KEQ #5

Report & Analysis

of

CITY OF COOKEVILLE ANNEXATION

on the

UPPER CUMBERLAND EMC

Electric System

March, 2004

Prepared by:

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I. Introduction.

Personal Information & Scope of Engagement. I am Robert C. Dew, Jr. I have been retained by Upper Cumberland Electric Membership Corporation ("UCEMC") to provide expert opinion testimony on the following subjects: territorial annexations; electric distribution systems engineering and design; and the costs associated with reintegrating UCEMC's Putnam County, Tennessee electric distribution system if the nine condemnations at issue in this case are completed. In connection with this last subject, I have prepared a comprehensive reintegration plan, which is discussed in greater detail below.

I am the Chief Executive Officer of PowerTech Engineering, L.L.C. ("PowerTech"), which is located in Atlanta, Georgia. PowerTech is a full-service engineering consulting firm that provides a broad range of services – including field engineering work, transmission/distribution design and planning, substation design, and retail rate and cost-of-service analysis – to a variety of electric utility companies around the country. PowerTech's clients include rural electric cooperatives, municipal electric systems and investor-owned utilities.

I am registered as a Professional Engineer in 16 states including Tennessee. I attended Purdue University, the Georgia Institute of Technology and Butler University, and I have worked in the electric utility engineering field since 1972. A copy of my biographical and professional information is attached as "Appendix A".

I am being paid my standard rate of $150/hour for my work in this case. My compensation does not depend on the conclusions that I reach, or the content or results of my testimony. I have given expert opinion testimony previously. See attached resume and "Territorial Resume" in Appendix "A". My opinions in this case are based on my review of the materials provided to me, and my 30+ years of experience as a professional electric utility engineer.

Materials Reviewed. In connection with this engagement for UCEMC, I have reviewed the following material:

1. The Annexations' Locations Map of Cookeville, Tennessee, prepared by the Cookeville Planning Department in April 2003.

2. West Cookeville/ Interstate 40 Annexation Area Map prepared by the Cookeville Planning Department, 7/29/2002.

3. The Annexations' Locations Map of Cookeville, Tennessee, prepared by the Dept. of Planning & Codes dated October 4, 2000.

4. The Planning Region/Urban Growth Boundary map prepared by the Dept. of Planning and Codes 10-3-2000.

5. Various City/County maps of Cookeville & Putnam County, Tennessee.

6. All Upper Cumberland EMC Detail Maps in the Cookeville area.

7. The 2002-2004 Construction Work Plan for Upper Cumberland EMC.

8. The 2003 Long-Range Plan for Upper Cumberland EMC.

9. The Upper Cumberland EMC Power Requirements Study dated May 2002.

10. The final report of Mr. Tom Barnes titled "Analysis of Electric System Costs Associated with City of Cookeville Annexation" dated November 2003.

11. Tennessee Code Annotated §6-51-112 and §65-34-101.

12. The "Comprehensive Future Land Use Plan, 1999-2020" prepared by the City of Cookeville.

I have also reviewed the depositions of Jim Shipley and Tony Peek, as well as the expert witness disclosure for Tom Barnes.

Assumptions Underlying Expert Opinions. In reaching my expert opinions in this case, I have made the following assumptions:

1. That Tennessee Code Ann. §6-51-112 dictates the measure of damages to be applied in this case;

2. That, consistent with Tennessee Code Ann. §6-51-112(a)(2)(B), the City of Cookeville, Tennessee ("Cookeville" or "the City") is required to compensate UCEMC for "the cost of constructing any necessary facilities to reintegrate the system of the cooperative outside the annexed area after detaching the portion to be sold";

3. That any system reintegration proposal must conform to federal Rural Utilities Service ("RUS")[1] construction and design requirements, as well as good utility design practices;

4. That any system reintegration proposal must insure that UCEMC's post-annexation distribution network operates as reliably and efficiently as it does in its current configuration;

5. That, consistent with Tennessee Code Ann. §6-51-112(a)(2)(B) and §65-34-101, any electric distribution facilities necessary for reintegration should be located outside the annexation areas to the fullest extent possible; and

6. That, consistent with the deposition testimony of City officials, any system reintegration proposal should address the loss of UCEMC access rights to the City's West Cookeville district substation.

Summary of Expert Opinions. Based on my experience in the utility engineering industry, it is my opinion that the nine condemnations at issue in this case represent a watershed event in UCEMC's operational history. In my experience, it is highly unusual for a rural utility cooperative to be divested of such a large, relatively high-density area of service territory all at once. If the condemnations at issue in this case are successful, it is reasonable to expect that the loss of this service territory will have a dramatic adverse impact on UCEMC. In particular, the loss of this service territory will make UCEMC's existing distribution loop around the City effectively useless. In my opinion, in order for UCEMC to continue operating in Putnam County with the same reliability and efficiency that it does now, this distribution loop must be rebuilt.

Although much of the distribution loop can be rebuilt using existing UCEMC facilities, easements and rights-of-way, it is my opinion that some new construction will be necessary.

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[1] The RUS was formerly known as the Rural Electrification Administration ("REA").

Much of this new construction will involve upgrading UCEMC existing distribution lines to higher capacity distribution lines. The construction also will involve designing and building a new substation for UCEMC to replace the capacity lost at the West Cookeville substation, which UCEMC now has a contract with the City to use for load service. In my opinion, that substation cost-sharing arrangement will no longer be practical once the condemnations are complete.

Using UCEMC's historical costs for similar construction, I estimate that reintegrating UCEMC existing distribution loop will cost approximately $5.825 million.

II. Description of UCEMC's Distribution System.

UCEMC was organized under the Rural Electrification Act of 1936. It was incorporated locally on August 16, 1939, and it has been providing reliable, dependable electric service to its members since energizing its first distribution line in the late 1930s and early 1940s.

Currently, UCEMC provides service to approximately 43,500 customers located in all or parts of Putnam, Overton, Smith, Jackson, DeKalb, Picket, White, Clay, Macon and Wilson counties in middle Tennessee. UCEMC purchases power from the Tennessee Valley Authority ("TVA") at 10 delivery points and distributes that power at a primary voltage of 12.5/7.2 kV over approximately 4,200 miles of distribution line. UCEMC is not a generation or transmission utility.

As noted, UCEMC's service territory includes Putnam County. The City of Cookeville is the county seat for Putnam County. The City is located, more or less, in the geographic center of Putnam County. UCEMC has been providing service to members located within and adjacent to the City's municipal boundaries from its own distribution lines since virtually UCEMC's inception.

Table 1 sets out some of UCEMC's operating statistics for calendars years of 2000-2002, as reported on the RUS Form 7 report.

TABLE 1: General System Operating Statistics

	2000	2001	2002
Miles Of Distribution Lines	4,152.7	4,197.7	4,237.3
Year-End Consumers	43,107	43,751	44,488
Consumers Per Mile	10.4	10.4	10.64
Average Residential Consumption (kWh/month)	1,225	1,237	1,283
Total MWh Purchased	942,509	957,032	1,004,893
Total MWh Sold	886,593	900,016	942,663

UCEMC distributes power from 10 substations throughout its service area. The Algood and West Cookeville district substations are 69 kV delivery points. Eight of UCEMC's substations – Gordonsville, South Carthage and North Carthage, Double Springs, Gainesboro, Baxter, Bangham and Livingston – are 161 kV delivery points. Together, these 10 substations provide UCEMC with 38 distribution circuits. All 38 distribution circuits are constructed for and operated at 12.5/7.2 kV. Throughout the UCEMC system, installed overhead conductor ranges in size from #8 CWLD to 795 ACSR. Underground conductor sizes vary as needed per individual application.

UCEMC's distribution system and substations were planned, designed and built to RUS design and construction standards. These standards are used by approximately 900 RUS-financed electric cooperatives nationwide, and they are a necessary pre-condition to receiving this type of federal financing. In my experience, RUS design and construction standards are particularly rigorous, with a focus on making a system as durable, reliable and efficient as possible. Over the years, RUS has developed many engineering and operations guidelines, bulletins, Construction Specifications, etc.; a partial list is shown below. In order to comply with RUS design and construction standards, rural electric cooperatives often must

invest more in building and maintaining their system infrastructure than is required by their municipal counterparts, like Cookeville, which are not regulated by RUS.

In particular, UCEMC's distribution system was planned, designed and constructed to the standards and specifications contained in the following RUS (or REA) bulletins:

1. REA Bulletin 50-3 (Standard D-804): Specifications and Drawings for 12.2/7.2 KV Line Construction.
2. REA Bulletin 50-5 (Standard D-803): Specifications and Drawings for 14.4/24.9 KV Line Construction.
3. REA Bulletin 50-6 (D-806): Specifications and Drawings for Underground Electric Distribution.
4. RUS Bulletin 17240-101B: System Planning Guide, Construction Work Plans.
5. REA Bulletin 61-12: Armless or Narrow Profile Construction.
6. RUS Bulletin 1724D-101A: Electric System Long-Range Planning Guide.
7. RUS Informational Publication 202-1: List Of Materials Acceptable for Use On Systems of RUS Electrification Borrowers.
8. REA Bulletin 65-1: Design Guide for Rural Substations Replaced by RUS Bulletin 1724E-300.
9. REA Bulletin 160-2: Mechanical Design Manual for Overhead Distribution Lines replaced by RUS Bulletins 1724E-150, 1724E-151, 1724E-152, 1724E-153 and 1724E-154.
10. RUS Bulletin 1728F-806: Specifications and Drawings for Underground Electric Distribution.
11. RUS Bulletin 1730-1: Electric Systems Operations and Maintenance.

Under RUS guidelines, a portion of all new UCEMC construction is inspected by a licensed engineer to insure that it meets RUS standards. Additionally, as a part of the RUS regulatory process, UCEMC is required to engage in systematic process of short-, medium- and

long-range planning. Due to growth in UCEMC service area, this planning process has been virtually continuous in recent years. UCEMC currently has a "Two-Year Construction Work Plan" (completed in April 2002),[2] a "Power Requirements Study" (completed in 2002),[3] a new "Long-Range System Planning Report" (completed in 2003)[4] and other current planning and engineering reports. These reports were completed using the Milsoft engineering analysis program and a line section model of UCEMC's distribution system. All of UCEMC's planning studies and reports have been examined and approved by RUS field personnel and RUS personnel in Washington, D.C.

UCEMC's Putnam County-Area Distribution Loop. Putnam County is among the more populous counties served by UCEMC. In fact, some 18,000 UCEMC consumers, or more than 40% of UCEMC membership, reside in Putnam County. As a result of this concentration of members, Putnam County also represents relatively high-density service area for UCEMC. In Putnam County, UCEMC has approximately 14 customers per mile of distribution line, which is some 40% higher than UCEMC's overall customer density per mile line.

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[2] RUS requires all rural electric cooperative that it finances to prepare a "Two-Year Construction Work Plan" on a periodic basis. The Two-Year Construction Work Plan, usually the groundwork for a loan application, generally is based on the recommendations contained in a cooperative's current "Long-Range Plan." The Two-Year Construction Work Plan, which is a detailed look at the system, takes the projected two-year load growth and superimposes it on the existing system to see where the system needs improvement to carry the projected two-year power loading. Both the Two-Year Construction Work Plan and the Long-Range Plan designs are based upon adequate voltage levels for the ultimate consumers, as well as allowable ampacities on existing conductors, allowable energy losses and system reliability consistent with good utility practice.

[3] A "Power Requirements Study" is a load forecast based upon end-use or econometric modeling with all pertinent parameters such as consumer growth, increased kWh usage, commercial and industrial growth, etc., contained in the forecasting model.

[4] Under RUS requirements, the "Long-Range Plan" kW demand is generally based on growth as projected in a Power Requirements Study. In a Long-Range Plan, which normally covers a 20-year time period, the cooperative generally expands a model of its existing system to meet the loads of the system reflected in the Power Requirements Study. The cooperative is designed both from a distribution and transmission standpoint to serve the load as projected in the 20-year planning period. Additionally, this long-range planning process typically examines facilities requirements will be at 5-year and 10-year intervals.

With Cookeville situated effectively in the middle of Putnam County, UCEMC has been required over the years to plan, construct and operate a distribution loop that enables it to serve around the City. This loop is necessary for UCEMC to serve those 18,000 members that reside in Putnam County but outside the City's municipal boundaries. This territory includes the City of Algood, the City of Baxter and the City of Monterey.

In order to address the unique service situation found in Putnam County, UCEMC relies on four substations with backfeed capability. Service is provided by the UCEMC's Double Springs substation (a 161 kV/12 kV, 58 MVA capacity substation) in the south; the Algood substation (a 69 kV/12 V, 37 MVA capacity substation) in the east; the Cookeville District substation[5] in the west; and the Bangham substation (a 161 kV/12 kV, 66 MVA transformer capacity substation) to the north. These four substations are tied together with a loop consisting of large, heavy-duty three-phase distribution lines. This distribution loop effectively encircles the City. As a result of this loop arrangement, UCEMC is able to backfeed portions of its system that may be out of power due to various causes.

Exhibit A illustrates the UCEMC distribution facilities in the Cookeville area and surrounding areas. Furthermore, the 1953 Cookeville Municipal limits is shown in a blue outline. The City's proposed Urban Growth boundary, is shown in red outline and the existing city limits of Cookeville, as of April 2003, is shown in yellow outline. Exhibit A also shows interstate 40, a major feature in Putnam County, in green

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[5] Unlike its other substations, UCEMC does not own the West Cookeville substation. Rather, UCEMC shares that substation with the City. This substation was built by TVA in the 1960s and subsequently purchased by the City. Under a contract with the City, UCEMC has access to four heavy-duty distribution circuits at this substation and capacity of at least 60 MVA in summer and 50 MVA in winter at 12 KV. UCEMC makes what are effectively lease payments to the City for use of the substation.

III. Description and Analysis of Current Annexations.

Exhibits B and C show the tremendous growth in the City's municipal boundaries since 1953. With the annexations at issue in this case, the City's borders have grown considerably once again. Moreover, with the adoption of its *Comprehensive Future Land Use Plan 1999-2020*, it is reasonable to expect that the City's boarders will continue to grow out to the so-called "Urban Growth Boundary" depicted on Exhibit B over the next few years. Currently, all of the territory lying between the City's existing municipal limits and the Urban Growth Boundary are served by UCEMC. The adoption of the *Comprehensive Future Land Use Plan 1999-2020*, therefore, has significant implications for UCEMC's facilities in Putnam County. In my opinion, many of these facilities risk being rendered partially useless or idled as a result of the City's continued growth. If that were to happen, UCEMC would likely incur dramatic cost increases as it sought to maintain and operate these facilities, while at the same time it was experiencing a sharp decrease in customer revenues.

As I understand it, the nine annexations at issue in this case involve 5,631.4 acres and approximately 1,170 existing UCEMC members. Taken together, these nine annexations equate to approximately 8.8 square miles of UCEMC territory. In my 25+ years of experience with territorial annexation, it is very unusual to see a utility divested of such a large area of service territory at one time. Furthermore, it is my understanding that the City has a tenth annexation (involving 86 acres) in the works. According to the Cookeville Planning Department map dated April 2003, the City annexed the 86 acres located in the Putnam County-North Washington Avenue area effective April 23, 2003. Based on recent events, it is reasonable to expect the City will seek to condemn the UCEMC facilities located in this area as well.

