



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

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NOV 01 2006
PUBLIC SERVICE
COMMISSION

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November 1, 2006

RE: In the Matter of Cumberland Valley Electric, Inc. v. Kentucky Utilities Company – Case No. 2006-00148

Dear Ms. O'Donnell:

Enclosed please find and accept for filing the original and eight (8) copies of Kentucky Utilities Company's Response to Cumberland Valley Electric, Inc.'s Initial Request for Information dated October 18, 2006 in the above-referenced matter.

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

Sincerely,

Allyson K. Sturgeon

AKS/kmw
Enclosures

C: Parties of Record

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

NOV 01 2006

PUBLIC SERVICE
COMMISSION

IN THE MATTER OF:

CUMBERLAND VALLEY ELECTRIC, INC.)

COMPLAINANT)

v.)

KENTUCKY UTILITIES COMPANY)

DEFENDANT)

CASE NO. 2006-00148

RESPONSE OF
KENTUCKY UTILITIES COMPANY
TO CUMBERLAND VALLEY ELECTRIC, INC.'S
INITIAL REQUEST FOR INFORMATION
DATED OCTOBER 18, 2006

Filed: November 1, 2006

INITIAL OBJECTIONS

As an initial matter, Kentucky Utilities Company (“KU”) objects to instruction (5) given by Cumberland Valley Electric, Inc. (“CVE”) on grounds that it is over broad, unduly burdensome and inconsistent with controlling practice and procedure. KU also objects to certain of the requests for information on the grounds set forth in subsequent specific responses. Without waiver of any objections, however, and subject to these and further specific objections as may be set out below, KU responds to the requests for information propounded by CVE as follows. All objections set forth above or below are made by counsel and not by any KU witness.

KENTUCKY UTILITIES COMPANY

CASE NO. 2006-00148

**Response to Cumberland Valley Electric, Inc.'s
Initial Request for Information
Dated 10/18/06**

Question No. 1

Witness: F. Howard Bush II

- Q-1. Does Mr. Bush agree that there is BMR electrical equipment used in the operation of Stillhouse Mine No. 2 located in CVE's territory that uses energy furnished by KU at its Lynch Station?
- A-1. Yes, energy is utilized by BMR or its affiliates in the territory of CVE in connection with the mining activities at Stillhouse #2, but such fact does not entitle CVE to serve the load at issue here. That utilization of energy is done as part of a larger electric consuming facility ("ECF") which both KU and CVE agree is located in the certified territories of both utilities (although there is a dispute as to what exactly constitutes the relevant ECF in this case). Of course, KU's full position in this case is set forth in its Motion to Dismiss, Answer and pre-filed testimony.

KENTUCKY UTILITIES COMPANY

CASE NO. 2006-00148

**Response to Cumberland Valley Electric, Inc.'s
Initial Request for Information
Dated 10/18/06**

Question No. 2

Witness: F. Howard Bush II

Q-2. What has KU advised customers since June 1972 who seek advice in connecting their facilities to KU in KU territory to facilitate use of KU service in the territory of another retail electric supplier?

A-2. Objection. This request is argumentative and seeks the production of information which is irrelevant to the issues in this proceeding and not reasonably calculated to lead to the discovery of admissible evidence, and could be read to call for the production of information which is protected by the attorney-client privilege.

However, without waiver of and subject to that objection, KU states that while it has no written documentation of what, if anything, it has "advised" customers since June of 1972 on the questioned issue, it at all times seeks to comply with the Certified Territories Act, as that Act is written and has been applied by the Public Service Commission and the Courts of this Commonwealth. If a customer questions KU as to its position on the provision of service, it is KU's general practice to refer the customer to the applicable statutes, regulations and orders or case opinions and to advise the customer of its opinion (usually informed by consultation with counsel) on the application of the law to the facts of the situation then presented. However, in any matter which is or may be disputed, KU also advises the customer that service rights in such situations are ultimately to be resolved by the Public Service Commission.

KENTUCKY UTILITIES COMPANY

CASE NO. 2006-00148

**Response to Cumberland Valley Electric, Inc.'s
Initial Request for Information
Dated 10/18/06**

Question No. 3

Witness: F. Howard Bush II

- Q-3. Provide a list of all customers who have facilities connected to KU that extend into the territory of another retail electric supplier.
- A-3. Objection. This request is argumentative and seeks the production of information which is irrelevant to the issues in this proceeding and not reasonably calculated to lead to the discovery of admissible evidence.

However, without waiver of and subject to that objection, KU states that it has numerous customers who own their own distribution systems, but it has no knowledge of whether or not those systems extend into other utilities' territories. It is KU's belief that such situation is common across the Commonwealth (and in other jurisdictions) and would be similar in the territory of most any retail electric supplier. See also KU's Answer to CVE's Q-11 to Mr. Bush below.

KENTUCKY UTILITIES COMPANY

CASE NO. 2006-00148

**Response to Cumberland Valley Electric, Inc.'s
Initial Request for Information
Dated 10/18/06**

Question No. 4

Witness: F. Howard Bush II

- Q-4. Provide and describe KU's past and current policy for furnishing retail electric service in its territory for use in the territory of another retail electric supplier.
- A-4. Objection. This request is argumentative and seeks the production of information which is irrelevant to the issues in this proceeding and not reasonably calculated to lead to the discovery of admissible evidence, and could be read to call for the production of information which is protected by the attorney-client privilege.

However, without waiver of and subject to that objection, KU has no "policy" in this regard other than to at all times seek to comply with the Certified Territories Act, as that Act is written and has been applied by the Public Service Commission and the Courts of this Commonwealth. Each and every split-territory scenario must be and is evaluated on its own facts. However, KU does not knowingly provide power in its territory for use solely in the territory of another retail electric supplier, without the agreement of the neighboring retail electric supplier or the approval of the Commission. See also KU's Answer to CVE's Q-2 to Mr. Bush above.

KENTUCKY UTILITIES COMPANY

CASE NO. 2006-00148

**Response to Cumberland Valley Electric, Inc.'s
Initial Request for Information
Dated 10/18/06**

Question No. 5

Witness: F. Howard Bush II

Q-5. Please identify each territory dispute where Mr. Bush has "regularly assisted KU" since 1974 by year, case number where applicable and describe the nature of the assistance and to whom the assistance was provided?

A-5. Objection. This request is overbroad, seeks the production of information which is irrelevant to the issues in this proceeding and not reasonably calculated to lead to the discovery of admissible evidence, is proprietary and confidential, and misstates Mr. Bush's testimony.

However, without waiver of and subject to that objection, KU notes that the statement in Mr. Bush's testimony regarding his assistance to KU in territorial matters was not limited to only those instances in which an issue became the subject of a formal proceeding before the Commission. In Mr. Bush's experience, most territorial disputes involve routine inquiries from customers regarding potential service to a specific area and / or discussions with neighboring utilities which involve agreements for service that are resolved without a formal proceeding. Mr. Bush is frequently involved in those areas. In addition, with regard to formal Commission proceedings involving territorial disputes, and not including the pending proceeding, Mr. Bush has been involved in providing assistance on case development, analysis, preparation and strategy in PSC Case Nos. 2002-00008, 2003-00226, 2005-00441 and 2006-00214, and in sponsoring data requests and/or testimony in PSC Case Nos. 2002-00008, 2003-00226, and 2006-00214. Mr. Bush may also have had involvement in other territorial cases in the past, but he cannot recall those with specificity at this time.

KENTUCKY UTILITIES COMPANY

CASE NO. 2006-00148

**Response to Cumberland Valley Electric, Inc.'s
Initial Request for Information
Dated 10/18/06**

Question No. 6

Witness: F. Howard Bush II

Q-6. Please describe the location of the portions of BMR line shown on Exhibit FHB-5.

A-6. Page 1 of 4 of Exhibit FHB-5 shows a portion of the BMR-owned line as it leaves the BMR substation in Cloverlick and heads toward Stillhouse #2. Page 2 of 4 of Exhibit FHB-5 shows a portion of the BMR-owned line as it comes down the mountain ridge toward the Stillhouse #2 portal. Page 3 of 4 of Exhibit FHB-5 shows a portion of the BMR-owned line in the area of the Stillhouse #2 portal at or near the area where BMR began an extension of the existing line over to the portal itself. Page 4 of 4 of Exhibit FHB-5 shows a different view of the same section of the line as shown on Page 3 of 4, but also shows other parts of the line relative to the end of the conveyor.

KENTUCKY UTILITIES COMPANY

CASE NO. 2006-00148

**Response to Cumberland Valley Electric, Inc.'s
Initial Request for Information
Dated 10/18/06**

Question No. 7

Witness: F. Howard Bush II

- Q-7. Provide a list of the KU personnel with whom Mr. Bush reviewed “the facts relevant to this matter”?
- A-7. Mr. Bush has had discussions or meetings with counsel, Kent Blake, Rick Lovekamp, Marty Reinert, Chuck Lane, Lonnie Bellar, Ed Staton and John Wolfram, and possibly with others that he can not presently recall with specificity.

KENTUCKY UTILITIES COMPANY

CASE NO. 2006-00148

**Response to Cumberland Valley Electric, Inc.'s
Initial Request for Information
Dated 10/18/06**

Question No. 8

Witness: F. Howard Bush II

Q-8. Provide the dates of meetings and discussions with BMR and Stillhouse representatives.

A-8. Objection. This request is overbroad, seeks the production of information which is irrelevant to the issues in this proceeding and not reasonably calculated to lead to the discovery of admissible evidence.

However, without waiver of and subject to that objection, and limiting this response to the subject matter of this proceeding and to any meetings or discussions that occurred before CVE filed its Complaint herein, KU states that it has had meetings and / or discussions on at least the following dates: February 28, 2006, March 10, 2006, March 24, 2006, and April 5, 2006. Additional meetings or discussions may have occurred but Mr. Bush has not been able to find exact dates for such.

KENTUCKY UTILITIES COMPANY

CASE NO. 2006-00148

**Response to Cumberland Valley Electric, Inc.'s
Initial Request for Information
Dated 10/18/06**

Question No. 9

Witness: F. Howard Bush II

Q-9. Provide a list of the Orders reviewed by Mr. Bush, the date he first became aware of those Orders and how he became aware of such orders.

A-9. Objection. This request is overbroad, seeks the production of information which is irrelevant to the issues in this proceeding and not reasonably calculated to lead to the discovery of admissible evidence, and may call for the production of information which is protected by the attorney client privilege or the work product doctrine.

However, without waiver of and subject to that objection, and restricting the answer to orders relating to territorial matters, KU states that Mr. Bush is not a lawyer and is not being offered as an expert on legal issues, but that from a lay utility perspective he is generally aware of and has at some point reviewed most, if not all, of the orders in territorial cases involving KU since 1974, and that he specifically reviewed the orders referenced in his testimony herein in preparation for that testimony. In addition, Mr. Bush believes that he has from time to time reviewed other orders in territorial matters over the course of his career, in connection with his job duties, but he is not able to identify with certainty which other such orders he has reviewed. Mr. Bush is unable to provide any more specific information regarding the dates on, or the manner in, which he first became aware of such orders.

KENTUCKY UTILITIES COMPANY

CASE NO. 2006-00148

**Response to Cumberland Valley Electric, Inc.'s
Initial Request for Information
Dated 10/18/06**

Question No. 10

Witness: F. Howard Bush II

- Q-10. Does Mr. Bush agree that coal is transported from BMR mines that utilize CVE furnished service to BMR's prep plant near Stillhouse Mine No. 1?
- A-10. On information and belief, KU agrees that coal is transported to BMR's prep plant at Cloverlick from at least one BMR-affiliated mine that is served by CVE, but that such mine is not located in Harlan County.

KENTUCKY UTILITIES COMPANY

CASE NO. 2006-00148

**Response to Cumberland Valley Electric, Inc.'s
Initial Request for Information
Dated 10/18/06**

Question No. 11

Witness: F. Howard Bush II

Q-11. List and describe the facilities for each "mining operation, industrial park and large farm" that utilizes customer-owned distribution lines and describe the network.

A-11. Objection. This request is over broad, unduly burdensome and seeks the production of information which is irrelevant to the issues in this proceeding and not reasonably calculated to lead to the discovery of admissible evidence.

However, without waiver of and subject to that objection, KU states that it has identified a number of mining operations, quarries, industrial complexes, state parks, schools, farms, military installations and other customers that utilize their own distribution systems, as shown on the document attached hereto, which is a representative, and not necessarily exhaustive, list. KU is generally not aware of the specifics regarding such facilities.

A G I Polymatrix (Etown)
Abbey of Gethsemani
Advanced Green Components (Winchester)
AFG
Allen Company (quarry)
Altec
Ambrake (Etown)
American Greetings
American Mining & Mfg.
Anr Coal
Appolo Fuels
Ashby Electric
B & D Mining
B & W Resources
Bell Co. Bd. Of Edu.
Bell County Coal
Bellarmine University
Bickett, James
Black Mountain Resources
Blackburn Correctional Institute (Lexington)
Bluegrass Army Depot (Richmond)
Bluegrass Plating
Bluegrass Station (Lexington)
Boonesboro State Park Campground
Bourbon Limestone
Brenntag Mid-South
Brown-Forman
Buggies Unlimited
C & H Development
Carmuese Lime
Cemex - Kosmos Cement
Ceradyne
CFS Colonial
Charolais Coal
CHAS Coal
CLA / CMC
Clipay
Coastal Coal (VA)
Consolidated Buscuit
Continental Resources
Cooper Tire
Core Minerals
Corning (Harrodsburg)
Crane/Fiat MFGCR/PL

CSD/DJI Joint Venture
CSX Rail
CTA Acoustics
Cumberland College
Cumberland Creek Coal
Cumberland Gap Tunnel
Cumberland Municipal Housing
Cumberland River Coal
Custom Engineering
Custom Resins
Dana Corp (Cecilia, KY)
Dart Container
Dawson Manufacturing
Dawson Springs Housing
Dixie Fuels
Dodge Hill Mining, LLC
Dyno Nobel Inc
Early Times
East Kentucky Power
Eastern Alloy
Eastern Kentucky University
Eckart
Energys
Ensign Bickford
FAA Faso
Federal Correctional Institution (Lexington)
Firestone
Florida Tile
Ford KTP
Ford LAP
Fox Knob Coal
Free Dome Coal
Gallagher Drilling
General Cable
General Shale (Fairdale)
Gibraltar Coal
Glitterwrap
Golden Foods
Green River Correctional
Greenville Housing
Groves Construction
Har Ken Oil
Harlan App. Reg. Hospital
Harlan Cumberland Coal

