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MAY 01 2006

PUBLIC SERVICE
COMMISSION

May 1, 2006

Ms. Beth O'Donnell
Executive Director
Public Service Commission
PO Box 615
211 Sower Blvd.
Frankfort, KY 40602-0615

Re: Cumberland Valley Electric, Inc. v. Kentucky Utilities, Inc.
Case No. 2006-00148

Hand Delivered

Dear Ms. O'Donnell:

Attached are the original and eleven copies of the Response of Cumberland Valley Electric, Inc. to Kentucky Utilities Company's Motion to Dismiss in the above-styled case. I have this day served a copy of the Response 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

MAY 01 2006

PUBLIC SERVICE
COMMISSION

In the Matter of:

CUMBERLAND VALLEY ELECTRIC, INC.)	
)	
COMPLAINANT)	
)	
vs.)	CASE NO. 2006-00148
)	
KENTUCKY UTILITIES COMPANY)	
)	
DEFENDANT)	

RESPONSE OF CUMBERLAND VALLEY ELECTRIC, INC.
TO KENTUCKY UTILITIES COMPANY'S MOTION TO DISMISS

On April 21, 2006, Defendant Kentucky Utilities Company ("KU") concurrently filed an Answer and Motion to Dismiss with respect to the Complaint filed by Cumberland Valley Electric, Inc. ("CVE") that is the subject of the instant proceeding. For all of the reasons set forth below, CVE respectfully requests that the Commission should deny KU's Motion to Dismiss. The Commission should further make those findings and conclusions that CVE requests below. Finally, the Commission should establish a procedural schedule for the full review of the remaining issues raised by CVE's Complaint.

KU's MOTION TO DISMISS

In its Motion to Dismiss, KU claims that an issue raised by CVE's Complaint has been previously decided by the Commission, and "that precedent requires dismissal of CVE's Complaint." KU Motion to Dismiss at pg. 3.

KU further attaches a 1977 Order of the Commission as support for its position. In the Matter of: The Complaint of Jellico Electric System v. Cumberland Valley Rural Electric Cooperative Corp. , Case No. 6637 (Order of February 22, 1977), attached to KU's Motion to Dismiss as Exhibit A. This case will subsequently be referred to in this Response as "Jellico v. CVE".

COMMISSION PRACTICE IN BOUNDARY DISPUTES

KU's Motion does not address consistent Commission practice that boundary disputes such as this case are highly fact-specific and will not ordinarily be decided without a fully developed record and a hearing. This Complaint involves a boundary dispute. In upholding KU's objection and overruling CVE's Motion for Summary Judgment in a 2004 decision¹, the Commission found "... as it has in previous boundary dispute cases, that each case must be decided on its

¹ See , Order of January 21, 2004, Case No. 2003-00226, In the Matter of: PETITION OF CTA ACOUSTICS, INC. TO RETAIN KENTUCKY UTILITIES COMPANY AS POWER SUPPLIER AND FOR EXPEDITED TREATMENT (subsequently referred to as "In Re: CTA") (although the CTA case did not involve a coal mine, the cited Commission comments refer to "boundary dispute cases" and not merely the specific case at issue)

specific facts.”² The Commission further ruled that “[t]he Commission notes that even in cases where the parties have agreed to stipulate the facts, the Commission’s responsibility to protect the public interest may well justify further inquiry and hearing.”³

In the instant case, CVE has filed its Complaint, supporting testimony of an expert witness, and an exhibit that includes an Agreed Statement of Facts. KU has filed an Answer and a Motion. This constitutes the entire record to date. Part of the proffer that has been made in support of CVE’s Complaint consists of an Agreed Statement of Facts. Both KU and CVE have agreed to the accuracy of the facts in this statement. Both KU and CVE have reserved the right to object to the admission of any particular facts, and have not waived any claims or defenses with respect to these or any other proffered evidence or theories. In addition, both KU and CVE have reserved the right “to offer or seek to introduce other evidence regarding the service at issue.” Willhite Exhibit 1, pg. 1 of 15. As such, the Agreed Statement of Facts does not constitute a stipulation that the record is complete, or that no additional facts will be offered, or even that the facts agreed to are relevant to this proceeding. This case is at a very early stage, and the Commission should follow its practice of allowing a full record to be developed, including a hearing and briefs, prior to entering a dispositive ruling on this Complaint, absent compelling cause.

² In Re: CTA, supra at pg. 8

³ In Re: CTA, supra at pg. 8. See, also, Order of March 21, 2002, Case No. 2002-00008, Kenergy Corp. v KU (KU Motion to Dismiss denied)

KU ALLEGATIONS CONCERNING CVE'S COMPLAINT

KU's Motion is based on a highly selective and inaccurate rendering of CVE's Complaint. CVE's Complaint consists of fifteen paragraphs, proffered testimony, and a proffered exhibit. The proffered testimony and exhibit were specifically incorporated by reference in the Complaint. CVE Complaint at pg. 4. With respect to this Complaint, KU has stated in its Motion that "CVE's Complaint is **premised** on the claim that delivery to a customer within a utility's certified territory is unlawful if some portion of the power is then transmitted by a private distribution network and used by the customer outside that territory. [emphasis added] [footnote omitted]". KU Motion to Dismiss at pg. 3. The footnote references the CVE Complaint at page 3 for this characterization of CVE's Complaint.

