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May 12, 2006

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MAY 12 2006

PUBLIC SERVICE
COMMISSION

Elizabeth O'Donnell
Executive Director
Kentucky State Board on Electric
Generation and Transmission Siting
211 Sower Boulevard
Frankfort, Kentucky 40602-0615

RE: *Cumberland Valley Electric, Inc. vs. Kentucky Utilities Company*
Case No. 2006-00148

Dear Ms. O'Donnell:

Enclosed please find and accept for filing the original and ten (10) copies each of Kentucky Utilities Company's Reply Brief in Further Support of Its Motion to Dismiss in the above-referenced matter. Please confirm your receipt of these filings by placing the stamp of your Office with the date received on the extra four additional copies of the filings 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
Attachments
cc: Parties of Record (w/enclosures)

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

In the Matter of:

MAY 12 2006

CUMBERLAND VALLEY ELECTRIC, INC.)

COMPLAINANT)

v.)

KENTUCKY UTILITIES COMPANY)

DEFENDANT)

PUBLIC SERVICE
COMMISSION

CASE NO. 2006-00148

**REPLY BRIEF OF KENTUCKY UTILITIES COMPANY
IN FURTHER SUPPORT OF ITS MOTION TO DISMISS**

Kentucky Utilities Company ("KU") has moved the Commission to dismiss the Complaint filed in this action by Cumberland Valley Electric, Inc. ("CVE"), which Complaint alleges that KU has violated the Certified Territories Act, KRS 278.016 *et seq.* (the "Act"). CVE has filed a Response to that motion, raising several issues which bear further comment by KU. Each of those issues is addressed in turn below.

I. **THE COMMISSION HAS THE AUTHORITY TO DISMISS CVE'S COMPLAINT WITHOUT A HEARING.**

CVE's first argument in its Response is that dismissal of its Complaint at this stage would violate some purported, but never identified, "practice" of the Commission to require a hearing in territorial boundary cases. Although the Commission has stated 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,”¹ it has never established a “practice” of requiring a hearing in all cases. To the contrary, the Commission has long recognized the obligation to dismiss a complaint where it fails to state a claim upon which relief can be granted, and has even dismissed actions involving territorial matters.² Indeed, before proceeding under any complaint, the Commission must determine whether the complaint states a claim which could entitle the complainant to relief.³ If no such claim is stated, then the Commission has recognized that the complaint should be dismissed.⁴

KU’s motion is based solely upon the allegations in CVE’s Complaint, accepting as true CVE’s recitation of the facts for purposes of that motion.⁵ Accordingly, the only issue now before this Commission is whether or not CVE’s Complaint states a claim upon which relief can be granted. For all of the reasons set forth below, it is KU’s contention that CVE has failed to state a claim which would entitle it to any relief from this Commission, and that there is no basis to proceed further with discovery or a hearing. If the Commission agrees with KU, then CVE’s Complaint must be dismissed.

¹ *In the Matter of: Petition of CTA Acoustics, Inc. to Retain Kentucky Utilities Company as Power Supplier and for Expedited Treatment*, Case No. 2003-00226 (PSC Order of January 21, 2004). (Emphasis added.)

² See, e.g., *In the Matter of: Michael and Carol Conover v. Inter-County Rural Electric Coop. Corp. and Kentucky Utilities Company*, Case No. 90-232 (PSC Order of February 6, 1991); *In the Matter of City of Hawesville, Kentucky v. Daviess County Water Assoc., Inc.*, Case No. 2004-00027 (PSC Order of March 25, 2004); *In the Matter of: Newman v. Salt River Electric Coop. Corp.*, Case No. 90-0088 (PSC Order of June 28, 1990); *In the Matter of: Radio Enterprises of Kentucky, Inc. d/b/a Metro-Page v. Commonwealth Telecommunications, Inc., Radio Communications Corporation and Metro Telecommunications of Kentucky, Inc.*, Case No. 10185 (PSC Order of May 17, 1988); *In the Matter of: Abandonment of Gas Service by Ashland Exploration, Inc., and Barnes Transportation Company, Inc.*, Case No. 10038 (PSC Order of November 11, 1987).

³ 807 KAR 5:001, Section 12(4).

⁴ *In the Matter of: Walter Callihan and Goldie Callihan v. Grayson Rural Electric Coop. Corp.*, Case No. 2005-00280 (PSC Order of August 1, 2005).

⁵ Although CVE claims that KU has inaccurately set forth the basis of CVE’s Complaint, that Complaint speaks for itself.