Highland Mining
Hopkins County Coal
Housing Authority of Winchester (2)
Hussey Copper
I C RR
IMC-Agrico
Infiltrator Systems (3)
Island Creek Coal
James Bickett
Jenmar Machining
Jim Beam (Boston)
Jones, Chris & Joseph
Ken American Resources
Kentucky Horse Park
Kentucky Manufacturing
Kentucky Solite
Kentucky State Penitentiary
Kingsford Mfg.
KY Dept of Mental Health
Ky State Penitentiary
Kyosan Denki America
Lake Cumberland Regional Hospital
Laurel Co. Board of Education (Corbin)
Laurel Co. Board of Education (London)
Levi Jackson State Park
Liggett Mining #2
Livemore Apartments
Loeb and Payne
Loeb, Herman
London Housing Auth
Lone Mountain Processing
Louisville Forge
Louisville Zoo
Lyon County Housing
Manalapan Mining (Harlan)
Manalapan Mining (Pineville)
Martin Marietta 3 Rivers Rock
Martin Marietta Aggregate
Mason Farms
Maysville Community College
MeadWestvaco Virginia Corp
Meritor
Middlesboro Hospital
Mill Branch (VA)

Morganfield Housing
Mosaic
Mrs. Smiths Bakery
Nally Hamilton
National Coal
National Coal
National Standard
Nestle
New Horizon Coal
New Page Corporation
North American Stainless
Nugent Sand
Ohio County Coal Company
Okonite
Osram-Sylvania (Main)
Osram-Sylvania (Winchester)
Outwood ICF Inc
Paramount Mining (VA)
Peabody Coal Co. Camp 9 mines
Perdue Farms
Period Inc
Pigeon Creek Processing (VA)
Pine Mntn. State Park
Pineville Hsng. Auth.
Pleasant View Mining
Powell Mountain Coal (VA)
Publishers Printing (Lebanon Junction)
Publishers Printing (Shepherdsville)
Quality Cabinets
Quebecor World
R. B. Coal
RAPT
RB Coal
Red River Coal (VA)
Republic Conduit
Rex Coal
Reynolds Metals (Hale Ave)
Reynolds Metals (Produce Rd)
Richmond Housing Authority
Richmond Utilities Water Plant
River Metals
Rivers Metals Recycling
River View Coal
Roberts Brothers

Robertson & Sons Oil
Robinson, C A
Rogers Group
Roseclare Oil
Sekisui (future)
Sequoia Energy
Sherwin Williams
Sigmon Coal
Solution Dispersions
Somerset Community College
Somerset Glass Plant
Somerset Housing Authority
Somerset Water
Somerset Wood Products
Sonoco
Southeast Community College
Southern Baptist Seminary
Southern Belle
Square D
Standard Armature
Stanford Lumber
Steel Technologies
Stewart, J.S.
Sturgis Housing
Summit Polymers
Sunlite Farms
Sypris Technologies
T G Kentucky
Teledyne / Portland Forge
Texas Gas
Thornberry Lumber
Toyota
Trane
Union County Board of Education
Universal Operating
University of Kentucky (Henderson)
University of Kentucky (Lexington)
University of Louisville (Belknap Campus)
University of Louisville (Medical)
VIC Coal (VA)
Village Center
Vojecaro Properties LLC
Wald LLC
Warrior Coal

Webster County Coal
West Ky Correctional Complex
White Stone / Oldcastle Stone
Whitley Broadcasting
Williamsburg Housing Auth
Worthington Steel

KENTUCKY UTILITIES COMPANY

CASE NO. 2006-00148

**Response to Cumberland Valley Electric, Inc.'s
Initial Request for Information
Dated 10/18/06**

Question No. 12

Witness: F. Howard Bush II

- Q-12. Identify each "mining operation, industrial park and large farm" that overlaps the certified territory of two or more utilities and whether there is an Order authorizing modification of the certified territory boundary lines.
- A-12. Objection. This request over broad, unduly burdensome and seeks the production of information which is irrelevant to the issues in this proceeding and not reasonably calculated to lead to the discovery of admissible evidence.

However, without waiver of and subject to that objection, KU states that it is generally unaware of whether a customer's property overlaps certified territorial lines, as was the case here until CVE began challenging the service to Stillhouse #2. KU is unable to identify any other ECF, currently served by KU, which overlaps the certified territory of KU and a neighboring retail electric supplier and which is not the subject of either an agreement between the utilities or an order of the PSC.

KENTUCKY UTILITIES COMPANY

CASE NO. 2006-00148

**Response to Cumberland Valley Electric, Inc.'s
Initial Request for Information
Dated 10/18/06**

Question No. 13

Witness: F. Howard Bush II

- Q-13. Does Mr. Bush admit that the Baldwin Oil wells were in territory of Henderson Union prior to June, 1972 and only became located in KU's certified territory as a result of the enactment of KRS 279.016-.018? If no, please explain.
- A-13. KU admits that the facts are as stated in the final Order in that case. KU has no information beyond that set forth therein. KU does not "admit" the requested assertion because there were no certified territories before June 1972, and to the extent that the wells were "in" the territory of either utility before that date, the best guidance on that point comes from the Order itself, which provides that the wells "have always been located in KU's certified territory."

KENTUCKY UTILITIES COMPANY

CASE NO. 2006-00148

**Response to Cumberland Valley Electric, Inc.'s
Initial Request for Information
Dated 10/18/06**

Question No. 14

Witness: F. Howard Bush II

Q-14. Please provide the supporting calculations for the \$41,000 revenue differential between KU and CVE tariffs.

A-14. Please see the attached document. The reference in Mr. Bush's testimony should be "approximately \$42,000."

Comparative Billing

	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6	Month 7	Month 8	Month 9	Month 10	Month 11	Month 12	Total
Monthly Billing Data													
Demand (kw)	800	800	800	800	800	800	800	800	800	800	800	800	
Energy (kwh)	344,560	344,560	344,560	344,560	344,560	344,560	344,560	344,560	344,560	344,560	344,560	344,560	
Cumberland Valley Billing													
Demand Charge	\$2,944.00	\$2,944.00	\$2,944.00	\$2,944.00	\$2,944.00	\$2,944.00	\$2,944.00	\$2,944.00	\$2,944.00	\$2,944.00	\$2,944.00	\$2,944.00	\$2,944.00
Energy Charge	\$14,757.50	\$14,757.50	\$14,757.50	\$14,757.50	\$14,757.50	\$14,757.50	\$14,757.50	\$14,757.50	\$14,757.50	\$14,757.50	\$14,757.50	\$14,757.50	\$14,757.50
Subtotal	\$17,701.50	\$17,701.50	\$17,701.50	\$17,701.50	\$17,701.50	\$17,701.50	\$17,701.50	\$17,701.50	\$17,701.50	\$17,701.50	\$17,701.50	\$17,701.50	\$17,701.50
Monthly Adjustment Factors													
Fuel Adjustment Clause	\$1,607.54	\$1,607.54	\$1,607.54	\$1,607.54	\$1,607.54	\$1,607.54	\$1,607.54	\$1,607.54	\$1,607.54	\$1,607.54	\$1,607.54	\$1,607.54	\$1,607.54
Subtotal	\$19,309.04	\$19,309.04	\$19,309.04	\$19,309.04	\$19,309.04	\$19,309.04	\$19,309.04	\$19,309.04	\$19,309.04	\$19,309.04	\$19,309.04	\$19,309.04	\$19,309.04
Taxes													
School Tax	\$579.27	\$579.27	\$579.27	\$579.27	\$579.27	\$579.27	\$579.27	\$579.27	\$579.27	\$579.27	\$579.27	\$579.27	\$579.27
Sales Tax	\$1,193.30	\$1,193.30	\$1,193.30	\$1,193.30	\$1,193.30	\$1,193.30	\$1,193.30	\$1,193.30	\$1,193.30	\$1,193.30	\$1,193.30	\$1,193.30	\$1,193.30
Total	\$21,081.61	\$21,081.61	\$21,081.61	\$21,081.61	\$21,081.61	\$21,081.61	\$21,081.61	\$21,081.61	\$21,081.61	\$21,081.61	\$21,081.61	\$21,081.61	\$252,979.32
Rate IV-A (3)													
\$3.68													
\$0.04283													
\$0.0046655													
3.00%													
6.00%													
Kentucky Utilities Billing													
Customer Charge	\$120.00	\$120.00	\$120.00	\$120.00	\$120.00	\$120.00	\$120.00	\$120.00	\$120.00	\$120.00	\$120.00	\$120.00	\$120.00
Demand Charge	\$3,880.00	\$3,880.00	\$3,880.00	\$3,880.00	\$3,880.00	\$3,880.00	\$3,880.00	\$3,880.00	\$3,880.00	\$3,880.00	\$3,880.00	\$3,880.00	\$3,880.00
On-Peak	\$584.00	\$584.00	\$584.00	\$584.00	\$584.00	\$584.00	\$584.00	\$584.00	\$584.00	\$584.00	\$584.00	\$584.00	\$584.00
Off-Peak	\$7,980.01	\$7,980.01	\$7,980.01	\$7,980.01	\$7,980.01	\$7,980.01	\$7,980.01	\$7,980.01	\$7,980.01	\$7,980.01	\$7,980.01	\$7,980.01	\$7,980.01
Energy Charge	\$12,564.01	\$12,564.01	\$12,564.01	\$12,564.01	\$12,564.01	\$12,564.01	\$12,564.01	\$12,564.01	\$12,564.01	\$12,564.01	\$12,564.01	\$12,564.01	\$12,564.01
Subtotal	\$3,262.98	\$3,262.98	\$3,262.98	\$3,262.98	\$3,262.98	\$3,262.98	\$3,262.98	\$3,262.98	\$3,262.98	\$3,262.98	\$3,262.98	\$3,262.98	\$3,262.98
Monthly Adjustment Factors													
Fuel Adjustment Clause	\$539.70	\$539.70	\$539.70	\$539.70	\$539.70	\$539.70	\$539.70	\$539.70	\$539.70	\$539.70	\$539.70	\$539.70	\$539.70
Environmental Surcharge	(\$217.02)	(\$217.02)	(\$217.02)	(\$217.02)	(\$217.02)	(\$217.02)	(\$217.02)	(\$217.02)	(\$217.02)	(\$217.02)	(\$217.02)	(\$217.02)	(\$217.02)
Merger Surcredit	(\$56.52)	(\$56.52)	(\$56.52)	(\$56.52)	(\$56.52)	(\$56.52)	(\$56.52)	(\$56.52)	(\$56.52)	(\$56.52)	(\$56.52)	(\$56.52)	(\$56.52)
Value Delivery Surcredit	\$16,093.15	\$16,093.15	\$16,093.15	\$16,093.15	\$16,093.15	\$16,093.15	\$16,093.15	\$16,093.15	\$16,093.15	\$16,093.15	\$16,093.15	\$16,093.15	\$16,093.15
Subtotal	\$482.79	\$482.79	\$482.79	\$482.79	\$482.79	\$482.79	\$482.79	\$482.79	\$482.79	\$482.79	\$482.79	\$482.79	\$482.79
Taxes													
School Tax	\$994.56	\$994.56	\$994.56	\$994.56	\$994.56	\$994.56	\$994.56	\$994.56	\$994.56	\$994.56	\$994.56	\$994.56	\$994.56
Sales Tax	\$17,570.50	\$17,570.50	\$17,570.50	\$17,570.50	\$17,570.50	\$17,570.50	\$17,570.50	\$17,570.50	\$17,570.50	\$17,570.50	\$17,570.50	\$17,570.50	\$17,570.50
Total	\$17,570.50	\$17,570.50	\$17,570.50	\$17,570.50	\$17,570.50	\$17,570.50	\$17,570.50	\$17,570.50	\$17,570.50	\$17,570.50	\$17,570.50	\$17,570.50	\$210,846.00

Amount By Which Service Supplied By Cumberland Valley Would Be Higher Than That Supplied By Kentucky Utilities \$42,133.32

Notes : (1) Estimated load at Stillhouse #2 supplied by Black Mountain Resources.
 (2) Energy determined by applying an arithmetic average of the monthly load factors of the total customer load for twelve months to the estimated load.
 (3) Assumes a primary delivery
 (4) Monthly adjustment factors are those for August 2006
 (5) Recognizes the actual transmission delivery
 (6) Assumes equal on-peak and off-peak demands

KENTUCKY UTILITIES COMPANY

CASE NO. 2006-00148

**Response to Cumberland Valley Electric, Inc.'s
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Question No. 15

Witness: F. Howard Bush II

- Q-15. Please provide a tabulation of the annual revenue received from BMR for 2004, 2005 and 2006 to date for service furnished at Lynch.
- A-15. Objection. This request seeks the production of information which is irrelevant to the issues in this proceeding and not reasonably calculated to lead to the discovery of admissible evidence. In addition, it is KU's longstanding policy to not voluntarily disclose customer-specific information.

KENTUCKY UTILITIES COMPANY

CASE NO. 2006-00148

**Response to Cumberland Valley Electric, Inc.'s
Initial Request for Information
Dated 10/18/06**

Question No. 16

Witness: F. Howard Bush II

- Q-16. Please provide KU's understanding of the date that Arch Minerals commenced underground mining operations in any of the permitted boundary of Stillhouse Mine No. 2. Provide any documentation in KU's possession that supports this response.
- A-16. KU itself has no knowledge of or documentation regarding the date on which Arch Minerals or any affiliate or predecessor first commenced mining in any of the permitted boundary of Stillhouse #2 as shown on the exhibits in this proceeding. However, it is KU's understanding, on information and belief, that mining activities did previously occur in those reserves by Arch Minerals or an affiliate, as depicted on Exhibits Matda-1 and Matda-2, and that Arch used the distribution facilities now owned by BMR to serve those operations. If fact, it is KU's understanding, based on information and belief, that the dark gray or black area of earth, just to the left of the two utility poles in the foreground on Page 3 of 4 of Exhibit FHB-5, was the location of a fan shaft used in connection with Arch's mining activities in these reserves.

KENTUCKY UTILITIES COMPANY

CASE NO. 2006-00148

**Response to Cumberland Valley Electric, Inc.'s
Initial Request for Information
Dated 10/18/06**

Question No. 17

Witness: F. Howard Bush II

Q-17. Please state if KU has any knowledge of underground mining operations in the current permitted boundary of Stillhouse Mine No. 2 prior to Arch Minerals's mining activities. If so, please provide documentation supporting such response.

A-17. See A-16 above.

