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April 30, 2007

VIA HAND DELIVERY

RECEIVED

APR 30 2007

**PUBLIC SERVICE
COMMISSION**

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

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

Dear Ms. O'Donnell:

Enclosed please find and accept for filing the original and ten (10) copies of Kentucky Utilities Company's Post-Hearing Brief in the above-referenced matter. Please confirm your receipt of this filing by placing the stamp of your Office with the date received on the two additional copies provided 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/cja
Enclosures

cc: Anthony G. Martin (w/Encl.)
W. Patrick Hauser, PSC (w/Encl.)
Forrest E. Cook (w/Encl.)

Louisville 438039v1

LEXINGTON ♦ LOUISVILLE ♦ FRANKFORT ♦ HENDERSON

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

In the Matter of:

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

APR 30 2007

PUBLIC SERVICE
COMMISSION

CASE NO. 2006-00148

POST-HEARING BRIEF OF KENTUCKY UTILITIES COMPANY

Kentucky Utilities Company ("KU"), pursuant to the schedule established at the conclusion of the hearing in this matter on March 14, 2007, hereby submits its post-hearing brief to the Kentucky Public Service Commission ("Commission"). For all of the reasons set forth below, KU is entitled to continue serving the mining operations of Stillhouse Mine No. 2 ("Stillhouse # 2"), and the Complaint of Cumberland Valley Electric, Inc. ("CVE"), alleging that KU has violated the Certified Territories Act, KRS 278.016 *et seq.* (the "Territories Act"), should be dismissed.

FACTUAL SUMMARY

This dispute involves the provision of electric service to underground mining operations at Stillhouse # 2, which is operated by Stillhouse Mining, LLC ("Stillhouse LLC"), a subsidiary of Black Mountain Resources, Inc. ("BMR").¹ KU furnishes and meters 69 kV power to BMR at

¹ CVE Complaint, ¶ 6.

KU's Lynch Substation in Lynch, Kentucky.² BMR owns a substation, known as the BMR U.S. Steel Substation, immediately adjacent to KU's Lynch Substation, as shown below in Figure 1, and the two substations are connected via a 69kV tap owned by BMR.³ BMR's substation is also connected to a 69 kV line, owned and maintained by BMR, which is used to distribute electric power to mining operations conducted by BMR or its affiliates in parts of Harlan County.⁴ Such customer-owned facilities are common in the coal-mining industry in Kentucky.⁵



Figure 1

² Direct Testimony of Ronald L Willhite ("Willhite Direct"), p. 6, lines 20-21.

³ Exhibit FHB-6.

⁴ Willhite Direct, p. 7, lines 1-11.

⁵ Transcript of Evidence from March 14, 2007 Hearing ("Transcript"), p. 19, lines 2-4.

KU's Lynch Substation, which is located entirely within KU's certified territory, dates back over seven decades.⁶ That substation is closely tied to the development of, and provision of electric service to, coal mining operations in the area on a tract of land sometimes referred to as the U.S. Steel Property. The majority of that property, estimated to contain some 43,000 acres, was purchased in 1917 by the U.S. Steel Coal and Coke Co.⁷ Both the town of Lynch and the coal mining operations in the area originally obtained electricity from a privately-owned power plant and distribution system. Beginning in 1931, however, the power plant was closed and retail electrical service was purchased from KU at the Lynch Substation, which was connected to the already-existing private distribution system used to distribute power to the U.S. Steel property.⁸ Although multiple companies have since owned and mined the property, the contiguous boundary of quality coal and the electrical distribution system are the foundation upon which all owners have relied through the years. With periodic upgrades, that distribution system has continued in place to the present date.⁹ Indeed, that distribution system was a part of the acquisition by BMR in 1998 from Arch Minerals ("Arch") (the successor in interest to U.S. Steel's mining operations in the area), and it has been an essential part of BMR's mining plans at all times. That distribution network is still fed by KU's Lynch Substation, just as it has been since 1931, and presently serves nine (9) mining operations and one (1) coal-preparation plant, all of which are on the U.S. Steel Property in Harlan County, south of Looney Creek.¹⁰ All previous mining operations in that same area, which were conducted by U.S. Steel or its

⁶ Direct Testimony of F. Howard Bush, II ("Bush Direct"), p. 4, lines 17-21.

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

⁸ Matda Direct, p. 3, lines 16-22.

⁹ Matda Direct, p. 3, lines 18-21; p. 4, line 1.

¹⁰ Matda Direct, p. 4, lines 1-6.

successors in interest, including now BMR, have been served by KU through the Lynch Substation.¹¹

Stillhouse LLC began operations at Stillhouse # 2 in 2005.¹² Although the portal for Stillhouse # 2 is located in CVE's certified territory, the reserves to be mined from that portal, in what is known as the Harlan Seam of coal, are in the territories of both KU and CVE.¹³ While the Stillhouse # 2 portal itself is only about two years old, BMR's predecessors in interest conducted mining in the reserves now permitted to Stillhouse # 2 beginning decades earlier. Specifically, U.S. Steel, and later Arch, began conducting underground mining in the immediate vicinity and in the same reserves on the U.S. Steel property, in an operation known as Mine # 37, in 1970 or 1971.¹⁴ Indeed, Stillhouse # 2 is pulling additional 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 covered Mine # 37.¹⁵

Power was supplied to Mine #37 through the private distribution network now owned by BMR, connected to KU's Lynch Substation. In about 1980 or 1981, Arch extended that distribution line to serve a fan for Mine # 37 located approximately 700 feet from the current Stillhouse # 2 portal.¹⁶ In 1998, Mine # 37 ceased operations, but the distribution line remained in place.¹⁷

¹¹ Bush Direct, p. 6, lines 1-9; p. 8, lines 19-21; Transcript, p. 37, lines 1-9.