II. CVE'S COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

A. There is no Requirement for Commission Approval to Construct or Operate a Customer-Owned Line.

At the center of the issue immediately before the Commission is the existence of a 69 kV line, owned and operated by BMR, which line is used to distribute electric power to mining operations conducted by BMR or its affiliates in Harlan County.⁶ That line has been used by BMR since at least the early 1980s.⁷ The use of customer-owned distribution lines has been commonplace in the coal-mining industry in Kentucky for decades.⁸

In its Response, CVE does not necessarily take issue with customer-owned lines, but argues that a customer may only construct and operate a privately-owned distribution line which traverses two service territories after first seeking and obtaining the approval of this Commission.⁹ Therefore, CVE argues, BMR's line is "unlawful" because it was not approved by the Commission before it was extended into CVE's territory.¹⁰ That position, however, is unsupported in law.

As a creature of statute, the Commission has only those powers conveyed to it by the General Assembly.¹¹ It is well-settled that the Commission's statutorily-granted jurisdiction extends only to utilities within the Commonwealth.¹² A "utility" is defined as one who "owns,

⁶ Willhite Testimony, p. 7, lines 1-11.

⁷ *Id.*, p. 7, lines 7-9.

⁸ See, e.g. *In the Matter of: The Complaint of Jellico Electric System v. Cumberland Valley Rural Electric Coop. Corp.*, Case No 6637 (Order of February 22, 1977); *In the Matter of: Henderson-Union Rural Electric Coop. Corp.*, 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).

⁹ CVE Response, pp. 5, 11.

¹⁰ *Id.*, p. 11.

¹¹ *Public Service Commission v. Jackson Co. Rural Electric Coop., Inc.*, 50 S.W.3d 764, 767 (Ky. App. 2000).

¹² KRS 278.040(2); *In the Matter of: The Application of Electric Energy, Inc. for a Certificate of Convenience and Necessity to Construct a Power Transmission*, Case No. 89-232 (Order of November 1, 1989).

controls, operates, or manages any facility used or to be used in connection with ... the generation, production, transmission, or distribution of electricity to or for the *public, for compensation, for lights, heat, power, or other uses.*"¹³

Here, there is no allegation that BMR, which owns and operates the distribution system in question for the sole purpose of providing power to itself or its affiliates, is operating as a utility in any way.¹⁴ The Commission has recognized that it has no jurisdiction over private entities, like BMR, who own and operate power lines in Kentucky but do not use those lines to provide "service to or for the public."¹⁵ In that case, the Commission noted that "only a 'utility' can be made to comport with the Commission's statutes and regulations."¹⁶ Moreover, and most directly on point, Kentucky's highest court has held that a private mining company has no obligation to obtain approval from the Commission to construct or operate a line for private use.¹⁷ In reaching that conclusion, the Court reasoned that the mining company was not acting as a utility because "it did not construct the line to serve the public and [did] not intend to serve the public."¹⁸

Because BMR is not acting as a utility, the Commission has no jurisdiction over BMR and cannot require that company "to comport with the Commission's statutes and regulations."¹⁹ In particular, there was and is no basis to require BMR to obtain any approval from this

¹³ KRS 278.010(3)(a). (Emphasis added.)

¹⁴ Willhite Testimony, p. 7, lines 1-11.

¹⁵ *In the Matter of: The Application of Electric Energy, Inc. for a Certificate of Convenience and Necessity to Construct a Power Transmission*, Case No. 89-232 (Order of November 1, 1989), p. 1. The Commission explained that "one offers service to the 'public' ... when he holds himself out as willing to serve all who apply up to the capacity of his facilities." *Id.*, p. 2. (citing *North Carolina ex rel. Utilities Comm'n v. Carolina Tel and Tel. Co.*, 148 S.E.2d 100, 109 (N.C. 1966)). See also KRS 278.040(2).

¹⁶ *In the Matter of: The Application of Electric Energy, Inc. for a Certificate of Convenience and Necessity to Construct a Power Transmission*, Case No. 89-232 (Order of November 1, 1989), p. 1.

¹⁷ *Cumberland Valley Rural Elec. Coop. Corp. v. Public Serv. Comm'n*, 433 S.W.2d 103, 104 (Ky. 1968).

¹⁸ *Id.*

¹⁹ *In the Matter of: The Application of Electric Energy, Inc. for a Certificate of Convenience and Necessity to Construct a Power Transmission*, Case No. 89-232 (Order of November 1, 1989), p. 1.