KU's simplistic paraphrase of the "premise" of CVE's Complaint is not accurate. The "premise" of CVE's Complaint is that the Stillhouse Mine No. 2 is a new electric consuming facility ("ECF") that is located in adjacent territories, and that pursuant to KRS 278.018(1) the Commission **shall** determine which retail electric supplier will serve such a new ECF by applying the criteria contained in KRS278.017(3). As this case does involve private lines owned and extended by a customer as opposed to a utility, CVE further requested that the Commission determine that such lines should not be considered as part of the analysis of the Territorial Act. The purpose of this request is discussed at length in Willhite

testimony at pages 14-16. CVE asserts that retail electric suppliers such as KU are not permitted to “take credit” for customer owned lines as part of the analysis under KRS278.017(3), since the relevant criteria includes the proximity of **utility owned** distribution lines.

CVE has not claimed, as asserted by KU, that a customer owned line can never under any circumstances be lawfully extended into a second utility’s service territory. However, CVE has asserted, and continues to assert, that such an extension can only be made pursuant to a lawful Order of this Commission, and not at the unfettered discretion of a customer or a retail electric supplier. CVE further continues to assert that the existence of customer owned service lines in a particular area is not properly considered to advance the position of either retail electric supplier in applying the criteria contained in KRS278.017(3). CVE further requests a finding that such lines do not in any way affect or alter the provisions of the Territorial Act.

As explained in Willhite Testimony, the Territorial Act established territories based on “existing distribution lines of the retail electric suppliers. They further recognized that the **same criteria** should be applied if a future new ECF located in the territory of two or more retail electric suppliers. [emphasis added].”⁴ This is the basis of CVE’s request that the Commission find that customer owned electric lines should not be considered in applying the criteria contained in the Territorial Act to boundary disputes.

⁴ Willhite Testimony at pg. 14.

As noted by Mr. Willhite, the Commission has previously been asked to assign customer owned utility lines to one or another retail electric supplier to improve that distributor's position in a boundary dispute. In Case No. 93-211⁵, for instance, the Commission determined that it was unnecessary to resolve this issue, since the presence of a customer constructed tap line "neither benefited nor prejudiced" Henderson Union in consideration of the statutory criteria of KRS278.017(3).⁶ However, in the instant case, such an improper imputation of customer owned lines to a particular retail electric supplier could in fact severely prejudice CVE.⁷

CVE has clearly stated and supported a valid claim under KRS278.016-018, commonly known as the Territorial Act. The statute proscribes a particular mechanism and criteria for the resolution of such disputes. As previously noted, the Commission has consistently held that boundary disputes are very fact specific, and will not ordinarily be resolved without a fully developed record and after hearing. KU's Motion to Dismiss states no valid reason to consider this case any differently.

KU CLAIM OF A CONTROLLING PRECEDENT

⁵ In the Matter of: Henderson-Union Rural Electric Corporation v. Kentucky Utilities Company, Case No. 93-211, Order of March 3, 1994.

⁶ Willhite testimony at pg. 16.

⁷ See , also, In the Matter of: Matrix Energy, LLC for Determination of Retail Electric Supplier, Case No. 2003-00228, Order of May 3, 2004 at pp. 7-8 (Kentucky Power Company claims that distribution lines owned by coal companies should be treated as Kentucky Power facilities for the purpose of applying KRS278.017(3)(a) as to proximity of facilities. Commission considers only retail electric supplier facilities in resolving this issue.)

⁹ Indeed, a number of the claims made in KU's answer also appear to be based upon the principle alleged to have been established in the "controlling precedent".

KU's Motion is entirely dependent on what it claims to be a controlling precedent found in the Order of February 22, 1977 in Jellico vs. CVE.⁹ This Order involves a different set of facts and issues than the instant case. Further, KU's Motion ignores subsequent developments in Jellico v. CVE that completely undermine the claims in its Motion to Dismiss, and indeed demonstrate that KU's position in this case with respect to the metering point for electricity being the point of sale or use is completely erroneous.

CVE believes that a number of other cases decided by the Commission provide guidance as to the proper application of the Territorial Act. CVE accepts, and has proceeded in accordance with, the Commission's often expressed belief that a full record is necessary to resolve these necessarily fact-specific cases. KU, however, claims that one Commission Order from 1977 establishes something akin to a per se rule that any customer can choose, without Commission approval, to establish a point of sale or use in the territory of a chosen retail electric supplier, and then extend indefinitely outward to new facilities in adjacent territories as it desires by extending its own lines, again without Commission approval. As KU's support for this position is one Commission Order, it is necessary to examine the Commission's, and the courts', findings in that Case in some detail.¹⁰

¹⁰ It should be noted that the Order provided by KU is not the final Order in Case No. 6637. Subsequent Commission and court actions involving Case No. 6637 will be described further below.

