

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter Of:

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**PUBLIC SERVICE
COMMISSION**

Petition And Complaint Of Kentucky Power)
 Company For A Declaration Of Its Right)
 To Serve The Mountain Enterprises, Inc. Asphalt)
 Plant And The Proposed Mountain Materials, Inc.)
 Rock Crushers And Quarry Located In Carter)
 County, Kentucky In Lieu Of Grayson Rural)
 Electric Cooperative Corporation; Or, Alternatively,)
 For An Order Correcting The Certified Territory)
 Map Of The Area Bounded By The Intersection)
 I-64 and U.S. 60 And Nearby Vicinity In Carter)
 County, Kentucky To Include The Sites Of The)
 Proposed Mountain Enterprises, Inc. Asphalt Plant)
 And The Proposed Mountain Materials, Inc.'s)
 Rock Crushers and Quarries In Kentucky Power)
 Company's Certified Territory)

P.S.C. Case No. 2009- 00485

Complaint and Petition

Kentucky Power Company respectfully petitions the Public Service Commission of Kentucky for an order declaring that Kentucky Power may provide service to the proposed Mountain Enterprises, Inc. ("Mountain Enterprises") asphalt plant, and the proposed Mountain Materials, Inc. ("Mountain Materials") rock crushers and quarry, all of which are located in Carter County, Kentucky. Alternatively, Kentucky Power seeks an Order of the Commission correcting the certified map of the area in Carter County, Kentucky bounded by I-64 and U.S. 60 to include in Kentucky Power Company's certified territory the proposed Mountain Enterprises asphalt plant and the proposed Mountain Materials rock crushers and quarries. In support thereof, Kentucky Power states:

Bases For The Commission's Jurisdiction

1. This is an action by Kentucky Power Company ("Kentucky Power") pursuant to the Commission's authority under KRS 278.016-218.018 to administer the certified territory statutes of the Commonwealth, its authority under KRS 278.260 to adjudicate complaints "as to the rates and service of any utility," and its general regulatory authority under KRS 278.040 with respect to utilities providing service in the Commonwealth.

Parties

2. Kentucky Power is an electric utility organized as a corporation under the laws of the Commonwealth of Kentucky in 1919. A certified copy of Kentucky Power's Articles of Incorporation and all amendments thereto was attached to the Joint Application in Case No. 99-149¹ as Exhibit 1. The post office address of Kentucky Power is 101A Enterprise Drive, P.O. 5190, Frankfort, Kentucky 40602-5190. Kentucky Power is engaged in the generation, purchase, transmission, distribution and sale of electric power. Kentucky Power serves approximately 175,000 customers in the following 20 counties of eastern Kentucky: Boyd, Breathitt, Carter, Clay, Elliott, Floyd, Greenup, Johnson, Knott, Lawrence, Leslie, Letcher, Lewis, Magoffin, Martin, Morgan, Owsley, Perry, Pike and Rowan. Kentucky Power also supplies electric power at wholesale to other utilities and municipalities in Kentucky for resale. Kentucky Power is a utility as that term is defined at KRS 278.010.

3. Grayson Rural Electric Cooperative Corporation ("Grayson") is a cooperative corporation organized under the laws of the Commonwealth of Kentucky in 1950 and is regulated as a utility by the Commission. Grayson is a member of East Kentucky Power Cooperative, Inc., and provides retail electric service in portions of five counties in northeastern

¹ *In the Matter of: The Joint Application Of Kentucky Power Company, American Electric Power Company, Inc. And Central And South West Corporation Regarding A Proposed Merger*, P.S.C. Case No. 99-149.

Kentucky. Grayson's certified territory in part abuts the certified territory of Kentucky Power. Its principal office is located at 109 Bagby Park, Grayson, Kentucky 41143. A copy of this Petition and Complaint is being served by U.S. Mail on Grayson's counsel and registered agent, W. Jeffrey Scott, 311 West Main Street, Grayson, Kentucky 41143.

Background

4. The area in dispute is roughly bounded by I-64 on the north and west, and U.S. 60 on the east and south in Carter County, Kentucky. A map of the area is attached as EXHIBIT 1. For more than 55 years the area has been the site of active stone quarries and asphalt plants. Kentucky Power has provided electric service to the quarries and asphalt plants in the disputed area since approximately 1952.