Commission to construct or operate the private distribution line at issue. Accordingly, there is no basis for finding, as CVE requests, that BMR's private line is "unlawful."²⁰

B. KU's Delivery of Power to Black Mountain Resources, Inc. is Consistent with the Certified Territories Act.

There is likewise no basis for finding KU to be in violation of the law. KU is merely providing service to its mining customer at the Lynch Substation, within its certified territory, just as it has done since approximately 1931.²¹ In trying to establish some violation by KU, CVE takes issue with KU's citation to this Commission's decision in *Jellico v. CVE*,²² arguing that the case can be distinguished on its facts and that, in any event, the decision is not precedent because of subsequent developments on appeal. CVE is simply wrong on both points.

In considering CVE's arguments, it is important to first recognize that the Commission's decision in *Jellico v. CVE* contained two findings, each of which was separate and distinct from the other, and either one of which justified a dismissal of that case.²³ First, the Commission determined that Jellico was unable to render adequate service to Cal-Glo's expanded operations. That determination was based upon KRS 278.030, and not upon the Certified Territories Act.²⁴ Second, the Commission determined that the service at issue was consistent with the Certified Territories Act because the electric consuming facilities in Jellico's certified territory were "served by power from the 'central station source' in [CVE]'s territory."²⁵ KU has cited only the second of those two determinations as support for its motion to dismiss.

²⁰ CVE Response, pp. 11 - 14.

²¹ Agreed Statement of Facts (attached as Willhite Testimony Exhibit 1), p. 3; Item 1 Vicinity Map (attached to Agreed Statement of Facts).

²² *In the Matter of: The Complaint of Jellico Electric System v. Cumberland Valley Rural Electric Coop. Corp.*, Case No 6637 (Order of February 22, 1977).

²³ *Id.*, pp. 5-6.

²⁴ *Id.*, p. 5.

²⁵ *Id.*, pp. 5-6.

CVE claims that the *Jellico* decision is distinguishable from the present case because that case involved issues of the adequacy of the opposing utility's facilities and the cost to upgrade those facilities, neither of which is present here.²⁶ Those facts, however, were only material to the PSC's determination on the adequacy of Jellico's service under KRS 278.030, which is not at issue in this proceeding, and were not even cited, much less relied upon, by the Commission in reaching its determination that the point of metering is the location "where actual service takes place."²⁷ Therefore, those factual differences provide no basis whatsoever for distinguishing that portion of the *Jellico* holding which is at issue here.

CVE also claims that the Commission's decision in *Jellico* should be disregarded here because it was "overturned on appeal."²⁸ In making that argument, CVE once more confuses the two separate determinations made by the Commission in the *Jellico* case. An examination of the appellate opinions in the *Jellico* case reveals that the only issue addressed on appeal was the Commission's determination on adequacy of service, which determination, again, is not the subject of KU's motion.²⁹ Indeed, the Franklin Circuit Court found only that the Commission erred in not making an express determination as to the adequacy of Jellico's proposed service,

²⁶ CVE Response, p. 9. Again, KU is taking CVE's allegations as true for purposes of its motion, but reserves the right to challenge each of those allegations, as set forth in its Answer, if this matter is not dismissed. Specifically, but not exclusively, KU reserves the right to, and will, contend and offer evidence establishing that the Stillhouse Mine No. 2 does not constitute a new electric consuming facility and, alternatively, that KU is entitled to continue serving the Stillhouse Mine No. 2 pursuant to KRS 278.018(1) and 278.017(3).

²⁷ *In the Matter of: The Complaint of Jellico Electric System v. Cumberland Valley Rural Electric Coop. Corp.*, Case No 6637 (Order of February 22, 1977), pp. 5-6.

²⁸ CVE Response, p. 11. CVE implies some bad faith by KU in "fail[ing] to reveal" the appeal in the *Jellico* case. Certainly, there was no intent by KU or its counsel to be anything other than entirely forthcoming with the Commission. Neither of the appellate opinions in this case is published, and therefore efforts to cite-check the Commission's decision in *Jellico* did not reveal those appeals. In any event, however, as set forth herein, it remains KU's opinion that the *Jellico* opinion provides strong guidance to the Commission on the relevant issue here.

