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PUBLIC SERVICE  
COMMISSION

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

Case No. 2019-00274

In the Matter of:

BERNHEIM ARBORETUM AND  
RESEARCH FOREST

COMPLAINANT

V.

LOUISVILLE GAS & ELECTRIC COMPANY

DEFENDANT

**BERNHEIM'S BRIEF IN SUPPORT OF ESTABLISHING A *PRIMA FACIE* CASE**

Comes now the Complainant, Bernheim Arboretum and Research Forest ("Bernheim"), by and through counsel, and for its Brief in support of establishing a *prima facie* case as ordered by the Public Service Commission ("Commission") in its August 20, 2019 Order, states as follows.

**INTRODUCTION**

Bernheim filed a Formal Complaint against Louisville Gas & Electric Company ("LG&E") with the Commission on August 2, 2019, pursuant to 807 KAR 5:001 Section 20. Bernheim claims that the Commission had no authority to grant a Certificate of Public Convenience and Necessity ("CPCN") to LG&E for the Bullitt County Natural Gas Pipeline ("BC Pipeline") if the CPCN was not applied for pursuant to statutory and regulatory requirements. Bernheim also claims the clandestine nature in which LG&E received a CPCN for the BC Pipeline prevented the public, including Bernheim, from publicly objecting to the project. Bernheim is an LG&E customer and in 2016 owned property, at minimum, indirectly affected by the PC Pipeline. Bernheim currently owns

property directly affected by , the BC Pipeline Project and was most recently served with a condemnation petition for the same pipeline to take property protected by conservation easements held by the Kentucky Heritage Land Conservation Fund, a state agency. The property was also purchased using state funds.

On August 20, 2019, the Commission, through its *prima facie* review of the Formal Complaint, entered an Order requiring Bernheim to brief issues of standing and notice related to 2016 LG&E rate case whereby no CPCN was ultimately required by the Commission for the BC Pipeline. The Commission also allowed LG&E to file a response, and Bernheim to reply. In a subsequent Order, the Commission allowed the Attorney General to participate in this initial *prima facie* briefing.

**I. BERNHEIM HAS STANDING TO ASSERT THE CLAIMS IN THE FORMAL COMPLAINT.**

The Commission has requested Bernheim to “brief the legal issue of whether Bernheim Arboretum has standing to claim that notice is required upon the filing of a CPCN application for a natural gas pipeline and that it would be entitled to receive notice of a CPCN application by LG&E for construction of the Bullitt County natural gas pipeline.” Order at 3.

Bernheim filed its Formal Complaint shortly after LG&E filed suit to condemn Bernheim property for the BC Pipeline despite ongoing negotiations between the parties. As stated in its Formal Complaint, Bernheim is the owner of a 16,000 acre arboretum, forest and nature preserve in Bullitt and Nelson Counties, Kentucky, with a mission to connect people with nature. The property consists of the 600-acre arboretum, large expanses of scenic woodlands crossed by 40 miles of hiking trails, and extensive natural areas managed for conservation purposes. Bernheim estimates that over 750,000 people

will visit its property this year for recreational, research, and educational purposes.

Bernheim is the largest privately-owned preserved forest in the United States, East of the Mississippi River. Bernheim is also one of the largest property owners in Bullitt County, has a land use unique to the eastern United States, and is an LG&E customer. The proposed BC Pipeline will cross a substantial portion of the Bernheim property.<sup>1</sup>

The regulatory requirements to file a Formal Complaint are limited, but the Complainant is required to state, “Fully, clearly, and with reasonable certainty, the act or omission, of which complaint is made, with a reference, if practicable, to the law, order, or administrative regulation, of which a failure to comply is alleged, and other matters, or facts, if any, as necessary to acquaint the commission fully with the details of the alleged failure; and ...the relief sought.” 807 KAR 5:001 Section 20(1). The Commission then examines “the complaint to ascertain if it establishes a *prima facie* case and conforms to this administrative regulation.” 807 KAR 5:001 Section 20(4).

