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PUBLIC SERVICE COMMISSION

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISION

Case No. 2019-00274

In the Matter of:

BERNHEIM ARBORETUM AND RESEARCH FOREST — COMPLAINANT

V.

LOUISVILLE GAS & ELECTRIC COMPANY — DEFENDANT

BERNHEIM'S REPLY 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

LG&E has misled the Commission as it has misled the public and ratepayers in this case and the 2016 rate case. LG&E not only asserts a standing argument recently rejected by the Kentucky Supreme Court, it also continues to misconstrue the record regarding the 2016 rate case. The record speaks for itself, and LG&E concedes that at no time did it apply for a CPCN for the Bullitt County Pipeline. LG&E was required, and failed, to obtain a CPCN via a separate case other than the 2016 rate case. Bernheim has established standing for a *prima facie* case, LG&E should be ordered to respond to the Complaint, and the Commission should void the CPCN awarded to LG&E for the Bullitt County Pipeline.

ARGUMENT

I. LG&E HAS ASSERTED A STANDING STANDARD REJECTED BY THE KENTUCKY SUPREME COURT.

Although LG&E relies on *Commonwealth Cabinet for Health & Family Servs., Dep't for Medicaid Servs. v. Sexton by & through Appalachian Reg'l Healthcare, Inc.*, 566 S.W.3d 185, 191 (Ky. 2018), for its standing claims, LG&E completely ignores the holding in *Sexton*. Although the Kentucky Supreme Court did adopt the *constitutional* standing test from *Lujan v. Defenders of Wildlife,* 504 U.S. *555,* 560-61 (1992), the Court also expressly clarified that the *Lujan* standing test only applies to constitutional standing, not statutory standing. *Sexton* makes this distinction:

> Though all are termed "standing," the differences between statutory, constitutional, and prudential standing are important. Constitutional and prudential standing are about, respectively, the constitutional power of a ... court to resolve a dispute and the wisdom of so doing. Statutory standing is simply statutory interpretation: the question it asks is whether [the legislature] has accorded *this* injured plaintiff the right to sue the defendant to redress his injury.

Sexton at 191. *Lujan* standing requirements are derived from Article III of the U.S. Constitution, which limits the judicial power to "Cases" and "Controversies" as defined by the U.S. Constitution. U.S. Const., Art. III, § 2. The Kentucky Supreme Court decided to adapt these U.S. constitutional requirements to the Kentucky Constitution, ultimately holding that the same constitutional standing principles expounded in *Lujan* should apply under the Kentucky Constitution. However, as the Kentucky Supreme Court made abundantly clear, "Our decision today is not that the Cabinet correctly decided that Sexton did not have the requisite standing to seek redress through an administrative agency hearing; rather, it is that Sexton does not have the requisite standing to seek redress for this alleged injury in a Kentucky court. Whether a party has the requisite

standing to seek redress through an administrative agency is an entirely different question than whether a party has the requisite standing to seek redress through a Kentucky court." *Id.* at 199. Still, LG&E attempts to obfuscate the obvious, asserting a standing test for administrative cases that the Kentucky Supreme Court explicitly rejected in the same case on which LG&E relied.

Sexton does suggest the appropriate standing test for administrative cases based on a right granted by statute. "The question whether a plaintiff can sue for violations of [a statute] is a matter of statutory standing, 'which is perhaps best understood as not even standing at all.' ... Dismissal for lack of statutory standing is properly viewed as dismissal ... for failure to state a claim [upon which relief may be granted]." *Sexton* at 191. The *Sexton* court cites *Graden v. Conexant Sys. Inc.,* 496 F.3d 291, 294–95 (3d Cir. 2007), which states:

> Constitutional and prudential standing are about, respectively, the constitutional power of a federal court to resolve a dispute and the wisdom of so doing. Statutory standing is simply statutory interpretation: the question it asks is whether Congress has accorded *this* injured plaintiff the right to sue the defendant to redress his injury. To answer the question, we employ the usual tools of statutory interpretation. We look first at the text of the statute and then, if ambiguous, to other indicia of congressional intent such as the legislative history. (Citations omitted.)