²⁹ The appellate opinions were attached to CVE's Response as Exhibits A and B.

and in so doing stated that it was “unnecessary to query” the territorial issues raised by the customer-owned line.³⁰

On further review, the Court of Appeals affirmed the Franklin Circuit Court and ordered the case remanded to the Commission “for a determination of the adequacy of the service proposed by Jellico.”³¹ Although the Court of Appeals went on to state “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,”³² that “thought” was mere *dicta*, which does not carry the weight of precedent, because it was not necessary to the Court’s decision.³³ Specifically, the Court of Appeals’ decision turned on its finding that a “proper resolution” of the *Jellico* case required “a further determination by the Commission on the question of adequacy of service furnished and proposed to be furnished by Jellico.”³⁴ The Court of Appeals did not in any way analyze the issue of whether or not the point of sale occurs at the meter, an issue it conceded had not been ruled upon by the Franklin Circuit Court.³⁵

Simply stated, there was no finding, by either the Franklin Circuit Court or the Court of Appeals, that the Commission erred in *Jellico* when it found that CVE’s service to Cal-Glo was consistent with the Certified Territories Act.³⁶ For that reason, CVE is incorrect when it asserts that the referenced portion of the *Jellico* order was “overturned on appeal.” Furthermore, that holding in *Jellico* was merely an affirmation of a principle previously established by the

³⁰ *Jellico Electric System v. Public Service Commission of Kentucky and Cumberland Valley Rural Electric Coop. Corp.*, Franklin Circuit Court Civil Action No. 87821 (Order of August 18, 1977).

³¹ *Jellico Electric System v. Public Service Commission of Kentucky and Cumberland Valley Rural Electric Coop. Corp.*, Kentucky Court of Appeals Case No. CA-1743-MR (Opinion and Order of September 1, 1978), p. 5.

³² *Id.*

³³ *See, e.g. Brown v. Diversified Decorative Plastics, LLC*, 103 S.W.3d 108, 110 (Ky. App. 2003).

³⁴ *Jellico Electric System v. Public Service Commission of Kentucky and Cumberland Valley Rural Electric Coop. Corp.*, Kentucky Court of Appeals Case No. CA-1743-MR (Opinion and Order of September 1, 1978), p. 5.

³⁵ *Id.*, pp. 4-5.

³⁶ *In the Matter of: The Complaint of Jellico Electric System v. Cumberland Valley Rural Electric Coop. Corp.*, Case No 6637 (Order of February 22, 1977), pp. 5-6.

Commission in *In the Matter of: Pennyrile R.E.C.C. v. Warren R.E.C.C. and Felmont Oil Corp.*³⁷ In that case, which predated *Jellico*, the Commission addressed the Complaint of Pennyrile Rural Electric Cooperative Corporation (“Pennyrile”) regarding the delivery of power to Felmont Oil Corporation (“Felmont”) by Warren Rural Electric Cooperative Corporation (“Warren”).³⁸ Warren delivered power to Felmont at a point within Warren’s territory, but the power was ultimately distributed into Pennyrile’s territory over a distribution line owned by Felmont.³⁹ The Commission dismissed Pennyrile’s Complaint because the provision of power to Felmont occurred in Warren’s territory.⁴⁰ In so doing, the Commission also noted that the use of customer-owned distribution lines can, in some instances, be “more economical and the most flexible for [the customer’s needs].”⁴¹

Here, CVE concedes that BMR is served through a metering station at KU’s Lynch Substation, well within KU’s certified territory.⁴² Although CVE would have the Commission act to preclude BMR’s use of a private distribution system for providing power to its operations and those of its affiliates, there is no basis in law for the Commission to so act. As a member of the public in KU’s certified territory, BMR is entitled to receive electric service in that territory,

³⁷ *In the Matter of: Pennyrile R.E.C.C. v. Warren R.E.C.C. and Felmont Oil Corp.*, Case No. 3483 (PSC Order of September 29, 1958). This case was relied upon heavily by CVE in its brief in the *Jellico* case, where it argued that a utility “has an absolute right to sell power” at a metering point in the utility’s territory, and the customer has the “absolute right to purchase” the power at that metering point and transmit it into another utility’s territory, so long as the power is not resold by the customer. *In the Matter of: The Complaint of Jellico Electric System v. Cumberland Valley Rural Electric Cooperative Corp.*, Case No 6637, Brief for Cumberland Valley RECC and Cal-Glo Coal Company, p. 5.

³⁸ *In the Matter of: Pennyrile R.E.C.C. v. Warren R.E.C.C. and Felmont Oil Corp.*, Case No. 3483 (PSC Order of September 29, 1958), p. 1.