**A. BERNHEIM HAS STANDING NOW TO ESTABLISH A PRIMA FACIE CASE AND HAS LEGITIMATE LEGAL INTERESTS THAT WILL BE HARMED BECAUSE OF THE VIOLATIONS ALLEGED IN ITS FORMAL COMPLAINT.**

To address an initial matter, the Commission seems to assert that Bernheim was required to have standing at the time of the rate case in which the Commission granted a CPCN to LG&E *sua sponte* for the BC Pipeline to establish a *prima facie* case. Although, Bernheim did have standing at the time (*see infra*), such an inquiry is unnecessary. Bernheim is currently suffering harm to its legal interests as a result of LG&E’s and the

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<sup>1</sup> The specific property at issue, affected by the BC Pipeline, was purchased by Bernheim in 2017.

Commission's violations when LG&E requested and Bernheim approved a CPCN for the BC Pipeline. Bernheim currently has standing to assert a *prima facie* case.

The Commission is a creature of statute, and has only such powers as granted by the General Assembly. As such, the Commission must find warrant in the enabling statutes for the actions taken, process provided, and decisions made. *PSC v. Jackson County RECC*, 50 S.W.2d 764 (Ky. App. 2001), *citing Boone Co. Water and Sewer District v. PSC*, 949 S.W.2d 588 (Ky. 1997). KRS 278.310 requires the hearings and investigations before the Commission "shall be governed by rules adopted by the commission, and in the conduct thereof neither the commission nor the commissioner shall be bound by the technical rules of evidence." There is no authority stating Bernheim must have owned property or had a property interest at the time LG&E was granted a CPCN for the BC Pipeline. In fact, Bernheim is remiss to use the term "applied" because LG&E never did apply for a CPCN. The routes are largely kept confidential until such time LG&E is required to disclose the location in its attempts to acquire or condemn the property. With regards to the BC Pipeline, the Commission itself has asserted, "The PSC has no jurisdiction over the specific route of the pipeline between its proposed termini." Thus, when the former property owner knew of LG&E's intention to acquire the property for the pipeline or when Bernheim acquired the property is of no consequence to its ability to have standing to file a Formal Complaint. What does matter is that Bernheim is *now* experiencing substantial impacts from the approval of the BC Pipeline CPCN and the construction of the pipeline through its protected property. Even if those impacts to its property are only realized now, Bernheim still has standing to file a Formal Complaint to

address those impacts, as 807 KAR 5:001 Section 20 has no restriction on when those harms are suffered.

Bernheim has legitimate safety concerns and, as an LG&E customer, cost concerns for the pipeline. The Attorney General has also noted the Commission's concerns with LG&E's pipeline practices, "including LG&E's willful violation of pipeline safety standards and the Commission's admonishment of LG&E for not seeking timely waiver from required periodic assessments of pipeline integrity, the latter involving the pipeline to which LG&E proposes to connect the Bullitt County pipeline." *Id.* at 2. A large portion of the BC Pipeline will be located on Bernheim property where guests will likely be present. Bernheim has a legitimate legal interest in receiving reliable and safe gas service from LG&E and to ensure the safety of its guests, especially in light of LG&E's recent violations of the required periodic assessments and the recent problem of pipeline explosions in Kentucky.

LG&E is also concerned with the Commission's current failure to review the environmental permits for the pipeline to ensure compliance. The Attorney General notes that "although a number of the cited permits have been filed with the Commission in the Post Case Correspondence section of the 2016 rate case, there is no evidence that the Commission has reviewed the permits for accuracy or compliance with its orders or with LG&E's prior representations. In light of the allegations made in [Bernheim's] Complaint, the Commission should review LG&E's compliance regarding the environmental concerns of governmental entities subject to the pertinent permits." *Id.* at 3. Again, Bernheim's purpose is to connect people with nature. Bernheim is obligated to

conserve and preserve its properties for future generations. It must be able to protect its property, guests, employees, and conservation interests from environmental harm.