¹² Matda Direct, p. 4, line 8.

¹³ 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.

¹⁴ Transcript, p. 186, lines 13-20.

¹⁵ Transcript, p. 186, line 21 to p. 187, line 4; p. 215, lines 2-3.

¹⁶ Transcript, p. 192, lines 6-23.

¹⁷ Transcript, p. 72, lines 19-24; p. 62, line 24 to p. 63, line 16; p. 101, line 21 to p. 102, line 5.

The existing customer-owned distribution line was extended approximately 1048 feet when BMR decided to mine through a new Stillhouse # 2 portal in 2005.¹⁸ BMR owns or controls all of the land on which it has a private distribution system, and BMR's witness testified that the company made the extension because doing so was the most flexible and economical option for the company and not in any effort to bypass the Territories Act.¹⁹ Moreover, the evidence was undisputed that KU had no knowledge of or involvement in the customer's decision to extend the line.²⁰ With that extension, KU's power, supplied to BMR at the Lynch Substation, has been used for the operations at Stillhouse # 2 since 2005.²¹

On April 7, 2006, after initial efforts to resolve the matter by agreement were unsuccessful, CVE filed a formal complaint against KU seeking a ruling that it is entitled to serve Stillhouse # 2. Following significant discovery, a hearing was held on March 14, 2007. Following the hearing, KU initiated settlement discussions with CVE, as encouraged by the Commission. Again, despite good faith efforts, no resolution was reached. Accordingly, this matter is now ripe for decision by the Commission.

ARGUMENT

This action arises under the Territories Act, a part of the law in Kentucky that has generated a relatively large number of rulings by the Commission over the years, many of which have resolved disputed service rights to coal-mining operations. Those rulings have been clear, consistent and lawful, have provided longstanding guidance to utilities and ratepayers affected

¹⁸ Transcript, p. 192, line 12 to p. 193, line 17.

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

²⁰ Bush Direct, p. 21, lines 2-3; Transcript, p. 16, lines 20-24; p. 103, line 20 to p. 104, line 12.

²¹ Matda Direct, p. 2, line 21 to p. 3, line 2.

by territorial issues, and should be followed and applied by the Commission here.²² As set forth below, the plain language of the Territories Act, as well as the past holdings of the Commission, support KU's service to BMR for use at Stillhouse # 2, and the Commission should enter an order approving the continuation of that service and dismissing CVE's Complaint.

I. KU HAS NOT VIOLATED THE TERRITORIES ACT.

As an initial matter, CVE's continuing claim that KU has violated the law in serving Stillhouse # 2 must be addressed. Regardless of the manner in which this case is ultimately evaluated by the Commission, it is clear that KU has not violated the law in any regard. KU is providing service at its Lynch Substation in exactly the same manner as it has for decades. Even viewing the facts of this case in the light most favorable to CVE, Stillhouse # 2 is located in the adjacent territories of both KU and CVE. Unless and until the Commission determines which utility is entitled to serve Stillhouse # 2, neither KU nor CVE has an exclusive "right" to serve that customer. As the Commission has previously ruled, where an electric-consuming facility ("ECF") is located in the certified territories of two adjoining utilities, there can be no claim that one utility has violated the service territory of another in rendering service before a final Commission decision.²³ Accordingly, KU's service to Stillhouse # 2 up to the point of a

²² South Cent. Bell Telephone Co. v. Public Service Commission, 702 S.W.2d 447, 451 (Ky.App. 1985), *citing* Utility Regulatory Commission, 642 S.W.2d 591, 593 (Ky.App. 1982) (holding that the Commission should not depart from past administrative interpretation of the law which has been consistently followed, except for the most cogent of reasons). Indeed, many of the Commission's past rulings, relied upon by KU here, have been upheld by reviewing courts.

²³ *In the Matter of: Matrix Energy, LLC For Determination of Retail Electric Supplier*, Case No. 2003-00228 (Commission Order of May 3, 2004).

determination of service rights by this Commission cannot be considered a violation of KRS 278 in any event, and the Commission should so rule in its final order herein.²⁴

II. CVE'S UNAUTHORIZED SERVICE TO BMR'S TIMBERTREE OPERATIONS AND ITS FAILURE TO DISCLOSE THAT SERVICE IN DISCOVERY WEIGH AGAINST ITS CREDIBILITY IN THIS PROCEEDING.

Next, and before addressing the substantive issues in this proceeding, KU believes it is important to address a significant lack of candor by CVE which should be carefully weighed by the Commission as it considers the merits of this matter. Throughout this proceeding, CVE has attempted to cast itself in a particularly positive light, claiming that it has a policy of "strict adherence" to the Territories Act while at the same time alleging KU has acted in violation of the Act.²⁵ The evidence, however, reveals exactly the opposite.