In my experience, the proposed condemnations will have an immediate impact on UCEMC's operations. The electric utility industry is one of the most capital intensive industries

in the country. Therefore, electric utilities must invest substantially more in plant for each dollar of revenue received than is required in other industries. These heavy investments require electric utilities to engage in more long-range planning than is required for other industries. Distribution lines, substations, transmission facilities and generating plants must be and are planned, designed, constructed and operated with a view toward not only present service, but for service to future, additional consumers and service area. When a utility loses either its existing customers or part of its existing service area, its long-range planning is thwarted and a portion of its investment is rendered totally or partially useless. At the very least, such investment becomes less cost effective than previously projected. Consequently, it is critical for a utility to have a relatively fixed service territory. Without a fixed territorial service area that does not change substantially over time, it is very difficult if not impossible to plan and efficiently operate a complex electrical system. Facilities that are planned and constructed may become under-utilized or not necessary at all due to territorial changes and subsequent loss of territory.

In the present case, these annexation effects can be seen at UCEMC's Cookeville District substation. Because that substation **now** lies deep within Cookeville's municipal limits, the distribution lines connected out of the four circuits UCEMC uses at that substation travel for several miles before reaching the first UCEMC member. This arrangement is inefficient and is not consistent with good utility practice, which dictates that distribution substations and lines should located as close to consumers as possible in order to minimize costly line losses. In my opinion, if the proposed takings are successful, UCEMC effectively will have had "the heart" cut out of its Putnam County distribution system from a service and growth standpoint, and its distribution lines will have to travel many more miles through the City's electric system territory in order to reach UCEMC members. As a result, the inefficiencies created for UCEMC by the

current West Cookeville district substation arrangement will be greatly worsened. The reality of this situation has not gone unrecognized by the City. Indeed, in his deposition, the City's electric department manager acknowledged that, if these nine condemnations are successful, good utility practice will effectively require the City and UCEMC to sever their cost-sharing arrangement at the Cookeville District substation. See Tony Peek's Deposition, pg. 122.

IV. Reintegration Plan for UCEMC's Putnam County Distribution System.

In Tennessee, state statute sets out the formula to be used in calculating the condemnation damages owed to an electric cooperative that has service territory annexed by a municipality. See Tennessee Code Ann. §6-51-112. One component of this formula is the so-called "reintegration costs" – that is, the costs needed to restore the utility's distribution system to its full capacity once the portion being acquired is disconnected. Specifically, Tennessee law provides that UCEMC is entitled to "the cost of constructing any necessary facilities to reintegrate the system of the cooperative outside the annexed area after detaching the portion to be sold." See Tennessee Code Ann. §6-51-112(a)(2)(B).

Given my familiarity with UCEMC's Putnam County distribution system, I have developed a plan that outlines the steps that will be necessary in order to reintegrate that system if the nine condemnations in this case are completed. My plan is based on several key operational assumptions.

First, my plan assumes that UCEMC's post-annexation Putnam County distribution system should operate at least as efficiently and as reliably as it does in its current configuration. In my opinion, in order to compensate UCEMC fully, UCEMC's Putnam County distribution system after reintegration must have as nearly as possible the same capacity and operational flexibility as it does today.

Second, my plan assumes that, in addition to the requirements of good utility practice, any necessary reintegration facilities must conform to RUS design and construction standards. As noted above, as an RUS-financed cooperative, UCEMC is required to adhere to these standards as a part of its federal financing arrangements.

Third, in keeping with Tennessee Code Ann. §6-51-112(a)(2)(B) and §65-34-101, any necessary reintegration facilities should be located outside the City's municipal boundaries to the fullest extent possible. Indeed, Tennessee law imposes this requirement in the interest of public health, safety and welfare. Tennessee law also recognizes that the "duplication of electric system facilities results in excessive consumer costs and adverse environmental and aesthetic impacts." See Tennessee Code Ann. §65-34-101.

Fourth, consistent with good utility practice, my plan assumes that UCEMC and the City will sever their cost-sharing arrangement at the Cookeville District substation once the condemnations are complete. In addition to good utility practice, this assumption also reflects the recognition in Tennessee law that duplicate facilities and overlapping service arrangements are not in the public interest. See Tennessee Code Ann. §65-34-101. This assumption also reflects the recognition by the City's electric department manager that this arrangement will be ineffective once the condemnations are complete. See Tony Peek's Deposition, pg. 122.

Exhibit D illustrates this reintegration plan in detail. A significant feature of the reintegration plan is the construction of a new transmission-supplied substation several miles northwest of the existing Cookeville District substation on Benton Young Road under TVA's existing 161/69 kV transmission line. As noted, the construction of this new substation results from the need to replace the capacity UCEMC now derives from the Cookeville District substation cost/sharing arrangement. Importantly, this new substation will provide backfeed

capacities to UCEMC's other Putnam County substations similar to what exists now. In addition, the new distribution loop utilizes UCEMC's existing distribution facilities wherever possible. However, to rebuild the loop consistent with its existing capacities, several miles of existing three-phase distribution line will have to be converted to a larger size, and some new three-phase distribution line will have to be built as well. A detailed description of this new distribution loop, divided into 24 sections, is as follows:

Section #1. Starting at UCEMC's Double Springs substation and going northward using the existing 556 MCM-ACSR circuit for approximately 2.3 miles; then convert the existing 3/0 ACSR to three-phase 556 MCM-ACSR for approximately 2.3 miles going eastward.

Section #2. At County Farm Road, convert the existing three-phase, 2 ACSR to three-phase, 556 MCM-ACSR for approximately 0.8 miles.

Section #3 & 3A. Heading eastward on Benton Young Road, convert the existing three-phase, 2 ACSR to three-phase 556 MCM-ACSR double circuit to connect into the new UCEMC substation.

Section #4. UCEMC's new substation is to be built adjacent to TVA's 161/69 kV transmission line; continuing on Benton Young Road, convert the existing three-phase 2 ACSR to three-phase 556 MCM-ACSR for approximately 0.6 miles.

Section #4E & 5. Turning northward along the Gainesboro Grade, use the existing three-phase 336 MCM-ACSR circuit for approximately 1.2 miles up to the Shipley School Road; then convert the existing three-phase 2 ACSR to three-phase 556 ACSR for approximately 1.0 miles to Allen Road.

Section #6. On Allen Road, convert the existing one-phase 4 ACSR to three-phase 556 MCM-ACSR for approximately 0.8 miles.

Section #7. Turning northward on Dobson Branch Hwy (Hwy. 135), use the existing three-phase 336 MCM-ACSR circuit for approximately 0.8 miles.

Sections #8, 9 & 10. Turn eastward onto Howard Draper Road and Hutcheson Road and convert the existing one-phase and three-phase 4 ACSR circuit to three-phase 556 MCM-ACSR for approximately 1.9 miles.

Section #10E. Turn south on Fisk Road (Hwy. 136) and use the existing three-phase 336 MCM-ACSR circuit down to the Whitaker Springs Road for approximately 1.1 miles.

Section #11. Turn eastward on Whitaker Springs Road; convert the existing three-phase 1/0 ACSR circuit to three-phase 556 MCM-ACSR for approximately 2.0 miles to tie into the north circuit out of UCEMC's Algood substation.

Section #12, 13 & 13B. Proceed southward out of the Algood substation along the double circuit 556/336 ACSR conductor to the Cookeville city limits; then construct new double circuit 556 MCM-ACSR circuits starting at the city limits and proceeding southward on Old Qualls Road to Buck Mountain Road.

Section #13A. Proceed eastward along Buck Mountain Road to the Dry Valley Road with new double circuit 556 MCM-ACSR circuits.

Section #13C & 13D. Continue with double circuit 556 MCM-ACSR conductor southward along Dry Valley Road into US 70N approximately 2.5 miles; proceed southeastward along US 70N with double circuit 556 MCM-ACSR to intersect with UCEMC's Dry Valley circuits.

Section #14. Continue southward using existing three-phase 336 MCM-CSR circuit approximately 1.0 mile along US 70N to Brown Mill Road.

Section #15. Continue eastward along Brown Mill Road using existing three-phase 336 ACSR circuit.

Section #16. Starting at Boyd Farris Road, convert the existing one-phase 2 ACSR to three-phase 556 MCM-ACSR for approximately 1.0 mile.

Section #17. Continue southward down Old Bridge Road and convert the existing conductor to three-phase 556 MCM-ACSR for approximately 0.8 miles to the Bob Bulloch Road.

Section #18. Turning westward, convert the existing conductor/construct new three-phase 556 MCM-ACSR along Bob Bullock Road to the Old Sparta Road for approximately 1.1 miles.

Section #19. Continue southward down Old Sparta Road and across State Road 111 and convert the existing conductor to three-phase 556 MCM-ACSR for approximately 0.6 miles to the South Creek Road development.

Section #20. Turning northward, convert the existing conductor to three-phase 556 MCM-ACSR northward along South Creek Road for approximately 0.7 miles.

Section #21. Head northward and convert the existing line conductors along Pigeon Roost Creek Road and Bunker Hill Road to three-phase 556 MCM-ACSR conductor for approximately 1.0 mile.

Section #22. Convert the existing three-phase 1/0 ACSR and 2 ACSR distribution line from Bunker Hill Road westward along the West Cemetery Road to the Burgess Falls Road to three-phase 556 MCM-ACSR for approximately 1.9 miles.

Section #23. Proceed southwest along Burgess Falls Road and convert the existing three-phase 3/0 ACSR to three-phase 556 MCM-ACSR for approximately 0.8 miles.

Section #23A. Use the existing three-phase 336 MCM-ACSR circuit along Burgess Falls Road until it connects with existing double circuit 556 MCM-ACSR line at Cave Creek Road; use this existing line going northward to Bennett Road.

Section #24. Convert the existing distribution line along Bennett Road and Old Stewart Road to three-phase double circuit 556 MCM-ACSR back to Mine Lick Road and to connect to the existing three-phase 556 MCM-ACSR double circuit line for approximately 2.7 miles; then head northward on Mine Lick Road using the existing three-phase double circuit 556 MCM-ACSR line to connect to UCEMC's Double Springs substation.

The costs associated with this reintegration plan have been estimated using UCEMC's historical cost per mile for similar types of construction. These same historical costs were used to estimate line construction costs contemplated in UCEMC's current "Two-Year Work Plan", which was reviewed and approved by RUS for loan purposes. Where no direct comparable cost existed, other comparable construction costs were used to estimate the necessary construction costs in the reintegration plan.

Significantly, the cost estimates contained in the reintegration plan do not include any costs for the acquisition of any necessary easements or rights-of-way or for rock removal. The addition of such costs could cause the overall cost of the reintegration plan to rise dramatically. As is customary in engineering practice, anything other than estimated cost for the proposed reintegration plan will not be known until after the reintegration plan has been formally designed and let for bid. Therefore, due to various unquantified factors, a 20% contingency factor has been included in the cost estimates.

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This 20% contingency factor includes, but is not limited to, the following:

1. Blasting of rock holes for poles
2. Right-of-way clearing
3. Purchase of additional right-of-way
4. Condemnation costs of additional right-of-way
5. Re-engineering costs due to right-of-way constraints
6. Litigation Expenses (right-of-way)
7. Unforeseen & extraordinary construction costs
8. Material acquisition delays
9. Dramatically increased material costs
10. Dramatically increased fuel costs
11. Surveying costs
12. Underground utility locating expense
13. Underground utility repair expenses
14. Transfer costs of CATV, telephone and data circuits
15. Traffic control expense
16. Additional supervisory expense
17. Road and driveway repair
18. Landscaping expenses
19. Unexpected environmental costs

RE-INTEGRATION PLAN COST ESTIMATES

Section	Operation	Miles	Cost/Mile	Cost
Section #1 Along 70N Hwy	3-Phase, 3/0 ACSR to 3-Phase, 556 ACSR	2.3	$100,000	$230,000
Section #2 North on County Farm Rd	3-Phase, 2 ACSR to 3-Phase, 556 ACSR	0.8	$100,000	$80,000
Section #2A	3-Phase, 2 ACSR to 3-Phase, 336 ACSR	0.6	$75,000	$45,000
Section #3 On Benton Young Road	3-Phase, 2 ACSR to 3-Phase, 556 ACSR DC	0.8	$150,000	$120,000
Section #3A	New Substation: North Cookeville 161/12 KV - 50 MVA			$2,500,000
Section #4 On Benton Young Road	3-Phase, 2 ACSR to 3-Phase, 556 ACSR	0.6	$150,000	$90,000
Section #4E North Gainesboro Grade	use existing 3-Phase, 336 ACSR			
Section #5 Shipley School Road	3-Phase, 2 ACSR to 3-Phase, 556 ACSR	1.0	$100,000	$100,000
Section #6 Allen Road	1-Phase, 4 ACSR to 3-Phase, 556 ACSR	0.8	$100,000	$80,000
Sections #8, #9, #10 Howard Draper Road and Hutcheson Road	3-Phase, 4 ACSR to 3-Phase, 556 ACSR	1.9	$100,000	$190,000
Section #11 Whitaker Springs & Gibbons Road	Convert 3-Phase, 1/0 ACSR to 3-Phase, 556 ACSR	2.0	$100,000	$200,000
Section #13A Dry Valley Road (North)	Convert 3-Phase, 336 ACSR to double circuit 336 ACSR	0.7	$100,000	$70,000
Section #13B Buck Mountain Road going east to Old Qualls Road and then north toward Algood Substation	Convert DC, 336 ACSR to quadruple circuit 336 ACSR	1.5	$200,000	$300,000

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Section #13C Dry Valley Road from Buch Mountain Road going south to seward	Convert DC, 336 ACSR to quadruple circuit 336 ACSR	0.6	$200,000	$110,000
Section #13D Dry Valley Road from Sewage lift station south to grocery south of Interstate Hwy.40	Triple circuit 336 ACSR and City 3-Phase underbuild to quadruple circuit 336 ACSR and city underbuild	1.9	$200,000	$380,000
Section #14 & #15 US 70 & Brown Mill Road	Use existing 3-Phase, 336 ACSR (part in city) south Use part of existing 336 ACSR up to Boyd Farris Road			$0
Section #16	Convert 1-Phase, 2 ACSR to 3-Phase, 556 ACSR (Boyd Farris Road)	1.0	$100,000	$100,000
Section #17	Convert 3-Phase, 1/0 ACSR to 3-Phase, 556 ACSR along Old Bridge Road	0.8	$100,000	$80,000
Sections #18 & #19	Convert/construct 1-Phase, 2 ACSR to 3-Phase, 556 ACSR along Bob Bulloch Road and across SR 111	1.7	$100,000	$170,000
Section #20	Convert 3-Phase, 2 ACSR to 3-Phase, 556 ACSR along South Creek Road	0.7	$100,000	$70,000
Section #21	Convert 1-Phase, 2 ACSR to 3-Phase, 556 ACSR along Bunker Hill Road and Rigean Roost Creek Road	1.0	$100,000	$100,000
Section #22 along W. Cemetery Road	Convert 3-Phase, 2 ACSR (1/0 ACSR) to 556 ACSR	1.9	$100,000	$190,000
Section #23	Convert 3/0 ACSR to 3-Phase, 556 ACSR	0.8	$100,000	$80,000
Section #24 down Old Stewart Road to Bennet Road (going south and east back to Cave Creek Rd)	South of Interstate within city limits new double circuit 556 ACSR	2.7	$200,000	$540,000
			GRAND TOTAL:	**$5,825,000**

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V. Analysis of Cookeville's Reintegration Proposal.