KENTUCKY UTILITIES COMPANY

CASE NO. 2006-00148

**Response to Cumberland Valley Electric, Inc.'s
Initial Request for Information
Dated 10/18/06**

Question No. 18

Witness: F. Howard Bush II

- Q-18. Provide a citation to all Kentucky Commission decisions known to Mr. Bush where the Commission determined that customer owned distribution lines are to be attributed to one utility or another in applying the four factors contained in KRS278.017(3). Please provide specific citations to the language of such orders, if any, where such a determination is alleged to have been made, and to which of the four factors such an attribution was applied.
- A-18. Mr. Bush is not a lawyer and is not being offered as an expert on legal issues, but from a lay utility perspective he is only aware that the issue of customer-owned lines has been addressed in those cases referenced in his direct testimony or that of Mr. Willhite. With regard to that portion of this request seeking specific citations to the language in such orders, and other specific information, KU objects on grounds that such information is as accessible to CVE as it is to KU, and thus it is improper to request such original work from KU or Mr. Bush.

KENTUCKY UTILITIES COMPANY

CASE NO. 2006-00148

**Response to Cumberland Valley Electric, Inc.'s
Initial Request for Information
Dated 10/18/06**

Question No. 1

Witness: Lonnie E. Bellar

- Q-1. Please describe the exact location of the portal and the BMR affiliate referred to at page 3, lines 12-13.
- A-1. The portal referenced is Stillhouse #1. The location of that portal, and the location of KU's distribution facility in relation to that portal, is identified on Exhibit LEB-1

KENTUCKY UTILITIES COMPANY

CASE NO. 2006-00148

**Response to Cumberland Valley Electric, Inc.'s
Initial Request for Information
Dated 10/18/06**

Question No. 2

Witness: Lonnie E. Bellar

- Q-2. Does Mr. Bellar agree that the Stillhouse Mine No. 2 is subject to a single contingency outage of the BMR 69 kv line extending from Lynch to Cloverlick and the BMR 12 kv line extending from the BMR Cloverlick Station to the Stillhouse No. 2 Mine?
- A-2. Without having specifically evaluated the capabilities of those facilities, Mr. Bellar would agree. Of course, any contingency in such scenario would be on the customer's side of the meter and not the responsibility of KU. In comparison, the contingency vulnerabilities discussed in Mr. Bellar's testimony regarding CVE's service to the customer, would be on CVE's side of the meter.

KENTUCKY UTILITIES COMPANY

CASE NO. 2006-00148

**Response to Cumberland Valley Electric, Inc.'s
Initial Request for Information
Dated 10/18/06**

Question No. 3

Witness: Lonnie E. Bellar

Q-3. Does the probability of a line outage increase with the length of the line?

A-3. Generally speaking, and all other things being equal, the probability of a line outage is greater the longer the line.

KENTUCKY UTILITIES COMPANY

CASE NO. 2006-00148

**Response to Cumberland Valley Electric, Inc.'s
Initial Request for Information
Dated 10/18/06**

Question No. 4

Witness: Lonnie E. Bellar

Q-4. Is it Mr. Bellar's Testimony that he does not affirm the accuracy of his Exhibit 1 with regard to the BMR facilities shown thereon?

A-4. No. Mr. Bellar affirms the accuracy of that exhibit with regard to the BMR and affiliated facilities shown thereon, to the best of his information and belief. However, the reference to verification of those facilities by Mr. Matda was made because Mr. Matda is also a witness in this proceeding and is the individual with the best information regarding those facilities and the accuracy of their depiction on this Exhibit.

1 of investor owned utilities. It is unfair competition by the federal government at the detriment
2 of ODP's remaining customers and the public interest. PVEC wrongfully withheld its complete
3 "plan of action," assisted by TVA, from this Commission when it sought advice from the Staff
4 in 1993, when it responded to ODP's informal complaint, and throughout the course of this
5 action.

6 **Q. What does the evidence in this case show with regard to whether there would be any direct,**
7 **substantial and immediate harm to the utility who loses the service?**

8 A. Sigmon was an existing customer of ODP for many years. ODP served Sigmon's preparation
9 plant and the Calvin and Glenbrook mines long before PVEC "captured" those loads. As a
10 result, since October 1996 ODP has suffered and will continue to suffer a loss of revenue of
11 approximately \$1 million per year, which results in direct, substantial and immediate injury to
12 ODP.

13 **Q. What does the evidence in this case show with respect to the direct, substantial and**
14 **immediate harm that will occur to ODP if PVEC is permitted to continue to serve the**
15 **Sigmon load?**

16 A. In addition to the continuing damage caused by the loss of revenues, PVEC will have every
17 economic incentive to begin to acquire ODP's remaining mining loads in Virginia and Kentucky
18 along the Virginia border. PVEC has admitted that its new Calvin substation, built without full
19 disclosure of its true purpose to ODP, is presently configured with the capacity of approximately
20 13.6 MW, which is substantially in excess of Sigmon's current requirements of less than 6 MW.
21 RMH Rebuttal Exhibit 10. Any visual inspection of the substation shows that the facility has been
22 built not only with this existing excess capacity, but even substantial additional space to install

1 more transformers. The photograph contained in RMH Rebuttal Exhibit 10 is a fair and accurate
2 depiction of the amount of ground space at the facility that presently is not occupied and the
3 presence of additional unused concrete platforms for the installation of additional transformers.
4 The use of this facility and other similar facilities that could be built could easily permit PVEC
5 to systematically capture the mining load of ODP this part of Virginia and in Harlan County and
6 Bell County, Kentucky. The impact on ODP is estimated to be approximately \$6 to \$8 million
7 in lost revenues to the ODP jurisdiction in addition to the Sigmon load PVEC already has
8 captured. This amount is approximately 15 to 20 percent of the total Virginia jurisdictional
9 revenue of ODP and would cause ODP's return to decline by as much eight percentage points.
10 The loss in mining revenues will leave stranded an estimated \$7.3 million that ODP has invested
11 in transmission and substation facilities primarily used to service its mining loads.

12 **Q. Are there duplication of facilities in this case?**

13 A. Yes. Anyone standing at ODP's Calvin substation only has to turn and view the substation PVEC
14 constructed less than a quarter of a mile away to serve the same load that ODP has served for
15 years. The line built from the PVEC substation to the preparation plant also is a duplication of
16 facilities.

17 **Q. Who has the right and obligation to serve in this instance?**

18 A. ODP. It was exercising its right and fulfilling its obligation to serve its existing customer and all
19 of the mining operations in Virginia and Kentucky when PVEC captured the load. This case does
20 not involve a new customer, but rather an existing customer and mining operations which ODP
21 has been serving since 1912. PVEC's claim of an obligation to serve is without merit because
22 ODP's right to serve is superior to any claim by PVEC that it should be entitled, by its contrived

1 point of delivery, to induce the migration of ODP's existing customer.

2 **Q. In light of these facts, how should the point of delivery test, should the Commission choose**
3 **to adopt such a test, be applied in this case?**

4 A. As demonstrated by the facts of this case, the blind application of the point of delivery test, as
5 advanced by PVEC, encourages the use of abusive and anticompetitive tactics to capture existing
6 loads from electric utilities because it allows a utility to coerce or induce the existing customer
7 of another utility to leave the system based only upon the contrived location of the meter. Any
8 objective application of the test should find that the evidence described above balances heavily
9 in favor of ODP continuing to serve all facilities and operations in its certified territory, and
10 against PVEC's contrived metering point.

11 **Q. On page 19 of his testimony, Mr. Meyers argues that PVEC's service to Sigmon for use**
12 **within ODP's service territory "also satisfies the geographic load center test." Do you**
13 **agree?**

14 A. No. First, although neither party advocates the adoption of the geographic load center test, ODP
15 would undoubtedly prevail under such an analysis. This test determines the appropriate electric
16 service provider based upon the location of the primary concentration of electrical usage, rather
17 than upon where a potential customer might locate its point of delivery. Further, while many
18 commissions have rejected this test, characterizing it as "highly technical", PVEC has produced
19 no such evidence to support its conclusion that it would prevail under such a test.

20 In a nutshell, the geographic load center test allows the utility which serves the majority
21 of a customer's load to serve the entire load, regardless of where the territorial boundaries lie.
22 The test appears to be contrary to Virginia law (which allows only the authorized utility to serve

1 in a certificated area). However, it is clear from Mr. Palmer's Rebuttal Map Exhibit 1 and his
2 companion Rebuttal Exhibit 2, and even from PVEC's own Service Area Map (attached as
3 Exhibit A to Exhibit 22 of Mr. Meyers' testimony) that all but one of the currently licensed mines
4 are wholly within ODP's (and KU's) certified service territory, and all of the current mining
5 operations are being conducted for Sigmon entirely within ODP's (and KU's) certified territory.

6 It is thus clear that ODP would prevail under any analysis of this test.

7 **VI. RECOMMENDATIONS OF HEWETT TO THE VIRGINIA STATE CORPORATION**
8 **COMMISSION**

9 **Q. What actions do you recommend that the Commission take to ensure continued compliance**
10 **with the Utility Facilities Act by all utilities?**

11 A. I recommend that the Commission first deny PVEC's Motion to Dismiss. Second, the
12 Commission should declare that PVEC has violated the Utility Facilities Act by fostering and
13 encouraging a scheme to entirely eliminate ODP as the lawful provider of electric power to
14 Sigmon for use at mining operations at Calvin, Virginia. Third, I recommend that the
15 Commission permanently enjoin PVEC from selling and/or delivering any power to be used at the
16 Calvin mining operations in ODP's service territory. Finally, the Commission should order PVEC
17 to pay the damages sustained by ODP arising from the loss of Sigmon as a customer, in the
18 amount of \$1,000,000 for each 12 month period in which PVEC has served the disputed load..

19 **Q. Does this conclude your testimony?**

20 A. Yes, it does.

21 0115953.07

COMMONWEALTH OF VIRGINIA
BEFORE THE
STATE CORPORATION COMMISSION

PETITION OF)
)
KENTUCKY UTILITIES COMPANY)
D/B/A) CASE NO. PUE 960303
OLD DOMINION POWER COMPANY)
)
FOR INJUNCTIVE RELIEF AND/OR)
DECLARATORY JUDGMENT AGAINST)
POWELL VALLEY ELECTRIC COOPERATIVE)

REBUTTAL TESTIMONY OF

WILLIAM R. "MIKE" PALMER
ENGINEER
PALMER ENGINEERING COMPANY

ON BEHALF OF
OLD DOMINION POWER COMPANY

1 Q: Please state your name, position, and business address.

2 A: My name is William R. "Mike" Palmer. I am a
3 registered engineer and registered land surveyor in
4 Kentucky and Virginia. I have approximately thirty
5 years' experience in both fields specifically related to
6 the coal-mining industry. My business address is Route
7 2, Box 368-B, Big Stone Gap, Virginia 24219.

8 Q: Did you testify earlier in this proceeding?

9 A: Yes. I submitted direct testimony on behalf of Old
10 Dominion Power Company ("ODP").

11 Q: What is the purpose of your rebuttal testimony?

12 A: Its purpose is to rebut portions of Mr. Randell W.
13 Meyers' testimony, submitted by Powell Valley Electric
14 Cooperative ("PVEC"). I will explain where Sigmon Coal
15 Company, Inc. ("Sigmon") and its affiliate, Jericol
16 Mining, Inc. ("Jericol"), have property holdings in
17 PVEC's southwest Virginia service territory on which
18 independent mining operators have mined coal or have
19 proposed to mine coal. I also will explain when those
20 operations became active or were proposed, and who
21 operated them. That information, together with the
22 information I presented in my direct testimony, will show
23 that the mineral leases held by Sigmon do not constitute
24 a single, integrated or contiguous mining operation. It

1 also will show that the majority of Sigmon's current and
2 future electric loads do not lie in territory assigned to
3 PVEC.

4 **Q: What is Sigmon?**

5 Sigmon is a company that owns mineral rights to
6 parcels of land in Lee County, Virginia and Harlan
7 County, Kentucky upon which mining operations are
8 conducted by independent mining operators.

9 **Q: How did you gather the information presented in this**
10 **testimony?**

11 **A:** Just as I gathered the information presented in my
12 direct testimony. I reviewed public records on file at
13 the Harlan County, Kentucky and Lee County, Virginia
14 courthouses; the Kentucky Department of Mines and
15 Minerals; the Kentucky Department of Surface Mining
16 Reclamation and Enforcement; and the Virginia Department
17 of Mines, Minerals and Energy with regard to the property
18 holdings and mining activities of Sigmon and Jericol, as
19 well as any contractors doing mining for Sigmon and/or
20 Jericol in Lee County, Virginia and Harlan County,
21 Kentucky.

22 **Q: Please explain what exhibits are attached to your**
23 **testimony.**

1 A: Rebuttal Map Exhibit 1, prepared under my
2 supervision, shows the locations of certain mining
3 operations that have been conducted, are being conducted,
4 or are proposed on properties for which Sigmon owns
5 mineral rights. It is attached to my testimony as a
6 rebuttal to Exhibit A to Exhibit 22 of Mr. Meyers'
7 testimony, which fails to show the locations of a number
8 of proposed mining operations in the areas at issue in
9 this case. For purposes of supervising the preparation
10 of Rebuttal Map Exhibit 1, I accepted PVEC's portrayal of
11 the location and size of the area it defines as "Property
12 Controlled by Jericol Mining, Inc./Sigmon Coal Company
13 Inc." as accurate. That area is demarcated with green
14 background lines on Rebuttal Map Exhibit 1. It also was
15 necessary, though, to include on Rebuttal Map Exhibit 1
16 several operations that PVEC failed to include on its map
17 in order to demonstrate more accurately and completely
18 where Sigmon and Jericol have property holdings in
19 southwest Virginia and southeast Kentucky on which
20 independent mining operators have mined coal, are mining
21 coal, or have proposed to mine coal.

22 The chart titled "Mining Operations on Sigmon
23 Properties" is attached to my testimony as Rebuttal
24 Exhibit 2 to provide a clear picture of the location,

1 status, and other pertinent information relating to the
2 mining operations depicted on Rebuttal Map Exhibit 1.

3 **Q: Have mining operations on Sigmon's properties been**
4 **conducted inside PVEC's Lee County service territory?**

5 A: Yes. In the past, three separate mining operations
6 have been conducted in the Hoover Chapel area of PVEC's
7 Lee County service territory. The first was in the
8 Taggart/Darby Seam (Mine Index No. 12579, MSHA ID No. 44-
9 05884); the second was in the Taggart Marker/Kellioka
10 Seam (Mine Index No. 14074, MSHA ID No. 44-06574); and
11 the third was in the Harlan/Wilson Seam (Mine Index No.
12 14438, MSHA ID No. 44-06862). The first operation opened
13 and closed periodically between 1981 and 1991, and the
14 second opened and closed periodically between 1990 and
15 1994. Both were closed prior to ODP's filing of its
16 petition in this case. The third operation was a new
17 mine, licensed on December 31, 1996. It actually began
18 operations in 1997, and reportedly ceased producing coal
19 in December 1997. To the best of my knowledge, there are
20 no other mining operations in the Hoover Chapel area of
21 PVEC's Lee County service territory.