With regard to KU's conduct, the evidence of record conclusively establishes that KU has at all times proceeded appropriately with regard to the service to Stillhouse # 2. Specifically, CVE has conceded that KU was unaware that BMR had extended its own facilities over to Stillhouse # 2 until notified of that fact by CVE, and that once notified, KU was cooperative in discussing service rights with CVE and in developing agreed facts to present to the Commission to aid in resolving this matter.²⁶ Moreover, KU explained that its policy is to always work to comply with the Territories Act.²⁷ And, CVE's own witness acknowledged that it is KU's

²⁴ As explained below, that service was actually provided for some time without KU's knowledge. Thereafter, the matter was presented to this Commission for decision, and there was no order prohibiting KU from continuing to provide service pending a final decision in this matter.

²⁵ CVE Response to KU Supplemental Data Request 11; CVE Complaint, ¶¶ 8-10.

²⁶ Transcript, p. 16, lines 20-24; p. 17, lines 11-18; p. 103, line 20 to p. 104, line 12. Indeed, Mr. Willhite conceded that because "KU is delivering power at a point that it's been delivering for decades and it doesn't change anything on its system, you can understand why" KU would not have known when BMR extended its own line over to Stillhouse # 2. Transcript, p. 104, lines 7-12.

²⁷ KU Response to CVE Data Request No. 4 to Mr. Bush.

practice not to extend service to customers in split-territory scenarios without either the agreement of the other utility or the approval of the Commission.²⁸

CVE, on the other hand, was revealed to have knowingly undertaken service to a mining customer located largely in the territory of KU, without the agreement of KU or the approval of this Commission. Specifically, CVE's witness Mr. Abner admitted on cross-examination that CVE began serving BMR at the Timbertree mine in Blair, Kentucky in September 2006, even though the reserves to be mined – and thus the ECF itself – are located in the territories of both CVE and KU.²⁹ That service was undertaken without notifying KU to attempt to agree on service rights, and without obtaining any approval from the Commission.³⁰ According to CVE's own witness, Mr. Willhite, CVE's service to Timbertree is "contrary to the [Territories] Act."³¹

More troubling, however, is that CVE appears to have affirmatively tried to hide its service to Timbertree from KU and this Commission.³² On October 18, 2006, approximately one month after CVE had begun serving Timbertree, KU expressly inquired in discovery regarding whether CVE had extended service to any ECF located partly within the territories of both KU and CVE.³³ CVE carefully responded, not answering the question directly but rather claiming that it had "made no study" of what customers might be located in both territories and implying

²⁸ Transcript, p. 17, line 19 to p. 18, line 1.

²⁹ Transcript, p. 126, line 16 to p. 127, line 12. BMR's witness Mr. Matda testified that the Timbertree reserves are actually located mostly in KU's territory. Transcript, p. 199, lines 19-20. The Commission has long recognized that the location of coal reserves determines the location of the ECF in considering a split-territory case involving a mining customer. *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 (Commission Order of May 3, 2004). Indeed, in Matrix the Commission held that the location of reserves is "the determining factor" in considering the location of the ECF.

³⁰ Transcript, p. 127, lines 17 to 25.

³¹ Transcript, p. 18, lines 2-7.

³² CVE claimed a lack of disclosure based on the existence of some sort of agreement with the customer "not to speak of the [Timbertree] mine" in this proceeding. Transcript, p. 127, lines 15-16. Of course, any such agreement, if it existed, would excuse neither CVE's conduct in knowingly connecting service nor its failure to be forthcoming in discovery.

³³ KU Request for Information No. 20 to CVE, dated October 18, 2006.

if there were such customers they had been served only through “inadvertent oversight.”³⁴ Of course, an accurate and complete response by CVE would have disclosed the ongoing service to Timbertee, which at that time was unknown to KU.³⁵ Then, one month later, KU propounded a supplemental data request to CVE, seeking information on CVE’s practice regarding service to split-territory customers.³⁶ CVE responded by asserting that once a customer is deemed to be located in two adjacent territories, “contact is made with the adjoining utility to jointly determine the appropriate supplier.”³⁷ Again, CVE passed on an opportunity to disclose its service to Timbertree, and instead placed self-serving, and clearly inaccurate, information into the record.³⁸

Interestingly, when confronted with CVE’s actions in serving Timbertree, Mr. Abner attempted to justify the service by stating, “What we did is hooked up a load at their request at a location within our territory.”³⁹ Of course, that explanation is contrary to the position CVE has taken elsewhere in this record, where it has argued against KU’s service to BMR, which occurs at a point well within KU’s territory, by claiming that the point of delivery of service has no bearing.⁴⁰ Moreover, Mr. Abner’s claim that service was initiated “at the[] request” of BMR was later revealed to also represent less than a full disclosure, when BMR’s witness testified that BMR only requested service from CVE at Timbertree based on CVE’s representation that the location of the portal controlled.⁴¹ Of course, the Commission has repeatedly rejected such a

³⁴ CVE Response to KU Request for Information No. 20.

³⁵ Transcript, p. 155, lines 6-14.

³⁶ KU Supplemental Request for Information No. 11 to CVE.