I have reviewed the November 2003 final report "Analysis Of Electric System Costs Associated with the City of Cookeville Annexation", which was prepared by Mr. Thomas M. Barnes, P.E., of the Allen & Hoshall Engineering Company.

The report purports to "… establish a basis for evaluating the cost of cooperative system reintegration." However, Mr. Barnes' definition of reintegration costs to UCEMC in all annexation areas appears to be to be limited to "… a restocking charge of metering equipment and costs related to the coordination of the facility transfers" when the city takes UCEMC's existing members. I totally disagree with Mr. Barnes' definitions of reintegration.

Mr. Barnes' report makes no attempt to estimate true impact of these takings on UCEMC's existing Putnam County distribution system, or the reintegration costs associated with remedying this impact. Furthermore, very little detail is shown in Mr. Barnes' Exhibit A (how the City of Cookeville (CED) will serve the annexation customers), nor is there any reintegration costs or route shown. In his Exhibit B, Mr. Barnes proposes several miles of duplicate facilities to be constructed by CED to serve the cooperative members now in the annexation areas.

In Exhibit C to his report, Mr. Barnes proposed several more miles of duplicate facilities to be constructed by CED to serve the cooperative members in the annexation areas. In Exhibit D to his report, Mr. Barnes proposes a large amount of duplicate facilities to be constructed by CED to serve existing cooperative consumers. These duplicate facilities include two new 3-phase distribution line crossings of Interstate 40. Mr. Barnes' Exhibit E provides very little detail of how he plans to provide service to the cooperative consumers now located in the annexation areas.

Additionally, Mr. Barnes' report does not quantify in dollars and cents the cost to build the duplicate facilities shown in his exhibits, nor does it quantify improvements to the CED system

going all the way back to the existing substations, including distribution feeders that will be necessary to serve the load being taken from the cooperative and put on the city. Furthermore, Mr. Barnes' report does not even mention or attempt to quantify the cost of purchasing the cooperative's facilities located within the city limits.

In summary, Mr. Barnes' report does not address the reintegration costs to be incurred by UCEMC. Rather, Mr. Barnes' report simply focuses on the costs associated with disconnecting UCEMC's existing distribution system from the affected annexation areas. As a result of this narrow focus, Mr. Barnes' report grossly underestimates the true costs of reintegration. Furthermore, in my opinion, Mr. Barnes' recommendations are in violation of §65-34-101, which says, in part, that "duplication of electric system facilities leads to excessive consumer costs and adverse environmental and aesthetic impacts".

VI. Summary and Conclusion.

As noted above, it is my opinion that the nine condemnations at issue in this case will have a dramatic and lasting impact on UCEMC's operations. For all the reasons discussed, it is very detrimental for a rural electric cooperative to lose a large, relatively high-density area of service territory. At a minimum, the loss of such territory undermines the cooperative's current system planning efforts and plant investment, and it greatly complicates the necessary process of future planning. In addition, based on my experience, territorial takings of the type at issue in this case almost always have an adverse impact on a cooperative resulting in higher rates for the remaining customers.

If the condemnations involved in this case are successful, it will be necessary to rebuild UCEMC's Putnam County distribution loop in order to insure that UCEMC has the operational reliability and efficiency in that area that it enjoys now. Although much of the distribution

loop can be rebuilt using existing UCEMC facilities, easements and rights-of-way, it is my opinion that some new construction – largely in the form of distribution line upgrades – will be necessary. The construction also will involve designing and building a new substation for UCEMC to replace the capacity lost at the Cookeville District substation, which will have been rendered effectively useless as a result of the condemnations. Based on UCEMC's historical costs for similar types of construction, I estimate that reintegrating UCEMC existing distribution loop will cost approximately $5.825 million.

Submitted by:

ROBERT C. DEW, JR., P.E.

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APPENDIX

PowerTech

Robert C. Dew, Jr.
Chief Executive Officer

EDUCATION: Butler University, Indianapolis, Indiana
Masters of Business Administration (MBA), 1981

Georgia Institute of Technology, Atlanta, Georgia
Post Graduate work in Electrical Engineering, 1976-1977

Purdue University, West Lafayette, Indiana
Bachelor of Science Degree in Electrical Engineering (BSEE), 1971

PROFESSIONAL REGISTRATION:

Registered Professional Engineer in the following states:

Alabama	15947
Alaska	EE7414
Colorado	25812
Florida	36391
Georgia	10417
Illinois	062-043005
Indiana	18011
Kentucky	15391
Mississippi	11573
North Carolina	13920
Ohio	E45240
South Carolina	12061
Tennessee	17555
Texas	79861
Virginia	20330
West Virginia	9778

PROFESSIONAL MEMBERSHIP:
Senior Member IEEE, Member PES and Rural Electric Power Committee;
Past Chairman of the IEEE-Rural Electric Power Committee;
1995 & 1996 Chairman, Rural Electric Consulting Engineers Association;
Consultant Member, NRECA Transmission & Distribution System Planning SubCommittee.

EXPERIENCE

1/02-present *PowerTech Engineering, LLC, Norcross, GA*
Mr. Dew joined PowerTech Engineering in January 2002 as CEO. PowerTech provides broad based engineering consulting services to electric utility companies including electric cooperatives, municipals and investor-owned utilities. Their specialties include distribution

design and planning, transmission design, substation design, retail rate and cost-of-service as well as field engineering for all of the design specialties.

11/99 -12/01 *United Utility Supply Cooperative, Inc., Louisville, KY*

In November 1999, Mr. Dew joined United Utility Supply as Executive Vice President and Chief Operating Officer. This position is responsible for the day-to-day operations and activities of the functions under his direction except as specified otherwise by the Bylaws of the Board of Directors. UUS is a manufacturer and distributor of transformers for the electric utility industry and is the manufacturer's representative for approximately 100 other manufacturing companies specializing in products for the electric utility industry.

- Directly responsible for the manufacturing and engineering department, budgets and corporate insurance department, human resources department, marketing material management department, marketing support department and (United Utility Supply) information services department.
- Directly supervised the area marketing managers in Alabama, Delaware, Maryland, Virginia, Florida, Illinois, Indiana, Kentucky, Ohio, Pennsylvania and Tennessee.
- Responsible for administering approved budget, loans of the cooperative within the limits of credit established by Board action, approval of the accounting systems, procedures, statistics and types of reports necessary for sound management.

01/74-11/99 *Southern Engineering Company, Atlanta, GA*

From 1997 until 11/1999, Mr. Dew was in charge of all Electrical Utility Engineering at Southern Engineering Company including Distribution Design & Planning, Transmission Engineering, Substation Engineering and Field Engineering.

In June 1990, Mr. Dew was elected to the Board of Directors of Southern Engineering Company.

In June 1987, Mr. Dew was promoted to Vice President.

In June 1984, Mr. Dew was promoted to Assistant Vice President and transferred back to the Atlanta office. He was placed in charge of the Distribution Design Department, the System Control and Communications Department, and Southern's two branches offices. These departments have a greater level of contact with the electric distribution cooperatives than any other part of the company and, as such, remain on the leading edge of the rural cooperative needs.

In 1978, Mr. Dew moved to Indianapolis and established Southern's first district office. In addition to managing this office, Mr. Dew's duties include distribution design, planning and construction of electrical facilities. He was directly responsible for the preparation of two-year work plans, long-range plans, sectionalizing studies, Borrowers Environmental Reports and other engineering studies required by the clients in the mid-west. Mr. Dew was the principal territory negotiator from Southern for Indiana Statewide during the implementation of the Indiana Territorial Act. He personally negotiated territory for over 25 cooperatives during which time he negotiated with the five investor-owned utilities in the state and a majority of the municipals. Mr. Dew has testified before the Indiana Public Utilities Commission on matters related to rate making and territorial safeguards.

Mr. Dew joined Southern in 1974. Prior to coming to Southern, he worked as staff engineer for two REMCs in Indiana. One of these, Tipmont REMC, is one of the largest cooperatives in Indiana. Mr. Dew also gained additional "hands-on" utility operating experience as staff engineer for the Harrison County REMC in Indiana.

From January 1974 until late 1978, Mr. Dew was a staff engineer in the Distribution Design Department of Southern. In this capacity he was responsible for developing two-year construction work plans, long-range plans, economic studies of utility construction, sectionalizing studies and general consulting for a number of rural electric cooperatives in the southeast.

09/72 - 01/74 Staff Engineer, Tipmont Rural Electric Cooperative, Linden, Indiana
Mr. Dew's duties included the design and staking of overhead and underground distribution systems as well as assisting in the operations of the Cooperative. Mr. Dew also assisted the General Manager in evaluating proposed wholesale rate changes as well as proposed changes in retail rates.

02/72 - 09/72 Staff Engineer, Harrison County Rural Electric Cooperative, Corydon, Indiana
Mr. Dew's duties included the design and staking of overhead distribution lines, liaison with prospective large power customers, assistance with operations of the utility plant and general engineering duties.

SPECIFIC PROJECT EXPERIENCE

Preparation of over 100 two-year construction work plans, long-range plans and sectionalizing studies for cooperatives and municipals in 10 states.

Supervision of field engineers responsible for the construction of approximately 200 miles of distribution lines in Illinois, Indiana and Ohio.

Project Manager – Long-Range Transmission and Distribution Plan for Chugach Electric of Anchorage, Alaska. This cooperative is one of the largest in the country having a membership in excess of 60,000.

Project Manager - NRECA/CFC Telecommunications Study. This study evaluated the potential and feasibility of telecommunications in rural America. As Project Manager, Mr. Dew coordinated the efforts of approximately 15 professionals within Southern Engineering Company and outside consultants in the preparation of this study.

Initiated the first engineering and financial feasibility study for an electric cooperative of a satellite TV receiving system for Kankakee Valley REMC in Wanatah, Indiana in 1983.

Provided expert witness testimony on behalf of the United REMC in a territorial dispute involving the General Motors Truck Plant near Ft. Wayne, Indiana in 1984. Total expected load of the plant was 80 MW.

Provided expert witness testimony on behalf of Berkeley ECI at Moncks Corner, South Carolina versus South Carolina Electric & Gas in the Johns Island territory case in 1989.

Provided expert witness testimony on behalf of Union Electric Cooperative (also known as United Power Inc.) in Brighton, Colorado in their territorial dispute against Public Service Colorado in 1986. This dispute involved service to the then new Denver International Airport.

Project Manager - NRECA Simplified Staking Manual. This project involves the development of a 100 page "How To" manual for distribution line staking. Particular emphasis is placed on simplicity for those who are new to staking power lines.

Project Manager - For coordinated response of the sixteen Florida Electric Cooperatives to the PSC Docket 89033-EU "Cost Effectiveness of Undergrounding Power Systems". Mr. Dew supervised all the work on the project and testified at the formal hearing.

Mr. Dew has presented expert testimony before the Georgia Public Service Commission, the Indiana Utility Regulatory Commission, the Florida Public Service Commission, the Kentucky Public Service Commission, the Colorado Public Service Commission and the South Carolina Public Service Commission on behalf of approximately 50 electric cooperatives in territorial disputes and retail rate cases.

Performed Electrical Accident Investigation and provided expert witness testimony on behalf of investor-owned utilities, electric cooperatives and plaintiffs in electrical accident cases in Georgia, Indiana, Illinois, West Virginia, Kentucky, Virginia, Mississippi, Alabama, Tennessee and Florida, including NESC applications, interpretation and opinions involving all NESC's since the 1928 edition.

Electrical accident investigations, including depositions, and testimony presented in state and federal courts involving the following:

1) electrical contact accidents involving CB antennas, TV antennas, pipes, irrigation pipes, aluminum ladders, extendable painting apparatus, tar mops, roofing equipment, farm machinery, cranes, dump trucks, automobiles, trucks, smoke stack scrapers, and cleaning devices.
2) electrical contact cases involving personnel climbing of transformer poles, climbing platform mounted transformers, stealing of electrical conductors, entering and climbing on substation structures, etc., including interpretation of warning signs and posting requirements.
3) system protection including the coordination of breakers, reclosers, fuses, etc., including accidents involving downed electrical conductors that remain energized.
4) applications of the NESC horizontal clearance requirements to buildings, towers, structures signs, antennas, etc., including wind displacement of conductors.
5) application of the NESC vertical clearance requirements over roads, cultivated land, unimproved land, mountainous terrain, lakes, rivers, streams, etc., based on pre-1990 NESC conditions and post-1990 NESC conditions.
6) applications of the NESC vertical and diagonal clearances required over roofs, beside buildings, structures, etc.
7) application of the general NESC requirements including inspections, work rules, etc.

PUBLICATIONS

1) Contributing Author - NRECA "A to Z" Distribution Automation Manual (1999).
2) Principal-In-Charge - NRECA Materials Feasibility Study (1999).
3) Principal-In-Charge - NRECA Animal Caused Outage Manual (1995).
4) Principal-In-Charge - United Utility Supply - A Guide for the Economic Evaluation of Distribution Transformers (1993).
5) Principal-In-Charge - NRECA Simplified Staking Manual (1992).
6) Principal-In-Charge - TVPPA Transmission &Distribution Standard and Specifications Manual (1990).

TERRITORIAL RESUME

1980-1983	Implemented Indiana's new "Territorial Protection Act" by negotiating territory between most of the 42 electric Cooperatives, 70-odd municipals and the 5 investor-owned utilities. This included the inventory and appraisal of traded facilities.
1984	Provided "expert witness" testimony on behalf of the United REMC, Huntington, IN, in the United REMC v. I&M Electric Company. This territorial dispute involved the service rights to the then new General Motors truck plant on I-69 south of Fort Wayne, IN.
1986	Provided "expert witness" testimony on behalf of the Union REC, Brighton, CO; in the Public Service of Colorado v. Union REC. This territorial dispute involved the electric service rights to the then new Denver Colorado International Airport.
1985	Provided "expert witness" testimony on behalf of Berkeley Electric Cooperative, Monks Corner, SC; this territorial dispute involved service rights to a large commercial load on John's Island, SC.
1986 to Present	Provided "expert witness" testimony on behalf of numerous Georgia Cooperatives at the Georgia PSC with regard to service rights in 900 kW cases. Since 1973, any new load over 900 kW connected has been a customer choice load, but the verification of this load has been questioned many times.
1986 to Present	Provided "expert witness" testimony on behalf of a number of Indiana Cooperatives in municipal annexation cases.
1990	Assisted in the negotiations of the sale of 2,500 Okefenoke Electric Cooperative consumers to the Jacksonville Electric Authority for $6,500 per consumer after many years of negotiations and a Florida PSC hearing.
1994	Led the inventory, appraisal and re-integration team during the sale of approximately 2,500 consumers of the 4 County EPA to the City of Columbus, MS, based upon a previously negotiated territorial agreement.
1980 to Present	Presented engineering "expert witness" testimony on behalf of electric cooperative clients at the Georgia PSC, Indiana PSC, Florida PSC, Colorado PSC and the South Carolina PSC – and also at pre-hearings in Kentucky and Ohio.