KU contends that the Jellico v. CVE case has “facts remarkably similar to those present here”.¹¹ A review of the February 22, 1977, Order does not support this statement. In the Jellico v. CVE case¹², Cal-Glo Coal Company (“Cal-Glo”) owned a mining facility served by Jellico Electric System (“Jellico”). Jellico was a Tennessee municipal utility that provided some electric service in an area adjacent to the service territory of CVE (then known as Cumberland Valley Rural Electric Cooperative Corporation). Cal-Glo also operated three mines in the service territory of CVE that were served by CVE. In 1975, Cal-Glo planned to upgrade its facilities in the Jellico-served area, and approached Jellico in advance to provide such service. This new facility would greatly increase Cal-Glo’s power needs from Jellico.

Cal-Glo was informed by Jellico that Jellico’s current facilities were inadequate to serve Cal-Glo’s increased power needs, and that Cal-Glo would need to advance the necessary capital in the amount of \$133,000 in 1975 dollars in order for Jellico to upgrade its facilities to serve Cal-Glo’s power needs. In light of Jellico’s demands, Cal-Glo then approached CVE and requested that CVE agree to allow Cal-Glo to connect to CVE facilities that were already sufficient to serve Cal-Glo’s new operations, and then extend Cal-Glo’s own line to serve the new facility.

The first and most obvious and material difference in the facts of this case was that Cal-Glo did in fact first seek to connect to Jellico, and did not do so

¹¹ KU Motion to Dismiss at pg. 3.

¹² The facts stated here are from the Order attached as Exhibit A to KU’s Motion to Dismiss, at pp 2-3.

because it would be required to advance the cost of upgrading Jellico's inadequate facilities. Service inadequacy was the basis for the Commission determining that CVE, and not Jellico, should serve Cal-Glo's expanded operation. The Commission specifically found that Jellico's facilities were "inadequate to provide Cal-Glo's immediate and projected needs" and that Jellico's demand that Cal-Glo advance the funds to Jellico to construct necessary facilities was unreasonable.¹³ Further, the Commission specifically found that this condition to service "would **in and of itself** be sufficient grounds for denying Jellico the right to serve Cal-Glo's new facilities at Gatliff [emphasis added]." ¹⁴ The Commission specifically cited KRS278.030 as the basis for this finding, not any provision of the Territorial Act.

The material facts, then, most relevant to the Commission's decision to allow CVE to serve Cal-Glo's new facility were that Jellico's facilities were inadequate and that Jellico's demand that Cal-Glo advance the capital for major upgrades to provide such service was unreasonable under KRS278.030. No such fact exists in the instant case. By contrast, Stillhouse LLC never made any effort to advise CVE of its plans, or to work out a service agreement for its new mine. CVE is prepared to provide service to Stillhouse Mine No. 2 , and has made no demand for a capital contribution. KU fails to address these material factual differences in its Motion to Dismiss.

¹³ Order of February 22, 1977, Jellico v CVE at pg 5.

¹⁴ Order of February 22, 1977, Jellico v CVE at pg 5.

Having determined that Jellico could not reasonably serve the new Cal-Glo facility, the Commission then found “equally persuasive” that the new facility was “a new electric consuming facility in any commonsensical interpretation of the phrase”¹⁵, and that the new facility was located in adjacent territories. The Commission found that this gave it the authority to determine the appropriate supplier for the new ECF under KRS278.018(1). It was in conjunction with this finding that the Commission determined that “the point at which Cumberland meters its electricity to Cal-Glo is the point where actual service takes place.”¹⁶ However, the Commission Order does not specify how the factors contained in KRS278.017(3) would be applied to its considerations under KRS278.018(1), or indeed whether such factors were applied to its analysis.

The Commission’s determination that it was lawful for Cal-Glo to connect to CVE’s facilities and then extend its own line to serve the new facility was not, as KU argues, a blank check for any customer to establish a service point in one territory and then extend that service indefinitely and without Commission review into any adjacent service territory. Such an interpretation of the Territorial Act is simply not supported by the February 22, 1977 Order in Jellico v. CVE . The Commission had already determined that for other reasons, Jellico was incapable of providing reasonable service to Cal-Glo’s new facility, and that CVE was the appropriate retail electric supplier to serve the new facility.

¹⁵ Order of February 22, 1977, Jellico v. CVE , at pg 5.

¹⁶ Order of February 22, 1977, Jellico v. CVE , at pg. 5.

It should also be noted that the Commission specifically stated that, as a result of the Commission's balancing of the equities and the "evidence of record", Cal-Glo might have the right to energize its own facilities to purchase power from CVE, but only "if this Commission so holds in a **validly enacted order**, then such action by Cal-Glo is 'lawful' [emphasis added]." ¹⁷ The necessary corollary to this finding is that, absent a validly enacted order, a customer extending its own line from one service territory into another to use retail electric service from that other retail electric supplier is **unlawful**.

The Commission's findings with respect to the inability of Jellico to provide reasonable service to Cal-Glo are clearly not applicable to this case. No such claim has been made with respect to CVE's ability to serve Stillhouse Mine No. 2. The facts and issues of the two cases are not "remarkably similar".

KU'S CITED PRECEDENT WAS OVERTURNED ON APPEAL

KU's Motion is even more flawed in that it fails to reveal that the Commission's Order of February 22, 1977, was **set aside** by Order of the Franklin Circuit Court ("FCC") on August 18, 1977.¹⁸ The FCC Order specifically found that Jellico v. CVE involved service deficiencies, and that "[I]t is unnecessary to query if an expansion of an operation really constitutes a new

¹⁷ At pp. 3-4.