In *CGM, LLC v. BellSouth Telecommunications, Inc.*, 664 F.3d 46, 52–53 (4th Cir. 2011), another case cited by the *Sexton* Court, the Court states, "Statutory standing is simply statutory interpretation: the question it asks is whether Congress has accorded *this* injured plaintiff the right to sue the defendant to redress his injury." (Citations omitted). In the same vein as *Graden, supra, CGM* states, "In a case where the question is "whether Congress intended to confer standing on a litigant like [the one at bar] to bring

an action under [the statute at issue]", "[o]ur task is essentially one of statutory construction." *CGM, LLC, supra.* Though the case law is somewhat redundant, the standing requirements in a Kentucky administrative agency case are fundamentally different than those in a federal or state court case.

Thus, the proper the standard for statutory standing requires assessing whether the legislature has accorded a party such as Bernheim the right to seek relief to redress its injuries. That analysis is based on the statute and the interpretation of that statute. [1] While *Lujan* is instructive on constitutional standing, as the Kentucky Supreme Court has stated, there is no place for such an analysis in an administrative case, except to the extent a statute were to require the use of the *Lujan* standard.

II. BERNHEIM HAS STANDING TO ESTABLISH A *PRIMA FACIE* CASE.

In Kentucky, issues of statutory construction and interpretation are matters of law for a court to decide. *Board of Educ. of Fayette Co. v. Hurley-Richards*, 396 S.W.3d 879, 886 (Ky. 2013). When interpreting statutes, courts will consider the legislative intent, but will not ignore the plain language of the statute. *Comm. of Ky., Dept. of Rev. v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005). "In fact, 'the plain meaning of the statutory language is presumed to be what the legislature intended, and if the meaning is plain, then the court cannot base its interpretation on any other method or source.'" *Id.* Courts will construe "non-technical words according to their common meanings." *Com. v. Love*, 334 S.W.3d

[1] Furthermore, in *Commonwealth v. DLX, Inc.*, Ky., 42 S.W.3d 624, 626 (2001), the Kentucky Supreme Court held that an administrative agency cannot decide constitutional issues, supporting the idea that an administrative agency must focus on statutory interpretation, not state or federal constitutional jurisprudence, to identify the standing requirements of the agency in an adjudicative matter.

92, 93 (Ky. 2011). "All words and phrases shall be construed according to the common and approved usage of language." KRS 446.080(4).

A. BERNHEIM HAS STATUTORY STANDING

As cited by LG&E, KRS 278.260(1) states:

> The Commission shall have original jurisdiction over complaints as to rates or service of any utility, and upon a complaint in writing made against any utility by any person that any rate in which the complainant is directly interested is unreasonable or unjustly discriminatory, or that any regulation, measurement, practice or act affecting or relating to the service of the utility or any service in connection therewith is unreasonable, unsafe, insufficient or unjustly discriminatory, or that any service is inadequate or cannot be obtained, the commission shall proceed, with or without notice, to make such investigation as it deems necessary or convenient.

This statute gives the Commission original jurisdiction over complaints "as to rates or service" of any utility. Bernheim has alleged it was injured and aggrieved by LG&E's violation of Kentucky statutes and regulations by receiving a CPCN for the Bullitt County Pipeline without ever formally applying for a CPCN pursuant to the requirements in those statues and regulations. *See* Formal Complaint. As the relationship between a customer and utility is through rates and service, the injury alleged implies that the fundamental grievance is related to Bernheim's injury as a result of being a customer of LG&E. Bernheim specifically alleged in the Formal Complaint and Brief that it has legitimate safety, rate, service, and waste concerns as an LG&E gas customer and as one of the largest property owners in LG&E's jurisdiction both today and at the time of the 2016 rate case.