22 **Q: Did Sigmon operate those mines in the Hoover Chapel Area?**

23 A: At most, Sigmon may have operated them for very
24 brief periods when it temporarily held licenses to the

1 mines, although that is unlikely. It is more often the
2 case that a company like Sigmon holds mining licenses for
3 brief interim periods when one independent contractor
4 finishes its operations and until the next starts in
5 order to avoid having the licenses expire.

6 The mines at issue were operated by several
7 different contract operators. The Taggart/Darby Seam
8 Mine first was licensed as Mine #4 in 1981 by Yale Mining
9 Corporation, which operated it until 1982. Kanal Coal
10 Corporation licensed it in 1982 as Mine #1, and operated
11 it until 1983. Bob Belcher (operating as Cox Creek Kanal
12 Coal Co., Inc.) next licensed the mine as Mine #1 on
13 February 5, 1986, and operated it until December 31,
14 1988. Mike Yates (operating as HAR-LEE Coal Co., Inc.)
15 then licensed the mine on February 27, 1989, as Mine #1,
16 and operated it until December 31, 1990. Finally, Robert
17 Hicks (operating as Big Dog Coal Company) licensed the
18 mine as Mine #2 on January 4, 1991, and operated it until
19 May 5, 1991.

20 The Taggart Marker/Kellioka Seam Mine first was
21 licensed as Mine #2 on March 23, 1990, by Mike Yates
22 (operating as HAR-LEE Coal Co., Inc.), and was operated
23 until December 31, 1990. Sigmon then licensed the mine
24 on January 4, 1991, and held the license as Mine #1 for

1 a brief period of time until March 29, 1991. Robert
2 Hicks (operating as Big Dog Coal Company, Inc.) next
3 licensed it on March 29, 1991, and operated it as Mine #3
4 until December 31, 1991. Sigmon again licensed the mine
5 on February 2, 1992, and held the license for another
6 short period of time as Mine #1 until March 11, 1992.
7 Finally, Bob Belcher (operating as TM Fuels, Inc.)
8 licensed the mine on March 19, 1992, and operated it as
9 Mine #2 until December 31, 1994.

10 The Taggart/Darby Seam Mine and the Taggart
11 Marker/Kellioka Seam Mine apparently comprise the Belcher
12 Mine Area that Mr. Meyers references in his testimony.

13 The Harlan/Wilson Seam Mine first was licensed on
14 December 31, 1996, as Mine #5 by Four-O-Mining Company,
15 Inc., which operated it until May 14, 1997. Bethlehem
16 Coal Corp. then licensed the mine as Mine #1 on May 14,
17 1997. The mine reportedly ceased producing coal this
18 past December, as I have explained.

19 **Q: How many mines are operated on Sigmon properties in**
20 **PVEC's territory in Lee County, Virginia?**

21 Assuming the Harlan/Wilson Seam Mine in fact ceased
22 producing coal in December, there is no mining activity
23 on Sigmon properties in PVEC's service territory. There
24 also are no mining licenses on file that would allow

1 mining activity to begin in that territory. A permit for
2 four proposed Sigmon mines was submitted and approved in
3 December 1994 as part of a large strip permit, but there
4 is no indication of when, or if, they may in fact be
5 opened. Sigmon has not applied for a license to mine any
6 of the proposed mines, which is a clear indication that
7 it has no intention of mining them in the near future.

8 **Q: Do the mineral leases held by Sigmon constitute an**
9 **integrated operation of a single mine?**

10 A: No. Sigmon has mineral leases on both the ODP/KU
11 and PVEC sides of the state territorial boundary. But
12 those operations do not comprise a single, integrated
13 coal mining operation stretching over parts of PVEC's,
14 ODP's, and KU's service territories. Instead, the mines
15 are separate and distinct, and are operated by
16 independent mining companies, as shown by the lists of
17 independent operators who have had rights to the various
18 mines over time. The mining operations are not
19 interconnected, but are built, operated, and maintained
20 to mine different coal seams, which are like layers in a
21 cake -- each is separate and distinct, and yields a
22 particular type of coal. The mines have their own names
23 and separate openings. Each mine has an individual
24 federal Mine Safety and Health Administration

1 Identification number, and Virginia mines have individual
2 state mine index numbers, while Kentucky mines have
3 individual mine file numbers.

4 **Q: Do the mineral leases held by Sigmon constitute a single,**
5 **contiguous mining operation?**

6 No. Sigmon itself operates only its office and
7 preparation plant in ODP's service territory. Although
8 Sigmon has obtained mineral rights for a number of
9 different land parcels, it does not operate the mines on
10 those parcels. Sigmon is a contractor that enters into
11 agreements with independent mining companies who actually
12 mine and produce the coal, and use all of the power
13 consumed in the various mining operations.

14 **Q: What is the custom and practice between a company like**
15 **Sigmon and an independent mining contractor with regard**
16 **to covering the cost of electricity consumed by the**
17 **independent contractor while mining?**

18 A: It is standard practice for an independent
19 contractor to pay for the electricity it consumes through
20 metering, by means of a deduction in its price per ton of
21 coal, or on a pro rata basis. The relationship between
22 a mineral rights holder, such as Sigmon, and an
23 independent mining contractor is a business relationship,
24 so the mineral rights holder does not provide electric

1 power to the independent contractor without being paid in
2 full for that power.

3 **Q: Do you agree with Mr. Meyers' claim that the majority of**
4 **Sigmon's current and future electric loads in Lee County**
5 **lie in territory assigned to PVEC?**

6 No. While Sigmon has leasehold interests in
7 properties throughout Lee County, Virginia and Harlan
8 County, Kentucky, the electric power Sigmon distributes
9 to the independent mining contractors is consumed in
10 mines operated in ODP's and KU's service territories.
11 The number of mining operations by independent mining
12 companies of the coal reserves held by Sigmon in ODP's
13 and KU's service territories has increased since the
14 Petition in this case was filed. In the same period of
15 time, two mining operations in the Hoover Chapel Area in
16 PVEC's service territory have closed, and the third
17 reportedly has ceased producing coal.

18 **Q: Does this conclude your rebuttal testimony?**

19 **A: Yes.**

Mining Operations on Sigmon Properties
Lee County, VA and Harlan County, KY
(as of February 16, 1998)

MINE/SEAM	LOCATION	ODP/KU OR PVEC SERVICE TERRITORY	STATUS OF OPERATIONS	LICENSE AND PERMIT NOS.	COMMENTS
Upper Mason Seam	Calvin Area -- VA	ODP/KU	Proposed	DMLR Permit No. 1501065.	Original permit 1991. Revised 6/97. Operations expected to go northeast.
Harlan/Wilson Seam	Calvin Area -- VA	ODP/KU	Inactive	MSHA ID No. 44-06667. Mine Index No. 14198. DMLR Permit No. 1501065. Permittee: Sigmon.	1st licensed 1991. Operated between 1991- 1995 by 3 independent operators: Sammy Joe Enterprises; Cola Coal Company; and Ashley Coal Co. License currently held by Sigmon.
Harlan/Wilson Seam	Carroll Hollow Area -- VA	ODP/KU	Active	MSHA ID No. 44-06781. Mine Index No. 14336. DMLR Permit Nos. 1501065 and 1601423. Permittee: Sigmon.	1st licensed 1994. Operated 1994-present by 3 different independent operators: CNS Mining, Inc.; Calvin Mining Corp. No. 1; and Lee-Coal Mining, Inc. Reportedly mined through into KY.
Harlan/Wilson Seam	Hoover Chapel Area -- VA	PVEC	Filed as Active but reportedly no longer producing coal.	MSHA ID No. 44-06862. Mine Index No. 14438. DMLR Permit No. 1601466. Permittee: Sigmon.	Serviced by Sigmon- constructed power line from Sigmon substation at Calvin. 1st licensed in 1996. Operated between 1996-97 by 2 different independent operators: Four-O-Mining Co. and Bethlehem Coal Corp. Mining reported ceased 12/97.

MINE/SEAM	LOCATION	ODP/KU OR PVEC SERVICE TERRITORY	STATUS OF OPERATIONS	LICENSE AND PERMIT NOS.	COMMENTS
Mine # 1 and Mine #2 in Clintwood Seam; Mine #3 in Dorchester Seam; and Mine #4 in Upper Norton Seam	Southern Strip Area -- "Sigma," VA	PVEC	Proposed	DMLR Permit No. 1601519. Permittee: Sigmon.	Proposed since 1990. 1 permit submitted and approved for all four mines 12/94. Very close to each other, and part of a large strip permit. One is probably known as the "Sigma Mine," but no permit under that name. No license to begin mining, so no plans to mine in near future.
Darby 2 Mine in Darby Seam	Glenbrook Area -- KY	ODP/KU	Reportedly no longer producing coal.	MSHA ID No. 15-16627. KDMM File No. 16007. KDSMRE Permit No. 448-5158.	Began several years ago as a Jericol-operated mine. 3 subsequent independent contractors -- most recent is Trinity Coal Corp. Mining reported ceased approx. 1/1/98.
Kellioka Mine	Glenbrook Area -- KY	ODP/KU	Proposed	KDSMRE Permit No. 848-5265.	Site construction started then stopped.
2 Mines in the Wax Seam	Glenbrook Area -- KY	ODP/KU	Proposed	KDSMRE Permit No. 848-5262.	
Mine #1-A in Creech Seam	Glenbrook Area -- KY	ODP/KU	Active	MSHA ID No. 15-17925. KDSMRE Permit No. 448-5173. Permittee: Jericol.	Was operated by Jericol as Creech 2 Mine, but idle for several yrs. before being licensed and reopened by independent mining company TM Fuels, Inc. 6/97 as Mine #1-A. Activity expected to go generally northward.
Taggart Marker #2 in Taggart Marker/Kellioka Seam	Glenbrook Area -- KY	ODP/KU	Active	MSHA ID No. 15-17441. KDMM File No. 18262.1. KDSMRE Permit No. 848-5265.	Licensed 9/97 by an independent contract operator: Trinity Coal Corp. Activity expected to go generally northward.
Low and Middle Splint Seams in Nim Hollow	Glenbrook Area -- KY	ODP/KU	Proposed	KDSMRE Prelim. App. Nos. 848-5363 and 848-5365.	Jericol has filed 2 prelim. apps. (7/97 and 8/97) w. KDSMRE.

MINE/SEAM	LOCATION	ODP/KU OR PVEC SERVICE TERRITORY	STATUS OF OPERATIONS	LICENSE AND PERMIT NOS.	COMMENTS
Huff Creek Hollow/Darby Seam	Glenbrook Area -- KY	ODP/KU	Proposed	KDSMRE Prelim. App. No. 848-5364.	Jericol filed prelim. app. 7/97.
Darby 3	Glenbrook Area -- KY	ODP/KU	Inactive	KDSMRE Permit No. 848-5265.	Started 2-3 yrs. ago and worked only a short time. Workings extend fewer than 500 ft. (initial projections were for @ 8,000 ft.)

COMMONWEALTH OF VIRGINIA
BEFORE THE
STATE CORPORATION COMMISSION

PETITION OF

KENTUCKY UTILITIES COMPANY
D/B/A OLD DOMINION POWER COMPANY

CASE NO. PUE960303

FOR INJUNCTIVE RELIEF AND/OR
DECLARATORY JUDGMENT AGAINST
POWELL VALLEY ELECTRIC COOPERATIVE

COMMENTS OF KENTUCKY UTILITIES COMPANY
D/B/A OLD DOMINION POWER COMPANY
ON THE OCTOBER 19, 1998
REPORT OF HOWARD P. ANDERSON, JR., HEARING EXAMINER

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November 17, 1998

COMMONWEALTH OF VIRGINIA
BEFORE THE
STATE CORPORATION COMMISSION

PETITION OF

KENTUCKY UTILITIES COMPANY
D/B/A OLD DOMINION POWER COMPANY

CASE NO. PUE960303

FOR INJUNCTIVE RELIEF AND/OR
DECLARATORY JUDGMENT AGAINST
POWELL VALLEY ELECTRIC COOPERATIVE

COMMENTS OF KENTUCKY UTILITIES COMPANY
D/B/A OLD DOMINION POWER COMPANY
ON THE OCTOBER 19, 1998
REPORT OF HOWARD P. ANDERSON, JR., HEARING EXAMINER

INTRODUCTION

Kentucky Utilities Company d/b/a Old Dominion Power Company ("ODP"), by counsel and pursuant to the Rules of Practice and Procedure of the Virginia State Corporation Commission, Rule 5:16(e), *Responsive Pleadings*, files these comments on the REPORT OF HOWARD P. ANDERSON, JR., HEARING EXAMINER, issued October 19, 1998 (the "Report") in this proceeding.

For the reasons discussed below, ODP respectfully states that the Report correctly applies the point of use analysis adopted by the Commission in *Petition of Prince George Electric Cooperative*, PUE960295 (Final Order June 25, 1998) ("Prince George"), finding that Powell Valley Electric Cooperative ("PVEC"):

is in clear violation of the Virginia Utilities Facilities Act by providing electricity to a customer (Sigmon) for use in

the service territories of [ODP] and Kentucky Utilities Company.

Report, page 10. That notwithstanding, the Report then erroneously concludes that the TVA Act preempts the application of the Utility Facilities Act (Chapter 10.1 of Title 56 of the Code of Virginia) in this case.

ODP takes exception with the recommendations of the Report that PVEC's Motion to Dismiss be granted, and ODP's Petition for injunctive relief and/or declaratory judgment be denied. Accordingly, ODP asks the Commission not to accept the recommendation in the Report that the Commission lacks jurisdiction to enforce the Utility Facilities Act against PVEC. ODP asks the Commission to enter an order: (i) finding that the Commission does have jurisdiction to enforce the Utility Facilities Act, (ii) upholding the Report's finding that, based upon the point of use analysis adopted in *Prince George*, PVEC has violated the Act, and (iii) enjoining PVEC from serving Sigmon's operations outside of PVEC's service area and ordering that such service be forthwith transferred back to ODP.