5. On July 10, 1952, Kentucky Power entered into an easement agreement with Harry McCoy for a perpetual easement for the construction, maintenance and operation of electric power lines to provide electric service to the disputed area. A subsequent easement for additional lines to serve the area was obtained by Kentucky Power from J.M. and Mary McCoy on December 3, 1958. Copies of the easements are attached as EXHIBIT 2.

6. Soon after obtaining each easement, Kentucky Power built and began operating distribution lines in the easements in connection with the provision by Kentucky Power of electric service to quarries and asphalt plants in the area.

7. As recently as November 14, 2008 Kentucky Power provided electric service to a Mountain Enterprises asphalt plant located in southwestern portion of the disputed territory. That service began on January 11, 1988 and concluded on November 14, 2008.

8. The location of Kentucky Power's existing distribution facilities in the disputed area, and the location of the former Ken-Mor Stone and Acme Stone quarry and the former Mountain Enterprise asphalt plant are illustrated on EXHIBIT 1.

9. Upon information and belief Kentucky Power states that Grayson has not previously provided electric service to the disputed area. Kentucky Power further states upon information and belief that prior to its construction of a substation on U.S. 60 after Kentucky Power began providing service to the area in the 1950's, Grayson lacked the facilities to provide electric service to the quarries and asphalt plants in the disputed area. Even after the construction of the substation, Grayson lacked the distribution lines to provide service in the disputed area. Prior to the current controversy, Grayson never objected to Kentucky Power's provision of electric service to the quarries and asphalt plants in the disputed area.

The Present Controversy

11. In November and early December, 2009 Kentucky Power learned that Mountain Materials and Mountain Enterprises have plans to expand their operations in the disputed area in three stages. First, Mountain Materials plans to begin operation in January, 2010 of a rock crusher near the former Mountain Enterprises' asphalt plant. Second, within the next two to three years Mountain Enterprises and Mountain Materials plan to begin operation of an asphalt plant and a rock crusher, respectively, near the old quarry site. Finally, Kentucky Power is informed that in the future Mountain Materials intends to begin quarrying rock in the disputed area west of Tygart's Creek. Upon information and belief Kentucky Power states that each of the new operations will be located on the same tract that contains the former quarry and asphalt plant. The proposed location of the Mountain Enterprises asphalt plant and the Mountain Material rock crushers and quarry are illustrated on EXHIBIT 1.

12. On November 25, 2009, Kentucky Power received a letter from counsel for Grayson requesting that Kentucky Power remove its facilities in the disputed area, and stating that Grayson intended to provide three-phase electric service to the proposed Mountain Enterprises asphalt plant and Mountain Materials rock crushers and quarry. A copy of the letter is attached as **EXHIBIT 3**.

13. On December 2, 2009, Kentucky Power was contacted by a representative of Mountain Enterprises on behalf of Mountain Materials requesting electric service to Mountain Materials' proposed rock crusher near the former Mountain Enterprises' asphalt plant.

14. Kentucky Power estimates it can serve the initial Mountain Materials rock crusher by extending its existing distribution facilities in the disputed area by approximately 500 feet. Kentucky Power further estimates it can serve the new asphalt plant and second rock crusher by extending its existing facilities 800 feet. Finally, Kentucky Power estimates it can serve the proposed Mountain Materials quarry by extending its existing facilities 2100 feet (1300 from the proposed asphalt plant and rock crusher site.) Upon information and belief, Kentucky Power states that Grayson will be required to construct significantly longer distribution facilities to serve the new facilities. Further, it is Kentucky Power's understanding that each of the proposed operations will be located within the area of the former asphalt and quarry operations.

The Certified Territory Map

15. The 1972 Kentucky General Assembly enacted Kentucky's Certified Territory Law, KRS 278.016-278.018. The Certified Territory Law was intended "to encourage the orderly development of retail electric service, to avoid wasteful duplication of distribution facilities, to avoid unnecessarily encumbering the landscape of the Commonwealth of Kentucky, to prevent the waste of materials and natural resources, [to promote] ... the public convenience and necessity and to minimize disputes between retail electric suppliers which may result in inconvenience, diminished efficiency and higher costs in serving the customer...."