³⁷ CVE Response to KU Supplemental Request for Information No. 11.

³⁸ Mr. Abner acknowledged on cross-examination that CVE had failed to follow its purported policy of notifying the adjoining utility when it undertook to serve Timbertree, even though it knew the reserves were partially within KU’s territory, without notifying KU. Transcript, p. 126, line 9 to p. 127, line 18.

³⁹ Transcript, p. 127, lines 23-24.

⁴⁰ Rebuttal Testimony of Ronald L. Willhite (“Willhite Rebuttal”), p. 6, lines 10-16. KU would agree, however, that the location of the point of delivery, where that point is new and is used to serve an entirely new ECF, like Timbertree, provides no support for service under the Territories Act. Here, there is no evidence in the record that Timbertree is part of a previously-existing ECF.

⁴¹ Transcript, p. 211, line 23 to p. 212, line 7.

position, holding that it is the location of the reserves, and not the location of the portal, which is relevant in a case such as this.⁴² Indeed, CVE's own witness acknowledged that the location of the reserves, and not the portal, is what is relevant in this type of proceeding.⁴³

While CVE has tried to create the impression of improper conduct by KU in this proceeding, the evidence establishes that it is CVE, and not KU, which has acted in a legally questionable manner. CVE's conduct, especially taken as a whole and in the context of this case, raises serious questions about its overall credibility in this proceeding, and the Commission should give due weight to that issue when evaluating CVE's testimony and its positions here.

III. KU IS ENTITLED TO CONTINUE SERVING STILLHOUSE # 2 BECAUSE IT IS PART OF AN EXISTING ECF THAT WAS SERVED BY KU BEFORE THE TERRITORIES ACT WAS ENACTED.

With regard to the substantive issue of which utility is entitled to serve Stillhouse # 2, the Commission must first determine if Stillhouse # 2 is indeed a new ECF, as CVE contends. If it is not, but is instead part of a previously-existing ECF that was served by KU before the Territories Act became law, then KU is entitled to continue serving Stillhouse #2.

KRS 278.018 (4) provides:

no 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....⁴⁴

⁴² *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: Henderson Union RECC v. Kentucky Utilities Company*, Case No. 93-211 (PSC Order of March 3, 1994); *In the Matter of: Kenergy Corp. v. Kentucky Utilities Company*, Case No. 2002-00008 (PSC Order of October 18, 2002); *In the Matter of: Matrix Energy, LLC For Determination of Retail Electric Supplier*, Case No. 2003-00228 (Commission Order of May 3, 2004).

⁴³ Transcript, p. 13, lines 8-23.

⁴⁴ The only exception to that provision is with regard to customers who are otherwise not receiving adequate service from a retail electric supplier, which exception is not at issue here.

An ECF is defined as “everything that utilizes electricity from a central station source.”⁴⁵ While a central station source is not defined, and the nature of the central station source could vary from case to case depending on the facts, the Commission and reviewing courts have found a substation at which service is rendered to constitute a central station source.⁴⁶ Here, however, even if the meter or service drop is considered the central station source, that location is still at KU’s Lynch Substation. Moreover, the Commission has previously made clear that the concept of an ECF under the Territories Act is not dependent on the identity of the customer.⁴⁷ In other words, the Territories Act focuses on territory – not customers – to be served, and so it is the territory which should be the focus here.

Here, KU has a history of service to the territory at issue which predates the Territories Act. As set forth in the factual summary above, KU has served mines on the U.S. Steel property south of Looney Creek dating back to 1931.⁴⁸ 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 by Stillhouse # 2.⁴⁹ As shown in Figure 2 below, the surface activities supporting Mine # 37 extended to within about 700 feet of the location where the Stillhouse #2 portal is now located, and were literally adjacent to the area in which other physical facilities now supporting Stillhouse # 2 are located.⁵⁰

⁴⁵ KRS 178.010 (8). Mr. Willhite offered a rather tortured argument that this definition should only apply to ECFs “plural”, and not to an ECF “singular.” Willhite Rebuttal, p. 10, lines 6-22. However, the Commission itself has previously used the definition in exactly the same way offered by KU here. *In the Matter of: Inter-County RECC v. Kentucky Utilities Company*, Case No 94-326 (PSC Order of March 14, 1996). Mr. Willhite’s opinion on the issue should be rejected.

⁴⁶*In the Matter of: Kentucky Utilities Company v. Henderson Union RECC*, Case No. 89-349 (PSC Order of May 23, 1990); *Owen Co. RECC v. Public Service Commission*, 689 S.W.2d 599 (Ky. App. 1985).

⁴⁷ *In the Matter of: Inter-County RECC v. Kentucky Utilities Company*, Case No 94-326 (PSC Order of March 14, 1996).

⁴⁸ Bush Direct, p. 6, lines 1-9; p. 8, lines 19-21; Transcript, p. 37, lines 1-9.

⁴⁹ Transcript, p. 186, line 13 to p. 187, line 4.

⁵⁰ Transcript, p. 192, lines 6-23; Exhibit FHB-8, p. 2 of 3.