Bernheim, as an LG&E gas customer, also has a legitimate legal interest that it pays just and reasonable rates to LG&E. As the Attorney General has stated, “LG&E has previously provided evidence that it has already, before beginning construction, encountered cost overruns on this pipeline.” AG Motion to Intervene at 6. “In its 2016 rate case, LG&E stated that the proposed pipeline was estimated to cost ‘approximately \$27.6 million,’ while in 2018 it inexplicably budgeted \$38.7 million for the project.” *Id.* “Although the Company used the risk of increased costs to shield from public view certain information, it has failed to explain why the price of the pipeline has nevertheless increased nearly 50% in just two years.” Again, Bernheim, as an LG&E customer, must be able to protect itself from unjust or unreasonable rates and inefficient use of customer funds.

In sum, Bernheim – today – has standing to establish a *prima facie* case to protect its legitimate property and legal interests. Because of LG&E’s and the Commission’s violation of established law in approving the CPCN, Bernheim’s legitimate legal and property interests will be harmed, especially in light of LG&E’s harm to Bernheim’s protected property, Bernheim’s legitimate legal interests to ensure the health, safety, welfare, and integrity of its properties and guests, Bernheim’s legitimate legal interests as an LG&E gas customer to receive safe, reliable, and affordable gas service, and to pay just and reasonable rates for its gas. Bernheim currently has standing to establish a *prima facie* case through Bernheim’s Formal Complaint.

**B. BERNHEIM HAD STANDING TO INTERVENE IN THE 2016 RATE CASE, BUT WAS UNREASONABLY DENIED NOTICE OF LG&E'S REQUEST FOR A CPCN.**

Even assuming Bernheim does not currently have standing to establish a *prima facie* case through its Formal Complaint, Bernheim certainly would have standing to intervene in LG&E's 2016 rate case, Case No. 2016-00371, if it knew LG&E was requesting a CPCN that could harm its legitimate property and legal interests. Unfortunately, Bernheim had no notice of the request. No one did.

As stated in the Formal Complaint, LG&E never applied for a CPCN for the BC Pipeline. The BC Pipeline was not even mentioned until page 209 (out of 1776 pages for that exhibit), Exhibit 10, of LG&E's Application, Statutory Notice, and Filing Requirements for paper and electronic filing. LG&E maintained throughout the 2016 rate case that it did not need a CPCN, claiming the pipeline is an ordinary extension of its existing gas system in the usual course of business. Not until the Commission's Second Request for Information to LG&E, Question No. 64, is it even mentioned that a CPCN may be needed for the pipeline. In LG&E's response to Question No. 64, it again denied that a CPCN was necessary. Five months later, LG&E again claimed it did not require a CPCN for the BC Pipeline, but on page 37 of its Post Hearing Brief, in the Conclusion section, LG&E claimed in the alternative, if the LG&E did require a CPCN for the Bullitt County Pipeline Project, the Commission should award LG&E a CPCN regardless. A month later, the Commission held that a CPCN is required, and, despite LG&E never applying for a CPCN, the Commission granted a CPCN to LG&E for the BC Pipeline.

At no time until its May 2017, Post Hearing Brief did LG&E request the Commission to award LG&E a CPCN for the BC Pipeline. LG&E failed to state it was requesting a CPCN until that time. No party, including Bernheim, had any notice,

constructive or otherwise, that LG&E was requesting a CPCN for the BC Pipeline. The published Notice of Public Hearing was also of no help. Published in newspapers throughout LG&E's jurisdiction on April 19 and 20, 2017, the public notice for the rate case stated as follows:

#### NOTICE OF PUBLIC HEARING

The Public Service Commission of Kentucky issued an order on April 7, 2017, scheduling a hearing to begin on May 9, 2017, at 1 :00 p.m., Eastern Daylight Time, at 211 Sower Boulevard in Frankfort, Kentucky, for the purpose of cross-examining witnesses of Louisville Gas and Electric Company ("LG&E") and interveners in Case No. 2016-00371, which is the Application of LG&E for an Adjustment of Its Electric and Gas Rates and for Certificates of Public Convenience and Necessity. This hearing will be streamed live and may be viewed on the PSC website, [psc.ky.gov](http://psc.ky.gov).