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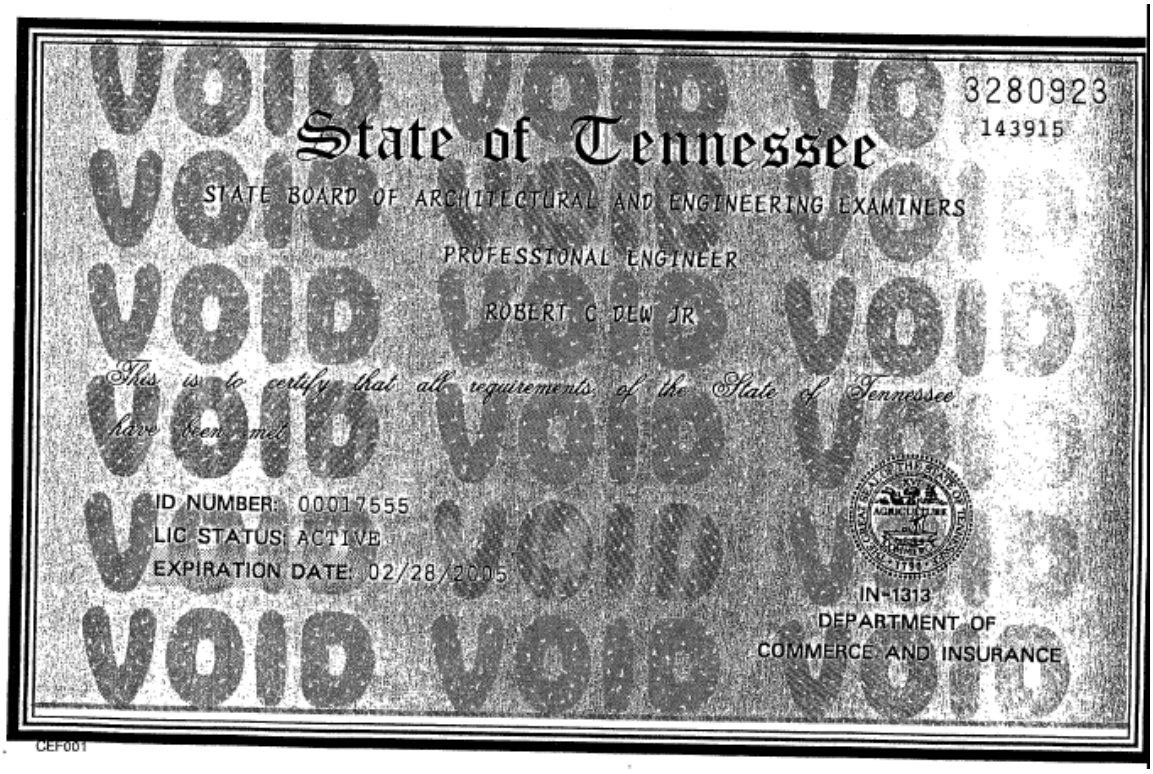

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State of Tennessee

STATE BOARD OF ARCHITECTURAL AND ENGINEERING EXAMINERS

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ROBERT C DEW JR

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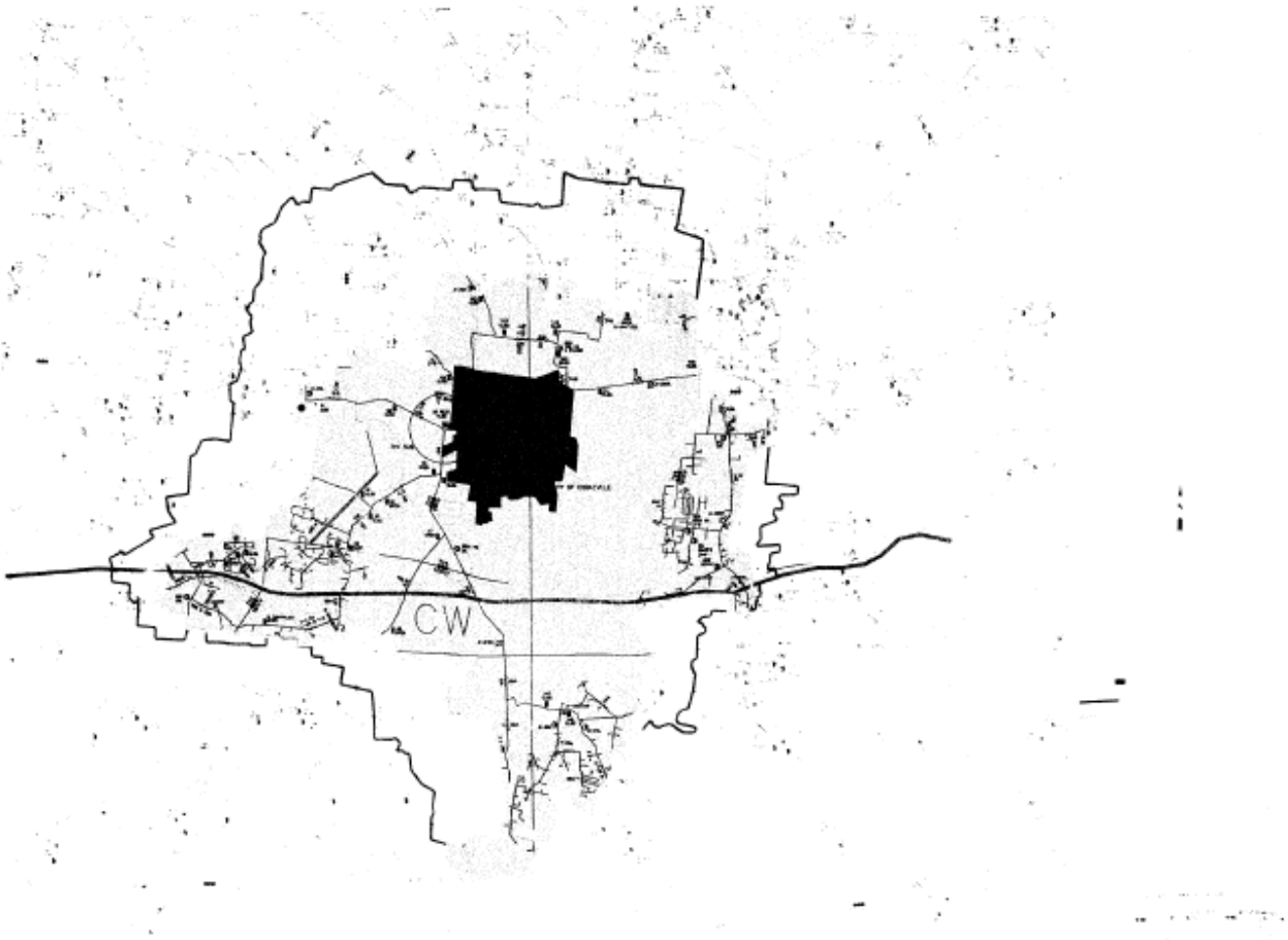

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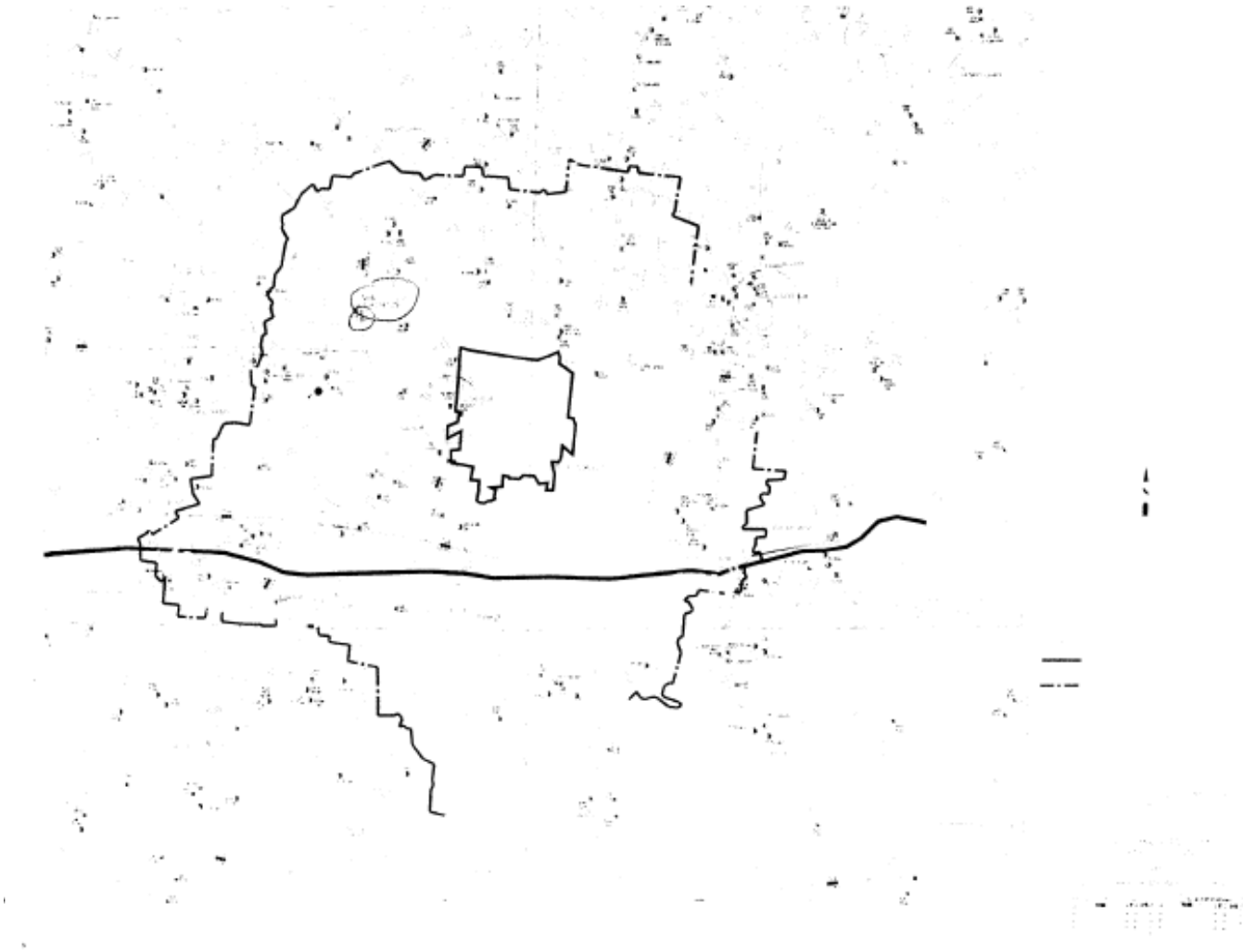

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 07a0138p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CITY OF COOKEVILLE, TENNESSEE,
Plaintiff-Appellant,

v.

UPPER CUMBERLAND ELECTRIC MEMBERSHIP CORPORATION; HILDA G. LEGG; RURAL UTILITIES SERVICES, an Agency of the Department of Agriculture; DEPARTMENT OF AGRICULTURE; SHELDON PETERSON, Governor; NATIONAL BANK FOR COOPERATIVES; NATIONAL RURAL UTILITIES COOPERATIVE,
Defendants-Appellees.

Nos. 05-5886; 06-5363

Appeal from the United States District Courts
for the Middle District of Tennessee at Cookeville and Nashville.
No. 02-00093—Thomas A. Wiseman, Jr., District Judge.

Argued: March 5, 2007

Decided and Filed: April 19, 2007

Before: ROGERS and GRIFFIN, Circuit Judges; RUSSELL, District Judge.*

COUNSEL

ARGUED: Andree Sophia Blumstein, SHERRARD & ROE, Nashville, Tennessee, for Appellant. W. Brantley Phillips, Jr., BASS, BERRY & SIMS, Nashville, Tennessee, Frances M. Toole, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. **ON BRIEF:** Andree Sophia Blumstein, SHERRARD & ROE, Nashville, Tennessee, T. Michael O'Mara, Cookeville, Tennessee, for Appellant. W. Brantley Phillips, Jr., John R. Lodge, Jr., Russell S. Baldwin, BASS, BERRY & SIMS, Nashville, Tennessee, Frances M. Toole, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

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*The Honorable Thomas B. Russell, United States District Judge for the Western District of Kentucky, sitting by designation.

OPINION

ROGERS, Circuit Judge. In this case, we affirm the federal district court's resolution of a dispute over one element of the compensation that Tennessee law requires when a city annexes territory and exercises its right to purchase electric utility property within the annexed territory. The federal court had jurisdiction because a federal agency, the Rural Utilities Service ("RUS"), was a party defendant. We reverse, however, a post-judgment order enjoining the city from providing electric service in this annexed area pending resolution of the compensation dispute.

When a Tennessee municipality that owns and operates its own electric system annexes territory in which an electric cooperative is providing electric services to customers, the municipality has two choices of how to provide electric services to those customers under Tennessee law. *See City of South Fulton v. Hickman-Fulton Counties Rural Elec. Coop. Corp.*, 976 S.W.2d 86, 90 (Tenn. 1998). The municipality can either "grant such cooperative a franchise to serve the annexed area" or, as the City of Cookeville chose to do here, "offer to purchase any electric distribution properties and service rights within the annexed area owned by any electric cooperative." Tenn. Code Ann. § 6-51-112(a). The same Tennessee statute that requires this choice also provides a formula for determining the amount of compensation that the municipality must offer the cooperative. *See* Tenn. Code Ann. § 6-51-112(a)(2). As part of this compensation, the municipality must offer "[a]n amount equal to the cost of constructing any necessary facilities to reintegrate the system of the cooperative outside the annexed area after detaching the portion to be sold." Tenn. Code Ann. § 6-51-112(a)(2)(B).

Cookeville annexed nine areas in which the Upper Cumberland Electric Membership Corporation ("UCEMC") provided electric services. Cookeville sued UCEMC, originally in state court, to condemn UCEMC's facilities and electric service rights in the annexed areas. RUS was later added as a defendant. Cookeville and UCEMC disagreed on the cost of reintegration—Cookeville argued that the cost was approximately $127,000 whereas UCEMC argued that the cost was $5.825 million. The district court agreed with UCEMC and ordered Cookeville to pay the higher amount so that UCEMC could build a new substation and distribution loop. Cookeville appealed. While that appeal was pending, Cookeville began building electric facilities in the annexed areas and providing electric services to customers in those areas. UCEMC sought and obtained an injunction from the district court enjoining Cookeville from building facilities or providing service until it paid UCEMC the damages owed for the condemnation. Cookeville appealed, and now the propriety of both the damage award and the injunction are before this court. Cookeville also challenges the district court's jurisdiction over the entire case and the district court's jurisdiction to enter the injunction while the first appeal was pending.