Figure 2

Moreover, Stillhouse # 2 is covered by the same DSMRE permit that covered Mine # 37.⁵¹ All of Mine # 37's operations, like those of Stillhouse # 2 now, were served from KU's Lynch Substation, with power then delivered over customer-owned lines for ultimate consumption.⁵²

These facts support a finding that Stillhouse # 2 is a continuation of an ECF which existed, and was being lawfully served by KU, on June 16, 1972. BMR is a successor in interest to the mining rights previously held by Arch, and before it by U.S. Steel, on the U.S. Steel Property, which rights include mining in the reserves now being mined by Stillhouse #2. All mining activity that has ever been conducted in those reserves, south of Looney Creek in Harlan County, has been served by KU at the Lynch Substation, with further distribution over customer-

⁵¹ Transcript, p. 215, lines 2-3.

owned lines. Part of that mining was done through the operation known as Mine # 37, which mined in reserves now mined by Stillhouse # 2, and which had physical facilities next to those which now exist to support the Stillhouse # 2 operation.

Because it is the territory, and not the customer, which is relevant in considering whether a new ECF has been established, the fact that Mine # 37 closed before Stillhouse # 2 was operational should have no bearing. In a previous case with similar issues, the Commission addressed service to a group of oil wells in Western Kentucky.⁵³ The wells were located in KU's certified territory, but they had been served by Henderson Union RECC dating back to before the Territories Act. The number of oil wells operating at any given point fluctuated, and there was apparently more than one owner/operator of the wells over that period of time. However, throughout that time service was provided at a single metering point and then delivered to the separate wells through a customer-owned distribution system. When KU sought to serve the oil wells, the Commission denied the request, citing KRS 278.018 (4). Specifically, the Commission considered the cluster of oil wells to be a single ECF and found that Henderson Union RECC was entitled to continue serving the ECF because it was the utility providing service to that ECF as of June 16, 1972.

Like the oil wells in the case cited above, the exact number and location of mine portals on the U.S. Steel Property south of Looney Creek has fluctuated over the years, as operators have changed and mining activity has ebbed and flowed, but the operations have nonetheless been clustered in one place, mining a continuous area of reserves.⁵⁴ It is undisputed that the Harlan Seam coal reserves on the U.S. Steel Property south of Looney Creek in Harlan County

⁵² Rebuttal Testimony of F. Howard Bush, II ("Bush Rebuttal"), p. 4, lines 5-21.

⁵³ *In the Matter of: Henderson Union RECC v. Kentucky Utilities Company*, Case No. 9454 (PSC Order of July 8, 1986).

⁵⁴ CVE's witness, Mr. Willhite, acknowledged that coal mining is boom or bust. Transcript, p. 53, lines 14-17.

were being served by KU as of June 16, 1972, and for that reason KU is entitled to continue serving Stillhouse # 2 pursuant to KRS 278.018 (4).

III. KU IS ENTITLED TO CONTINUE SERVING STILLHOUSE # 2 BECAUSE THE STATUTORY CRITERIA IN THE TERRITORIES ACT FAVORS KU.

Even assuming, however, that Stillhouse # 2 should be considered a new ECF, KU is still entitled to continue its service to that facility. In the event the Commission determines that Stillhouse #2 is a new, stand-alone ECF, there is no question but that the ECF falls within the territories of both KU and CVE.⁵⁵ As previously noted, in territorial disputes involving mining customers, the Commission has consistently considered the location of the reserves in determining whether or not the case involves an ECF in the territories of two adjacent utilities, even when the majority of the reserves are in the territory of one utility.⁵⁶ In fact, the Commission has labeled the location of reserves as the “pivotal” factor and has recognized that the location of the portal has no impact on the resolution of a territorial boundary dispute where the reserves are located in two adjacent territories.⁵⁷ The Commission has also given no weight to the timing of planned mining activities that are to take place in the territories of two neighboring utilities, so long as some mining will occur in both territories.⁵⁸

⁵⁵ Bush Direct, p. 10, lines 5-17; Willhite Direct, p. 10, lines 8-12; Transcript, p. 16, lines 2-14; Exhibits Matda-1, Matda-2 and Matda-3.

⁵⁶ *In the Matter of: Kentucky Utilities Company v. Henderson-Union RECC*, Case No. 89-349 (PSC Order of July 2, 1990); *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: Kenergy Corp. v. Kentucky Utilities Company*, Case No. 2002-00008 (PSC Order of October 18, 2002).

⁵⁷ *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).

⁵⁸ *In the Matter of: Henderson-Union RECC*, Case No. 93-211 (PSC Order of March 3, 1994); *In the Matter of: Kenergy Corp. v. Kentucky Utilities Company*, Case No. 2002-00008 (PSC Order of October 18, 2002).