LOUISVILLE GAS AND  
ELECTRIC COMPANY  
220 West Main Street  
Louisville, Kentucky 40202

Even if an interested party that qualified for intervention was concerned about potential pipelines being constructed by LG&E in its service area and read the above notice, those interested parties would still not have notice of LG&E's CPCN request for the BC Pipeline because it was never made by LG&E until May 31, 2017. Regardless, LG&E never applied for the CPCN pursuant to KRS § 278.020(1)(b), 807 KAR 5:001 Section 14 (1), and 807 KAR 5:001 Section 15 (2), and otherwise failed to demonstrate the requisite need for the project. The Commission's *sua sponte* award of the CPCN was beyond its statutory powers.

While the application for a CPCN does not require the same public notice as an electric transmission line or a cellular tower, LG&E should not be allowed to obfuscate



its request for a CPCN under thousands of pages of testimony and memoranda. LG&E's clandestine attempt to unlawfully request a CPCN should have never been condoned by the Commission. In the very least, LG&E should have requested the CPCN prior to the public hearing. LG&E failed to do so. No party was ever put on any type of notice whatsoever that LG&E applied for a CPCN for the BC Pipeline because LG&E never applied for it.<sup>2</sup>

If LG&E did apply for a CPCN, KRS 278.020(1)(b) requires, "Upon the filing of an application for a certificate, and after any public hearing which the commission may in its discretion conduct *for all interested parties*, the commission may issue or refuse to issue the certificate, or issue it in part and refuse it in part." (Emphasis added). The use of the phrase "for all interested parties" suggests that there are more parties than merely the applicant, and presumes some form of public notice to parties who might be interested or affected. The lack of meaningful and timely public notice for a new 12-mile pipeline prevented those interested and potentially adversely affected, including Bernheim, from being able to challenge the necessity, and the absence of wasteful duplication, that are the criteria for the issuance of a CPCN. By awarding LG&E a CPCN without requiring LG&E to apply for the CPCN pursuant to KRS 278.020, LG&E and the Commission failed to afford any notice or public hearing "for all interested parties" including Bernheim.

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<sup>2</sup> It is also not incumbent upon Bernheim to request that LG&E apply for a CPCN. Bernheim is not in the position to determine when or why LG&E should apply for a CPCN. Bernheim is not privy to LG&E's strategies or plans. The notion that Bernheim "should have been aware" of the pipeline prior to Bernheim purchasing the property LG&E is attempting to acquire for the BC Pipeline is irrelevant.

Even if Bernheim wanted to protect its legitimate property and legal interests at the time of the rate case, there was no reason for it to do so. Bernheim had no notice of the request for the CPCN. Again, no one did.

**II. IF BERNHEIM HAD NOTICE OF AN APPLICATION FOR A CPCN, IT WOULD HAVE STANDING TO INTERVENE.**

807 KAR 5:001 Section 4(11) requires that an applicant for intervention “request leave” to intervene. A motion to intervene requires the movant’s name, mailing and e-mail address, and “shall state his or her interest in the case and how intervention is likely to present issues or develop facts that will assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings.” This section also contains the general standard governing intervention in Commission proceedings arising under KRS Chapter 278, providing that the Commission “shall” grant leave to intervene on one of two grounds: either the person “has a special interest in the case that is not otherwise adequately represented” or that “his or her intervention is likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings.”

The Commission’s discretion regarding intervention is not unlimited. As noted in *EnviroPower LLC v. PSC*, 2007 WL 289328 \*4, 2007 Ky. App. Unpub. LEXIS 121, “The PSC’s exercise of discretion in determining permissive intervention is, of course, not unlimited. . . . [T]here is the limitation in the PSC intervention regulation . . . which requires the showing of either “a special interest in the proceeding which is not otherwise adequately represented,” or a showing that intervention “is likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly

complicating or disrupting the proceedings.” As a creature of statute, the Commission is without the authority to alter, ignore, or vitiate the statutory language.