¹⁸ Order of August 18, 1977, Jellico Electric System vs. Public Service Commission, et al., CA No. 87621 ("JES v PSC") (Order attached hereto as Exhibit A) (This Order is contained in the official record of Case No. 6637 and the copy attached hereto was obtained from the PSC record by counsel for CVE).

electric- consuming facility or if the point of metering is the place of sale.”¹⁹ The FCC Order stressed that the Commission must follow statutory procedures in its considerations, and found that the Commission had not done so in the Order of February 22, 1977.

Upon further review of the Franklin Circuit Court decision, the Court of Appeals in an unpublished opinion upheld the FCC Order setting aside the Commission’s February 22, 1977 Order, and remanded the case to the Commission for further proceedings consistent with its findings.²⁰ The further proceedings were limited to consideration and orders relating to whether Jellico could provide adequate service to Cal-Glo. With respect to the finding from the Commission’s February 22, 1977, Order in Jellico v. CVE cited by KU as being controlling precedent in the instant case, the Court stated that “...we are of the opinion that under the evidence the Cal-Glo operation cannot be considered to be a “new electric consuming facility” and we also think that **the location of the electric meter is not the controlling factor in determining the point of sale of the electric power.** [emphasis added]”²¹ In addition, the Court of Appeals specifically found that “[t]he trial court was correct in its conclusion that Jellico **has a statutory right to furnish the power in controversy** unless its

¹⁹ Order of August 18, 1977, JES v. PSC at pg. 3.

²⁰ Opinion Remanding for Further Consideration of September 1, 1978, Jellico Electric System v. PSC, CA-1743-MR (Opinion attached hereto as Exhibit B) (This Order is contained in the official record of Case No. 6637 and the copy attached hereto was obtained from the PSC record by counsel for CVE)(Underlines and marks in the Opinion were present in the copy of the Opinion in the Commission’s file, and were not added by CVE).

²¹ Opinion, Exhibit B hereto, at page 5.

service is deemed to be inadequate and it refuses to comply with an order to provide adequate service. [emphasis added]" ²²

In its remand Order, the Franklin Circuit Court remanded the case to the Commission "for a determination (**pursuant to KRS278.018(3)**) of the adequacy of the service proposed by the plaintiff Jellico Electric System to Cal-Glo Coal Company. [emphasis added]" ²³

Following a remand hearing pursuant to the Court of Appeals' instructions, the Commission issued a new Order in Case No. 6637 on August 10, 1979.²⁴ This Order reiterated the instructions of the Court of Appeals, and in particular stated that the appropriate procedure on remand was to hold a hearing limited only to the adequacy of service provided by Jellico. The Commission found that Jellico had failed to render adequate service to Cal-Glo, and that Jellico was given twenty days to submit a plan to the Commission by which it could render adequate service to Cal-Glo. In accordance with the remand opinion and Order, no further consideration was given to any other issue.²⁵

The full record in Jellico v. CVE clearly does not support either KU's Motion or its statement of the law. Indeed, the Court of Appeals opinion supports a conclusion of law as follows:

²² Opinion, Exhibit B hereto, at pg. 5.

²³ Remand Order of November 9, 1978, JES v. PSC, at pg. 1, Order attached hereto as Exhibit C.

²⁴ Order of August 10, 1979, Jellico v CVE, attached hereto as Exhibit D. This Order was not referenced in KU's Motion to Dismiss.

²⁵ The Commission issued another order on December 8, 1981, approving an Industrial Power Contract submitted by Joint Motion of the parties, and dismissed the action with prejudice. No reference to this Order is contained in KU's Motion to Dismiss.

1. Even if it is a customer extending a line from a metering or delivery point, the point of sale or use is not the metering or delivery point, but rather the point where the retail electric service is actually used by the customer.

The opinion also supports the following general conclusion of law with respect to extensions into another retail electric distributor's territory:

2. Absent a validly enacted Commission Order following the statutorily mandated procedure, the retail electric supplier whose service territory includes the point where the retail electric service is actually used has the statutory right to furnish the retail electric service in controversy.²⁶

The following findings with respect to KU's Motion and CVE's Complaint can be made at this point in the proceeding:

1. Stillhouse LLC and BMR²⁷ extended a distribution line into CVE's certified service territory to use KU retail electric service in its Stillhouse Mine No. 2 without seeking Commission approval;

²⁶ See , Case No. 2004-00197, *In the Matter of: Joint Application of Bullitt Utilities, Inc. and the Bullitt County Sanitation District for Approval of Transfer of Wastewater Treatment Facility* , Order of July 22, 2004 at pg 5 (Commission establishes conclusion of law citing unpublished opinion of the Court of Appeals in *Oldham County Sanitation v. Kentucky Public Service Comm'n* , Case No. 2001-CA-001482-MR.) Although the Court of Appeals also determined that "under the evidence" the Cal-Glo operation was not a new ECF, this is precisely the type of finding that the Commission has held to be fact-specific to each boundary dispute case.