The Formal Complaint was also made "in writing" against a "utility." Bernheim has alleged that the "regulation" of LG&E by the Commission was done in violation of

the law, and that LG&E's and the Commission's "measurement, practice, or act" of awarding the CPCN and building the pipeline is "unreasonable, unsafe, insufficient, and unjustly discriminatory" to Bernheim and its customers under the conditions by which approval was granted to LG&E by the Commission. Bernheim has alleged that the service is "inadequate" as LG&E has a history of not complying with pipeline inspection requirements, and LG&E has underestimated the cost of the Bullitt County Pipeline to the detriment of LG&E customers, including Bernheim. Having satisfied the preceding requirements, the Commission "shall" proceed, with or without notice, to make such investigation as it deems necessary or convenient.

As stated in Bernheim's Brief, Bernheim has also complied with 807 KAR 5:001 Section 20(1). That regulation requires Bernheim 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). Bernheim, in its Formal Complaint and Brief has stated "fully, clearly, and with reasonable certainty" that LG&E never applied for a CPCN pursuant to law, and that the Commission acted outside of its authority by awarding a CPCN without a formal application. Bernheim cited the statutes and regulations violated by LG&E and the Commission. Bernheim also stated the facts with specificity and attached exhibits to "acquaint the commission fully with the details of the alleged failure." Bernheim also specified the relied sought.

Lastly, citing its own precedent, the Commission states, "A complaint establishes a *prima facie* case when, on its face, it states sufficient allegations that, if not contradicted

by other evidence, would entitle the complainant to the requested relief." 8/20/2019 Order at 3, *citing* Case No. 2010-00404, *Bulldog's Enterprises, Inc. d/b/a Bulldog's Road House v. Duke Energy Kentucky, Inc.* (Ky. PSC Nov. 15, 2010). Again, this is not a constitutional standing requirement. It is statutory, and Bernheim has stated sufficient allegations that are not contradicted, and would entitle them to its requested relief. Again, LG&E has conceded that it did not apply for a CPCN for the Bullitt County Pipeline. Response at 18.

Again, the specific allegations against LG&E are outlined in Bernheim's Formal Compliant and Brief. The details will not be repeated here, but as the previous paragraphs demonstrate, Bernheim has satisfied the plain language requirements and legislative intent of KRS 278.260(1) and 807 KAR 5:001 Section 20. Any additional standing requirements, constitutional or otherwise, are not required at this administrative level, as they are not identified in KRS 278.260(1), which is the authority the Kentucky Legislature has delegated to the Commission to protect the citizens of Kentucky via a ratemaking process. Appending a *Lujan* based standing requirement would be inconsistent with the plain language requirement of statutory construction under Kentucky law. Having complied with the statutory and regulatory requirements of the Kentucky Legislature and the Commission, Bernheim has the appropriate statutory standing to establish a *prima facie* case.

LG&E's thin reliance on *Application of Bullitt Utilities, Inc. for a Certificate of Convenience and Necessity and Surcharge for Same,* Case No. 2014-00255, Order (Ky. PSC Dec. 23, 2014) is also misplaced. In that case, the issue of the failure to apply for a CPCN in accordance with statutory and regulatory requirements was never raised. In addition, *Bullitt Utilities* involved the construction of sanitary sewer infrastructure to

mitigate the egregious sanitary sewer discharges and treatment plan mismanagement in northern Bullitt County at the time. In contrast, LG&E is a sophisticated utility that attempted to circumvent the law by not applying for CPCN for a controversial gas pipeline. The *Bullitt Utilities* case is inapposite under the facts before the agency in Bernheim's Formal Complaint.

LG&E also takes issue with Bernheim's "tedious analysis of the Commission's standard for intervention" as an "unnecessary hypothetical" and "abstract question." However, in its Order, the Commission asserts that Bernheim may not have been entitled to notice in the rate case "as a property owner had a CPCN for the pipeline been requested in Case No. 2016-00371." Order at 3. The Commission also requested Bernheim to "brief the issue of whether Bernheim Arboretum had a protected property interest (or any other legally recognized interest) that was allegedly violated by the June 22, 2017 Order in Case No. 2016-00371)." *Id.* at 4. The essential issue of Bernheim's Formal Complaint, and the issue LG&E continues to ignore, is that LG&E never applied for a CPCN for the Bullitt County Pipeline. As Bernheim "tedious[ly]" stated throughout its Brief, Bernheim cannot complain, allege, or intervene to oppose an issue that was never properly before the Commission, of which no party had any notice whatsoever that such a request would be made.[2] In its Brief, Bernheim established that it has standing now to establish a *prime facie* case through its Formal Complaint. Bernheim also