16. Pursuant to KRS 278.017(2) retail electric suppliers were required to file with the Commission on or about June 16, 1972 maps showing the retail electric suppliers' then existing distribution lines. Thereafter, and based upon the then existing distribution lines, maps of the certified territory of each retail electric supplier were prepared. KRS 278.017(2). By law the boundary lines were to be drawn substantially equidistant between the existing distribution lines of adjoining retail electric suppliers. KRS 278.017(1).

17. For reasons unknown to Kentucky Power, the boundary line between the certified territories of Kentucky Power and Grayson placed Kentucky Power's then existing facilities in the disputed area in Grayson's certified territory. The location of the boundary line in relation to Kentucky Power's distribution facilities in the disputed area is illustrated on as EXHIBIT 1.

18. Kentucky Power maintained and operated its distribution facilities in the disputed area in an open and notorious fashion. Prior to the current controversy, Grayson never objected to Kentucky Power's provision of electric service to the quarries and asphalt plants in the disputed area despite the fact Grayson now contends the facilities lie within Grayson's certified territory.

Bases For Kentucky Power's Claims

- (a) The Proposed Service By Grayson And Its Request That Kentucky Power Remove Its Existing Facilities Is Contrary To Public Policy.

19. Grayson's plans to construct new facilities to provide service to the proposed Mountain Enterprises asphalt plant is contrary to the policies underlying Kentucky's Certified Territory Law. Specifically, such construction will result in the disorderly development of retail electric distribution facilities in the disputed area, the wasteful duplication of facilities, the unnecessary encumbering of the landscape of the Commonwealth in the disputed area, and the waste of materials and natural resources. Further it is contrary to the public convenience and necessity and will result in inconvenience, diminished efficiency and higher costs in serving Mountain Enterprises.

20. Grayson's request that Kentucky Power remove its existing facilities in the disputed area will result in waste of materials and natural resources, diminished efficiency, and a higher cost to Kentucky Power to serve its remaining customers.

- (b) The Statutory Factors For Resolving Boundary Disputes Uniformly Favor Modifying The Existing Boundary Between Kentucky Power and Grayson.

21. KRS 278.017(3) provides the factors the Commission is to consider in resolving certain disputes regarding the boundaries between the certified territories of adjoining retail electric suppliers. It is unclear whether the factors are expressly applicable to the current dispute. Even if they are not expressly applicable, they provide a reasonable and fair basis for the Commission's exercise of its authority to resolve complaints of this sort. Each of the factors favors modifying the apparent existing boundary to permit Kentucky Power to provide service to the proposed Mountain Enterprises asphalt plant and the proposed Mountain Enterprises rock crushers and quarry.

22. As of June 16, 1972, Kentucky Power's distribution facilities were closer to the disputed area than Grayson's then-existing facilities. In fact, at that time Kentucky Power was providing retail electric service to other facilities on the same tract on which the proposed operations will be built.

23. Kentucky Power began supplying retail electric service in the disputed area approximately 20 years prior to the enactment of the Kentucky Certified Territory Law. Its distribution facilities were originally constructed beginning in 1952, although components have been replaced during their existence. Grayson was not providing retail electric service to the disputed area in 1972.

24. Kentucky Power had adequate and dependable distribution facilities serving the disputed area on June 16, 1972. Kentucky Power continues to maintain facilities in the disputed area today that will allow it to provide dependable, high quality retail electric service at reasonable costs. Further, upon information and belief, Kentucky Power states that Grayson will be required to extend its existing facilities across Kentucky Power's facilities to provide service to the proposed operations.

25. Grayson's construction of facilities to serve the proposed Mountain Enterprises asphalt plant and the Mountain Materials rock crusher and quarry will result in duplication of electric distribution lines and facilities. Kentucky Power's provision of service to the asphalt plant will not duplicate any existing Grayson distribution lines and facilities.

(c) The Commission May Use Its Inherent Power To Enter An Order *Nunc Pro Tunc* To Correct The Erroneous Boundary.

26. Under KRS 278.017(1) and KRS 278.017(2), and in light of the existence of Kentucky Power's distribution lines in the disputed area on June 16, 1972, the boundary line

between Kentucky Power and Grayson in the disputed area should have been drawn to place the disputed area within Kentucky Power's certified territory.