²⁷ Hereafter referred to as ("Stillhouse/BMR")

2. Neither Stillhouse/BMR nor KU has ever sought Commission approval either to extend a distribution line for Stillhouse Mine No. 2 into CVE's territory or to have KU furnish, make available or render retail electric for use in CVE's territory;
3. Absent such a validly enacted Order approving retail electric service by KU and modifying the exclusive certified territory as required by the Act, CVE has the exclusive right to furnish the retail electric service being provided in its service territory by KU;
4. The point of delivery for Stillhouse Mine No. 2 is at the terminus of the BMR 12 kv private distribution line where it is connected to the electric facilities used in operating Stillhouse Mine No. 2, which is in the certified territory of CVE, not at the point of delivery or metering for BMR in KU's service territory some 7.5 miles away;
5. CVE has now, and has always had, the statutory right to furnish the retail electric service in controversy unless and until the Commission, following statutory procedures, determines that some other retail electric supplier has the right to furnish such retail electric service in CVE's certified service territory, and enacts a valid Order permitting such service;
6. The extension of a private line from a metering or delivery point in KU's service territory prior to the enactment of such an order results in an unlawful infringement of CVE's statutory right to furnish the retail electric service in controversy.

WHEREFORE, CVE respectfully requests that the Commission deny KU's Motion to Dismiss. CVE further respectfully requests that the Commission adopt the proposed Conclusions of Law and findings with respect to current service to the Stillhouse Mine No. 2 pending any Order for future service that it may eventually issue following the statutory process that applies to issues that have not yet been resolved. CVE renews its request first made in Paragraph 15 of its Complaint that the Commission immediately Order that a meter be placed at the Stillhouse Mine No. 2 site to record usage at the site during the pendency of this proceeding. The placement of the meter will ensure proper accounting for revenues from the new mine, which will be more accurate than the revenues that will have to be estimated to date for service to the mine. CVE further respectfully requests that the Commission Order that KU account for all of the revenues for service as estimated to date and measured from this point forward and establish a plan to expeditiously turn those revenues over to CVE. Finally, CVE requests that the Command establish a procedural schedule to expeditiously resolve the remaining issues raised by CVE's Complaint.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Anthony B. Miller", is written over a horizontal line.

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**ATTORNEYS FOR COMPLAINANT
CUMBERLAND VALLEY ELECTRIC, INC.**

EXHIBIT A

FRANKLIN CIRCUIT COURT
Civil Action No. 87821

JELLICO ELECTRIC SYSTEM

PLAINTIFF

VS:

O R D E R

PUBLIC SERVICE COMMISSION OF
KENTUCKY and CUMBERLAND VALLEY
RURAL ELECTRIC COOPERATIVE CORP.

F I L E D

DEFENDANTS

JAMES H. COLLINS

***** JUDGE AT COLUMBIA

KRS 278.016 authorizes the division of the state into geographical retail electrical service areas. The pertinent part of that statute reads "...no retail electric supplier shall furnish retail electric service in the certified territory of another retail electric supplier."

KRS 278.017 establishes the boundaries of the certified territory of each retail electric supplier.

KRS 278.018 reaffirms the exclusive right of each retail electric supplier to furnish retail electric service to all electric-consuming facilities located within its certified territory, and prohibits the furnishing of service to a consumer for use in facilities located within the certified territory of another retail electric supplier. In the event a utility does not render or propose to render adequate service to an electric-consuming facility in the certified territory, the Commission may, after hearing, order such failure to be corrected. Upon failure so to do, the Commission may authorize another supplier to furnish the service.

In this case Cal-Glow, a mining company, expanded its operation within Jellico Electric System's territory near the boundaries with Cumberland R.E.C.C. Electric service was furnished over Cal-Glo's own lines by Cumberland rather than by Jellico. Following a hearing the Public Service Commission made four findings: One, the expansion of the mining company operations constitutes a new electric-consuming facility; two, a large capital expenditure would be required of Jellico which would have to be advanced by the mining company; three, a small capital expenditure would be required of the mining company to connect with Cumberland; and four, the point of metering is the place of sale.

From an Order of the Public Service Commission granting the right to supply electric service in Jellico's territory this case arises.

The Order of the PSC declares "...the unusual facts giving rise to this controversy mandates further analysis into the relative equities on each side.". The fallacy of that reasoning is the Public Service Commission is a creature of statute and not generally endowed with equity powers. The Supreme Court of Kentucky most recently in a decision rendered December 3, 1976, in Commonwealth of Kentucky, ex rel vs. South Central Bell Telephone Company, Franklin Circuit Court Civil Action No. 86665, reminded us all that the law means what it says when it wrote

"It is significant that the legislature used the phrase 'provided by law'. It did not write 'according to the principles of equity jurisprudence'. ...We do not believe that the legislature... intended to open up the area for discretionary relief granted upon comparatively nebulous and generous equitable principles."

The statutory procedure was not followed here. The mining company apparently on its own initiative upgraded its power line from Jellico's service area to the Cumberland service area.

Following a hearing, the Public Service Commission held the mining company in Jellico's area had the right to obtain its power from Cumberland. According to its Order, this was the equitable thing to do. But according to the law Jellico has the exclusive right to furnish electric service in its area, with certain exceptions. If, after a hearing, the Public Service Commission finds a service to be inadequate, it may direct the deficiency to be remedied within a fixed period of time. If there is a failure to comply, then the Public Service Commission may authorize another supplier to furnish the needed service. But until such finding is made and corrective measures ordered, the Public Service Commission has no authority to permit one electric supplier to provide service into another certified territory.