All that is required of an applicant for intervention is that the applicant state his or her interest, and state how intervention is “likely” to present either issues or facts that will assist the Commission in fully considering the matter.

Additionally, the Kentucky Constitution guarantees that affected members of the public, including Bernheim, receive a full and fair opportunity to be heard, especially where Bernheim will speak for a distinct subset of the public. *See* Section 2 of the Kentucky Constitution. To deny Bernheim access to a CPCN proceeding for a pipeline that could harm Bernheim’s legitimate legal and property interests is to deny Bernheim its constitutional rights to be heard, and would undermine the integrity of the Commission’s CPCN regulatory process.

**A. BERNHEIM WOULD HAVE A SPECIAL INTEREST IN A CPCN PROCEEDING FOR THE BC PIPELINE.**

There is no question that, both in fact and at law, Bernheim would have been a person with “a special interest in the case that is not otherwise adequately represented” if LG&E applied for the CPCN as required by law. Bernheim is a long time LG&E gas customer and one of the largest landowners in LG&E’s jurisdiction. Bernheim also has a fiduciary duty to protect, preserve, and conserve its property and resources through conservation easements held by the Commonwealth of Kentucky. In order to ensure the health, welfare and integrity of its guests, sponsors, donors, workers, and property, Bernheim also has a duty to ensure that the regulated utilities that serve it comply with the law, charge Bernheim just and reasonable rates, and that any pipeline will be safe, reliable, and will not be a waste of resources.

Furthermore, the primary beneficiary of the BC Pipeline, Jim Beam Brands Co., has a relationship with Bernheim to help promote and enhance environmental and water cycle education, improve watershed protection, and preserve and promote biodiversity. This relationship allows Bernheim to present specialized knowledge related to the impacts that pipeline may have on Jim Beam, and its relationship with Bernheim's resources, and that of the surrounding community. Bernheim holds a special interest in the case that would not otherwise be adequately represented without their participation in the CPCN case. Unfortunately, Bernheim had any notice whatsoever that LG&E applied for a CPCN as a part of LG&E's 2016 rate case. If Bernheim had notice of an application for a CPCN for the BC Pipeline, it would have been afforded intervenor status as an entity with a special interest in the case that is not otherwise adequately represented.

**B. BERNHEIM COULD AND WOULD HAVE PRESENTED ISSUES OR DEVELOPED FACTS THAT WOULD ASSIST THE COMMISSION IN FULLY CONSIDERING THE MATTER.**

As an alternative to the "special interest" standard for a grant of intervention in Commission proceedings, 807 KAR 5:001 Section 4(11)(b) provides that the Commission "shall grant a person leave to intervene if the commission finds that he or she has made a timely motion for intervention and . . . that his or her intervention is likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings." (Emphasis added.) Again, there is no other party like Bernheim in Kentucky, with its extensive private land holdings and conservation obligations; at minimum, there is no other party like Bernheim within LG&E's jurisdiction. Bernheim could have assisted the Commission by presenting

issues and developing facts that could assure that the pipeline is needed, is built and maintained safely, is funded properly, will not cause harm to Bernheim and its unique interests, and its costs are fair, just, and reasonable. Bernheim would have been able to provide important testimony and data related to the effects of the pipeline on protected property including threats to the property from improperly maintained and inspected pipelines, as well as the impacts the pipeline may have on resources, guests, and visitors of Bernheim. Bernheim would have helped to ensure that the Commission considered all necessary and relevant information before making a fully informed decision that best serves the varied interests of all consumers of the pipeline. There is no doubt that Bernheim is a unique LG&E gas customer that can bring a perspective to a CPCN case that no other party can. There is also no evidence that Bernheim would be obstructionist or otherwise unduly complicate or disrupt a CPCN proceeding for the pipeline.