The district court properly exercised jurisdiction because a federal agency was a party. The district court order requiring Cookeville to pay reintegration costs of $5.825 million was legally proper and not clearly erroneous. The district court's injunction, entered during the pendency of the appeal from the district court's compensation order, however, improperly expanded the scope of the previous order. We therefore affirm in part and reverse in part.

I.

In 2000, Cookeville annexed five areas surrounding the city. In 2002, Cookeville annexed four additional areas. With respect to each annexed area, Cookeville gave notice to UCEMC, an electric cooperative serving customers in the annexed areas, as required by Tennessee law, but

UCEMC refused to sell voluntarily any of its electric distribution properties or service rights in those areas. *See* Tenn. Code Ann. § 6-51-112(a)(1) (requiring notice).

Removal and Denial of Motion to Remand

On July 31, 2001, Cookeville brought a civil action against UCEMC in Tennessee state court in order to condemn UCEMC's facilities and service rights. On August 14, 2002, Cookeville amended its complaint and added RUS and National Rural Utilities Cooperative Finance Corporation ("CFC") as defendants. RUS is a federal agency. *See* 7 U.S.C. § 6942. RUS and CFC each hold a security interest in all of UCEMC's equipment and service rights within the annexed areas. UCEMC, RUS, and CFC removed the case under 28 U.S.C. § 1442(a)(1) to the United States District Court for the Middle District of Tennessee. Cookeville then filed a motion to remand in the district court arguing that the district court lacked subject matter jurisdiction.

The district court denied Cookeville's motion to remand. *Tennessee ex rel. City of Cookeville v. Upper Cumberland Elec. Membership Corp.*, 256 F. Supp. 2d 754, 758 (M.D. Tenn. 2003). Section 1442 states that "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue" can remove a civil action to the district court. Courts have also required as necessary for removal under this statute that the defendant assert a colorable federal defense. Here, the district court held that "[c]learly, the RUS is an agency of the United States being sued for acting under color of its office in this case." *Tennessee ex rel. City of Cookeville*, 256 F. Supp. 2d at 758. The court also held that defendants asserted the colorable federal defense of preemption because they "adequately pled" such a defense and the defense was an issue the district court needed to decide. *Id.*

Tennessee Statute

The crux of this case is what compensation Cookeville must pay to UCEMC for UCEMC's facilities and service rights in the annexed areas. Tennessee law provides the following formula for determining the amount of compensation an annexing municipality must pay an electric cooperative:

> The municipality shall offer to purchase the electric distribution properties of the cooperative located within the annexed area, together with all of the cooperative's rights to serve within such area, for a cash consideration, which shall consist of:
>
> > (A) The present-day reproduction cost, new, of the facilities being acquired, less depreciation computed on a straight-line basis; plus
> > (B) An amount equal to the cost of constructing any necessary facilities to reintegrate the system of the cooperative outside the annexed area after detaching the portion to be sold; plus
> > (C) An annual amount, payable each year for a period of ten (10) years, equal to the sum of:
> > (i) Twenty-five percent (25%) of the revenues received from power sales to consumers of electric power within the annexed area, except consumers with large industrial power loads greater than three hundred kilowatts (300kW), during the last twelve (12) months preceding the date of the notice provided for in subdivision (a)(1); and

> (ii) Fifty percent (50%) of the net revenues, which is gross power sales revenues less wholesale cost of power including facilities rental charge, received from power sales to consumers with large industrial power loads greater than three hundred kilowatts (300kW) within the annexed area during the last twelve (12) months preceding the date of the notice provided for in subdivision (a)(1).

Tenn. Code Ann. § 6-51-112(a)(2). Cookeville and UCEMC agreed on the first and third elements of the statutory formula. Cookeville agreed to pay UCEMC $1,136,325.25 for the present-day reproduction cost, new, less depreciation of UCEMC's electric distribution properties located in the annexed areas. Cookeville also agreed to make ten annual payments to UCEMC of $276,330 to comply with section 6-51-112(a)(2)(C).

Trial

Cookeville and UCEMC did not agree on the second element of the statutory formula: "the cost of constructing any necessary facilities to reintegrate the system of the cooperative outside the annexed area after detaching the portion to be sold." *See City of Cookeville v. Upper Cumberland Elec. Membership Corp.*, 360 F. Supp. 2d 873, 879 (M.D. Tenn. 2005) (quoting Tenn. Code Ann. § 6-51-112(a)(2)(B)). At a bench trial in November of 2004, each side presented testimony of an expert who had produced a "reintegration" plan. Cookeville's expert, Thomas M. Barnes, testified about the report that he prepared. In the report, Barnes stated that to reintegrate UCEMC's system, UCEMC would only need to construct facilities in one of the annexed areas and would incur "costs related to coordination of the facility transfer" and "a restocking charge of metering equipment" in all of the annexed areas. Barnes estimated the total reintegration costs to be $127,282.64. Prior to the annexations, Cookeville and UCEMC shared a Cookeville-owned substation in West Cookeville ("West Substation"), and Barnes' plan anticipated that UCEMC would continue to use that substation.

UCEMC's expert, Robert C. Dew, Jr., testified about the report that he prepared. In his report, Dew concluded that UCEMC needed a new substation and distribution loop built. Dew estimated that this would cost $5.825 million. Dew's plan anticipated that UCEMC would no longer use the West Substation after the annexations. At trial, Dew testified that the new substation was needed to "have the same operational flexibility, same capacity, same reliability, and better efficiency" as compared to UCEMC's system prior to the annexation. Dew testified that after Cookeville removes UCEMC's former customers, UCEMC will be left with extra line that continues through the annexed areas without serving any customers, resulting in increased costs from maintaining the line and losing electricity due to resistance in that line.[1]

District Court Decision

The district court agreed with UCEMC and found that the disputed second part of the formula equaled $5.825 million. *City of Cookeville*, 360 F. Supp. 2d at 879.[2] In coming to that conclusion, the court first noted that "[t]here was some argument at trial as to whether [the statutory]

---

[1] When a current is run through an electrical line with resistance, some of the electrical energy is converted to heat and lost. The longer the line, the more resistance between the substation and the consumer, and thus the more electricity lost.

[2] The district court first held that the proposed condemnation did not frustrate the purpose of the Rural Electrification Act ("REAct"). *City of Cookeville*, 360 F. Supp. 2d at 875-78. Neither party challenges this part of the court's ruling.

definition meant the cost of returning the system to running as well as it had before or whether it meant the cost of making the system adequate for operation." *Id.* The court concluded that "reintegration costs are those costs associated with returning the system to running as well as [it] had before the condemnation—no extra inefficiencies and no extra costs related to the system." *Id.* The district court found "that reintegration costs equal the cost of a new substation and the cost of restoring UCEMC's distribution loop with the new substation." *Id.* This was because the condemnations otherwise "would lead to inefficient electric distribution" for UCEMC due to the loss of electricity along lines no longer serving UCEMC customers and due to the maintenance of those lines. *Id.*[3]

Overall, the district court found that UCEMC's condemnation damages totaled "a single payment of $6,961,325.25 and 10 annual payments of $276,330.00 per year." *Id.*

Motions to Alter or Amend and Appeal

Cookeville and UCEMC moved to alter or amend the court's order. The issues presented in the motions involved how and when Cookeville was to pay UCEMC, whether UCEMC would be allowed to petition the court for additional reintegration costs if the cost of building the substation and distribution loop exceeded $5.825 million, and whether Cookeville was condemning feeder lines associated with Cookeville's West Substation. The district court denied the motions of Cookeville and UCEMC as to the means and timing of payment because there was "no good reason that the parties should not be able to come to a resolution of how to execute the judgment." The court also held that $5.825 million was the maximum amount Cookeville had to pay and that if the "actual costs are less than that amount, the remaining amount shall revert to or remain with" Cookeville. Finally, the court held that Cookeville did not condemn the feeder lines, which remained UCEMC's property.

Both parties appealed. UCEMC later voluntarily dismissed its cross-appeal.

Injunction

While the appeal (No. 05-5886) was pending, Cookeville began constructing electric distribution facilities inside some of the annexed areas. Cookeville admits that it installed street lighting and other electric facilities in the annexed areas, but maintains that none of those facilities serviced UCEMC's pre-annexation customers. Cookeville explained that it has only "begun to serve new customers, *i.e.*, customers who had moved into the annexed areas (into the City of Cookeville) after the annexation and who had not previously been UCEMC customers."

On December 2, 2005, defendants filed with the district court a joint motion for injunctive relief and costs. Defendants moved for an order compelling Cookeville to "immediately transfer to UCEMC all electric service currently being provided by [Cookeville] within UCEMC's exclusive service territory," enjoining Cookeville "from constructing electric distribution facilities and/or servicing customers within UCEMC's exclusive service territory," and requiring Cookeville "to pay all reasonable costs and attorneys' fees incurred by [d]efendants in connection with bringing" the motion. Cookeville responded by arguing that the district court lacked jurisdiction to issue an

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[3]The district court also made a number of rulings not challenged on appeal. The district court refused to include as reintegration costs the cost of power lines within the annexed areas because no evidence was presented at trial regarding those costs. *Id.* The court also refused to make an upward adjustment sought by UCEMC in the amount of over $3.1 million for "lost revenue from [supposedly] low cost/high profit customers [in the annexed areas]." *Id.* & n.5. Finally, the court declined to make a downward adjustment sought by Cookeville for defendants' purported "delay in complying with the Tennessee law related to condemnations." *Id.* & n.6.

injunction because the notice of appeal filed in appeal No. 05-5886 transferred jurisdiction to the court of appeals, and that even if the district court had jurisdiction, it should not issue an injunction because post-annexation, a municipality has the right to provide electric service, not an electric cooperative.

On January 6, 2006, the district court granted defendants' motion for injunctive relief and costs. The court concluded that Cookeville was

> unlawfully constructing new electric distribution facilities and providing electric services to customers within one or more of the nine annexation areas at issue in this case; that such annexation areas [were] within the statutorily-assigned exclusive service territory of [UCEMC]; and that while [Cookeville had] sued to condemn UCEMC's exclusive service rights associated with these annexations areas, it ha[d] not yet paid the condemnation damages awarded and [wa]s not entitled to the use and benefit of such exclusive service rights until UCEMC ha[d] been fully compensated . . . .

Accordingly, the district court held that Cookeville's actions constituted "an unlawful interference with UCEMC's exclusive service rights to the nine annexation areas." The district court ordered Cookeville to "transfer to UCEMC within 30 days . . . all electric service customers within any of the nine annexation areas that are currently being served by" Cookeville. Furthermore, the court enjoined Cookeville from providing electric service to customers within the annexed areas until appeal No. 05-5886 is resolved and Cookeville pays in full "the ultimate damage award to UCEMC, including reintegration costs, . . . or until otherwise ordered" by the district court. Finally, the court ordered Cookeville to pay defendants' reasonable costs and attorneys' fees associated with the injunction motion because it found that Cookeville's actions were "not undertaken in good faith, and that said interference continued despite reasonable efforts by [d]efendants to avoid needless additional litigation." Cookeville filed a timely notice of appeal of this order (No. 06-5363).

II.

We affirm the district court's order in appeal No. 05-5886. Defendants properly removed the case to the district court and the district court's decision on the merits awarding reintegration costs of $5.285 million to UCEMC was not clearly erroneous. However, we vacate the district court's injunction in appeal No. 06-5363. The district court did not have jurisdiction to issue the injunction because the injunction sought to expand the district court's previous order.

1. Removal Jurisdiction

Defendants properly removed this action to federal court.[4] A civil action may be removed to the federal district court if the action is brought against

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[4] As a preliminary matter, RUS argues that this court cannot entertain the issue of removal jurisdiction because Cookeville failed to raise this issue in its notice of appeal. This contention lacks merit. Federal subject matter jurisdiction can of course be challenged at any stage of the litigation, and jurisdiction cannot be created by waiver. *See Ohio v. Doe*, 433 F.3d 502, 505-06 (6th Cir. 2006); *Alongi v. Ford Motor Co.*, 386 F.3d 716, 728 (6th Cir. 2004); *Fed. Nat'l Mortgage Ass'n v. LeCrone*, 868 F.2d 190, 192 n.3 (6th Cir. 1989). In any event, Cookeville appealed from the final order of the district court and this court consequently may consider any earlier errors to which Cookeville objected. Where a party indicates in its notice of appeal that it appeals from the district court's final order, this court considers any alleged errors that occurred prior to the final order. *United States v. Sandles*, 469 F.3d 508, 518 n.6 (6th Cir. 2006). Here, Cookeville's notice of appeal stated that it appealed "from the final order of the District Court." Therefore, we may consider the removal issue.

> [t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

28 U.S.C. § 1442(a)(1). In the context of federal officer removal, the Supreme Court has held that the officer "must both raise a colorable federal defense and establish that the suit is '*for* a[n] act under color of office.'" *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999) (quoting 28 U.S.C. § 1442(a)(1)) (citation omitted; emphasis and alteration in *Acker*).

Although the parties assume that the *Jefferson County v. Acker* officer removal test applies to federal agency removal as well, the text and legislative history of § 1442(a)(1) demonstrate that any federal agency sued can always remove under § 1442(a)(1) because the "sued" clause in that provision applies only to federal officers.[5]

The text of § 1442(a)(1), is best read to mean that the three entities that can remove are (1) the United States; (2) any agency thereof; or (3) any officer of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office. A possible different reading—assumed by the parties in this appeal—is that the three entities that can remove are (1) the United States; (2) any agency thereof; or (3) any officer of the United States or of any agency thereof; and that each of these entities must be sued in an official or individual capacity for an act under color of such office. Although the latter reading is supported by the placement of a comma directly preceding the word "sued" (suggesting that everything after the comma (*i.e.*, the "sued" clause) applies to each element of the list before the comma: the United States, any agency thereof, or any officer of the United States or any agency thereof), that reading does not make sense because the United States and federal agencies are not "sued in an official or individual capacity" and are not sued for an "act under color of such office." Indeed, distinguished scholars of federal jurisdiction have questioned whether amended § 1442(a)(1) should "be read to permit the United States to remove only when it is 'sued in an official or individual capacity for any act under color of such office'—perhaps a null set and surely a peculiar category." *See* Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts And The Federal System* 910 (5th ed. 2003). Moreover, the Supreme Court rejected an interpretation of an earlier version of the statute that would have applied a similar "sued" clause to agencies because under that interpretation, the statute "read[] very awkwardly" because "[a]n agency would not normally be described as exercising authority 'under color' of an 'office.'" *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 80 (1991). Our independent reading of the text of § 1442(a)(1) is thus that a federal agency defendant may remove without more.