27. The Commission has the authority to enter an order correcting the error *nunc pro tunc*. *Union Light Heat & Power Co. v. Public Service Commission*, 271 S.W.2d 331, 365-366 (Ky. 1954). The Commission should exercise that authority to correct the erroneous boundary line.

(d) Grayson Is Estopped From Claiming The Disputed Area; Alternatively, Grayson Waived Any Rights It Might Have Under The Kentucky Certified Territory Law To Provide Retail Electric Service In The Disputed Area.

28. The existence and operation of Kentucky Power's distribution facilities in the disputed area was open and notorious for almost 60 years, including more than 37 years after the enactment of Kentucky's Certified Territory Law. During that period, and until the recent controversy, Grayson acquiesced in Kentucky Power's provision of service to the quarry and asphalt operations in the disputed area.

29. Kentucky Power relied upon Grayson's acquiescence, including making additional investments, and reasonably believed the disputed territory was within Kentucky Power's certified territory.

30. Grayson is estopped from claiming the disputed area.

31. Alternatively, Grayson's actions constitute a knowing waiver of any rights it might have to provide retail electric service in the disputed area.

Wherefore, Kentucky Power Company respectfully requests:

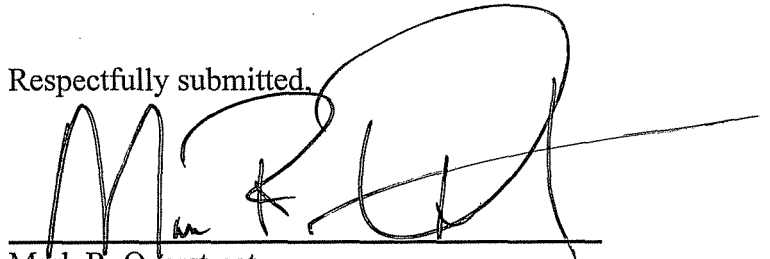
1. That the Commission enter an Order declaring that Kentucky Power may provide retail electric service to the proposed Mountain Enterprises asphalt plant and the proposed

Mountain Materials rock crushers and quarry, and all other facilities currently operating or that may subsequently locate in disputed area in Carter County, Kentucky.

2. That the Commission enter an Order *nunc pro tunc* correcting the boundary line between Kentucky Power and Grayson in the disputed area to include in Kentucky Power Company's certified territory the proposed Mountain Enterprises asphalt plant and the proposed Mountain Materials rock crushers and quarry, and all other facilities currently operating or that may subsequently locate in disputed area in Carter County, Kentucky.

3. That the Commission grant Kentucky Power such further relief to which it may be entitled.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'MRO', is written over a horizontal line. The signature is stylized and somewhat cursive.

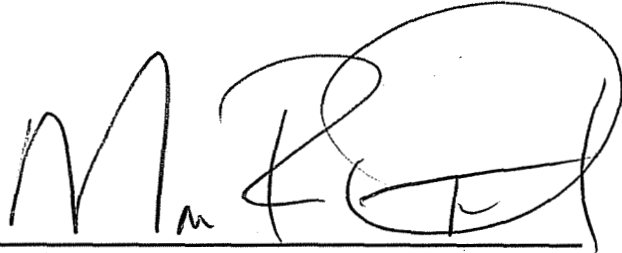
Mark R. Overstreet
STITES & HARBISON PLLC
421 West Main Street
P. O. Box 634
Frankfort, Kentucky 40602-0634

COUNSEL FOR KENTUCKY POWER
COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by first class mail, postage prepaid, upon the following parties of record, this 9th day of December, 2009.

W. Jeffrey Scott
311 West Main Street
Grayson, Kentucky 41143

A handwritten signature in black ink, appearing to read 'Mark R. Overstreet', written over a horizontal line. The signature is stylized and somewhat cursive.