In the past, the Commission has allowed intervention when it is “likely to present issues and develop facts that will assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings. *See Order entered July 10, 2015, Case No. 2015-00213* (order allowing Nucor Steel to intervene in Owen Electric Cooperative Inc.’s CPCN). It was also the case in 2018-00004, when the Commission allowed Republic Transmission, LLC to intervene in a CPCN for Big Rivers Electric Corporation to construct a transmission line in Hancock County, where it found that the intervenor had a “special interest in the proceeding that is not otherwise adequately represented.” *See Order entered April 11, 2018, Case No. 2018-00004*. Intervention is also permitted when the party “intends to play a constructive role in the Commission’s decision-making process.” *See Order entered January 11, 2017, Case No. 2016-371*

(granting AT&T Kentucky's motion to intervene in LG&E's CPCN). This is especially true in cases where the intervenors represent a unique subset which is distinct from the interests represented by the Attorney General, as was the case in 2011-00375, when the Commission allowed the Sierra Club and the Natural Resources Defense Council to intervene in LG&E's CPCN for the construction of a combined cycle combustion turbine at Cane Run Generating Station. In that case, the Commission found that "no other party to th[e] proceeding has the capacity or the incentive to assure that Movants' concerns are addressed" and that "neither the Commission staff nor the Attorney General's office will marshal the same level of environmental expertise as Movants with regard to the current state of renewable development. As such Movants are uniquely positioned to share their expertise with the Commission to ensure that it does not authorize the proposed Certificates of Convenience and Necessity only to discover that there was another cheaper and cleaner generation source." *See Order entered November 22, 2011, Case No. 2011-00375.* In 2007-00134, Kentucky-American Water Company filed for a CPCN for its construction of a water treatment plant on Pool 3 of the Kentucky River and a 30-mile pipeline to transport water from the new plant to an existing water distribution system, and even though the Attorney General intervened, the PSC still allowed intervention by numerous parties that were "likely to present issues and develop facts that will assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings" including Lexington-Fayette Urban County Government, Bluegrass Water Supply Commission, Kentucky Industrial Utility Customers, Inc., Kentucky River Authority, Louisville Water Company, as well as a citizen group, Citizens for Alternative Water Solutions (CAWS). Each of these cases lends support to

the legal and policy imperative for allowing Bernheim to have standing to pursue the instant case.

In addition to its property interest, Bernheim has a fiduciary duty to preserve and protect its lands for public use for generations to come which will be adversely affected by the granting of a CPCN for the BC Pipeline. This is a special interest which is not otherwise adequately represented in the current proceedings. Historically, in cases like this, the PSC has granted full intervenor status for special interest groups and environmental groups alike. *See supra*, Case No. 2007-00134, *see also Franklin Circuit Court, 18-CI-1115, 18-CI-1117, and 18-CI-1229, Opinion & Order* dated November 21, 2018. In its Opinion & Order ordering the Commission to grant intervenor status for the Metropolitan Housing Coalition, Association of Community Ministries, Sierra Club, and Community Action Council for Lexington-Fayette, Bourbon, Harrison and Nicholas Counties, Inc., the Franklin Circuit Court recently held that the Commission has “consistently allowed” affordable housing parties and environmental groups to intervene in these cases because they were “likely to present issues and develop facts that will assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings” and dismissed the Commission’s finding that the Attorney General would “adequately represent the residential and low-income customers.” *Id.* at 3, 6. The Court also found that:

It would certainly set a dangerous precedent to allow the Commission to abruptly depart from its well-known and long-held practice of allowing intervention by these plaintiffs without relying on substantial evidence to do so. By keeping these interest groups out of rate cases, relevant testimony goes unheard and valuable information is never considered. This undermines the integrity of the regulatory process. More importantly, however, it opens the door to an administrative proceeding entirely lacking due process. Our constitution guarantees that affected members of the public receive a full and fair opportunity to be heard; these

plaintiffs attempt to speak for certain distinct subsets of the public [and the PSC should grant the motions to intervene].