Here, the reserves to be mined from Stillhouse # 2 are within the territories of both KU and CVE.⁵⁹ For that reason, the parties agree that the ECF (if Stillhouse # 2 is indeed considered a new ECF) falls within the territories of both KU and CVE, and that the statutory factors in KRS 278.017 (3) thus control resolution of the service rights to that ECF.⁶⁰

A. The existing customer-owned lines should be considered by the Commission.

Before moving to the application of those statutory factors, however, there is a key threshold issue to first be resolved: should the Commission consider the presence of BMR's privately-owned distribution facilities in applying the Territories Act? Those facilities are utilized to serve a number of BMR's operations south of Looney Creek, just as they have been for decades. CVE would have the Commission entirely ignore those facilities in resolving this matter.⁶¹ KU, on the other hand, has asked the Commission to consider the existence of those customer-owned facilities, and to recognize that in light of those facilities KU and CVE can serve Stillhouse # 2 through different points of delivery.⁶²

As previously noted, the use of customer-owned facilities is common in the coal-mining industry in Kentucky.⁶³ Indeed, CVE acknowledged that it serves a number of customers that also use privately-owned distribution systems.⁶⁴ The Commission itself has even recognized that the use of customer-owned distribution lines can at times be "more economical and the most flexible" for the customer's needs.⁶⁵ And, specific to territorial disputes such as the one here, the Commission has considered the location of customer-owned facilities in resolving two territorial

⁵⁹ Transcript, p. 16, lines 2-14; Exhibits Matda-1, Matda-2 and Matda-3.

⁶⁰ Bush Direct, p. 10, lines 5-17; Willhite Direct, p. 10, lines 8-12; CVE Complaint, p. 4, ¶ 11.

⁶¹ Transcript, p. 38, lines 12-15.

⁶² Bush Direct, p. 16, lines 14-22.

⁶³ Transcript, p. 19, lines 2-4.

⁶⁴ CVE Response to KU Supplemental Request for Information No. 6; Transcript, p. 171, lines 7-16.

matters involving mining customers under KRS 278.017 (3).⁶⁶ Indeed, in one of those cases the Commission considered the customer-owned facilities in the same manner as that advocated by KU here, by recognizing the existence of the facilities and the fact that, in light of those facilities, the two utilities were able to serve the customer via different points of delivery.⁶⁷

In deciding whether or not to consider the existence of customer-owned facilities here, however, the Commission should not just look to its past rulings on the issue, although doing so supports KU's position, but should also consider the intent behind the Territories Act. In enacting that law, the General Assembly expressly explained that its intent in dividing the state into geographical boundaries for each retail electric supplier was:

to encourage the orderly development of retail electric service, to avoid wasteful duplication of distribution facilities, to avoid unnecessary encumbering of the landscape of the Commonwealth of Kentucky, to prevent the waste of materials and natural resources, for the public convenience and necessity and to minimize disputes between retail electric suppliers which may result in inconvenience, diminished efficiency and higher costs in serving the consumer....⁶⁸

Importantly, in interpreting the Act in the past, the Commission has held that the law's "clear intent" is "**to favor the utility whose cost to extend service will be less and to avoid duplication of facilities....**"⁶⁹

In this case, consideration of the customer's facilities in resolving this matter would further the intent of the Act. Specifically, if the Commission were to ignore the existence of BMR's distribution facilities, and require that service to Stillhouse #2 be rendered without use of

⁶⁵ *In the Matter of: Pennyrite Rural Elec. Coop. Corp. and Felmont Oil Corp.*, Case No. 3483 (PSC Order of September 29, 1954).

⁶⁶ *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).

⁶⁷ *In the Matter of: Matrix Energy LLC for Determination of Retail Electric Supplier*, Case No. 2003-00228 (PSC Order of May 3, 2004).

⁶⁸ KRS 278.016.

⁶⁹ *In the Matter of: Kenegy Corp. v. Kentucky Utilities Company*, Case No. 2002-00008 (PSC Order of October 18, 2002). (Emphasis added.)

that line as CVE urges, then it is undisputed that 2.75 miles of distribution line, cutting through heavily-wooded areas, would stand idle, while nearly ½ mile of additional line would be built into the same area to serve the same purpose as the idled line.⁷⁰ On the other hand, recognition of the customer-owned facilities in this case, as urged by KU and BMR, would allow existing facilities to be maximally used, thereby avoiding the construction of unnecessary additional facilities which would further encumber the landscape, waste resources and result in inconvenience and inefficiency for the customer.⁷¹

CVE has acknowledged that there is no statutory provision which precludes consideration of customer-owned facilities in a split territory case, and that the Commission has in the past considered such facilities in proceedings like the one here.⁷² However, it argues that BMR's privately-owned facilities should be ignored here because, essentially, they should not have been constructed in the first place.⁷³ That argument is without merit, for a number of reasons. The Commission does not have jurisdiction over customer-owned facilities, so the construction of such facilities is not regulated as may be the case with utility-owned facilities.⁷⁴ And, in any event, portions of the customer-owned facilities at issue date back to at least 1931, before this Commission even existed.⁷⁵ Moreover, there is absolutely no evidence offered by CVE, or present anywhere else in the record, that those facilities represented an excessive investment in relation to efficiency at the time they were originally constructed, or at any time thereafter when

⁷⁰ Matda Direct, p. 5, lines 5-11; Transcript, p. 188, lines 4-12; p. 189, lines 17-21; p. 65, lines 16-22; Exhibit FHB 5.

⁷¹ BMR paid for the distribution line when it acquired rights to the U.S. Steel Property from Arch. It would lose the benefit of that investment if the customer-owned line were idled as a result of a decision in this proceeding. Transcript, p. 108, line 21 to p. 109, line 6.

⁷² Transcript, p. 40, lines 19-22; p. 42, lines 4-13.