Mark R. Overstreet

EXHIBIT 1

164

Interstate 64

Site for future quarry
Service to crusher

Future Asphalt
Plant & Crusher

Old Quarry Site

Boundary
Line

Tygarts Creek

KPC Distribution Line

New Service
Crusher

Construct 2 spans

Asphalt Plant Location

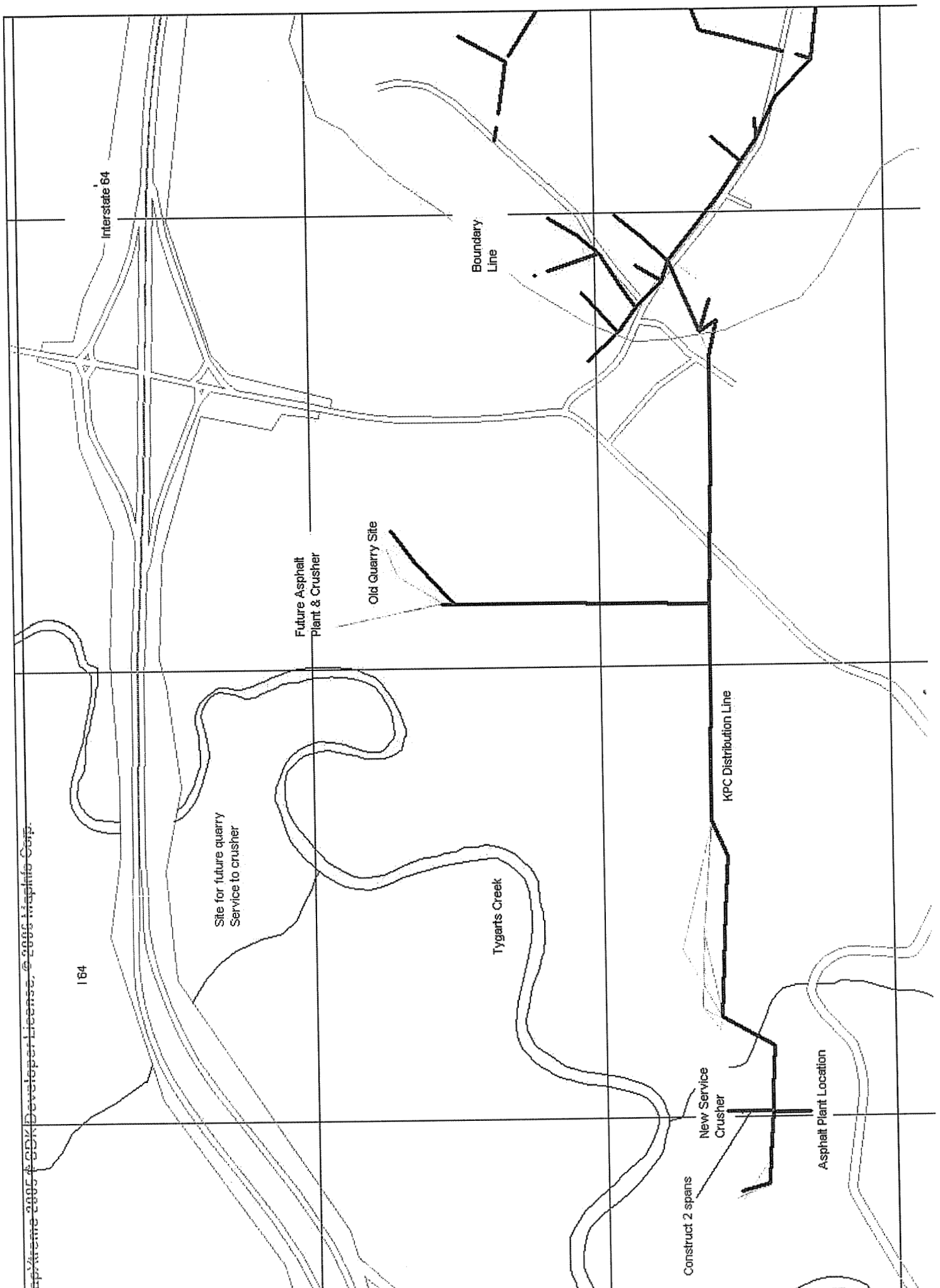


EXHIBIT 2

521/8087.31 T.P. 8
Book 87 Page 347
R/W Map No. 2253-201
Mr. Harry McCoy Est. No. _____
Clint Hill St. Drawing No. _____
(Address) Line _____

This Indenture, made this 10th day of June, 1952,
by and between Harry McCoy, Single

_____ of the
County of Carter, in the State of Kentucky, parties of the first
part and KENTUCKY AND WEST VIRGINIA POWER COMPANY, Incorporated, a corporation organized
and existing under the laws of the State of Kentucky, party of the second part,
WITNESSETH