*Id.* at 14.<sup>3</sup> Similarly, in this case, the Attorney General is not in a position to represent the unique interest of Bernheim as a conservation organization and ecological steward because it has no experience in these arenas. Bernheim's participation in these proceedings, as the largest privately held contiguous forest block in the Eastern United States, is essential to the Commission's understanding of the harms that can occur from environmental disturbances like the BC Pipeline. These disturbances affect clean air, clean water, wildlife refuge, environmental research, as well as educational opportunity for future generations. The Attorney General may be able to represent the interests of the ordinary ratepayer; however, he is not able to adequately represent the unique environmental and conservation interests of Bernheim in order ensure that LG&E's pipeline is necessary, not duplicative, and is safe and reliable for the 750,000+ visitors to Bernheim this year.

If LG&E had complied with the law and actually applied for a CPCN for the BC Pipeline, Bernheim would have standing to intervene in that case. Bernheim holds a special interest in assuring the pipeline is needed, is built and maintained safely, is funded properly, will not cause harm to Bernheim and its unique interests, and its costs are fair, just, and reasonable. Thus, Bernheim has an interest in the gas rates and service of LG&E and must be able to challenge the necessity and any wasteful duplication of the pipeline. *See Eastern Rockcastle Water Association*, Case No. 2017-00383 (Ky. PSC Oct. 17, 2017). Bernheim is also likely to present issues or to develop facts that assist the commission in

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<sup>3</sup> As the Commission is well aware, the Franklin Circuit Court was reversed by the Court of Appeals, and the case is currently pending before the Kentucky Supreme Court.



fully considering the matter without unduly complicating or disrupting the proceedings. Bernheim's ability to intervene or even comment on the BC Pipeline should not be limited because LG&E and the Commission failed to comply with the law.

**III. THE COMMISSION SHOULD NOT UNDERMINE THE INTEGRITY OF THE COMMISSION'S REGULATORY PROCESS BY ALLOWING THE UNLAWFUL GRANTING OF A CPCN TO STAND.**

As a creature of statute, the Commission is without the authority to alter, ignore, or vitiate the statutory language. The Commission has no statutory authority to award a CPCN that was not applied for in compliance with KRS § 278.020(1)(b), 807 KAR 5:001 Section 14 (1), and 807 KAR 5:001 Section 15 (2). The Commission should find that Bernheim has standing to establish a *prima facie* case through its Formal Complaint, void the CPCN for the BC Pipeline, require LG&E to apply for a CPCN for same, and allow interested parties to intervene in that case.

The Attorney General's Motion to Intervene highlights the public policy reasons to void the CPCN and require LG&E to follow the law. *See* Section 2(B) (above). Bernheim should also be given an opportunity to participate in any proceeding for a BC Pipeline CPCN. So far, through no fault of its own, Bernheim has been denied any such opportunity because LG&E failed to comply with the law and the Commission allowed LG&E to do so. Such conduct vitiates the integrity of the CPCN process.

**CONCLUSION**

Bernheim has standing to maintain a *prima facie* case through the Formal Complaint process to protect its legitimate property and legal rights. Bernheim has the right to assure that the pipeline is needed, is built and maintained safely, is funded properly, will not cause harm to Bernheim and its unique interests, and its costs are fair,

just, and reasonable in light of LG&E's rates and service. Still, no interested party, including Bernheim, received any notice of an application for a CPCN for the BC Pipeline because an application was never submitted. LG&E failed to comply with CPCN application requirements, and the Commission acted outside of its statutory authority in granting the CPCN *sua sponte*. Bernheim is entitled to relief through the Commission's Formal Complaint process. Bernheim respectfully requests this Commission to find the Formal Complaint establishes a prima facie case, and require the matter complained of be satisfied.

Respectfully submitted,

/s/ Randal A. Strobo

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#### **CERTIFICATE OF SERVICE**

In accordance with 807 KAR 5:001, Section 8, I certify that the Complainant's filing of the foregoing is a true and accurate copy of the same document being filed in paper medium; in person to the Public Service Commission on September 9, 2019.

/s/ Randal A. Strobo

Randal A. Strobo

Strobo Barkley PLLC