, line 1.

³⁶ Transcript, p. 119, line 20 to p. 120, line 2.

³⁷ Transcript, p. 177, lines 15-21; Direct Testimony of Lonnie E. Bellar, p. 5, lines 1-5.

³⁸ Bush Sur-Rebuttal, p. 7, lines 4-7.

of at least \$40,000, and the result would be to leave over 2.75 miles of privately-owned line, dating back over 25 years, without use or purpose, unnecessarily duplicating facilities, resulting in a cluttering of the landscape and a waste of materials and natural resources.³⁹ This factor favors KU.

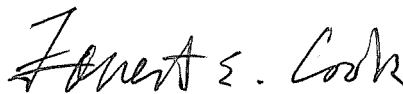
Finally, rates have sometimes been considered in close cases. KU has estimated that the customer would pay approximately \$42,000 more per year to take service from CVE rather than from KU, based on the utilities' available tariffs, and CVE has accepted that estimate as accurate based on the assumed load.⁴⁰ Comparison of the respective rates favors KU.

CONCLUSION

The present delivery of electric service to Stillhouse #2 is, simply put, the continuation of KU service to a pre-existing ECF. Alternatively, KU should continue to supply retail electric service to the customer based on the statutory criteria of KRS 278.017(3). Continuation of service avoids the wasteful duplication of facilities, unnecessary encumbering of the landscape, and waste of materials and natural resources.

Dated this 30th day of April, 2007.

Respectfully submitted,



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³⁹ Matda Direct, p. 5, lines 5-11; Transcript, p. 188, lines 4-12; p. 189, lines 17-21; p. 65, lines 16-22; Exhibits FHB 5 and 7; Bush Sur-Rebuttal, p. 7, lines 7-12.

⁴⁰ Transcript, p. 67, line 21 to p. 68, line 8.

CERTIFICATE OF SERVICE

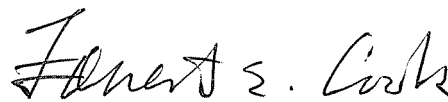
I hereby certify that a copy of the foregoing motion was served by first-class mail, postage pre-paid, upon the following, this 30th day of April 2007:

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