It is unnecessary to query if an expansion of an operation really constitutes a new electric-consuming facility or if the point of metering is the place of sale. Those points would probably not be raised in another hearing if one is had under KRS 278.018(3).

Accordingly, the Order of the Public Service Commission is hereby set aside.

This, the 18th day of August, 1977.


JUDGE, FRANKLIN CIRCUIT COURT
DIVISION TWO

EXHIBIT B

Commonwealth Of Kentucky
Court Of Appeals

RECEIVED

SEP 01 1978

CA-1743-MR

PUBLIC SERVICE COMMISSION
LEGAL AFFAIRS

JELICO ELECTRIC SYSTEM

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE SQUIRE N. WILLIAMS, JR., JUDGE
ACTION # 87821

PUBLIC SERVICE COMMISSION
OF KENTUCKY; CUMBERLAND
VALLEY RURAL ELECTRIC COOPERATIVE
CORPORATION and CAL-GLO COAL
COMPANY

APPELLEES

AND: 78-CA-20-MR

PUBLIC SERVICE COMMISSION
OF KENTUCKY; CUMBERLAND
VALLEY RURAL ELECTRIC COOPERATIVE
CORPORATION and CAL-GLO COAL
COMPANY

CROSS-APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE SQUIRE N. WILLIAMS, JR., JUDGE
ACTION # 87821

JELICO ELECTRIC SYSTEM

CROSS-APPELLEE

REMANDING FOR FURTHER CONSIDERATION

* * * * *

BEFORE: GANT, LESTER and VANCE, Judges.

VANCE, JUDGE: This appeal is taken from a decision of the Franklin
Circuit Court which set aside an order of the Public Service Commission.

Jellico Electric Company filed a complaint with the Commission alleging that its certified service area was being invaded by Cumberland Valley RECC and asking that Cumberland be prohibited from furnishing electric energy within Jellico's certified territory.

In 1967 Cal-Glo Coal Company leased substantial acreage in Whitley and Knox Counties in Kentucky and started operations near Gatliff, Kentucky. The leased area is partially within the certified service areas of both Jellico and Cumberland. Cal-Glo's initial operations were entirely within Jellico's service area but only a few hundred feet from Cumberland's territory. Cal-Glo built a line from its mine into Gatliff in order to obtain electric power from Jellico even though Cumberland had a line much closer to the mine. Cumberland challenged this action as an invasion of its territory, but the Public Service Commission found nothing improper. This decision of the Public Service Commission, in Cumberland Valley Rural Electric Cooperative Corporation v. Public Service Commission of Kentucky, Ky., 433 S.W.2d 103 (1968), was affirmed.

As Cal-Glo's mining activities expanded, it opened three mines in Cumberland's service area. Power for these mines was obtained from Cumberland, but the coal produced was transported to Cal-Glo's loading facilities at Gatliff which received its power from Jellico. Electric power supplied to Cal-Glo by Jellico greatly exceeds that supplied by Cumberland.

The controversy which is the subject of this appeal developed when Cal-Glo began planning for a major expansion of its facilities at Gatliff which would result in a substantial increase in its electric power requirements. Cal-Glo's plans include the construction of a unit train loading facility at the Gatliff terminal which will increase the power requirements from 200 horsepower to 800 horsepower. The second phase of the expansion program will be the addition of coal washing facilities, further increasing the power needs to 3,200 horsepower. Finally, Cal-Glo has long-term plans for opening three new mines in this area which would increase its total power needs to about 6,500 horsepower.

In 1975, Cal-Glo presented this expansion program to Jellico, requesting that necessary upgrading of its transmission lines in the Gatliff area be commenced in order that Cal-Glo's increased power needs could be satisfied. Jellico responded by submitting a proposal whereby it agreed to adequately upgrade its lines if Cal-Glo would advance the capital for the construction, which was estimated to be \$133,000. This proposal provided that Jellico would reimburse Cal-Glo for the principal amount but not interest by reducing the company's power bills by 10% for 10 years. Cal-Glo refused to accept this proposal.

The following year Cal-Glo contacted Jellico about the possibility of upgrading its lines only to the extent necessary to serve the company's immediate needs for 800 horsepower. Again, Jellico requested a capital advance of \$22,000 for new voltage regulators with reimbursement to be made through future bill adjustments.

Cal-Glo rejected this second proposal and instead opted to upgrade one of its own lines and extend it one-half mile into Cumberland's territory where there was an existing line which was adequate to supply all of Cal-Glo's projected needs. Jellico then filed a complaint with the Commission alleging infringement of its certified service area.

The Commission ruled against Jellico and held that Cumberland could supply Cal-Glo. This decision was based upon four findings. First, the expansion of the mining company operations constitutes a new electric-consuming facility located in two certified service areas and under KRS 278.018(1), the Commission can determine which electric supplier shall serve the new facility. Secondly, a large capital expenditure is required for Jellico to be able to supply this facility and Cal-Glo would be forced to advance the money. Thirdly, a small capital expenditure would enable Cal-Glo to connect with Cumberland's lines which are already adequate to meet its power needs. Fourthly, there is no invasion of Jellico's service area as the point of metering is the place of sale and Cal-Glo's power is metered within Cumberland's territory.