EXCEPTIONS

I. Factual Summary

As a result of what the Report properly recognizes as "tactics" which were "certainly aggressive,"¹ PVEC currently

¹Those tactics involve a "plan of action," through a contrived point of delivery, to "capture" ODP's existing customer, Sigmon Coal Company ("Sigmon"). Report, pages 3-4; ODP's Post-hearing Brief, pages 4-5. A thorough discussion of the background of this case, and how PVEC came to "capture" Sigmon from ODP, is contained in the testimony of

maintains a point of delivery just inside its service territory, as set by Virginia law, by which it serves all of Sigmon Coal Company ("Sigmon")'s operations located outside of PVEC's certified territory and historically served by ODP, and extending into Kentucky Utilities Company ("KU")'s territory in Kentucky. Report, pages 9, 11. At the time of the hearing in this matter, all of Sigmon's active mining operations were located wholly outside of PVEC's service territory.² Hearing Transcript ("Transcript"), pages 198, 200-01; Report, page 7. See also the map attached hereto as Exhibit 1, which is a copy of the Mike Palmer's Rebuttal Exhibit 1 in this case. As the Report recognizes, PVEC is currently providing power to Sigmon for use within the service territory of ODP in Virginia as well as "for use across the state line in Kentucky, an action for which it clearly has no state authority." Report, page 10.

Sigmon owns the mineral rights, plans development, and obtains the necessary permits for each mining site. Report, pages 2-3. However, Sigmon does not itself operate the mines or produce coal. Instead, it uses independent contractors who actually mine the coal

Robert M. Hewett, both pre-filed and before the Hearing Examiner, and is also discussed in the Report at pages 3-5 and in ODP's Brief at pages 1-7, 21-26.

²ODP has never contested PVEC's right to serve Sigmon's operations located within PVEC's territory. However, at the time of the hearing, there were no such operations. Dennis Brown, a Sigmon employee, admitted on cross-examination that the only power being consumed by Sigmon in PVEC's territory was for the inactive Harlan seam mine where Sigmon has "fans running and pumps running." Transcript, page 201. Moreover, the majority of Sigmon's proposed future electric loads lie outside of the territory assigned to PVEC. Report, page 8.

at several different sites and deliver it to Sigmon for processing and sale. As the Report notes,

the mineral leases held by Sigmon Coal do not constitute a single, integrated or contiguous mining operation. . . . [Sigmon's] mines are separate and distinct, and are operated by independent mining companies.

Report, page 8. Sigmon is compensated for the power the independent contractors use at the different mine sites. Transcript, page 209. In fact, in some cases Sigmon has separate meters for the mines. Id.

As a result of PVEC's capture of the Sigmon load historically served by ODP, ODP is suffering approximately \$1 million in lost revenue per year. ODP's Calvin Substation has been idled and its Keokee Substation and connecting transmission capacity largely idled. Moreover, ODP stands to lose further mining loads if PVEC is permitted to continue with its aggressive conduct without regulation by this Commission. The potential impact on ODP is approximately \$6 to \$8 million in lost revenues in addition to the load already captured by PVEC. That amount is approximately 15 to 20 percent of the total Virginia jurisdictional revenue of ODP, and would cause ODP's return to decline by as much as eight percentage points. In addition, the loss of mining revenues would leave stranded an estimated \$7.3 million that ODP has invested in transmission and substation facilities primarily used to serve its mining loads.³

³See Testimony of Robert M. Hewett, pages 22-23; Report page 9.

PVEC's actions to capture Sigmon have resulted also in an inefficient duplication of facilities. PVEC's new substation, built without disclosure of its true purpose,⁴ is "within sight of and less than a quarter mile from ODP's idled" Calvin substation, and resulted in the idling of an existing PVEC substation.⁵ Additionally, PVEC's extension of lines to serve Sigmon "constitutes further duplication of facilities." Report, page 9.

As a result of PVEC's "aggressive" conduct, the Hearing Examiner correctly found that, under the point of use test as adopted in *Prince George*, "[PVEC] is in clear violation of the Virginia Utility Facilities Act by providing electricity to a customer (Sigmon) for use in" ODP's service territory. Report, page 10. Certainly no other result could be reached on the facts of this case.

However, despite first stating that "the Commission regulates the service . . . of PVEC" and that "[t]he Commission has jurisdiction under the Utilities Facility Act to determine the service territories of electric utilities operating in Virginia," the Report goes on to recommend that PVEC's Motion to Dismiss be granted on grounds that "[e]nforcement of Virginia's Utility Facilities Act, in this instance, would result in significant interference with, and perhaps nullification of the contract

⁴See Report, page 4.

⁵See Exhibit 25 to Testimony of Robert M. Hewett, discussing PVEC's removal of its existing substation from service when it built the new substation that was later used to capture all of Sigmon's load.

between the TVA, PVEC and Sigmon." Report, pages 2, 10 and 11. As discussed below, however, the Report's recommendation on the entirely legal question of jurisdiction is based on an erroneous understanding of the relationship of the parties to the contract, as well as a misinterpretation of applicable law.

If the Report's finding on the jurisdiction issue is adopted by this Commission, the Utility Facilities Act could largely be rendered a nullity. Under the recommendation, while investor-owned utilities like ODP will have to continue to play by the rules and abide by the provisions of the Utility Facilities Act, including keeping facilities and reserves in place to serve native customers even though such loads may be "captured" away, PVEC will be able to engage in aggressive conduct to cherry-pick lucrative customers from neighboring utilities without any regard whatsoever for state-certificated services areas, so long as TVA is made an incidental party to the contract to sell power. The Commission's power to protect consumers, ensure dependable service, prevent duplication of facilities or protect the property rights of other utilities would be significantly eroded. Such a result is not only clearly against the public policy of this Commonwealth, it is not what Congress intended in enacting the TVA Act.

II THE REPORT'S RECOMMENDATION THAT THE COMMISSION CANNOT ENFORCE THE UTILITY FACILITIES ACT IS ERRONEOUS.

A. The Report's Factual Findings Regarding the Nature of the Relationship Between TVA and Sigmon are Erroneous.

The Report states that Sigmon receives power "pursuant to a contract with PVEC and TVA," and that "Sigmon is purchasing its

power from the TVA...." Report, pages 3, 10. Those findings are contrary to the clear evidence in this case and are simply wrong. Sigmon purchases its power from PVEC, not TVA. Sigmon is not TVA's customer.

There are two contracts at issue here. One involves only PVEC and Sigmon. The other involves PVEC and Sigmon and, to a limited extent, TVA. The first contract, Contract No. 558, is between PVEC and Sigmon and was entered into on March 1, 1996. That contract sets forth the terms and conditions pursuant to which firm and interruptible electric power and energy will be made available by PVEC for the operation of the Sigmon-owned mines and coal-treatment facilities in the Calvin area and in Harlan County, Kentucky.⁶

The Contract states, in relevant part:

Whereas, [Sigmon and PVEC] wish to agree upon the terms and conditions under which firm and interruptible electric power and energy will be made available by [PVEC] for the operation of [Sigmon's] said facilities.

* * * *

Subject to the other provisions of this contract and to the completion of the above-mentioned power supply facilities, [PVEC] shall, commencing with the date above, make available to [Sigmon], and [Sigmon] shall take and buy from [PVEC], [Sigmon]'s total requirements of firm and interruptible power

⁶This contract is tied to another contract, between Sigmon and TVA, whereby TVA agrees to buy coal from Sigmon at a price "greatly in excess of TVA's market price for coal." Sigmon is obligated to purchase all of its power requirements from PVEC for a period of ten years in order for TVA to continue purchasing coal from Sigmon at the premium price. Report, pages 5, 10. Thus, Sigmon is prevented from voluntarily leaving the PVEC system because of its contract to sell coal to TVA.

and energy for the operation of [Sigmon]'s total requirements of firm and interruptible power and energy....

* * * *

[Sigmon] also agrees to purchase all of its future increases in power requirements for its mining operations from [PVEC] under the terms of this contract or as amended.

* * * *

[PVEC] commits that in no case shall the total annual bill for energy and power takings under this Agreement exceed 98% of such bill as calculated using ODP firm power schedules applicable at the time of such takings.

* * * *

[Sigmon] agrees to be bound by [PVEC]'s standard policies and procedures in regard to past due accounts and termination of service for nonpayment.

Contract No. 558, attached as part of Exhibit 14 to the Pre-Filed Testimony of Randell W. Meyers, pages 1, 2, 4 and 5. (Emphasis added.)

The contract which involves TVA, Contract TV-98677U, also is dated March 1, 1996. That contract simply sets forth TVA's agreement to provide PVEC with both firm power and "economy surplus" power, and the rates at which the economy surplus power will be provided.⁷ PVEC agrees in the contract to resell the power to Sigmon. The contract provides in relevant part:

⁷Careful examination of the so-called "ESP rates" reveal them to be sham interruptible rates. This is highly suspect given that the end-use of the power is for underground mines, an activity which has unique safety concerns and does not lend itself to interruption of power on short notice. See Transcript, page 275.

WHEREAS, the parties hereto wish to agree upon the terms and conditions under which firm power and ESP will be made available by [PVEC] to [Sigmon];

* * * *

[PVEC] shall make available to [Sigmon] 1,500 kW of firm power.

* * * *

In addition to firm power, [PVEC] shall make available ESP Option C in such amounts as TVA, in its judgment, is able to supply, up to and including 7,100 kW.

* * * *

This contract may be terminated by [PVEC] or [Sigmon] upon at least 36 months' written notice....⁸

* * * *

3.1 [Sigmon] to Remain a Customer of [PVEC]

It is expressly recognized that [Sigmon] remains a customer of [PVEC] and is not a directly served customer of TVA. TVA is a party to this contract only because of the unique nature of ESP. [PVEC] retains responsibility for all power service and customer relations matters except as provided otherwise with respect to ESP.

* * * *

The power and energy made available to [Sigmon] by [PVEC] under this contract shall be delivered, taken, and paid for in accordance with the terms of this contract and the Schedule of Rules and Regulations of [PVEC] (as amended, supplemented, or replaced).

⁸TVA does not have the right under this clause to terminate the contract.

Contract TV-98677U, attached as part of Exhibit 14 to the Pre-Filed Testimony of Randell W. Meyers, pages 1, 2, 4, and page 5 of the ESP Attachment to the contract. (Emphasis added.)

While the Commission does not have the authority to regulate the rates of PVEC, the Commission does have a mandate to regulate the state-determined service areas of PVEC and other utilities. The Report's recommendation that this Commission lacks jurisdiction is based on the erroneous view that Sigmon is buying power directly from TVA, and that the regulation of the service territories of PVEC and ODP would render that contract a nullity. That is simply wrong.

A determination that PVEC is violating the Utility Facilities Act does not prevent PVEC from contracting with TVA to buy power, nor prevent Sigmon from buying power from PVEC. Such a determination allows PVEC's power purchases from TVA, but simply confines the power sales by PVEC to Sigmon to the geographic areas determined by state law (and, as discussed below, agreed to by PVEC for decades). Indeed, PVEC purchased power from TVA, and resold same to Sigmon, for loads located in PVEC's territory from approximately 1985 to 1993.

This case does not ask or require the Commission to pass on the ability or power of TVA to contract for the sale of power. ODP does not challenge TVA's right to sell power, and deliver such, to distributors consistent with federal law. However, this case involves ODP's challenge to PVEC's ability to resell power, from whatever source obtained, for use beyond PVEC's certificated

territory. Contrary to the Report's erroneous finding, the plain language of the contract demonstrates that PVEC, not TVA, is obligated to deliver power and otherwise provide service to Sigmon for use at its mining operations in ODP's service territory.

Once PVEC takes delivery of the power purchased from TVA, it is PVEC's power, not TVA's. This case is about the sale of PVEC power, not the sale of TVA's power. The geographic limits of that supplying of power to Sigmon by PVEC, and not PVEC's earlier purchase of power from TVA for distribution, is the focus of ODP's Petition herein. Enforcement of the Utility Facilities Act in this case cannot impair TVA's authority to contract with PVEC. This is so because enforcement of the Utilities Facilities Act simply identifies the area in which PVEC can distribute power purchased at wholesale (from TVA or anyone else).

Thus, there is error in the Report's findings on the nature of the contractual relationship between Sigmon and PVEC. Sigmon is PVEC's customer and is not a customer of TVA. It is the relationship between PVEC and Sigmon which ODP has asked this Commission to examine.

B. : There is No Support at Law for the Proposition that this Commission is Without Jurisdiction over this Dispute.

As the Report recognizes at page 6, federal preemption of state regulation may only occur where:

- (1) Congress expressly preempts state law (express preemption);
- (2) Congress legislates so comprehensively that it completely occupies a given field (field preemption); or

- (3) state law conflicts with federal law, and compliance with both laws is impossible, or state law is an obstacle to the accomplishment and execution of the purposes and objectives of Congress (implied or conflict preemption).

California v. ARC America Corp., 490 U.S. 93, 100-01 (1989) (citations omitted). As discussed below, the Report correctly finds no express or field preemption in this case, but erroneously determines that there is implied preemption of the Utility Facilities Act in this case. The Report's erroneous determination of implied preemption is discussed first.

1. The TVA Act does not conflict with the Utility Facilities Act.

Although the Report states, at page 6, that "the Virginia Utilities Facilities Act does not directly conflict with federal authority," it later recommends that the Commission should not assert its jurisdiction in this case because to do so "in this instance, would result in significant interference with, and perhaps nullification of the contract between the TVA, PVEC and Sigmon." Report, page 11. Because the Report had already found no express or field preemption in this case, its recommendation of no jurisdiction was necessarily based upon a finding of implied preemption. Such a finding, however, is clearly erroneous, for two distinct reasons.

- a. There can be no implied preemption as a matter of law.

The Report fails to recognize that there can be no implied preemption in this case as a matter of law. The regulation of

retail electric service territories, such as that found in the Utility Facilities Act, has long been recognized to be an area of traditional state concern and regulation. Tennessee Elec. Power Co. v. Tennessee Valley Authority, 306 U.S. 118, 141 (1939) (stating that "[w]hether competition between utilities shall be prohibited, regulated or forbidden is a matter of state policy"); Arkansas Electric Coop. Corp. v. Arkansas Public Service Comm'n, 461 U.S. 375, 377 (1983) (stating that "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States"); General Motors Corporation v. Tracy, 519 U.S. 278 (1997) (noting that the States have important interests in regulating competition among utilities).⁹

There is a strong presumption against a finding of federal preemption of areas which are traditionally subject to the police powers of the States. Medtronic Inc. v. Lora Lohr et Vir Lora Lohr, 518 U.S. 470 (1996). The enforcement of the Utility Facilities Act is a function long-recognized as within the police powers of Virginia.¹⁰ There is thus a strong presumption against a finding of federal preemption of the Act. The Report's

⁹Indeed, the Report correctly recognizes this by stating "[s]ervice territories have historically been encompassed within the police power reserved to the states, and there is a strong presumption against finding federal preemption in areas traditionally subject to state police powers." Report, page 6 (citations omitted).

¹⁰See Town of Culpeper v. Virginia Electric and Power Co., 207 S.E.2d 864 (Va. 1974); Report, page 6.

recommendation in this case falls far short of overcoming that strong presumption.