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[5]The removal statute, § 1442(a)(1), is broad and allows for removal when its elements are met "regardless of whether the suit could originally have been brought in a federal court." *Willingham v. Morgan*, 395 U.S. 402, 406 (1969). But as the Ninth Circuit reasoned in a case involving prior exclusive jurisdiction, *State Eng'r of Nev. v. S. Fork Band of Te-Moak Tribe*, 339 F.3d 804, 809 (9th Cir. 2003), "[§] 1442 is not a trump. If there are specific jurisdictional bars elsewhere that prevent the district court from asserting jurisdiction, the general removal provision cannot overcome the jurisdictional defect." *See also Nebraska ex rel. Dep't of Soc. Servs. v. Bentson*, 146 F.3d 676, 678-79 (9th Cir. 1998) (express deprivation of subject matter jurisdiction under 26 U.S.C. § 6305). Indeed, the legislative history of the 1996 amendment to § 1442 indicates that one purpose of giving agencies the power to remove was to "fulfill[] Congress' intent that questions concerning the exercise of Federal authority, the scope of Federal immunity and Federal-State conflicts be adjudicated in Federal court." S. Rep. No. 104-366, at 31 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4202, 4210-11. Cookeville does not identify any preclusive rule that would have divested the district court of jurisdiction after removal.

The legislative history provides compelling confirmation of this reading.[6] The addition of "The United States or any agency thereof" was the result of a 1996 amendment that sought to reverse an earlier Supreme Court decision. In *International Primate Protection League*, 500 U.S. at 79-82, the Supreme Court held that the pre-1996 version of § 1442 permitted only federal officers, not federal agencies, to remove suits to federal courts. The pre-1996 version stated that, "Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue" could remove a civil action to district court. Congress responded by replacing the beginning of the section (up to the phrase "or on account of") with the current language at issue. *See* S. Rep. No. 104-366, at 6-7, 30-31 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4202, 4202, 4210-11. This effectively added the United States and "any agency thereof" as parties that could remove cases to district court. *Id.* at 31 (noting that the amendment "legislatively reverses the Supreme Court's decision in *International Primate Protection League*").

The Senate Report supports a reading that § 1442(a)(1) as amended permits a federal agency to remove to federal district court without limitation. The Senate Report in multiple places separates the "sued" clause from reference to an agency and includes that clause only with reference to officers. For example, the Senate Report notes that the amended statute "allows civil actions . . . against Federal agencies as well as those against Federal officers sued in either an individual or official capacity to be removed to Federal district court." *Id.* at 30. The Senate Report goes on to state that the amendment "clarifies that suits against Federal agencies, as well as those against Federal officers sued in either an individual or official capacity, may be removed to Federal district court." *Id.* at 31. The Report, therefore, demonstrates that the "sued" clause applies only to federal officers and not to federal agencies. Such a reading is consistent with the "clear command from both Congress and the Supreme Court" that § 1442 is to be interpreted "broadly in favor of removal." *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1252 (9th Cir. 2006). RUS therefore properly removed the action to the district court under § 1442(a)(1) because RUS is a federal agency.

We recognize that other courts of appeals have suggested that a federal agency may also have to assert a colorable federal defense. *See City of Jacksonville v. Dep't of the Navy*, 348 F.3d 1307, 1313 n.2 (11th Cir. 2003) ("We recognize that it remains to be decided whether the requirement of a federal defense also applies to removal by the United States or one of its agencies."); *Parker v. Della Rocco*, 252 F.3d 663, 665 n.2 (2d Cir. 2001) (expressly not deciding whether a colorable federal defense is required for agency removal); *United States v. Todd*, 245 F.3d 691, 693 (8th Cir. 2001) (finding that the United States had asserted a colorable federal defense for removal under § 1442 rather than rejecting the need for one). The requirement of a colorable federal defense, however, is not only not supported by the statutory language, but also is not necessary to ensure the constitutionality of § 1442(a) under Article III of the Constitution. Article III, section 2 extends the federal judicial power "to Controversies to which the United States shall be a Party."[7] This case is thus different from *Mesa v. California*, 489 U.S. 121, 136-37 (1989), in which the Supreme Court rejected the government's argument that a federal defense is not required for officer removal. The *Mesa* Court reasoned that an interpretation of § 1442 requiring such a defense ensures Article III

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[6] We are mindful of the limited utility and reliability of legislative history. In this regard, "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

[7] This constitutional language of course does not lift the sovereign immunity of the United States. In this case, however, the federal agency consented to jurisdiction so that, as agreed by RUS counsel at oral argument, there is no sovereign immunity issue in this case. *Cf. Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 616 (2002) (holding that State waives Eleventh Amendment immunity when it removes to federal court).

jurisdiction by virtue of the case's "arising under" federal law. *Id.* No such interpretation is required where the United States is a party.

But even if a colorable federal defense were required, RUS fulfilled this requirement by asserting the defense of preemption. Defendants argued that federal law preempted Cookeville's proposed condemnation of UCEMC's facilities because the condemnation frustrated the purposes of the Rural Electrification Act of 1936 ("REAct"), 7 U.S.C. §§ 901-950bb (as amended). *City of Cookeville*, 360 F. Supp. 2d at 875. The district court noted that this was an issue of first impression in the Sixth Circuit, and that other courts had split on the issue. *Id.* at 875. *Compare Pub. Util. Dist. No. 1 of Pend Oreille City v. United States*, 417 F.2d 200 (9th Cir. 1969) (disregard of federal interest precluded condemnation under state law), *Pub. Util. Dist. No. 1 of Franklin County v. Big Bend Elec. Coop., Inc.*, 618 F.2d 601 (9th Cir. 1980) (condemnation under state law not permitted after disapproval by the Rural Electrification Administration), *City of Morgan City v. S. La. Elec. Coop. Ass'n*, 31 F.3d 319 (5th Cir. 1994) (state-law condemnation preempted by REAct), *with City of Stilwell v. Ozarks Rural Elec. Coop. Corp.*, 79 F.3d 1038, 1043-46 (10th Cir. 1996) (REAct does not preempt Oklahoma condemnation statute), *Tlingit-Haida Reg'l Elec. Auth. v. Alaska*, 15 P.3d 754, 766-68 (Alaska 2001) (similar). Although the district court ultimately sided with Cookeville and held that the REAct did not preempt Tennessee law permitting the condemnations (a decision defendants do not challenge on appeal), this does not mean that the defense was not colorable. For instance, in *Acker*, 527 U.S. at 431, the Supreme Court concluded that defendants presented a colorable federal defense of intergovernmental tax immunity even though the Court ultimately rejected that defense. *See also Magnin v. Teledyne Cont'l Motors*, 91 F.3d 1424, 1427 (11th Cir. 1996) ("[A colorable federal defense] need only be plausible; its ultimate validity is not to be determined at the time of removal."). Here, where the federal defense was an issue of first impression in this court and had previously found success in other circuits, one would be hard pressed to say that the defense was not colorable. Therefore, RUS properly removed the action to the district court even if assertion of a colorable federal defense were required for agency removal under § 1442(a)(1).

2. *Reintegration Costs*

The district court did not clearly err by holding that Cookeville must pay to build UCEMC a new substation and distribution loop. Tennessee law requires as part of the compensation that an annexing municipality must pay to an electric cooperative "[a]n amount equal to the cost of constructing any necessary facilities to reintegrate the system of the cooperative outside the annexed area after detaching the portion to be sold." Tenn. Code Ann. § 6-51-112(a)(2)(B). Cookeville argues that the district court erred by awarding reintegration compensation of $5.825 million for two reasons: (1) the district court applied an incorrect legal standard by requiring financial efficiency even though the statute requires only engineering efficiency; and (2) even if the district court applied the correct legal standard, UCEMC's reintegration plan, which the district court adopted, does not comply with that standard. This court reviews the district court's conclusions of law de novo and findings of fact for clear error. *Overton Distribs., Inc. v. Heritage Bank*, 340 F.3d 361, 365-66 (6th Cir. 2003).

a. Legal Standard

The district court applied a legal standard that is consistent with Tennessee law.[8] The district court interpreted reintegration costs under the Tennessee statute to mean "those costs associated with returning the system to running as well as [it] had before the condemnation—no extra inefficiencies and no extra costs related to the system." *City of Cookeville*, 360 F. Supp. 2d at 879. The Tennessee statute does not define "reintegrate" but the dictionary definition of "reintegrate" is "to restore to unity after disintegration." Webster's Third New International Dictionary 1915 (3d ed. 2002). The structure of section 6-51-112(a)(2) suggests that the reintegration costs are those necessary to place the system in the same state of integration that it was in prior to the condemnation. Section 6-51-112(a)(2)(A) provides for replacement costs for any facilities acquired by the municipality whereas section 6-51-112(a)(2)(B) then provides for the cost of constructing "necessary facilities to reintegrate the system of the cooperative." This scheme suggests that the reintegration costs are those necessary to reconnect the replaced facilities into the cooperative's existing electrical system. To bring the system back to "unity" would involve placing the system in as integrated a condition as existed prior to the annexation.

Cookeville argues that this standard was incorrect because it read into the statute "an additional requirement that cost inefficiencies, not just engineering disruptions, be compensated as part of the reintegration element of the statutory formula." The distinction Cookeville asks this court to draw between engineering and economic efficiency is largely semantic. It is not clear how an engineering inefficiency would not be costly, or how any increased cost would not be caused by engineering.[9] Cookeville refers to no authority for such a distinction in the statute, legislative history, case law, or any other source. There is nothing in the statute that purports to limit reintegration costs only to "engineering" efficiency. The statute instead seeks to place the electric cooperative in the same position it was prior to the municipality's condemnation of its facilities.[10]

b. Factual Findings

The district court's determination of the amount of reintegration costs was largely factual in nature, and the district court did not clearly err in its findings.

First, the district court did not clearly err by rejecting Cookeville's proposed reintegration plan. The question under the statute is what "necessary facilities" must be built in order to "reintegrate" UCEMC's distribution system. The district court agreed with UCEMC that Cookeville's reintegration plan, which involved maintaining UCEMC's use of the West Substation, created inefficiencies because UCEMC would incur extra costs in maintaining several miles of extra power lines leading to UCEMC's first customers and from losing electricity along those extra lines. *See City of Cookeville*, 360 F. Supp. 2d at 879. This finding is not clearly erroneous because there was adequate support in the record, in particular, the report and testimony of UCEMC's expert,

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[8] Defendants first argue that Cookeville should either be estopped from making this argument because Cookeville endorsed the same legal test at trial or should be deemed to have waived this argument because Cookeville failed to object or suggest another legal standard at trial. Cookeville proposed a reintegration plan that included inefficiencies and argued that this plan was consistent with the statute. Therefore, Cookeville neither is estopped from making, nor has forfeited, this argument on appeal.

[9] Indeed, the district court rejected an adjustment for loss of high paying customers. *See supra* n.3.

[10] As an alternative basis for upholding the district court's legal standard, defendants argue that Tennessee law permits the district court to modify the statutory formula for compensation. Because the district court applied a standard consistent with the statute, we do not need to reach this alternative argument.

Dew, for the fact that Cookeville's reintegration plan failed to account for inefficiencies added to UCEMC's electric distribution network.

The district court also did not clearly err by accepting UCEMC's reintegration plan. Arguably, UCEMC's reintegration plan results in a distribution system even more efficient than UCEMC previously had. In his report, Dew noted that UCEMC's plan "assumes that UCEMC's post-annexation Putnam County distribution system should operate *at least as efficiently* and as reliably as it does in its current configuration" (emphasis added). At trial, Dew stated that in formulating the UCEMC plan, he determined that the plan "had to have the same . . . operational flexibility, the same capacity, the same reliability[, and h]opefully, *improved* efficiency" (emphasis added). But once the district court concluded that Cookeville's plan did not meet the minimum required by Tennessee Code section 6-51-112(a)(2)(B), the district court was left only with UCEMC's plan, which did meet the minimum requirements of the statute. Cookeville did not propose an alternative plan—for example, a cost-shifting arrangement where UCEMC would continue to use the West Substation but Cookeville would compensate UCEMC for cost inefficiencies.[11] The district court's finding that UCEMC's plan was required was therefore not clearly erroneous. When left with the choice between two plans—one that was below the required minimum and one that was arguably above that minimum—the district court did not clearly err by requiring the only option that complied with the statute. Therefore, we affirm the district court's order requiring Cookeville to pay UCEMC up to $5.285 million in reintegration costs to construct a new substation and distribution loop.

3. Injunction

The district court, however, erred by issuing the injunction in appeal No. 06-5363 because the injunction expanded the district court's previous order on appeal in No. 05-5886 instead of merely enforcing it. "As a general rule the filing of a notice of appeal divests the district court of jurisdiction and transfers jurisdiction to the court of appeals." *Cochran v. Birkel*, 651 F.2d 1219, 1221 (6th Cir. 1981). "Although a district court may not alter or enlarge the scope of its judgment pending appeal, it does retain jurisdiction to enforce the judgment." *NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987). This court draws a "crucial distinction between *expansion* and *enforcement* of judgments." *Am. Town Ctr. v. Hall 83 Assocs.*, 912 F.2d 104, 110 (6th Cir. 1990) (emphasis in original). Here, in the injunction order, the district court decided two legal issues that it had not decided previously, and expanded significantly the scope of its previous order on appeal.

First, the district court decided that UCEMC enjoyed exclusive service rights in the annexed areas. In its order appealed in No. 05-5886, the district court merely decided the amount Cookeville was required to pay UCEMC in reintegration costs for annexing areas where UCEMC provided electric service. Whether UCEMC enjoyed exclusive service rights in those areas after Cookeville's annexation was not at issue. Thus, when the district court later enjoined Cookeville from "interfering" with UCEMC's exclusive service rights by providing electric service to new customers in the annexed areas, the district court was deciding an issue of law that went beyond the scope of the court's initial order that was on appeal at the time of the injunction, and granting relief beyond the scope of the earlier order.

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[11] We do not suggest that such a proposal would itself be consistent with the statute. The statute defines reintegration costs as "[a]n amount equal to the cost of *constructing* any necessary facilities," Tenn. Code Ann. § 6-51-112(a)(2)(B) (emphasis added), and thus might not include payments that are not for constructing facilities, but are instead meant to compensate the electric cooperative for cost inefficiencies.

Second, the district court decided that Cookeville was required to compensate UCEMC prior to taking UCEMC's property.[12] In denying UCEMC's motion to alter or amend the earlier order with respect to the timing of the payments, the district court refused to determine the means and timing of Cookeville's payments to UCEMC because there was "no good reason that the parties should not be able to come to a resolution of how to execute the judgment." The court also noted that the $5.825 million awarded to UCEMC was "a maximum amount for reintegration damages" and that "[i]n the event that actual costs are less than that amount, the remaining amount shall revert to or remain with" Cookeville. While that decision was on appeal to this court, the district court issued its injunction, which determined that Cookeville "is not entitled to the use and benefit of [UCEMC's] exclusive service rights until UCEMC has been fully compensated." This decision expanded the district court's earlier judgment, which explicitly declined to determine the timing of Cookeville's payments. Nowhere in the earlier order did the district court require Cookeville to compensate UCEMC prior to condemning UCEMC's property or building electric distribution facilities in the annexed areas. Also, the earlier order suggested that Cookeville might pay less than the $5.825 million owed by indicating that if the costs were lower than estimated, the savings might "remain" with Cookeville. Thus, the earlier order left open the question of whether Cookeville was required to compensate UCEMC prior to condemnation. Therefore, by requiring Cookeville to pay UCEMC prior to providing electric service within the annexed areas, the district court improperly expanded an order on appeal to this court and thus exceeded its jurisdiction.

III.

For the foregoing reasons, we **AFFIRM** the district court's order challenged in appeal No. 05-5886 and **REVERSE** the district court's injunction order challenged in appeal No. 06-5363.