That for and in consideration of the sum of One Dollar,
the receipt of which is hereby acknowledged, and other valuable considerations hereinafter set forth, the said
parties of the first part hereby grant, bargain, sell, convey and warrant to the party of the second part, its suc-
cessors and assigns, a right of way and easement with the right, privilege and authority to said party of the second
part its successors, assigns, lessees, and tenants to construct, erect, operate and maintain a line for the purpose of
transmitting electric or other power, in, on, along, over, through, or across the lands of the parties of the first
part situated in _____

District in the County of Carter in the State of Kentucky, and
on or near the waters of Tygart Creek, and bounded:
On the North by the lands of R. J. Dymann
On the East by the lands of W. H. Wheeler
On the South by the lands of W. H. Wheeler
On the West by the lands of Malcolm McCoy

This easement is for an electric line to be constructed as now surveyed. The width of said right of way is not to exceed forty (40) feet.

Being an easement over the same property conveyed to grantor herein by James M. McCoy et al
by deed dated 2-4-41, and recorded in _____
County, Deed Book No. 64 Page 405, Date 10-7-42

TOGETHER with the right to said party of the second part, its successors and assigns, to place, erect, maintain, inspect, add to the number of, and relocate at will, poles, towers, crossarms or fixtures, and string wires and cables, adding thereto from time to time, across, through or over the premises above referred to; to cut and at its option, remove from said premises or the premises of the parties of the first part adjoining the same on either side any trees, overhanging branches or other obstructions which may endanger the safety or interfere with the use of said poles and towers or fixtures or wires attached thereto or any structure on said premises; and the right of ingress and egress to and over the premises above referred to, and any of the adjoining lands of the parties of the first part, at any and all times, for the purpose of patrolling the line, or repairing, renewing or adding to the number of said poles, towers, structures, fixtures and wires, and for doing anything necessary or useful or convenient for the enjoyment of the easement herein granted; also the privilege of removing at any time any or all of said improvements erected upon, over or on said land;
(over)

BOOK 103 - Page 101

Mt. Harry McCoy Eas. No. 3 R/W Map. No. 3883-20
Olin Hall Key (Address) W. O. No. 5711901231 Temp. Prop. No. 5781

RECEIVED OF KENTUCKY POWER COMPANY, a Kentucky corporation, the sum of One Dollar (\$1.00), in consideration of which Harry McCoy Single

hereby grant and convey unto said Kentucky Power Company, its successors and assigns, the right and easement to construct, operate and maintain or remove an electric power line, with all necessary poles, anchors, wires and fixtures and the right to permit attachments of others to said poles on and over ~~the~~ ^{my} lands, with services and extensions therefrom, situate in the District of _____, County of Carter, and State of Kentucky, and bounded:
On the North by the lands of Pugest Creek
On the East by the lands of Dr. Wheller estate
On the South by the lands of U.S. Highway 70
On the West by the lands of Malcolm McCoy
with the right of ingress and egress to and from and over said premises.

Being an easement over the same property conveyed to grantor herein by James McCoy by deed dated 2-4-44, and recorded in Carter County, Deed Book No. 64, Page 405, Date 10-7-42

Together with the right to cut or trim any trees which may endanger the safety or interfere with the construction and use of said electric power line.

TO HAVE AND TO HOLD the same unto said Kentucky Power Company, its successors and assigns.

It is agreed that the foregoing is the entire contract between the parties hereto, and that this written agreement is complete in all its terms and provisions.

This agreement is dated the 5th day of April, 1957;

WITNESS the following signatures and seals.

WITNESS:
J.P. McCreary _____ (SEAL)
_____ (SEAL)
_____ (SEAL)
_____ (SEAL)
_____ (SEAL)
_____ (SEAL)
_____ (SEAL)
_____ (SEAL)
_____ (SEAL)

Harry McCoy _____ (SEAL)
_____ (SEAL)
_____ (SEAL)
_____ (SEAL)
_____ (SEAL)
_____ (SEAL)
_____ (SEAL)
_____ (SEAL)
_____ (SEAL)

ART PRINTING CO. 2-24 5500
 RIGHT OF WAY EASEMENT
 Form No. R/E 103-R/E.