Indeed, it is well-established that, even beyond a presumption against preemption, there may be no federal preemption of state regulation of utility service unless there is a clear and manifest purpose to have federal preemption. In California Div. of Labor Stds. Enf. v. Dillingham Constr. N.A., Inc., 519 U.S. 316 (1997), the Supreme Court stated that areas of "traditional state regulation" are only preempted when there is a "clear and manifest purpose of Congress." Similarly, in Burrows v. Ohio School Athletic Association, 891 F.2d 122, 127 (6th Cir. 1989), the Sixth Circuit explained that "[t]he Supreme Court has determined that it will not presume the invalidity of any state regulation absent specific Congressional intent" to prohibit the state regulation. (Citing Malone v. White Motor Co., 435 U.S. 497, 504 (1978)) (Emphasis added).

As is fully discussed in subsection II(B)(2) below, the Report correctly found that the TVA Act contains no "clear and manifest purpose" or "specific Congressional intent" to preempt state laws, such as the Utility Facilities Act, governing electric service territories. Rather, the TVA Act cuts the other way and embraces and respects traditional state regulation of rural electric cooperatives' service areas. The statute itself requires TVA to permit wholesale customers such as PVEC to obtain state

authorization to purchase and resell power,¹¹ and the Supreme Court has expressly recognized the Act's respect for state laws governing utility service territories. See 16 U.S.C. § 831k (stating that the TVA Board shall give its wholesale customers, "ample time to fully comply with any local law now in existence or hereafter enacted providing for the necessary legal authority" to purchase and resell TVA power); Tennessee Electric Power Co. v. TVA, 306 U.S. 118, 141-42 (1938) (holding that "[w]hether competition between utilities shall be prohibited, regulated or forbidden is a matter of state policy"); Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 338 (1936) (stating that TVA's actions in disposing of its surplus power "must not be contrived to govern the concerns reserved to the States"). Thus, because there is no express preemption of the Utilities Facilities Act by the TVA Act, there can be no implied preemption in this case as a matter of law. Dillingham Constr., 519 U.S. 316.

b. There can be no implied preemption on these facts.

Even assuming, for the sake of argument only, that an implied preemption analysis were proper here as a matter of law, there is no such preemption on the facts of this case. Implied preemption arises where it is impossible to comply with both federal and state law, or where the state law serves as an impediment to achieving the full purpose and objectives of Congress in enacting the federal

¹¹As discussed in section II(C) herein, PVEC obtained certificates of public convenience and necessity allowing it to distribute power within a certain geographical area which does not include the areas in dispute in this case.

law. California v. ARC America Corp., 490 U.S. 93, 100-01 (1989) (emphasis added). The cases cited by PVEC in its Motion to Dismiss, and then cited in the Report, do not support the Report's finding that the TVA Act preempts state-territorial laws. Every case cited in the Report involves issues of rate-making authority or direct state control over the federal government or its employees, none of which is in any way involved in this case.¹² Likewise, as discussed in section II(B)(2), the language of the TVA Act cited in the Report, which provides authority for TVA to sell its power to distributors to resell, in no way preempts state regulation over those distributors' service territories.

¹² See Johnson v. Maryland, 254 U.S. 51 (1920) (holding that the state could not require a postal employee to procure a driver's license by taking a test and paying a fee, although it could hold him responsible for violating its general traffic laws); Tennessee Valley Authority v. Kinzer, 142 F.2d 833, 837 (6th Cir. 1954) (involving the bankruptcy proceedings of a TVA employee); Posey v. Tennessee Valley Authority, 93 F.2d 726 (5th Cir. 1937) (finding that Alabama state law did not apply to an action against the TVA to recover for injuries received while employed by the TVA); Rainbow Realty Co. Tennessee Valley Authority, 124 F.Supp. 436, 441 (M.D. Tenn. 1954) (holding that Tennessee zoning ordinance could not "limit the exercise of the right of eminent domain" by the TVA); Ferguson v. Electric Power Board of Chattanooga, Tenn., 378 F.Supp. 787 (1974) (noting that "[i]n the absence of a clear violation of the 'purposes of this Act' the matter of rate setting under the Tennessee Valley Authority Act is not subject to judicial review"); Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) (upholding TVA's contract to purchase transmission lines and substations from Alabama Power Company); Georgia Power Co. v. Tennessee Valley Authority, 14 F.Supp. 673 (N.D.Ga. 1936) (finding that the TVA did not trespass Georgia Power Company's right of way by constructing power lines); and Mobil Oil Corp. v. Tennessee Valley Authority, 387 F.Supp. 498, 506-07 (N.D. Ala. 1974) (holding that "the judgment or expertise of the [TVA] in setting the electric power rates is a matter committed to its discretion by law and is not subject to judicial review").

- i. It is possible to comply with both the Utility Facilities Act and the TVA Act.

State agencies can regulate state-created entities, like PVEC,¹³ even though they contract with the federal government. The question is not whether there is an incidental effect of that regulation on the federal government, but rather whether there is preemption. See North Dakota v. United States, 495 U.S. 423, 440-41 (1990) (noting that incidental effect of regulation is not the same as preemption, stating that "[i]t is one thing, however, to say that the State may not pass regulations which directly obstruct federal law; it is quite another to say that they cannot pass regulations which incidentally" affect the federal government); United States v. State Corp. Commission of Virginia, 345 F.Supp. 843, 846 (E.D. Vir. 1972) (finding that this Commission's exercise of jurisdiction to approve a rate increase was not preempted, even though it resulted in increased costs to the federal government's arrangement with the state agency being regulated). Thus, the question here is not whether TVA will be somehow affected by the Commission's exercise of jurisdiction over PVEC, but rather whether the TVA Act preempts the Utility Facilities Act. As discussed herein, there is no such preemption.

¹³PVEC was "incorporated in 1938 pursuant to Chapter 159A of the 1936 Code of Virginia." PVEC has stated that it was organized to "provide electric service to those areas that investor-owned utilities were unwilling to serve." See Pre-filed Testimony of Randell W. Meyers, page 3. In other words, PVEC's mission was in part to extend "electric service to all unserved people...." Transcript, page 120. However, Sigmon was not "unserved" when PVEC captured it, as it and its predecessors had been served by ODP since approximately 1912. Transcript, pages 124, 126; Testimony of Robert M. Hewett, page 6.

State courts and commissions have recognized that they may exercise jurisdiction over utilities that resell TVA power. See Cities of Oxford v. Northeast Miss. Elec. Power Ass'n, 704 So.2d 59, 68-70 (Miss. 1997). There, the Mississippi Supreme Court upheld that state's Public Utilities Act which, like Virginia's Utilities Facilities Act, prohibits the provision of electric service without a certificate of public convenience and necessity, and grants exclusive certified territories prohibiting competition for customers in such areas. The law's application was being attacked by a group of municipalities, some of which are distributors of TVA power. Although the issue of preemption was not expressly addressed, the effect of the ruling was to apply the state territorial boundaries law to TVA distributors. Id. The court noted that the argument offered by the municipalities, that they should be able to extend "services whenever and wherever" they wanted "would make a shambles of the orderly and regulated scheme of utility service ordained by our legislature...." Id. at 68. No less can be said of the Report's recommendation in this case that the Commission not exercise any jurisdiction over PVEC in this case.¹⁴ Like the other state courts and commissions, this

¹⁴See also Re Electric Industry Restructuring 1998 WL 334887, PUR.4th Slip Opinion, Docket No. 7313-U, (Ga. Comm'n Staff Report, January 23, 1998) (noting that TVA distributors are "under the jurisdiction of the [Georgia] Territorial Act"); *Ex parte: In the Matter of Reviewing and Considering Commission Policy Regarding Restructuring of and Competition in the Electric Utility Industry*, Virginia State Corporation Commission, Staff Investigation on the Restructuring of the Electric Industry (Case No. PUE950089, December 1, 1997) (noting that PVEC's "service is regulated by this Commission").

Commission should not hesitate to exercise its jurisdiction over distributors of TVA power such as PVEC.

There can be no implied preemption when a conflict between state and federal law can be avoided. Otherwise, parties could use preemption as a shield providing license to deliberately violate state laws by merely asserting the appearance of a conflict. This is exactly what PVEC seeks to do here. Barnett Bank of Marion Co. v. Nelson, 517 U.S. 25 (1996), is a good illustration of implied preemption where it is impossible to comply with both state and federal law. There, federal law allowing national banks located in cities with populations of less than 5,000 to sell insurance was held to preempt state law, which permitted such activities only if the bank was not affiliated with a bank holding company. Id. at 1108-1111. The conflict was unavoidable.

Where, such as here, the conflict can be avoided, courts should strive to see that both state and federal law can be upheld. In Panhandle Eastern Pipeline Co. v. Madison Co. Drainage Bd., 898 F.Supp. 1302 (S.D.Ind. 1995), a county authority sought to widen and deepen a drainage ditch, thereby reducing the soil covering a pipeline to less than that required by the Federal Pipeline Safety Act. The court found that there was no conflict between state and federal law, since the pipeline company could simply bury its lines deeper. Id. at 1315. In the present case, it is in no way impossible for PVEC to comply with both state and federal law. Like the pipeline company in Panhandle, PVEC can comply with both state and federal law by not serving outside the area certified

under the Utility Facilities Act to PVEC, as it has always done in the past.¹⁵ The Utility Facilities Act allocates to PVEC, and other suppliers such as ODP, exclusive service territories. The TVA Act simply establishes a circumscribed area, or fence, beyond which TVA and distributors of its power may not serve. The federal Act does not grant any rights or privileges to distributors of power purchased in whole or in part from TVA to provide service within a certain area. ODP has never claimed that the outer limits of the fence are different than the areas in which PVEC may serve under the Utility Facilities Act.

- ii. The Utility Facilities Act is not an impediment to achieving the objectives of the TVA Act.

The exclusive service territories established by the Utility Facilities Act also do not serve as an impediment to achieving the objectives of the federal statute, *i.e.*, disposing of surplus federal power. PVEC has complied with both the Utilities Facilities Act and the TVA Act for more than forty years while purchasing TVA power. PVEC's compliance with state law, therefore, in no way impedes TVA's ability to dispose of its power. Indeed, the Utility Facilities Act and the TVA Act have always coexisted without issue in the past because PVEC did not attempt to circumvent Virginia law through the type of contrived point of delivery involved in this case. Again, Congress intended respect for state territorial laws in enacting the TVA Act. See 16 U.S.C.

¹⁵"ODP had supplied power to Sigmon Coal since 1985, when Sigmon Coal first acquired mineral rights to properties near Calvin in Lee County, Virginia and in Harlan County, Kentucky." Report, page 3.

§ 831k (requiring TVA to permit its customers, like PVEC, to obtain any and all "necessary legal authority," such as that of the Utility Facilities Act, to purchase and resell TVA power); Ashwander, 297 U.S. 288; Tennessee Elec. Power Co., 306 U.S. 118.¹⁶ Thus, the territorial limitations established by the Utility Facilities Act do not conflict with the TVA Act, and there is no implied preemption on the facts of this case.

2. The TVA Act does not expressly preempt state territorial laws.

As discussed above, under the rule of Dillingham, there may be no implied preemption of state territorial laws. The only valid road to preemption in such cases is express preemption. However, at page 6 of the Report, the Hearing Examiner states correctly that "[t]he TVA Act does not expressly preempt state territorial laws." The power which PVEC provides to Sigmon is both firm and economy surplus power purchased from TVA. The portion of the TVA Act which permits the sale of power by TVA in no way addresses the area in which that power may then be distributed by purchasers such as PVEC. 16 U.S.C. § 831i. Instead, the statute simply authorizes and sets out the terms under which there may be a sale of TVA power, stating, in relevant part, that:

[t]he Board is empowered and authorized to sell the surplus power not used in its operations, and for operation of locks and other works generated by it, to States, counties, municipalities, corporations,

¹⁶TVA recognizes state law controls the service territories of its distributors. See discussion of Larry Taylor Affidavit, *infra* at section II(C), and portions of TVA Brief attached hereto as Exhibit 2.

partnerships, or individuals, according to the policies hereinafter set forth; and to carry out said authority, the Board is authorized to enter into contracts for such sale for a term not exceeding twenty years, and in the sale of such current by the Board it shall give preference to States, counties, municipalities, and cooperative organizations of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members....

Id.

Congress clearly anticipated that TVA's wholesale customers would have to continue to comply with local laws when reselling power purchased from TVA. Section 12 of the Act provides that, in selling power to wholesale customers such as PVEC, the TVA board:

shall give to such State, county, municipality or other organization ample time to fully comply with any local law now in existence or hereafter enacted providing for the necessary legal authority for such State, county, municipality, or other organization to contract with the board for such power.

16 U.S.C. § 831k (emphasis added).¹⁷ Thus, TVA's only statutory authorization to sell power to PVEC is limited to PVEC's compliance with Virginia law. The TVA Act not only refrains from expressly preempting state territorial laws, it affirmatively embraces those laws in a spirit of federalism and respect for traditional areas of state regulation.

The TVA Act is also noteworthy for what it does not provide with regard to TVA's authority to sell power. TVA is not required

¹⁷Indeed, PVEC has previously recognized, and even sought the protection of, this Commission's jurisdiction over its service area. See discussion in section II(C) below.

to contract with rural electric cooperatives like PVEC, or to in any way undertake any contractual or utility obligation to provide retail or wholesale electric service. The Act makes no mention of preemption of state laws over distributors' service territories.¹⁸ Indeed, the closing clause of Section 12, quoted above, expressly compels respect for state laws, and requires TVA to permit its customers, like PVEC, to obtain any and all "necessary legal authority," such as that of the Utility Facilities Act, to purchase and resell TVA power. Congress, when enacting and amending the TVA Act, clearly intended TVA's sale of power to wholesale customers, and the distributor's subsequent reselling of that power, to respect traditional areas of state control.

There is no grant of authority or right for TVA to distribute its power in any geographical area. In fact, the authority granted under sections 10 and 12, which is itself limited, is further

¹⁸The TVA Act's legislative history also establishes that Congress intended for TVA and its distributors to respect state law with regard to the distributors' service areas. The Act as amended in 1959 was intended to maintain the stability of the respective service areas of the TVA distributors and the neighboring private power suppliers. Congress recognized that "the utilities in the surrounding areas are entitled to have their status settled..." so that they no longer had to be concerned about unfair competition from TVA and its distributors. 105 Cong. Rec. S13055 (daily ed. July 9, 1959) (statement of Sen. Kerr). As one Senator stated, "I am concerned lest Congress should enact language which might have the end result of destroying the stability and serviceability of investor owned power systems which have served their areas and their customers well." 105 Cong. Rec. S13060 (daily ed. July 9, 1959) (statement of Sen. Randolph). Indeed, in passing the TVA Act, Congress intended that TVA and its distributors would invoke the provisions of the Act with "extreme caution" so as to "not encroach on" the service areas of investor-owned utilities like ODP. S.Rep.No. 470, 86th Cong., 1st Sess. 10 (1959), reprinted in 1959 U.S.C.C.A.N. 2000, 2008 (7/2/59). The actions of PVEC in this case clearly fly in the face of Congressional intent.

qualified by Section 15d(a) of the TVA Act, which was enacted when TVA sought and received authority to self-finance its power system. Section 15d(a) is the only portion of the TVA Act which in any way deals with geographic service limitations, and it does not address the scope of state regulation of service territories. That section, in relevant part, provides:

Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957....