Jellico appealed to the Franklin Circuit Court which set aside the Commission's order for failure to follow the proper statutory procedure. The court found that under KRS 278.018(1) Jellico has the exclusive right to furnish electric service in its certified area and the Commission has no authority to permit an invasion of that area except as provided in KRS 278.018(3). Under that section, if after a hearing, the Commission finds that a utility's service is inadequate, it may direct that the deficiency be remedied within a fixed period of time. If the utility fails to comply, the Commission may then authorize another supplier to furnish the needed service.

The trial court refused to remand the case to the Commission or to issue an order permanently enjoining Cumberland from furnishing electricity within Jellico's territory. Appeal to this Court followed.

One of the original defenses asserted before the Commission was that Jellico did not propose to render adequate service. The Commission did not make any ruling as to adequacy of service but permitted Cumberland to furnish electric service to Cal-Glo on the basis of (1) a "new electric consuming facility" situated in both areas and, (2) that Cumberland was furnishing electric service to Cal-Glo in Cumberland's certified area because Cal-Glo had extended its own line into Cumberland's certified area and the electricity was metered there.

On appeal the trial court did not rule directly upon either of the grounds set forth by the Commission but, nevertheless, set aside the order of the Commission on the ground that statutory procedures were not followed. The Court reasoned that until a finding of inadequate service has been made, coupled with a refusal by Jellico to comply with a direction to remedy the inadequacy, the Commission is without power to permit Cumberland to provide service in Jellico's certified territory. The trial court refused to issue an injunction against Cumberland and overruled a motion to remand the case to the Commission for a determination of the question of adequacy of service.

The order of the Commission granted Cumberland the right to provide service to Cal-Glo. The judgment setting aside that order simply leaves the parties in the same position they were in when the matter was first presented to the Commission.

We think the action of the trial court in setting aside the order was proper. Although the trial court did not pass directly on the issues raised by the Commission, we are of the opinion that under the evidence the Cal-Glo operation cannot be considered to be a "new electric consuming facility" and we also think that the location of the electric meter is not the controlling factor in determining the point of sale of the electric power.

The trial court was correct in its conclusion that Jellico [★] has a statutory right to furnish the power in controversy unless its service is deemed to be inadequate and it refuses to comply with an order to provide adequate service.

As we have already noted, the Commission had not made any finding as to adequacy of service although that issue was raised in the proceedings before it. The proper resolution of this controversy requires a further determination by the Commission on the question of adequacy of service furnished and proposed to be furnished by Jellico.

We do not accept the contention of Jellico that its service must be regarded as adequate pursuant to KRS 278.010(12) if it had sufficient capacity to supply Jellico's maximum estimated requirements during the year following commencement of permanent service. Under such a rule service once deemed to be adequate could never thereafter be deemed inadequate despite a complete failure to meet the increased needs of a customer.

A consideration of all of the equities does not convince us that the trial judge abused his discretion when he refused to issue the injunction. The judgment setting aside the order of the Commission is affirmed and it is ordered that a supplemental judgment be entered remanding the case to the Public Service Commission for a determination of the adequacy of the service proposed by Jellico.

At oral argument we were informed that the Public Service Commission had in fact heard evidence on the question of adequacy of service but was prevented by order of this Court from proceeding further. The order of remand shall direct that the hearing upon the question of adequacy of service be reopened and that all parties have the opportunity of presenting additional evidence upon the question and that proper orders be entered pursuant to KRS 278.018(3).

ALL CONCUR.

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VALLEY RECC and CAL-GLO COAL CO:

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SERVICE COMMISSION OF KENTUCKY:

Hon. William M. Sawyer
Hon. Paul M. Cupp
P.O. Box 615
Frankfort, Kentucky 40602

EXHIBIT C

FRANKLIN CIRCUIT COURT **FILED**
CIVIL ACTION NO. 87821

JELICO ELECTRIC SYSTEM

-vs-

SUPPLEMENTAL JUDGMENT

PUBLIC SERVICE COMMISSION OF
KENTUCKY, CUMBERLAND VALLEY
RURAL ELECTRIC COOPERATIVE
CORPORATION and CAL-GLO COAL
COMPANY

DEFENDANTS

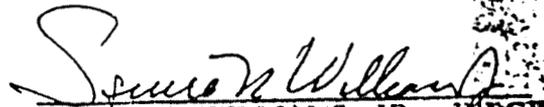
It appearing to the Court that the Mandate of the Court of Appeals dated October 12, 1978 was filed herein on October 13,

IT IS HEREBY ORDERED, ADJUDGED and DECREED pursuant to and in conformity with said Mandate and the opinion of the Court of Appeals dated September 1, 1978 that this cause be and it hereby is remanded to the defendant Public Service Commission of Kentucky for a determination (pursuant to KRS 278.018 (3)) of the adequacy of the service proposed by the plaintiff Jellico Electric System to Cal-Glo Coal Company.