⁷³ Willhite Rebuttal, p. 21, line 7 to p. 22, line 12.

⁷⁴ Sur-Rebuttal Testimony of F. Howard Bush, II ("Bush Sur-Rebuttal"), p. 9, lines 10-12.

⁷⁵ Matda Direct, p. 3, lines 17-22.

they were updated or expanded.⁷⁶ Finally, and perhaps most importantly, even if the original construction of the customer-owned lines could be criticized, that would not justify allowing CVE to further compound the situation by building duplicative facilities in the area.⁷⁷ The fact is that there are facilities in place, built over the course of many decades, which have the ability and capacity to be used in serving Stillhouse # 2.⁷⁸ There is simply no basis in law or reason to ignore those existing facilities in this case, and CVE's position on that issue should be rejected.

Commission Staff's counsel raised a number of questions at the hearing concerning the extent to which customer-owned facilities should be permitted. In that regard, it is important for the Commission to understand KU's position, and it appears that there may be some confusion in that regard. When KU's witness Mr. Bush spoke of "legitimate business purpose" in his testimony at the hearing, he did so in an effort to explain KU's opposition to any line constructed with the intent to circumvent the Act, and did not mean to imply that KU's position is broader than it is.⁷⁹ KU is not asking the Commission to issue a broad approval of customer-owned lines, and certainly does not believe that any line can be built in order to get around the provisions of the Act. Instead, KU is simply asking the Commission to decide this case based on the facts that present themselves, including the existence of private lines on a customer's property.

⁷⁶ Bush Sur-Rebuttal, p. 9, lines 13-16. To the contrary, BMR's witness testified that the most recent extension of just over 1000 feet from the site of the old Mine # 37 fan over to the Stillhouse # 2 portal cost only about \$10,000. Transcript, p. 194, lines 3-5. On the other hand, CVE would have to spend over \$40,000 to construct an extension to be able to serve the Stillhouse # 2 load. Transcript, p. 121, line 22 to p. 122, line 3.

⁷⁷ Bush Sur-Rebuttal, p. 9, lines 17-19. CVE has already engaged in duplication of facilities by constructing a new line along U.S. 119 within eye-shot of an existing line. While that new line was approved by the Commission, that approval was based on the representation that it would be a relocation of the old line. However, the old line still exists and serves nearly all of the customers it served before the new line was put into service. Interestingly, the new line was not built until after Stillhouse # 2 was in operation. Transcript, p. 114, line 4 to p. 115, line 3; p. 164, line 15 to p. 165, line 19; Exhibit FHB-9, pages 1-4.

⁷⁸ Bush Sur-Rebuttal, p. 9, lines 19-20; Matda Direct, p. 3, line 17 to p. 4, line 6. The section of the line built into CVE's territory to serve the Mine # 37 fan was built in 1981. Transcript, p. 49, line 24 to p. 50, line 1.

⁷⁹ Transcript, p. 153, lines 5-22; p. 162, lines 16-22; p. 169, lines 9-16. Indeed, in past cases KU has advised customers that construction of a private line could not be used to achieve service from a preferred utility.

In the present case, the facts do not involve a line constructed to circumvent the Territories Act. To the contrary, it is clear that the location of the customer-owned facilities here, and the mining operations they served, initially started solely in KU's territory, but over time migrated to a portion of the U.S. Steel property which is in the territory of both KU and CVE.⁸⁰ Extension of the customer's facilities followed, without the knowledge or involvement of KU and, apparently, without any understanding by the mining company that violation of utility territories might be at issue. At all times the construction of private lines here occurred on property owned or controlled by the customer, and was done for purpose of the customer's convenience and efficiency and not to try and circumvent the Act. Recognition of those lines in this proceeding will avoid duplication of facilities, unnecessary encumbrance of the landscape, waste of resources, and inefficiencies and inconvenience to the customer, thereby furthering the intent behind the Territories Act. Accordingly, the Commission should consider the customer-owned lines in applying the Act to the facts of this case.

In the future, in an effort to avoid potentially troublesome situations regarding further construction, KU commits to advise all customers who use customer-owned distribution lines that KU should be notified before any expansion of those facilities is undertaken. In the event a customer proposes an expansion of private lines into the territory of another utility, KU will promptly advise the other utility and a good faith effort will be made to resolve the matter by agreement, consistent with the Territories Act. If necessary, the matter will be presented to the Commission for decision.

⁸⁰ Bush Direct, p. 16, lines 8-11.

B. The application of the Territories Act’s split-territory criteria favors KU here.

KRS 278.018 (1) directs the Commission to consider the following factors 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:

- (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.

Application of those factors here, recognizing the existence of the customer’s own facilities, clearly favors KU.

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.”⁸¹ 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 # 2. Those KU facilities are immediately adjacent to the customer’s point of delivery.⁸² CVE’s facilities, on the other hand, are nearly ½ mile away from any point of delivery to Stillhouse # 2.⁸³ The first statutory factor, therefore, favors KU.

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 1931.⁸⁴ CVE’s facilities and service in the area nearest its proposed point of delivery date back to 1949.⁸⁵ Thus, the second factor also favors KU.

⁸¹ *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: Kenergy Corp. v. Kentucky Utilities Company*, Case No. 2002-00008 (PSC Order of October 18, 2002).