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[12] In addition, it appears that the district court erred on the merits in entering the injunction. Under Tennessee law, a municipality may condemn private property prior to paying compensation. In *Zirkle v. City of Kingston*, 396 S.W.2d 356, 360-62 (Tenn. 1965), the Supreme Court of Tennessee held that a municipality could take control of private water and sewer lines on annexed property notwithstanding the fact that the municipality had not paid just compensation to the owner of the lines prior to taking control of them. *See also White v. Nashville & N.W. R. Co.*, 54 Tenn. (7 Heisk.) 518 (1872) ("[I]t is the approved opinion that property in this country when taken for public use need not be paid for before being taken."); *cf. Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) ("The Fifth Amendment does not require that compensation precede the taking."). UCEMC points to a Tennessee statute that prohibits the taking of property until damages are paid. *See* Tenn. Code. Ann. § 29-16-122. However, the *Zirkle* court referred to similar language in a prior version of this statute, but nonetheless the court held that the municipality could still condemn the water and sewer lines prior to paying compensation because an injunction was not an appropriate remedy where the property owner could later sue for damages. 396 S.W.2d at 360-62. Therefore, it is doubtful that the district court could have enjoined Cookeville from encroaching on UCEMC's service rights prior to paying compensation, even if it had jurisdiction.

2 of 3 DOCUMENTS

City of Cookeville, Tennessee Plaintiff v. Upper Cumberland Electric Membership Corporation, et al., Defendants

No. 2:02-0093, Consolidated with No. 2:03-0042

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NORTHEASTERN DIVISION

360 F. Supp. 2d 873; 2005 U.S. Dist. LEXIS 4802

March 17, 2005, Decided
March 17, 2005, Entered

SUBSEQUENT HISTORY: Affirmed by, Injunction denied by *City of Cookeville v. Upper Cumberland Elec. Mbrshp. Corp., 2007 U.S. App. LEXIS 8960 (6th Cir.) (6th Cir. Tenn., 2007)*

PRIOR HISTORY: *Tenn. ex rel. City of Cookeville v. Upper Cumberland Elec. Mbrshp. Corp., 256 F. Supp. 2d 754, 2003 U.S. Dist. LEXIS 5449 (M.D. Tenn., 2003)*

DISPOSITION: Court found condemnation damages for nine areas that are subject of litigation.

COUNSEL: [1]** For TENNESSEE STATE OF, on the relation of, Plaintiff: John H. Sinclair, Jr., Tennessee Attorney General's Office, Nashville, TN

For CITY OF COOKEVILLE, TENNESSEE, Plaintiff: Frank Stovall King, Jr., King & Ballow, Nashville, TN; Thomas Michael O'Mara, O'Mara & Johnson, PLLC, Cookeville, TN

For UPPER CUMBERLAND ELECTRIC MEMBERSHIP CORPORATION, Defendant: J. Richard Lodge, W. Brantley Phillips, Jr., Russell S. Baldwin, Bass, Berry & Sims, Nashville, TN; Jacky Orange Bellar, Bellar & Bellar, Carthage, TN

For HILDA G. LEGG, Defendant: W. Brantley Phillips, Jr., Russell S. Baldwin, Bass, Berry & Sims, Nashville, TN; Jacky Orange Bellar, Bellar & Bellar, Carthage, TN

For RURAL UTILITIES SERVICES, an agency of the, Defendant: Robert C.Watson, Office of the United States Attorney, Nashville, TN; Frances M. Toole, Department of Justice, Washington, DC; Georgann Gutteridge, U. S. Department of Agriculture, Washington, DC

For AGRICULTURE, DEPARTMENT OF, Defendant: Georgann Gutteridge, U. S. Department of Agriculture, Washington, DC

For SHELDON C. PETERSON, Governor & CEO of National Bank for Cooperatives, Defendant: Paul C. Ney, Jr., Trauger, Ney & Tuke, Nashville, **[**2]** TN

For NATIONAL BANK FOR COOPERATIVES, Defendant: Paul C. Ney, Jr., Trauger, Ney & Tuke, Nashville, TN

FOR NATIONAL RURAL UTILITIES COOPERATIVE FINANCE CORPORATION, Defendant: Paul C. Ney, Jr., Trauger, Ney & Tuke, Nashville, TN

JUDGES: Thomas A. Wiseman, Jr., Senior U.S. District Judge

OPINION BY: Thomas A. Wiseman, Jr.

OPINION

[*874] MEMORANDUM

BACKGROUND

On July 31, 2001, the City of Cookeville Department of Electricity ("Cookeville" or "Plaintiff") filed a Complaint in the Circuit Court for Putnam County, Tennessee, seeking to condemn Upper Cumberland Electric Membership Corporation's ("UCEMC") facilities and service rights within five areas recently annexed by Cookeville. In order to comply with *Tenn. Code Ann. § 29-16-106*, which requires that all parties having any interest in the land or rights involved in an eminent domain case be made defendants, Cookeville added as defendants the federal Rural Utilities Service ("RUS"), an agency of the United States Department of Agriculture, and the National Rurual Utilities Cooperative Finance Corporation ("CFC"). On November 20, 2002, RUS removed this matter to federal district court pursuant to *28 U.S.C. § 1442 (a)(1)* **[**3]** . On May 15, 2003, this Court consolidated the original action to condemn five areas with another action seeking to condemn four additional service areas. UCEMC has over $ 33,000,000 in outstanding long-term debt, all of which is secured by mortgages held by RUS and CFC on all of UCEMC's property, including the property at issue in this case. **[*875]** RUS opposes the proposed condemnations and issued an opinion stating its opposition and detailing the reasons thereof.

On November 15, 2004, this action was heard in a bench trial before the Honorable Thomas A. Wiseman, Jr., Senior District Judge for the United States District Court for the Middle District of Tennessee.

ISSUE BEFORE THE COURT

While this litigation has been long and sometimes contentious, there is only one central issue before this Court, whether the proposed condemnations frustrate the purpose of the REA. If they do not, then state law is controlling, and the Court should make the calculation required by *Tenn. Code Ann. § 6-51-112(a)(2)*. If the Court finds that the proposed condemnations do frustrate the purpose of the REA, then the condemnation proceedings will be dismissed.

CASE LAW

The **[**4]** Court's ruling on partial summary judgment on March 25, 2003 lays out the applicable case law. As it was discussed thoroughly in that order, only a summary is necessary here.

The case law surrounding the issue of condemning service areas of utilities founded under the REA and funded by the RUS is fairly sparse. The United States Court of Appeals for the Sixth Circuit has yet to rule on the issue, and as such, this Court will treat this as a case of first impression. Two lines of thought have developed in the case law from other circuit and state courts. The first states that state law allowing condemnation of utilities founded under the REA and financed by the RUS are preempted by federal law and, as such, are invalid in their application to these utilities, **unless the RUS approved of the condemnations.** *See Public Utility Dist. No. 1 of Pend Oreille Cty. v. United States, 417 F.2d 200 (9th Cir. 1969)*; *Public Utility Dist. No. 1 of Franklin Cty. v. Big Bend Electric Cooperative, Inc., 618 F.2d 601 (9th Cir. 1980)*; *City of Morgan City v. South Louisiana Elec. Coop. Assoc., etal., 31 F.3d 319, 320 (5th Cir. 1994)*. The second line of **[**5]** thought is that the REA was not meant to preempt state law, but rather to operate within the framework of existing state law, thus allowing for condemnation of rural cooperatives. *See City of Stilwell v. Ozarks Rural Elec. Coop. Corp., 79 F.3d 1038 (10th Cir. 1996)*; *Tlingit-Haida Reg'l Elec. Auth. v. Alaska Pub. Utils. Comm'n, 15 P.3d 754 (Alaska 2001)*.

The purpose of the REA was to electrify rural areas of the United States. *See Pend Oreille, 417 F.2d at 201*; *City of Morgan City, 837 F. Supp. at 195*; *Wabash Valley Power Assoc. v. REA, 988 F.2d 1480, 1489-90 (7th Cir. 1993)* (stating that the federal purpose for the REA is the goal of rural electrification as well as the goal of getting paid in full for the loans issued). The courts recognized that this purpose could be hindered by condemning service areas without paying sufficient compensation. *See id.* The courts further held that, as the body appointed by Congress to the be arbiter of these questions, the RUS decision to approve or disapprove of a proposed condemnation should be given great deference. *See Public Utility District No. 1 of Franklin Cty., 618 F.2d at 603*; **[**6]** *City of Morgan City, 837 F. Supp. at 198*; *City of Morgan City, 31 F.3d at 324*.

The first line of thought was largely developed before the United States Supreme Court issued its opinion in *Arkansas Elec. Coop. Corp. v. Arkansas Public Serv. Commission, 461 U.S. 375, 76 L. Ed. 2d 1, 103 S. Ct. 1905 (1983)*; *but see City of Morgan City, 49 F.3d at 1075* (in a denial for rehearing, the Fifth Circuit upheld its **[*876]** earlier ruling **after** the *Arkansas Elec. Coop. Corp.* decision was issued). The facts of *Arkansas Elec. Coop. Corp.* are not identical to the case at bar, but similar enough to warrant an examination of the Court's reasoning.

In *Arkansas Elec. Coop. Corp.*, a plaintiff cooperative that received funding through the REA challenged the jurisdiction of the Arkansas Public Service Commission [Arkansas PSC] to control its rates. *Arkansas Elec. Coop. Corp., 461 U.S. at 377*. The plaintiff cooperative did not actually provide power directly to rural individuals, but sold it to its member cooperatives who then distributed the power. *Id.* The Arkansas PSC asserted jurisdiction over the rates charged by the member cooperatives **[**7]** based on state statutes. *Id. at 382*. The cooperative asserted that state regulation of the rates was preempted by the REA. *Id.* The Arkansas Supreme Court upheld the Arkansas PSC's jurisdiction over rates, and the United States Supreme Court affirmed. *Id.* The Court initially held: "Nothing in the *Rural Electrification Act* expressly pre-empts state rate regulation of power cooperatives financed by the [RUS]." *Id. at 385*. As to the argument that the state's involvement would frustrate the important federal interest behind the REA, the Court responded that "the legislative history of the Rural Electrification Act makes abundantly clear that, although the [RUS] was expected to play a role in assisting the fledgling rural power cooperatives in setting their rate struc-

tures, it would do so within the constraints of existing state regulatory schemes." *Id. at 386*. The Court continued:

> There may come a time when the [RUS] changes its present policy, and announces that state rate regulation of rural power cooperatives is inconsistent with federal policy. If that were to happen, and if such a rule was valid under the Rural **[**8]** Electrification Act, it would of course pre-empt any further exercise of jurisdiction by the Arkansas PSC . . . . the PSC can make no regulation affecting rural power cooperatives which conflicts with particular regulations promulgated by the [RUS]. Moreover, even without an explicit statement from the [RUS], a particular rate set by the Arkansas PSC may so seriously compromise important federal interests, including the ability of [the cooperative] to repay its loans, as to be implicitly pre-empted by the Rural Electrification Act. We will not, however, in this facial challenge to the PSC's mere assertion of jurisdiction, assume that such a hypothetical event is so likely to occur as to preclude the setting of any rates at all.

Id. at 388-89 (internal citations omitted). Thus, *Arkansas Electric* involved a different set of facts -- setting rates instead of condemning facilities -- and was decided on a facial challenge to the state agency's jurisdiction.

After the decision in *Arkansas Elec. Coop. Corp.,* the second line of cases developed which allowed condemnation of rural cooperatives. The United States Court of Appeals for the Tenth Circuit was **[**9]** faced with a case similar to the case at bar and concluded that, in light of *Arkansas Elec. Coop. Corp.,* the REA and RUS were to operate within the bounds of state law, and condemnation under state law should be allowed. *City of Stilwell, 79 F.3d at 1044*. The *City of Stillwell* court stated that the reasoning in the first line of cases was in error after *Arkansas Elec. Coop. Corp.* In *City of Stillwell,* the RUS did not oppose the condemnation and specifically described the impact of the proposed condemnation as "minimal." *Id. at 1045*.

Most recently, the Supreme Court of Alaska in *Tlingit-Haida Reg'l Elec. Auth. v. Alaska Pub. Utils. Comm'n, 15 P.3d 754, 757* **[*877]** *(Alaska 2001)* considered both the first and second line of thought and concluded that the second made more sense after the *Arkansas Elec. Coop. Corp.* decision. The court reasoned that, because the REA was designed to promote rural electrification, direct interference with property mortgaged to the RUS "could conceivably frustrate the purposes of the Act." *Id.* Such is not the case, however, if the state regulation is legitimate and allows the utility to recoup **[**10]** its investments. *Id.* In *Tlingit-Haida Regional Electrical Authority,* an RUS officer testified that losing the disputed service area would doom the utility and its ability to repay the loans. *Id. at 768*. The court, however, refused to rely on such a personal prediction, but instead deferred to the state commission's determination that the utility would be capable of surviving the loss of the contested service area. *Id.*

THE VIEW ADOPTED BY THIS COURT

As stated above, this case is one of first impression in the Sixth Circuit. As such, the Court lends persuasive weight to all of the decisions above, but must arrive at a conclusion as to which is the correct approach to the issue at hand. This Court chooses to adopt neither of the two views, but rather, a combination.

Congress may preempt state authority, within Constitutional limits, by so stating in express terms. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Commission, et al., 461 U.S. 190, 203, 75 L. Ed. 2d 752, 103 S. Ct. 1713 (1983)*. Absent explicit language, Congress' intent to supersede state law may be found in two ways. *Id. at 204*. First, Congress may "occupy, the **[**11]** field" by enacting legislation so pervasive and dominant that the federal system will be presumed to preclude enforcement of state laws on the same subject. *Id.* (citing *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 151, 73 L. Ed. 2d 664, 102 S. Ct. 3014 (1982))*. Second, "even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law . . . when 'compliance with both federal and state regulations is a physical impossibility' . . . or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (quoting *Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963); Hines v. Davidowitz, 312 U.S. 52, 67, 85 L. Ed. 581, 61 S. Ct. 399 (1941))*. It is this final version of preemption the Court finds applies to this situation.

There is no question that the purpose of the REA is to electrify rural America. With that in mind, this Court finds that no condemnation, or state law that allows such condemnations, can be upheld that directly conflicts with that purpose. That, however, is a far cry from **[**12]** saying that all condemnations of cooperatives established under the REA are per se illegal due to the *Supremacy Clause*. **It only means that any condemnation that hinders rural electrification that is currently in place and provided by a cooperative established under the REA is illegal.** That is the rule that this Court adopts.

This, of course, begs the question of who the better arbiter of whether a condemnation hinders rural electrification provided by a RUS funded cooperative is - the RUS or the courts. The answer to this question determines how much weight the RUS decision is given in consideration of whether or not to allow a condemnation; whether to treat an RUS decision with great deference, only reversible if found to be arbitrary or capricious, or as persuasive evidence. This was a question that puzzled **[*878]** the Court. On the one hand, it makes good sense that the RUS would in a very good position to determine whether a proposed condemnation would hinder rural electrification. There is no reason to believe, however, the RUS would be better qualified than a state commission that specializes in public utilities (as the Alaska Supreme Court relied on).