M. J.M. McCoy (Name) Eos. No. A R/W Map. No. 3883-201
Chico Hill, Ky. (Address) W. O. No. 581/9033.31 (W.O. No.)

RECEIVED OF KENTUCKY POWER COMPANY, a Kentucky corporation, the sum of One Dollar (\$1.00) in consideration of which J.M. McCoy and Mary J. McCoy, his wife,

heraby grant and convey unto said Kentucky Power Company, its successors and assigns, the right and easement to construct, operate and maintain or remove an electric power line, with all necessary poles, anchors, wires and fixtures and the right to permit attachments of others to said poles on and over our lands, with services and extensions therefrom, situate in the District of _____, County of Carter, and State of Kentucky, and bounded: On the North by the lands of Richard Duncan, On the East by the lands of Mary McCoy, On the South by the lands of U.S. Highway #60, On the West by the lands of Herbert Goodrich with the right of ingress and egress to and from and over said premises.

Being an easement over the same property conveyed to grantor herein by Richard McCoy Danell by deed dated 9-11-20 and recorded in Carter County, Deed Book No. 37, Page 282, Date 10-6-21

Together with the right to cut or trim any trees which may endanger the safety or interfere with the construction and use of said electric power line.
 TO HAVE AND TO HOLD the same unto said Kentucky Power Company, its successors and assigns.
 It is agreed that the foregoing is the entire contract between the parties hereto, and that this written agreement is complete in all its terms and provisions.
 This agreement is dated the 3rd day of December, 1958;

WITNESS the following signatures and seals.

WITNESS: J.H. McClure

J.M. McCoy (SEAL)
Mary J. McCoy (SEAL)
 _____ (SEAL)
 _____ (SEAL)
 _____ (SEAL)
 _____ (SEAL)
 _____ (SEAL)
 _____ (SEAL)
 _____ (SEAL)

EXHIBIT 3

W. JEFFREY SCOTT, PSC

Attorneys at Law
311 W. Main Street
P.O. Box 608
Grayson, Kentucky 41143

Phone - (606) 474-5194
FAX - (606) 474-5196
e-mail - wjscott@windstream.net

W. Jeffrey Scott
John P. Thompson

November 24, 2009

Mr. Errol Wagner
Kentucky Power Company
101A Enterprise Drive
P.O. Box 5190
Frankfort, KY 40602-5190

Dear Mr. Wagner:

As you know I represent Grayson Rural Electric Cooperative Corporation. The Cooperative has been given an application by Mountain Materials Company for three phase service at a limestone quarry in the Pleasant Valley area of Carter County, which Mountain obtained from the Cecil Heirs.

It is our understanding that Mountain's representatives asked Kentucky Power to remove their equipment that was near the site to be served so that Grayson, who has the right to serve this area under the territorial maps approved by the Public Service Commission, could place its facilities thereon. I also understand that Carol Fraley, President and CEO of Grayson Rural Electric, requested the same from Kentucky Power. We understand however that Kentucky Power is now of the belief that it may intend to serve this particular area although it is located within the service territory of Grayson Rural Electric.

I enclose herewith a map which shows the demarcation of the service territory applicable to AEP and that which is applicable to Grayson Rural Electric. The push pin that is denoted on this map with the Pelfrey substation shows the location of the Pelfrey substation with the area to be served located approximately 1,200 feet West of the Pelfrey substation.

As you know the limestone quarry located closest to the Pleasant Valley exit is of course being served by Grayson Rural Electric at this time who has facilities at that location.

Therefore, the Co-Op is now requesting that Kentucky Power remove its facilities so that there will be no duplication of facilities in this area and that Grayson Rural Electric can proceed with its duty to construct a line for its member owner and serve this

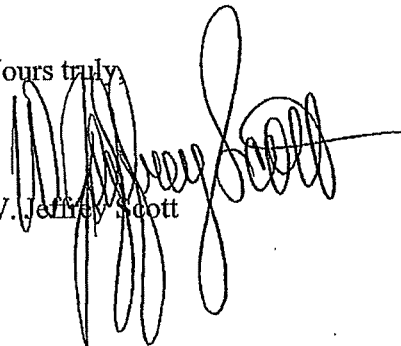
Mr. Errol Wagner
Kentucky Power Company
November 24, 2009
Page 2

area in accordance with the territorial maps and the Rules and Regulations imposed upon Grayson Rural Electric by the Kentucky Public Service Commission.