[2] Case intervention procedure was also used to elucidate the similarities between a Formal Complaint and a motion to intervene, and how the statutes and regulations have been interpreted to allow intervention or a Formal Complaint to move forward. Again, as shown in Bernheim's Brief, the statutes and regulations dictate what entities are allowed to seek relief from the Commission.

established that, if an application for the CPCN for the Bullitt County Pipeline was properly filed, it would have standing then to assert its claims. However, as LG&E has conceded, it never applied for a CPCN.

As the legislature has established the right to file a complaint with the Commission to address a rate or service of the utility or any service in connection therewith that is unreasonable, unsafe, insufficient or unjustly discriminatory, or inadequate through statute and regulation, the standing to assert such claims is statutory. KRS 278.260(1) and 807 KAR 5:001 Section 20 establish the requirements to file a complaint with the Commission. Bernheim has met those requirements. It has standing to establish a *prime facie* case.

B. EVEN IF *LUJAN* WAS THE STANDING TEST FOR ADMINISTRATIVE CASES, BERNHEIM CAN MEET THOSE CONSTITUTIONAL STANDING REQUIREMENTS.

While the Kentucky Supreme Court does not require the heightened *Lujan* standing standard to seek relief through an administrative agency, even if it did, Bernheim could meet both the constitutional and prudential requirements of that standing analysis. As adopted by the Kentucky Supreme Court, in order to establish constitutional standing, party must have suffered an injury in fact, there must be a causal connection between the injury and the conduct that is the basis of the complaint, and it must be likely, rather than speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

i. BERNHEIM HAS SUFFERED AN INJURY IN FACT.

LG&E claims Bernheim has not suffered an actual injury because it is not entitled to individual notice. LG&E has mis-framed the argument. Bernheim has alleged, and LG&E has conceded, that LG&E never filed an application for a CPCN pursuant to

Kentucky law. The Commission erred by awarding a CPCN without the statutory authority to award a CPCN without receiving an application. It is a legal and practical impossibility to have notice of an application that was never filed. The same applies to LG&E's claim that because Bernheim was not an owner of the property sought by LG&E until October 2018, it would not have received notice.[3] Again, LG&E concedes an application was never filed.

In addition to LG&E's failure to file the application, under the *Lujan* standard, Bernheim has indeed suffered many other types of injuries in fact. The destruction of an 8-acre parcel of the Bernheim forest, eliminating the connectivity and wildlife corridor from one side of the easement to the other, and the destruction of springs, vegetation, trees, and a variety of flora and fauna, many of which are threatened, are all actual, concrete, and particularized injuries to Bernheim. An injury in fact is also adequately alleged, under the *Lujan* constitutional standard, if a party's aesthetic or recreational value of the area is lessened by the challenged activity. *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 183 (2000). *See also*; *Friends of the Earth,*

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[3] Although Bernheim did not acquire the property until October 2018, it had been working to acquire it since 2009. Bernheim has been actively planning wildlife corridors through land extensions for over 11 years and began active negotiations with the previous owners in 2013. The previous landowners had worked over decades to protect this property, and wanted to work with Bernheim to protect it in the long term. Conservation acquisition projects like this take many years, and during that time Bernheim worked diligently to procure partners and secure funding, which it was able to do as early as March 2017, allowing Bernheim to fully research the conservation value of the property. This property was acquired because of its conservation value as a functioning forest and wildlife corridor, requiring substantial state and federal funding to acquire and the efforts of numerous state and federal government agencies, non-profits, private parties, and Bernheim. LG&E's cavalier efforts to destroy a portion of that property through a surreptitious effort to secure an unlawful CPCN award flies in the face of that public/private effort to protect a property with significant and unique conservation value.