It is further ordered that the hearing heretofore, on October 28, 1977, held by the Commission on this subject be reopened and that all parties shall have the opportunity of presenting additional evidence upon the question of the adequacy of Jellico's service and that upon

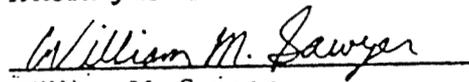
completion of the hearing, the Commission enter proper orders pursuant to KRS 278.018 (3) which may be reviewed by this Court upon the motion of either party and without the necessity of docketing a second appeal.

This 9 day of ^{Nov.} ~~October~~, 1978.


SQUIRE N. WILLIAMS, JR., JUDGE

HAVE SEEN:

E. Gaines Davis, Jr.
Attorney for Plaintiff


William M. Sawyer
Attorney for Public Service
Commission of Kentucky

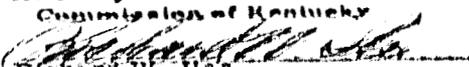

Richard W. Har
Counsel for Cumberland Valley
Rural Electric Cooperative
Corporation and Cal-Glo Coal
Company

EXHIBIT D

COMMONWEALTH OF KENTUCKY
BEFORE THE ENERGY REGULATORY COMMISSION

In the Matter of:

THE COMPLAINT OF JELICO ELECTRIC)
SYSTEM v. CUMBERLAND VALLEY RURAL)
ELECTRIC COOPERATIVE CORPORATION) Case No. 6637
and CAL-GLO COAL COMPANY)

O R D E R

On February 22, 1977, the Public Service Commission of Kentucky (predecessor to the Energy Regulatory Commission) authorized Cumberland Valley Rural Electric Cooperative Corporation to provide electric service to the Cal-Glo Coal Company's ("Cal-Glo") expanded mining operations in the Gatliff, Kentucky area. Since Gatliff is located in the service area of the Jellico Electric System ("Jellico") in Jellico, Tennessee, Jellico appealed this decision to the courts.

The Kentucky Court of Appeals subsequently remanded the case to the Commission for additional findings on the issue of Jellico's present ability to provide adequate service to the Cal-Glo Coal Company at Gatliff. The Court emphasized that while the issue of adequacy of service had been raised at the original proceedings before the Commission, no finding was made on this point in the PSC's order of February 22, 1977. In its decision of September 1, 1978, the Court of Appeals held that the omission of this finding was error on the part of the PSC. The Court then specified the appropriate procedures to be followed by this agency on remand:

The proper resolution of the controversy requires a further determination by the Commission on the question of adequacy of service furnished and proposed to be furnished by Jellico.^{1/}

^{1/} Jellico Electric System v. Public Service Commission, et. al., CA-1743-MR, decided September 1, 1978, Mimeo Op. P. 5.

Pursuant to the Court's order, the Energy Regulatory Commission ordered a new hearing in which all parties could present additional evidence as to the adequacy of the service presently being provided to Cal-Glo by Jellico at Gatliff, Kentucky. This hearing was held on January 23, 1979, at the Commission's office in Frankfort, Kentucky.

At the hearing, witnesses for Cal-Glo testified that their present (January 1979) energy requirements at Gatliff, Kentucky, were 1200 connected horsepower per day, and that by August 1979, Cal-Glo's coal-washing facilities would be complete, bringing the company's daily energy requirements to 3,968 connected horsepower.^{2/}

The general manager of the Jellico Electric System then testified that he was unsure of Jellico's present ability to supply Cal-Glo with power sufficient to energize facilities at the 1200 horsepower level without modifying its lines into Gatliff.^{3/} Jellico further testified that Cal-Glo's requirements as of August 1979 (3968 h.p.) could not be supplied by Jellico absent extensive re-engineering of the present line leading from Jellico to Gatliff.^{4/}

Based on the above-stated evidence of record, the Commission makes the following FINDINGS:

1. The present energy requirements of the Cal-Glo Coal Company at Gatliff, Kentucky, are 3,968 connected horsepower.

^{2/} Transcript of Evidence, January 23, 1979, pp. 10-11.

In a letter to the Commission dated August 6, 1979, Cal-Glo confirmed that the coal-washing facilities had been completed on schedule as previously testified to, and were in the process of being tested prior to being made fully operational on or about September 1, 1979. Cal-Glo indicated that this would bring their present electrical requirements at Gatliff to 4225 connected horsepower.

^{3/} T.E., 52, 56

^{4/} T.E., 59-60, 71-72

2. The Jellico Electric System is presently incapable of supplying this amount of electricity to Cal-Glo.

3. Jellico Electric System has failed to render adequate service to the Cal-Glo Coal Company at Gatliff, Kentucky, in that the amount of electricity offered by Jellico to Cal-Glo is inadequate to operate Cal-Glo's facilities which require approximately 4,000 connected horsepower on a daily basis.

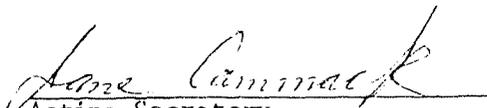
Based on the above-enumerated findings and pursuant to our statutory mandate as set forth in KRS 278.012(3), the Commission hereby ORDERS as follows:

The Jellico Electric System shall, within twenty (20) days from the date of this Order, submit to this Commission a plan by which Jellico proposes to render adequate service to the Cal-Glo Coal Company's facilities at Gatliff, Kentucky.

Done at Frankfort, Kentucky, this 10th day of August, 1979.

By the Commission

ATTEST:


Acting Secretary