⁸² Bush Sur-Rebuttal, p. 6, lines 6-14.

⁸³ Transcript, p. 48, lines 10-13.

⁸⁴ Bush Sur-Rebuttal, p. 6, lines 15-17; Transcript, p. 54, lines 15-24; p. 100, lines 5-13.

⁸⁵ Transcript, p. 54, lines 9-14.

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. KU's facilities, as already configured, are capable of continuing to provide dependable, high quality retail service to Stillhouse # 2 and to the customer's other mining operations, as they have done for many years, and no new facilities would be required.⁸⁶ CVE, however, would have to extend its facilities through construction of at least 2300 feet of line – in the area where the customer's own line already exists – and the addition of a transformer bank, all at a cost of approximately \$40,000 or more.⁸⁷ Moreover, CVE acknowledged that KU's substation, used to serve Stillhouse # 2, could be considered “more stable” than could the substation CVE would use to provide service.⁸⁸ And, while KU's substation has more than adequate capacity to serve Stillhouse # 2, CVE's available capacity is less robust.⁸⁹ Again, KU is favored under this factor.⁹⁰

Finally, the fourth factor addresses the elimination and prevention of duplication of facilities. Because KU would have to construct no additional facilities to continue serving this load, allowing that service to continue will maximize the use of existing facilities and will not duplicate any other facilities.⁹¹ If CVE were to serve the load, though, it would have to add a transformer bank and construct a line extension up to the area where the customer already has such facilities, resulting in the idling of a significant portion of BMR's existing distribution line

⁸⁶ Bush Sur-Rebuttal, p. 6, lines 20-23; Transcript, p. 39, lines 7-10; p. 60, lines 13-17.

⁸⁷ Transcript, p. 60, line 18 to p. 61, line 1. That cost could easily go higher because it does not include costs for transformer installation or right of way clearing. Transcript, p. 121, line 25 to p. 122, line 3. CVE's estimate also does not contain costs to acquire easements, and it has currently taken no action to inquire about the possibility of obtaining easements. Transcript, p. 122, lines 4-6.

⁸⁸ Transcript, p. 119, line 20 to p. 120, line 2.

⁸⁹ Transcript, p. 177, lines 15-21; Direct Testimony of Lonnie E. Bellar, p. 5, lines 1-5.

⁹⁰ CVE attempted to criticize the reliability of the customer-owned facilities that are utilized to provide KU's service to Stillhouse # 2, it is clear that BMR has every incentive to maintain those lines well, and the evidence revealed that there have been no outages on the line since it began service Stillhouse # 2 nearly two years ago. Transcript, p. 118, lines 9-24; p. 184, lines 9-17.

⁹¹ Bush Sur-Rebuttal, p. 7, lines 4-7.

and a duplication of facilities, waste of resources and unnecessary encumbering of the landscape.⁹² Thus, the final statutory factor also favors KU.

While it is KU's position that the factors set forth in KRS 278.017 (3) heavily favor it in this case, the Commission should consider the rates of the two utilities if it believes this case is a close call, as it has done in a previous matter.⁹³ 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.⁹⁴ Regardless of the exact amount of the differential, however, it is undisputed that consideration of the respective rates of the two utilities will favor KU.⁹⁵ For that reason, even if this were considered a close case, consideration of the rate impact to the customer would undoubtedly tip the scales in favor of allowing KU to continue providing service to Stillhouse # 2.

An application of the factors set forth in KRS 278.017 (3) favors KU. For that reason, KU is entitled to continue serving Stillhouse # 2, and an order should be entered accordingly.

CONCLUSION

After full discovery and a contested hearing, it is clear that allowing KU to continue serving Stillhouse # 2 would further the Territories Act's "clear intent" of favoring service by the "utility whose cost to extend service will be less and to avoid duplication of facilities...."⁹⁶ The only action required to allow KU to serve Stillhouse # 2 was a short extension to a longstanding

⁹² 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.


⁹³ *In the Matter of: Inter-County RECC v. Kentucky Utilities Company*, Case No. 94-326 (PSC Order of March 14, 1996); Transcript, p. 68, lines 9-21.

⁹⁴ Transcript, p. 67, line 21 to p. 68, line 8. BMR's witness testified that such a differential was "significant" to his company. Transcript, p. 191, lines 17-23.

⁹⁵ Transcript, p. 168, lines 12-21.

customer-owned line at the customer's cost of \$10,000, none of which was socialized across KU's customer base.⁹⁷ If CVE were to serve that mine, however, it would have to build nearly ½ mile of line at a cost of at least \$40,000, all of which would be socialized across CVE's customer base, 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.⁹⁸ The Commission should resolve this matter based on its longstanding interpretation and application of the Territories Act and the facts presented here, and should dismiss CVE's Complaint, finding that KU has not violated the Act and permitting KU's service to Stillhouse # 2 to continue.

Respectfully submitted,



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⁹⁶ *In the Matter of: Kenergy Corp. v. Kentucky Utilities Company*, Case No. 2002-00008 (PSC Order of October 18, 2002).

⁹⁷ Transcript, p. 194, lines 3-5.

⁹⁸ 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.

CERTIFICATE OF SERVICE

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