16 U.S.C. § 831n-4. This base area of service is often called the TVA "fence." The language of section 831n-4 does not grant any rights to provide service within certain geographical limitations,¹⁹ and does not expressly prohibit additional, state-level constraints on the service territories of TVA's distributors. Rather, the section simply imposes an outer barrier on the territories in which TVA or its distributors may supply TVA power, even if otherwise authorized under state law, in order to protect neighboring

¹⁹Indeed, it is important to note that no provision of the TVA Act grants rural electric cooperatives or other wholesale customers of TVA any authority to do anything. See generally City of Arab v. Cherokee Electric Cooperative, 673 So.2d 751, 755 (Ala. 1995) (holding that electric cooperatives that purchase and resell TVA power do not take on the attributes of the sovereign). In that case, the Alabama Supreme Court quoted from TVA documents submitted to Congress that its distributors are subject to state taxation because they are creatures of the state. Id. at 757. Here, PVEC improperly seeks to cloak itself in federal preemption to insulate it from state law restrictions on where it may supply power.

utilities from subsidized TVA competition.²⁰ Congress has not otherwise set out to govern the service territory of TVA and/or its distributors.

The Supreme Court has even spoken to this issue. In finding that a utility lacked standing to challenge TVA's sale of power to a distributor, who, in turn would sell power in competition with that utility, the Court explained:

-- Whether competition between utilities shall be prohibited, regulated or forbidden is a matter of state policy. That policy is subject to alteration at the will of the [state] legislature.

* * *

The [TVA]'s action in these states is consonant with state law. . . .

Tennessee Elec. Power Co. v. Tennessee Valley Authority, 306 U.S. 118, 141-42 (1939). Thus, the Report is clearly correct in finding that the TVA Act does not expressly preempt the Utility Facilities Act. The actions of TVA and PVEC here are in no way "consonant with [Virginia] law." Id.

3. The TVA Act does not preempt the field of regulation over TVA distributors.

The Report also recognizes correctly at page 6 that "the TVA Act does not grant any retail service rights to rural electric cooperatives. Instead, it simply authorizes sales of surplus power, and directs the TVA board to set out the terms under which

²⁰See Hardin v. Kentucky Utilities Co., 390 U.S. 1, 7 (1968) (holding that "it is clear and undisputed that protection of private utilities from TVA was almost universally regarded as the primary objective of the limitation").

the sale may occur." Thus, the Report finds that there is no "field preemption" of the Utility Facilities Act. Field preemption occurs where the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement...." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1946).

Congress, when enacting section 831i permitting TVA to sell its surplus power, intended for TVA to respect state authority in disposing of that power. In Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 338, the Supreme Court stated:

The constitutional provision is silent as to the method of disposing of property belonging to the United States. That method, of course, must be an appropriate means of disposition according to the nature of the property ... and we may assume that it must be consistent with the foundation principles of our dual system of government and must not be contrived to govern the concerns reserved to the States.

(Emphasis added.) See also Tennessee Elec. Power Co. v. Tennessee Valley Authority, 306 U.S. 118, 141-42 (1939) (holding that "[w]hether competition between utilities shall be prohibited, regulated or forbidden is a matter of state policy"). It is thus plain and clear that the TVA Act does not comprehensively occupy the field of service territory regulation, but instead seeks to limit its impact on state law. The Act establishes an outer limit, or fence, beyond which TVA may not serve, and, as regards the service areas of TVA distributors, the Act provides absolutely no guidance. To determine the territory in which TVA's distributors,

such as PVEC, may provide service, reference must be made to state territorial laws.²¹

Other courts have addressed the issue of state control over TVA distributors in other contexts. City of Arab v. Cherokee Elec. Coop., 673 So.2d 751, 753, 755 (Ala. 1995) (holding that the TVA distributors involved there were "created and operated under general Alabama State Law" and are not exempt from state taxation by virtue of their relationship with TVA); North Georgia Elec. Membership Corp. v. City of Calhoun, 450 S.E.2d 410, 413 (Ga. 1994) (holding that a membership corporation's relationship with TVA did not render it subject to the same exemption for state taxation as that enjoyed by TVA). These cases involve analogous situations where other jurisdictions have implicitly recognized that the TVA Act does not preempt the field of all regulation of TVA distributors.

In providing for the resale of TVA power, Congress could have authorized a separate class of federally incorporated entities to act as TVA distributors.²² It did not, however, and instead relied upon organizations, like PVEC, which are created and chartered under state, not federal, law. It is illogical that Congress would have intended to displace all state regulation over entities which

²¹See the Affidavit of Larry Taylor, discussed in detail in section II(C), stating that distributors of TVA power, such as PVEC, "operate under the laws of the States in which they do business and each has a defined geographic service area, as set forth under State law...."

²²One example of such entities are the national banks, which are chartered and organized exclusively pursuant to federal law, and over which Congress has absolute authority. See Barnett Bank of Marion County v. Nelson, 517 U.S. 25, 134 L.Ed.2d 237 (1996).

owe their very existence to the state laws under which they were established. The Supreme Court has recognized as much in finding that state law governs the regulation of service territories. Ashwander, 297 U.S. 288; Tennessee Elec. Power Co., 306 U.S. 118.

C. PVEC has Acquiesced to, and Sought the Protection of, this Commission's Jurisdiction since the Utility Facilities Act was Enacted.

The Commission's power to set and regulate the service territories of Virginia utilities is so clearly established that, until now, PVEC has acquiesced to, and even sought and claimed the protection of, the Commission's jurisdiction.²³ On May 29, 1951, the Commission issued numerous Certificates of Public Convenience and Necessity to ODP, authorizing it to be the exclusive provider of power in certain parts of southeastern Virginia, including the territory in dispute in this action. PVEC, whose service area borders that which was certificated exclusively to ODP, did not raise any objection. Later, on June 8, 1967, the Commission amended ODP's Certificate No. E-11a, clarifying the boundary lines between ODP and PVEC in the area that is now in dispute. Again, PVEC voiced no objection. See Testimony of Robert M. Hewett, pages 3-5; Rebuttal Testimony of Robert M. Hewett, pages 3-4.

On December 9, 1977, following an application by PVEC, the Commission issued Certificate No. E-V7 to PVEC, granting the cooperative the exclusive right to provide service within the area marked "PVEC Service Area" on United States Department of the

²³See Chapter 10.1 of Title 56 of the Virginia Code.

Interior Geological Survey Map V7. See Exhibit 1 to Rebuttal Testimony of Robert M. Hewett. Map V7, which includes the area in dispute here, was signed by representatives of both PVEC and ODP, indicating that the designated service areas for the respective utilities were correct. Thus, PVEC affirmatively recognized this Commission's jurisdiction over service territories. The map was then filed with the Commission. See Testimony of Robert M. Hewett, page 5.

PVEC did not attempt to provide any service outside its designated area until 1993, when it attempted to take over service to Sigmon's newly constructed coal preparation plant located inside ODP's service area. ODP complained in writing to PVEC, and then filed an informal complaint. In response to ODP's complaints, PVEC's General Manager, Randell W. Meyers, reported to the cooperative's Board of Directors that he had consulted with "the Virginia State Corporation Commission and that the cooperative is within its rights to serve [the Sigmon preparation plant]." See Exhibit 10 to Testimony of Robert M. Hewett. On May 20, 1993, Mr. Meyers wrote to Rosemary Henderson at this Commission, requesting direction on providing service to Sigmon and stating that PVEC's "metering point is definitely within [PVEC's] service area." Exhibit 4 to Testimony of Robert M. Hewett. (Emphasis added.) On June 7, 1993, counsel for PVEC responded to ODP's written demand that PVEC cease providing service to the preparation plant, and again relied upon the Commission's jurisdiction by arguing that, "[p]rior to establishing a service point to deliver power to Sigmon

Coal, we inquired with the Virginia State Corporation Commission and TVA to ensure that our delivery point would be within our assigned service territory."²⁴ (Emphasis added.) See Exhibit 4 to Petition of Kentucky Utilities Company for Injunctive Relief and/or Declaratory Judgment.²⁵

As part of the discovery process in this action, PVEC has continued to claim protection under the jurisdiction of the Commission, stating that its actions have been proper because:

it sought and obtained guidance from the Virginia State Corporation Commission staff regarding the sale of electricity to Sigmon Coal Company....

See PVEC's Answer 3 to ODP's Interrogatories and Requests for Production of Documents (Second Set). Indeed, as recently as November 19, 1997, PVEC General Manager Meyers was quoted in The Claiborne Progress as acknowledging the Commission's jurisdiction, saying that PVEC believes its actions are "consistent with ... the Virginia State Corporation Commission ruling...." Testimony of Robert M. Hewett, page 5.

²⁴In fact, in his Pre-filed Testimony, PVEC General Manager Randell Meyers first recommended "that the Commission enter an Order upholding Powell Valley's electric service to Sigmon under the Utility Facilities Act." Only as a fallback position did Mr. Meyers then suggest, as an alternative, "that the Commission should deny Kentucky Utilities' Petition by sustaining Powell Valley's Motion to Dismiss." Pre-Filed Testimony of Randell W. Meyers, pages 19-20. That testimony illustrates the lack of credibility in PVEC's Motion to Dismiss. It appears that PVEC is more than willing to accept this Commission's jurisdiction so long as it profits from the exercise of that jurisdiction.

²⁵PVEC never, in responding to ODP's informal complaint, raised a question as to this Commission's jurisdiction to resolve the dispute. Transcript, pages 129-130.

Amazingly, PVEC has taken the position in this case that, by virtue of the fact that, for the moment, it purchases power from TVA, the Commission has no jurisdiction to enforce any geographical limitations on PVEC's service. While that position is disingenuous enough on its face,²⁶ it is even more so in light of PVEC's past actions. If PVEC truly believed that the Commission had no authority over its service territory, it would not have applied for Certificates of Public Convenience and Necessity, approved and signed map V7, sought the Commission Staff's approval for the service to Sigmon, or mounted a defense in this action that its service to Sigmon had been approved by the Commission Staff. Time and again, PVEC has, through its actions, recognized the Commission's jurisdiction with regard to service territories, and it must not now be permitted to deny that conduct.

TVA itself has recognized that the service territories of its distributors, such as PVEC, are established and regulated by state, not federal, law. In an affidavit submitted by TVA in an action filed against it in Alabama, a TVA Vice-President, R. Larry Taylor, stated that TVA's distributors, including rural electric cooperatives organized under state law:

operate under the laws of the States in which
they do business and each has a defined

²⁶For example, if ODP or VEPCO were to buy power from TVA, they could, under the argument advanced by PVEC, disregard the Utility Facilities Act to the extent they resell the TVA power. The same argument would seem to apply to any utility or municipality purchasing power from some other federal entity such as the Southeastern Power Administration ("SEPA"). The profound chaos that would be caused by such a rule would nullify effective territorial regulation.

geographic service area, as set forth under State law, in which it is the exclusive retail supplier of electricity.

Exhibit 7 to Testimony of Robert M. Hewett. (Emphasis added.)

Moreover, in the federal court action which is also pending between KU, PVEC and TVA,²⁷ TVA has recognized this Commission's jurisdiction over PVEC in a brief submitted to the U.S. District Court. TVA stated:

-- [e]ach of these distributors [of TVA power] has a defined geographic service area, as set forth under State law, in which it is the exclusive retail supplier of electricity.

* * * *

In 1977, the Virginia State Corporation Commission issued certificates of public convenience and necessity to [PVEC] and [ODP] authorizing each of them to provide service within the areas shown on a series of maps signed by [PVEC] and [ODP].

* * * *

In fact, the service arrangement between Powell Valley and Sigmon . . . was carefully structured to fully comply with Virginia law after consultation with the Staff of the Virginia State Corporation Commission.²⁸

²⁷Contrary to PVEC's argument, KU's filing of an action in federal court is not a recognition of any overriding federal jurisdiction. Rather, KU believes that PVEC has violated both state and federal law, and that the two cases, although factually similar, involve quite different issues of law. Further, the federal action involves the "capture" of Sigmon load in Kentucky, which is not an issue in this case.

²⁸A copy of the relevant pages of TVA's brief to the U.S. District Court for the Eastern District of Kentucky are attached hereto as Exhibit 2. Although that brief is not part of the record in this case, the Commission can take official notice of the existence of the brief and the statements contained therein, as such is a matter of public record.

In the same brief, TVA also discussed the proceeding between ODP and PVEC before this Commission, and argued that ODP's position was in error in this proceeding as a matter of state law based upon the now-overruled Report of Examiner Ellenberg in *Prince George*. Neither PVEC nor TVA ever made any argument to the United States District Court that this Commission lacked jurisdiction to resolve the dispute between ODP and PVEC under the Utility Facilities Act. TVA's recognition of state commission's jurisdiction over its distributors is, perhaps, the reason that there is no published authority from any of the states within which TVA power is supplied through distributors, holding that state agencies have no jurisdiction over the service areas of those TVA distributors.

D. PVEC CANNOT BY CONTRACT ENGAGE IN CONDUCT THAT IS OTHERWISE UNLAWFUL.

As discussed in detail above, there is no federal preemption in this case and the Virginia Utility Facilities Act, therefore, must be enforced. This situation is no different from any other situation in which PVEC is prohibited from reselling power under the provisions of the Utility Facilities Act.

The Report found that PVEC "is in clear violation of the Virginia Utility Facilities Act by providing electricity to a customer (Sigmon) for use in the service territories of" ODP and KU. Report, page 10. That finding is supported by an abundant amount of competent evidence in the record. Since there is no preemption, any effect of the Commission's lawful exercise of jurisdiction over PVEC on the contract involving TVA is not

dispositive of whether the Commission has authority to take such action.