³⁹ *Id.*, pp. 1-2.

⁴⁰ *Id.*, pp. 2-3. In reaching its decision in that case, the Commission cited to a decision by the Pennsylvania PSC holding that it is lawful for a mining company to transfer power for its own use, via its own lines, from a metering point in one service territory to operations in another territory. *Northwestern Mining & Exchange Co. of Erie, Pa. v. West Penn Power Co.*, 61 PUR (NS) 186 (1945).

⁴¹ *In the Matter of: Pennyrile R.E.C.C. v. Warren R.E.C.C. and Felmont Oil Corp.*, Case No. 3483 (PSC Order of September 29, 1958), p. 4.

⁴² Willhite Testimony, p. 6, lines 20-21; Agreed Statement of Facts, p. 3; Item 1 Vicinity Map.

just like any other customer. KU has no ability to control the further distribution of power by BMR to its operations, or those of its affiliates, in the certified territory of KU or any other utility, and the Commission has no jurisdiction over privately-owned electric facilities.⁴³

Contrary to CVE's contention, it is not KU's position that the Commission has in the past issued, or should now issue, a "blank check for any customer to establish a service point in one territory and then extend that service indefinitely ... into any adjacent service territory."⁴⁴ It is simply KU's position that, based on the facts of this case, the provision of power by KU to BMR at the Lynch Substation is consistent with the Certified Territories Act. KU is delivering power at the same substation used to provide service to BMR and predecessor mining companies for over 70 years, and BMR is then delivering that power to multiple mining operations via a private distribution line that has also been in existence for decades.⁴⁵

Allowing KU's longstanding service to BMR to continue will further the intent of the Certified Territories Act by avoiding the wasteful duplication of facilities, unnecessary encumbering of the landscape, and waste of materials and natural resources, and by promoting convenience, efficiency and low costs in serving BMR.⁴⁶ On the other hand, if CVE's position were to prevail, BMR would be forced to take power at a point of delivery which it has not chosen, thereby separating its delivery of power at Stillhouse Mine No. 2 from that of its other affiliates in the area (all of which are presently served by delivery of power at KU's Lynch

⁴³KRS 278.040(2); *In the Matter of: The Application of Electric Energy, Inc. for a Certificate of Convenience and Necessity to Construct a Power Transmission*, Case No. 89-232 (Order of November 1, 1989); *Cumberland Valley Rural Elec. Coop. Corp. v. Public Serv. Comm'n*, 433 S.W.2d 103, 104 (Ky. 1968).

⁴⁴CVE Response, p. 10.

⁴⁵ Agreed Statement of Facts (attached as Willhite Testimony Exhibit 1), p. 3; Item 1 Vicinity Map (attached to Agreed Statement of Facts); Willhite Testimony, p. 7, lines 7-9. The BMR line, or parts of it, has been in existence for decades, but only came to be owned by BMR in the early 1980s.

⁴⁶ KRS 278.016 (providing the express intent of the General Assembly, in enacting the Certified Territories Act, to be "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

Substation), CVE would construct new facilities to serve BMR in place of facilities which already exist, and a significant portion of BMR's long-existing distribution line would be rendered useless.⁴⁷

CONCLUSION

It is undisputed that KU delivers power to BMR at KU's Lynch Substation, well within KU's certified territory, and that BMR then distributes that power to mining operations conducted by it or its affiliates in Harlan County, some portion of which is within CVE's certified territory. Because KU is furnishing power to BMR within its own certified territory, KU is not in violation of the Certified Territories Act. And, because BMR is not acting as a utility, its private distribution line can not be held to violate the Act. For all of those reasons, CVE's Complaint fails to state a claim upon which relief can be granted, and must be dismissed.⁴⁸

retail electric suppliers which may result in inconvenience, diminished efficiency and higher costs in serving the consumer...").

⁴⁷ There could well be other situations in the future, such as where a new private line is constructed for the sole purpose of providing customer choice between neighboring utilities, or where a utility and customer collude to construct facilities for the purpose of avoiding the territorial restrictions set forth in KRS Chapter 278, that would lead to a different result from that advocated by KU here. However, there is not so much as an allegation that those situations are present here, and there is no need for the Commission to rule on hypothetical future issues at this point.

⁴⁸ For all of the same reasons, and those set forth in KU's Answer to CVE's Complaint, CVE's requests for other relief, as set forth in its Response, should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by first-class mail, postage pre-paid, upon the following, this 12th day of May, 2006:

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