Inc. v. Gaston Copper Recycling Corp., 629 F.3d 387 (CA. 2011). A large, tree-less and vegetation-less corridor through a forest will have deleterious impacts on the aesthetic, recreational, and conservation values of that property.

The failure to apply for the CPCN caused other injuries. Bernheim was not allowed to comment as an intervenor or a member of the public on the proposed pipeline. As stated in its Brief, Bernheim is a unique property owner in LG&E's jurisdiction. It is not only one of the largest property owners in the region, but it is also a tourist and researcher destination and economic development driver for the area. Bernheim will likely have more than 500,000 unique visitors in 2019 and those visitors contribute substantially to the regional economy. Bernheim also has contractual relationships with adjacent entities, including Jim Beam. By not being able to even try to intervene or comment on this CPCN, due to a failure of any notice, Bernheim's legitimate safety, service, duplication, and waste concerns could never be addressed. That failure to provide due process when the outcome will have detrimental impacts to Bernheim also constitutes an injury in fact.

LG&E claims Bernheim suffered only "hypothetical harm." LG&E relies on the notice it published in *The Pioneer News*, asserting "residents received more notice than if LG&E had filed a standalone CPCN proceeding." Brief of Louisville Gas and Electric Company Regarding Standing Issues ("Response") at 11. Yet, there is no mention of CPCN for the Bullitt County Pipeline in that notice, nor any mention of the Bullitt County Pipeline CPCN in its application. In effect, this is less notice than required, because LG&E buried its disclosure of the pipeline under thousands of pages of testimony. If LG&E had applied for a CPCN, a simple review of the application would reveal LG&E's intentions.

ii. BERNHEIM'S INJURIES WERE CAUSED BY LG&E'S CONDUCT.

LG&E admits it did not file an application for the CPCN. Still, it was awarded the CPCN. That constitutes a failure to comply with Kentucky law and is a violation of due process. That violation, and the related failure of notice, prevented Bernheim from intervening or publicly commenting on the CPCN award, which, in turn, prevented Bernheim from protecting its interests with regards to the rates, service, and safety of the pipeline.

iii. THE COMMISSION CAN REDRESS BERNHEIM'S HARM.

LG&E claims that a Commission order can only be set aside if the case was tainted by malice, fraud, or corruption, and that an order cannot be modified retroactively. Response at 14. However, if a CPCN was unlawfully requested and awarded, there was never a valid order. As an unlawful act, the Order was void *ab initio*, or with no legal effect. *Bowling v. Nat. Res. & Envtl. Prot. Cabinet*, 891 S.W.2d 406, 411 (Ky. Ct. App. 1994). Likewise, a judgment entered by a court without subject matter jurisdiction is void *ab initio. S.J.L.S. v. T.L.S.,* 265 S.W.3d 804, 833 (Ky. Ct. App. 2008). Having made no application, the Commission did not have jurisdiction or statutory authority to hear the request for the CPCN. Thus, the Commission can redress Bernheim's harm be declaring the Order awarding the CPCN void *ab initio*.

In sum, even if the Commission required a party to have constitutional standing to establish a prima facie case, Bernheim would qualify. Bernheim will suffer injuries-in-fact that are caused by LG&E and that this Commission could redress.

III. LG&E IS USING ITS MONOPOLY MARKET POWER TO UNFAIRLY BIAS ITS CUSTOMERS.

In the Attorney General's Motion to Intervene, the Attorney General agrees with Bernheim's concerns with LG&E's tactics used to complete the pipeline, and how "LG&E used its website and incumbency to coerce the remaining land owners to grant easements." AG Motion to Intervene at 4. The Attorney General states, "LG&E's inappropriate use of its monopoly status to pressure others into agreeing with its projects is not new to the Company." *Id.* Those tactics continue.