TVA's contract is predicated on PVEC's lawful right to sell to retail customers. However, PVEC has no such right at law on the facts of this case. The contract cannot be written so as to provide otherwise. It is well-settled that no contract can be made in violation of the law. *See Colbert v. Ashland Construction Co., Inc.*, 11 S.E.2d 612 (Va. 1940); *American-LaFrance and Foamite Industries, Inc. v. Arlington County, Virginia*, 192 S.E. 758 (Va. 1937). Thus, PVEC's contract to provide power to Sigmon for use within ODP's service area is unenforceable because it violates the Utility Facilities Act.

E. THE SUPREMACY CLAUSE PROVIDES NO PROTECTION FOR PVEC'S ACTIONS IN THIS CASE.

PVEC also raised the issue of the Supremacy Clause in its Motion to Dismiss. Although that issue is very briefly mentioned at pages 6 and 11 of the Report, the recommendation to grant the Motion to Dismiss does not appear to be based on the Supremacy Clause. Regardless, PVEC's arguments regarding the Supremacy Clause are inapposite because PVEC and TVA lack authority to serve beyond the areas certified to PVEC under the Utility Facilities Act.

The Supremacy Clause requires first and foremost an evaluation of whether the federal agency is properly acting within a sphere authorized by Congress. *See McCulloch v. Maryland*, 4 Wheat 316, 426 U.S. 579 (1819) (stating that "[i]t is of the very essence of

supremacy to remove all obstacles to action within its own sphere"); Tennessee Valley Authority v. U.S. Carbon Products, Inc., 427 F.Supp. 474, 477 (E.D. Ill. 1976) (stating that TVA is not subject to state statutes or control when it is properly "executing its constitutional powers"). As discussed in section II(B) (2) above, there is no authority in the TVA Act for the sale of power outside the territory certified to TVA distributors under state law.

Further, the Supremacy Clause arguments raised by PVEC are inherently linked to notions of preemption. See Rose v. Rose, 481 U.S. 619, 625 (1987) (stating that in areas of traditional state regulatory concern, the Supreme Court has "limited review under the Supremacy Clause to a determination of whether Congress has positively required by direct enactment that state law be preempted") (internal quotes omitted). As analyzed in section II(B) (2) above, there has certainly been no express preemption of the Utility Facilities Act. Thus, the Supremacy Clause provides no further protection for the actions of PVEC in this case.


CONCLUSION

For the foregoing reasons, ODP respectfully requests that this Commission reject the recommendations in the Report to grant PVEC's Motion to Dismiss and deny ODP's Petition for injunctive relief and/or declaratory judgment. ODP respectfully requests this Commission to enter an order: (i) holding that this Commission does have jurisdiction to enforce the Utility Facilities Act, (ii) adopting upholding the Report's finding that, based upon the point

of use analysis adopted in *Prince George*, PVEC's actions violate, the Utility Facilities Act, and (iii) enjoining PVEC from serving Sigmon's operations outside of PVEC's service area and ordering that such service be forthwith transferred back to ODP.

November 17, 1998

Respectfully submitted,


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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true copy hereof was served via U.S. Mail this 17th day of November, 1998, upon the following:

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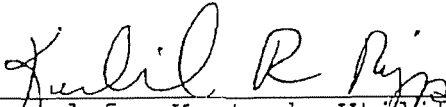
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COMMONWEALTH OF VIRGINIA
BEFORE THE
STATE CORPORATION COMMISSION

PETITION OF

KENTUCKY UTILITIES COMPANY
D/B/A OLD DOMINION POWER COMPANY

CASE NO. PUE960303

FOR INJUNCTIVE RELIEF AND/OR
DECLARATORY JUDGMENT AGAINST
POWELL VALLEY ELECTRIC COOPERATIVE

AFFIDAVIT OF ROBERT M. HEWETT

The affiant, Robert M. Hewett, having first been duly sworn, states as follows:

1. I am employed by Kentucky Utilities Company d/b/a Old Dominion Power Company (“ODP”), where I serve as President. I have personal knowledge of the matters stated herein.
2. As established by the affidavit of Jeffrey W. Sams, the concerns which I voiced, at page 22 of my direct testimony to the Commission in this matter, about ODP’s loss of future mining loads to Powell Valley Electric Cooperative (“PVEC”), has become a reality, as a new line has been constructed to allow PVEC to provide service to even more mines located within ODP’s certified territory.
3. The new line from Sigmon’s Kentucky operations into Virginia is an extension of the 34.5 kV line which, beginning in 1996, was constructed from PVEC’s substation near the territorial boundary line in the Calvin, Virginia area for the purpose of displacing ODP as the lawful supplier of electricity to Sigmon’s operations in Calvin, Virginia and Glenbrook, Kentucky. That 1996 line formed the basis of the filing of ODP’s Petition in this matter.

4. The new line extension has already been used by PVEC to take over service to the Holton, Pierrepoint and Crest operations, a customer of ODP's until February 25, 1999. The new line will also better position PVEC to take over additional mining operations in Lee and Wise counties, by connecting to existing transmission facilities which were put in place by Westmoreland Coal Company years ago. The former Westmoreland facilities and operations – which when operated by Westmoreland constituted the single-largest customer on the ODP system – are all located entirely within the area certified exclusively to ODP under the Virginia Utility Facilities Act.

5. ODP is informed and believes that PVEC's substation (depicted on Exhibit 1 to Mr. Sams' affidavit), completed in 1996 at the northern boundary of PVEC's service area near Calvin, Virginia, has available capacity, as presently configured, sufficient to serve the Holton, Pierrepoint and Crest operations, as well as more, if not all, of the former Westmoreland operations located wholly within ODP's service territory.

6. PVEC, by taking over the power supply to the Holton, Pierrepoint and Crest operations, will cause ODP to lose annual revenues of at least \$360,000, based on ODP's billings to Stoney Gap Coal Co. during calendar year 1998. A copy of ODP's billings to Stoney Gap for 1998 is attached as Exhibit RMH-1

Further the Affiant sayeth not.

Robert M. Hewett
Robert M. Hewett

STATE OF KENTUCKY)
)
COUNTY OF FAYETTE)

5th Subscribed and sworn to before me by Robert M. Hewett this
day of March, 1999.

My Commission expires: June 8, 1999.

Deane K. Zimmerman
NOTARY PUBLIC

521.3-001 771 STATUS ALIVE READ ROUTE 5863 PAGE 1
 STONEY GAP COAL CO ON DATE 03/97 DEPI RMKI
 EXETER OFF DATE 02/12/99

APPALACHIA, VA BALANCE 20,511.01 CIS ACTIVITY NONE
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***** USAGE HISTORY - USEH *****

METER NO. D041694 SUB-ADD CD A MULTP 03000 INST DATE 06/08/97 BILL CD 557
 REV. READ NO RD BILLED MEASURED POW.FACT. REVENUE US

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12/98	12/30	30	05201	V	690000	1006.8	.0	.0	27,519.93	V	001
11/98	11/30	32	04971	R	459000	970.8	.0	.0	22,204.89	R	001
10/98	10/29	29	04818	R	657000	1069.2	.0	.0	27,143.05	R	001
09/98	09/30	30	04599	R	627000	957.6	.0	.0	26,426.65	R	001
08/98	08/31	31	04390	V	597000	982.8	13.3	13.3	25,710.25	V	001
07/98	07/31	31	04191	V	585000	982.8	13.3	13.3	25,423.69	V	001
06/98	06/30	32	03996	V	648000	1044.0	.0	.0	26,928.13	V	001
05/98	05/29	29	03780	V	651000	1166.4	.0	.0	26,999.77	V	001
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ENTER TRANSACTION CODE OR PAGING REQUEST-

CUMBERLAND VALLEY ELECTRIC
CASE NO. 2006-00148

Response to Requests For Information From Kentucky Utilities
Dated October 18, 2006

24. Did Mr. Willhite retain or take with him copies of any documents contained in KU's files in any way regarding or relating to territorial boundary issues or disputes when he left KU? If so, please identify all such documents and produce copies of same.

ANSWER:

No.

**CUMBERLAND VALLEY ELECTRIC
CASE NO. 2006-00148**

**Response to Requests For Information From Kentucky Utilities
Dated October 18, 2006**

25. Does CVE contend that, if the Commission considers the BMR-owned lines and facilities in analyzing the criteria set forth in KRS 278.017(3), CVE is still entitled under controlling law to serve Stillhouse #2? If so, state in detail the factual and legal basis for that contention.

ANSWER:

CVE disagrees with the premise of the question. Customer-owned lines are clearly not to be considered as part of the analysis under KRS278.017(3). Even if customer owned lines are considered for some purpose, they clearly should not be attributed to one utility or another, as there is no rational basis for such an attribution to one utility over another. However, under the provisions of KRS278.017(3) CVE would be entitled to serve Stillhouse Mine No. 2 even if customer lines are considered, if it prevails with respect to the application of the four factors. The facts with respect to this issue are still being developed through discovery. CVE does not concede that KU will prevail under the proper application KRS278.017(3), even if BMR's distribution system is (improperly) attributed to KU. Based on preliminary analysis, CVE would prevail even under this circumstance, but a full analysis will require a full factual record, which does not currently exist.

**CUMBERLAND VALLEY ELECTRIC
CASE NO. 2006-00148**

**Response to Requests For Information From Kentucky Utilities
Dated October 18, 2006**

26. Please state the exact manner in which Mr. Willhite is being compensated for his work as a consultant in this matter (by the hour, on a contingency basis, or by some other mechanism). If on an hourly basis, state the amount per hour that Mr. Willhite is being paid. If on some other basis, state with specificity the terms on which payment is being or is to be made. Produce a copy of any agreement between CVE or its counsel and Mr. Willhite regarding the provision of services as a consultant.

ANSWER:

Mr. Willhite is being compensated at his standard hourly rate and for out-of-pocket expenses.

CUMBERLAND VALLEY ELECTRIC
CASE NO. 2006-00148

Response to Requests For Information From Kentucky Utilities
Dated October 18, 2006

27. Is it Mr. Willhite's or CVE's position, as set forth on page 9, line 12 of Mr.

Willhite's initial testimony, that Stillhouse Mines No. 1 and 2 constitute a single ECF? If so, please state in detail both the factual and legal basis for that contention.

ANSWER:

No. Stillhouse No. 1 and Stillhouse No. 2 are separate ECF's. In his testimony Mr. Willhite is addressing the erroneous KU/BMR position that Stillhouse Mine No. 2 is a continuation of an existing ECF that includes all of the U.S. Steel/ARCH/BMR mining operations. The Agreed Statement of Facts Item 1: Vicinity Map clearly shows that the two mines are distinctly separate. Their portals are some 2.18 miles apart. According to Department of Mines and Minerals Website Mine No. 1 opened in 1992 and extracts reserves in an easterly direction south of the city of Benham some 4 miles from the Mine No. 2 reserves. Mine No. 2 is a new mine that opened in 2005 and extracts reserves in a westerly direction 3 miles west of the city of Cumberland and adjacent to CVE's District Office. These mines, like other mines, have different names and have their own distinct state file numbers. They have distinct permit areas, reserves, mining plans and portals.

**CUMBERLAND VALLEY ELECTRIC
CASE NO. 2006-00148**

**Response to Requests For Information From Kentucky Utilities
Dated October 18, 2006**

28. Does CVE or Mr. Willhite contend that any of the maps submitted as exhibits to the testimony of Lonnie Bellar or Richard Matda are incorrect in any way? If so, state in detail each item which CVE or MR. Willhite contends is incorrect, and state in detail both the factual and legal basis for that contention.

ANSWER:

Yes. The maps are incomplete as they omit numerous electrical facilities including idle facilities of BMR; they do not identify the numerous other mines shown on the map that overlap the alleged permit boundary, particularly along the northern section of the map; they do not identify that the mined out reserves east of Stillhouse Mine No. 2 are those of the closed (1998) Arch Mine No. 37; and they do not appear to show the complete permit boundaries cited by Mr. Matda, particularly around the water pump to the north of the Mine No. 2 portal.

**CUMBERLAND VALLEY ELECTRIC
CASE NO. 2006-00148**

**Response to Requests For Information From Kentucky Utilities
Dated October 18, 2006**

29. Does CVE disagree with Lonnie Bellar's direct testimony regarding the capability of CVE's existing facilities to provide adequate, dependable service to Stillhouse #2, as set forth at page 4, lines 2-6 of his testimony? If so, state in detail the nature of such disagreement and the factual and legal basis supporting such disagreement.

ANSWER:

CVE agrees that failure of KU's Arnold to Evarts 69kV line, EKPC's Chad Substation, or CVE's distribution line would subject power flow to Stillhouse #2 to single contingency interruptions. A single contingency source is typical and is fully adequate and dependable. However, the 69 kv tap from KU's Lynch Station to BMR's U.S. Steel Station, BMR's 69 kv line to its Cloverlick Station, BMR's 69/12 kv Substation at Cloverlick and the myriad of BMR 12 kv distribution lines extending from the Cloverlick and U. S. Steel Substations presents significantly more risk of a single contingency outage for a KU served Stillhouse Mine No. 2. BMR will have to maintain a 7.5 mile line, including 2.75 miles which BMR apparently claims is only useful for serving Stillhouse Mine No. 2, as opposed to some 4700 feet from EKPC's Chad Substation for CVE to provide service. Mr. Bellar's direct testimony at page 3 lines 20 & 21 states that CVE ignores the existence of BMR's own distribution network. Mr. Bellar then selectively ignores the existence of BMR's distribution network when asserting his claims as to service adequacy by failing to point out the fact that KU's furnished retail electric service at Lynch for use at Stillhouse #2, as well as all other BMR loads served by BMR's distribution network, are also subject to single contingency interruptions. Mr. Bellar also fails to mention that KU's point of service to BMR, namely KU's metering equipment, may also represent a point of single contingency service. CVE asserts that it is fully capable of providing adequate and dependable service to Stillhouse #2. (See CVE's response to Item 10 of this data request.)

**CUMBERLAND VALLEY ELECTRIC
CASE NO. 2006-00148**

**Response to Requests For Information From Kentucky Utilities
Dated October 18, 2006**

30. Other than service to the water pump near Stillhouse #2, has CVE in the past served, or is CVE now serving, Black Mountain Resources LLC or any subsidiary or affiliate company or entity? If so, identify the location at which service was or is provided, the nature of the service (the voltage at which service is rendered and the type of operation(s) being served), the manner in which service is provided, the name of the account holder, and the dates on which service was commenced and on which it ended (if it is no longer active).

ANSWER:

Yes, North Fork Coal Company as shown on Bellar's Exhibit No. 1. Also, see response to Question 2.

CUMBERLAND VALLEY ELECTRIC
CASE NO. 2006-00148

Response to Requests For Information From Kentucky Utilities
Dated October 18, 2006

31. Produce all documents which support any and all of your responses to the foregoing requests, to the extent not otherwise requested.

ANSWER:

All documents [if any] supporting CVE's responses are attached to these responses.