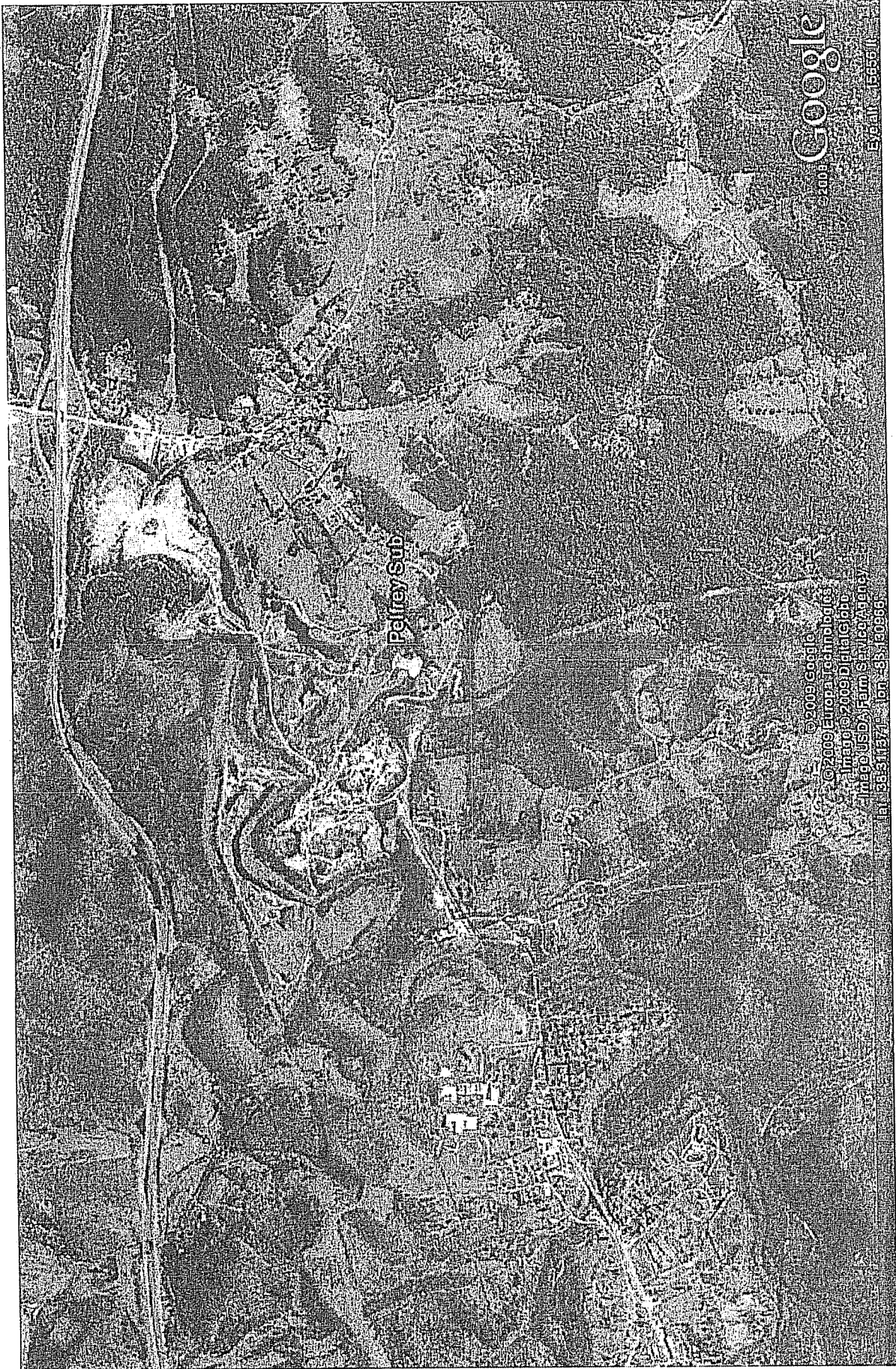
We look forward to hearing that this has been done as soon as practicable so that there will be no interruption in service.

Thank you for your attention to this matter.

Yours truly,


W. Jeffrey Scott

WJS/smm
Enclosure
Cc: Public Service Commission



Pellrey Sub

Google

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Image USA, Farm Service Agency
101-38-14966

Earth 165611