LG&E, utilizing its monopoly status and customer base is spreading its propaganda through its website and by other means, in particular a new webpage entitled, "Here's the full story on Bernheim and the Bullitt County Pipeline" recently posted to its website.[4] On that page, much like it did at the beginning of its Response, LG&E lists several "facts" about Bernheim, and then disparages Bernheim throughout the body of the text below. For example, LG&E claims the pipeline will only impact .03% of Bernheim's property, which is misleading and false. The impacts go far beyond the eight acres of property LG&E intends to take, including the destruction and removal of trees, vegetation, critical habitat, springs, streams, and other flora and fauna, many of which are threatened or endangered. The pipeline will diminish the effectiveness of Bernheim's Cedar Grove Wildlife Corridor and will prohibit forest regrowth on that land forever.

LG&E also insinuates that because Bernheim made a valid Complaint before the Commission and has responded to an unconstitutional taking, "More than 62 homes and business have been denied new service." LG&E has provided no support that Bernheim is

[4]Available at https://lge-ku.com/bullitt-county-pipeline, last visited September 25, 2019.

to blame for LG&E's failure to provide service. LG&E has created its own legal problems. LG&E is already millions of dollars over budget for the pipeline project. As noted by the Attorney General, "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." AG Motion at 6 (citations omitted). It is an abuse of LG&E's monopoly power for LG&E to publicly disparage Bernheim for LG&E's poor planning, poor budgeting, and undue legal risk.

Again, LG&E continues to use its monopoly status to pressure its customers and others into agreeing with this pipeline project. In light of these marketing practices and other questionable practices, serious doubts remain regarding the previously granted CPCN and LG&E's methods of obtaining the same.

IV. EVEN IF BERNHEIM'S FORMAL COMPLAINT IS DEFICIENT, THE COMMISSION ALLOWS FOR SUCH DEFICIENCIES TO BE CORRECTED.

LG&E claims Bernheim failed "to meet the requirements for a complaint in KRS 278.260." Response at 15. Bernheim has fulfilled all statutory and regulatory requirements in filing its Formal Complaint. However, in the alternative, even it did not as LG&E claims, 807 KAR 5:001 Section 20(4) provides flexibility to correct any deficiencies. For example, "If the commission finds that the complaint does not establish a prima facie case or does not conform to this administrative regulation, the commission shall notify the complainant and provide the complainant an opportunity to amend the complaint within a specified time." 807 KAR 5:001 Section 20(4)(a)(1). While the Commission is "unable to determine whether a prima facie case has been established" in this case, the Commission has not determined that the Formal Complaint "does not

establish a prima facie case..." If it does so, the Commission is required to "provide the complainant an opportunity to amend the complaint within a specified time."

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 and has standing to assert its claims. 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,

Randal A. Strobo
Clay A. Barkley
Strobo Barkley PLLC
239 South Fifth Street, Suite 917
Louisville, Kentucky 40202
(502) 290-9751
rstrobo@strobobarkley.com
cbarkley@strobobarkley.com

Counsel for Complainant Bernheim

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the above Reply has been served upon the following persons by First Class U.S. mail, postage prepaid, on September 26, 2019.

Kent A. Chandler
Rebecca W. Goodman
Justin M. McNeil
Lawrence W. Cook
Assistant Attorneys General
700 Capital Ave., Suite 20
Frankfort, KY 40601-8204

Rick E. Lovekamp
Manager Regulatory Affairs
Louisville Gas and Electric Company
220 W. Main Street
P.O. Box 32010
Louisville, KY 40202

Allyson K. Sturgeon
Managing Sr. Counsel, Regulatory & Transactions
LG&E and KU Energy LLC
220 W. Main Street
Louisville, Kentucky 40202

Louisville Gas and Electric Company
220 W. Main Street
P.O. Box 32010
Louisville, KY 40202

Kendrick Riggs
Stoll Keenan Ogden PLLC
500 W. Jefferson Street, Suite 2000
Louisville, Kentucky 40202-2828
Telephone: (502) 333-6000
Email: kendrick.riggs@skofirm.com

Monica H. Braun
Stoll Keenon Ogden PLLC
300 W. Vine Street, Suite 2100
Lexington, Kentucky 40507-1801

Randal A. Strobo
Strobo Barkley PLLC