There is the argument that **[**13]** Congress established the RUS, and as such, intended the RUS to be the decision maker. This Court, however, finds this argument unpersuasive. Congress established the RUS more as an administrative lending body to determine who was credit-worthy and to promulgate regulations to ensure those receiving funding would maintain their credit-worthiness and continue to electrify rural areas. The RUS is no more qualified than any other expert to determine whether a condemnation would hinder rural electrification. If information were shared, as it should be in a trial, the resulting battle of experts would be best settled by the court rather than blindly accepting the RUS decision and disregarding the opposing experts. As such, the Court finds that it should be the arbiter of this decision. [1]

1 It is important to note that throughout this discussion, the Court has maintained that the purpose of the REA is to electrify rural America, not to recover its funds lent. This omission is intentional. The Court will not extend the purpose of the REA to include this for fear of the slippery slope to which it may lead. To invalidate state law per the *Supremacy Clause* due to the presence of federal funds would have far reaching effects that this Court does not endorse.

[14]** APPLICATION TO THE CASE AT BAR

Given the view of the law as it stands articulated above, the final question of whether this specific condemnation frustrates the REA can now be resolved. The RUS issued an administrative opinion detailing its opposition to the proposed condemnations. The City of Cookeville provided an expert that testified that the condemnations would not cripple UCEMC's ability to service rural areas and thus, the condemnation should be allowed. After weighing each party's evidence carefully, the Court finds that these proposed condemnations do not frustrate the REA as long as sufficient compensation is given to the cooperative. [2] The question of what that compensation should be is the only one left for resolution. [3]

2 The Court here is not disregarding the RUS opinion. In fact, the Court wishes it had been more specific as to what amount of damages would have led to the RUS consenting to the condemnation. As discussed in greater detail below, the RUS opinion was based upon compensation proposed by Cookeville that the Court also finds insufficient. The Court is convinced, after hearing representatives from the RUS testify, that had the number the Court is finding for compensation been presented to the RUS, it would have approved of the condemnation.

[15]**

3 In fact, due to the nature of the Tennessee formula for determining just compensation for utility condemnation articulated in *Tenn. Code Ann. § 6-51-112(a)(2)* and the surrounding case law that allows for upward adjustments, this Court is hard pressed to think of a situation when the proposed condemnation would be invalid under the *Supremacy Clause*.

Tenn. Code Ann. § 6-51-112(a)(2) provides the formula for which compensation is to be determined in condemnation cases such as this one. The formula states that just compensation equals the sum of: the present day reproduction costs of the facilities being acquired, less depreciation computed on a straight line basis; reintegration costs; and annual payments for ten years that are calculated as a function of revenues from the condemned sites. The **[*879]** parties stipulated to the first and third parts of the formula, agreeing that: the present day reproduction costs less depreciation equal $ 1,136,325.25; and the ten annual payments as a function of revenue equal $ 276,330.00 per year. That leaves **[**16]** the Court only to determine the reintegration costs.

Tenn. Code Ann. § 6-51-112(a)(2)(B) describes reintegration costs as, "an amount equal to the cost of constructing any necessary facilities to reintegrate the system of the cooperative outside the annexed area after detaching the portion to be sold . . ." There was some argument at trial as to whether this definition meant the cost of returning the system to running as well as it had before or whether it meant the cost of making the system adequate for operation. After considering the parties' arguments, and finding no decisive, binding case law, the Court adopts the opinion that reintegration costs are those costs associated with returning the system to running as well as they had before the condemnation - no extra inefficiencies and no extra costs related to the system. [4]

4 To force the party losing its property to foot the bill for any additional costs that result from the condemnation, costs that could run annually for the life of the company, would be patently unfair.

[17]** Given that all parties admitted that at least one of the condemnations would lead to inefficient electric distribution, costs to UCEMC for maintenance of lines no longer serving UCEMC

customers and loss of some electricity paid for by UCEMC in lines that are not serving any remaining UCEMC customers (there was disagreement as to the degree of inefficiency and costs in lost electricity) that would result from continued use of the Cookeville substation, the Court finds that reintegration costs equal the cost of a new substation and the cost of restoring UCEMC's distribution loop with the new substation, or $ 5,825,000 ($ 2,500,000 for the new substation plus $ 3,325,000 for the restoration of the distribution loop). Because no evidence was presented at trial as to the cost of the power lines within the annexed areas, the city will not be obligated to pay any additional money for those. The Court further finds that the upward adjustment UCEMC asks for in the amount of $ 3,173,749 is unwarranted, and that UCEMC will still be able to provide low cost power to its rural customers without this adjustment. [5] Finally, the Court declines to make the downward adjustments proposed by Plaintiff. **[**18]** [6]

5 UCEMC asserts that it is owed this upward adjustment because of the lost revenue from the customers in the annexed areas - saying that these were low cost/high profit customers. To award this amount would be implicitly ruling that, under the REA, customers in non-rural areas should subsidize the rural customers. The Court finds that the REA did not contemplate such a system. The customers, having been annexed, are no longer inside the rural service areas and the annexing entity has no obligation to pay to subsidize the remaining cooperative customers.

6 Plaintiff asserts that these adjustments are warranted because of Defendants' delay in complying with the Tennessee law related to condemnations. This was a case of first impression that had prior precedent from other circuits that supported Defendant's position. Thus, this Court will not punish Defendant's for choosing to litigate the merits of the case by reducing the payments they are owed.

This brings the total condemnation damages to a single **[**19]** payment of $ 6,961,325.25 and 10 annual payments of $ 276,330.00 per year.

CONCLUSION

For the reasons set forth above, the Court finds that condemnation damages **[*880]** are $ 6,961,325.25 plus annual payments in the amount of $ 276,330.00 for ten years.

03-17-05

Thomas A. Wiseman, Jr.,

Senior U.S. District Judge

ORDER

For the reasons stated in the attached Memorandum, the Court finds that condemnation damages for the nine areas that are the subject of this litigation are $ 6,961,325.25 and ten annual payments of $ 276,330.00.

It is so ORDERED.

03-17-05

Thomas A. Wiseman, Jr.

Senior U.S. District Judge

3 of 3 DOCUMENTS

STATE OF TENNESSEE ex rel. CITY OF COOKEVILLE, TENNESSEE, Plaintiff, v. UPPER CUMBERLAND ELECTRIC MEMBERSHIP CORPORATION, HILDA G. LEGG, Administrator, RURAL UTILITIES SERVICE, an agency of the U.S. DEPARTMENT of AGRICULTURE, SHELDON C. PETERSEN, Governor & CEO, NATIONAL BANK OF COOPERATIVES, NATIONAL RURAL UTILITIES COOPERATIVE FINANCE CORPORATION, Defendants.

No. 2:02-0093

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

256 F. Supp. 2d 754; 2003 U.S. Dist. LEXIS 5449

March 24, 2003, Decided
March 26, 2003, Entered

SUBSEQUENT HISTORY: Judgment entered by *City of Cookeville v. Upper Cumberland Elec. Mbrshp. Corp., 2005 U.S. Dist. LEXIS 4802 (M.D. Tenn., Mar. 17, 2005)*

DISPOSITION: **[**1]** Cookeville's Motion for Remand and Cookeville's Motion for Summary Judgment DENIED.

COUNSEL: For TENNESSEE STATE OF, plaintiff: John H. Sinclair, Jr., Office of the Attorney General, Nashville, TN.

For CITY OF COOKEVILLE, TENNESSEE, plaintiff: Frank Stovall King, Jr., King & Ballow, Nashville, TN.

For CITY OF COOKEVILLE, TENNESSEE, plaintiff: Thomas Michael O'Mara, Cookeville, TN.

For UPPER CUMBERLAND ELECTRIC MEMBERSHIP CORPORATION, defendant: J. Richard Lodge, Russell S. Baldwin, Bass, Berry & Sims, Nashville, TN.

For UPPER CUMBERLAND ELECTRIC MEMBERSHIP CORPORATION, HILDA G. LEGG, defendants: W. Brantley Phillips, Jr., Bass, Berry & Sims, Nashville, TN.

For UPPER CUMBERLAND ELECTRIC MEMBERSHIP CORPORATION, HILDA G. LEGG, defendants: Jacky Orange Bellar, Bellar & Bellar, Carthage, TN.

For RURAL UTILITIES SERVICES, AGRICULTURE, DEPARTMENT OF, defendants: Michael L. Roden, Office of the United States Attorney, Nashville, TN.

For RURAL UTILITIES SERVICES, defendant: Frances M. Toole, Department of Justice, Washington, DC.

For RURAL UTILITIES SERVICES, AGRICULTURE, DEPARTMENT OF, defendants: Georgann Gutteridge, U. S. Department of Agriculture, Washington, **[**2]** DC.

For SHELDON C. PETERSON, NATIONAL BANK FOR COOPERATIVES, NATIONAL RURAL UTILITIES COOPERATIVE FINANCE CORPORATION, defendants: Paul C. Ney, Jr., Trauger, Ney & Tuke, Nashville, TN.

JUDGES: Thomas A. Wiseman, Jr., Senior United States District Judge.

OPINION BY: Thomas A. Wiseman, Jr.

OPINION

[*755] MEMORANDUM

On July 31, 2001, the City of Cookeville Department of Electricity ("Cookeville" or "Plaintiff") filed a Complaint in the Circuit Court for Putnam County, Tennessee, seeking to condemn Upper Cumberland Electric Membership Corporation's ("UCEMC") facilities and service rights within five areas recently annexed by Cookeville. In order to comply with *Tenn. Code Ann. § 29-16-106*, which requires that all parties having any interest in the land or rights involved in an eminent domain case be made defendants, Cookeville added as defendants the federal Rural Utilities Service ("RUS"), [1] an agency of the United States Department of Agriculture, and the National Rurual Utilities Cooperative Finance Corporation ("CFC"). UCEMC has about $ 33.96 million in outstanding long-term debt, all of which is secured by mortgages held by RUS and CFC on all of UCEMC's property, including the property **[**3]** at issue in this case. On November 20, 2002, RUS removed this matter to federal district court pursuant to *28 U.S.C. § 1442(a)(1)*. RUS has not consented to the proposed condemnation. Currently before the Court are two motions by Cookeville, one to remand the case to state court and the other for summary judgment. For the reasons set forth below, the Court DENIES both motions.

1 *The Rural Electrification Act of 1936* created the Rural Electrification Administration to oversee loans to promote rural electrification. *The Department of Agriculture Reorganization Act of 1994* created the Rural Utilities Service with jurisdiction over rural electric, telephone, waste, and water programs formerly under separate administrations, such as the Rural Electrification Administration. *See 7 U.S.C. § 6942*. Thus, even though some documents filed by Cookeville and cases cited by both parties refer to the Rural Electrification Administration, the Court will refer to the Rural Utilities Service.

[4] I. Motion to Remand**

A. Cookeville's Motion

Cookeville filed a Motion to Remand the Case for Lack of Subject Matter Jurisdiction on December 5, 2002. Cookeville claims that the United States, on behalf of RUS, lacks subject matter jurisdiction to prosecute this matter in this Court. In its affirmative defense to the Complaint, RUS claims this Court has subject matter jurisdiction because Cookeville's reliance on Tennessee state law may be preempted if Cookeville's actions are determined to frustrate the purpose of a RUS program **[*756]** defined by federal law. Cookeville claims that this affirmative defense lacks specificity and does not justify district court jurisdiction, because RUS does not allege or demonstrate how it will financially or otherwise suffer if this eminent domain case is remanded. The 1993 Restated Mortgage and Security Agreement ("1993 Agreement"), drafted by RUS, refers to the use of proceeds if the mortgaged property is taken under the power of eminent domain: "In the event the Mortgaged property [sic], or any part thereof, shall be taken under the power of eminent domain, all proceeds and avails therefrom, except to the extent that both of the Mortgagees **[**5]** shall consent to other use and application thereof by the Mortgagor, shall forthwith be applied by the Mortgagor."

B. UCEMC's Response

Defendant UCEMC, in its Response, notes that Cookeville seems to base its Motion to Remand entirely on the assertion that RUS's Answer did not plead a federal defense with sufficient specificity. *Section 1442(a)(1)*, however, authorizes the United States or any federal agency to remove a state court action against it to federal court as long as it was acting under color of office, and unlike the general removal statute, does not require that the action could have been originally filed in federal court. *See Williams v. Brooks, 945 F.2d 1322, 1324 n.2 (5th Cir. 1991)*. In order to give the district court jurisdiction, the federal agency need only raise a federal defense in its answer to the state action. *See Mesa v. California, 489 U.S. 121, 136, 103 L. Ed. 2d 99, 109 S. Ct. 959 (1989)*. RUS, in its Answer, stated as an affirmative defense that federal law may preempt the state law on which Cookeville relies, a federal question sufficient to confer federal subject matter jurisdiction. Since federal rules require **[**6]** only notice pleading, this Answer was sufficient notice to Cookeville of the defense under federal law. Whether federal law in fact preempts state law in this instance requires further discovery, and the ultimate success of the affirmative defense is not a prerequisite to this Court exercising jurisdiction. *See* James Wm. Moore, et al., *Moore's Federal Practice* § 107.15[1][b][iv][A] (3d ed. 2000) (citing *Jefferson County v. Acker, 527 U.S. 423, 431, 144 L. Ed. 2d 408, 119 S. Ct. 2069 (1999))*.

C. Cookeville's Supplement

Plaintiff Cookeville filed a "Supplement to Motion to Remand This Case for Lack of Subject Matter Jurisdiction," in which it argues that new information has come to its attention since filing the original Motion for Remand. [3] Cookeville learned that there was a 1996 Restated Mortgage and Security Agreement ("1996 Agreement") which restates the mortgagor's (UCEMC) right to sell the mortgagees' (RUS and CFC) security without the mortgagees' prior written approval. Section 3.11 of this 1996 Agreement states:

The Mortgagor may not ... without the prior written approval of each Mortgagee, sell, lease or transfer any Mortgaged **[**7]** Property to any other person or entity **[*757]** (including any subsidiary or affiliate of the Mortgagor), unless

(1) there exists no Event of Default or occurrence which with the passing of time and the giving of notice would be an Event of Default,

(2) fair market value is obtained for such property,

(3) the aggregate value of assets so sold, leased or transferred in any 12-month period is less than 10% of Net Utility Plant, and

(4) the proceeds of such sale, lease or transfer, less ordinary and reasonable expenses incident to such transaction, are immediately

(i) applied as a prepayment of all Notes equally and ratably,

(ii) in the case of dispositions of equipment, materials or scrap, applied to the purchase of other property useful in the Mortgagor's utility business, not necessarily of the same kind as property dispose [sic] of, which shall forthwith become subject to the Lien of the Mortgage, or

(iii) applied to the acquisition or construction of utility plant.

As an Exhibit, Cookeville attaches UCEMC's entry in the 2000 Membership Directory of the Tennessee Valley Public Power Association, where UCEMC's total system assets for 2000 are listed as $ 87,506,520. **[**8]** As a second Exhibit, Cookeville attaches the affidavit of Joseph A. Peek, Manager of the Cookeville Department of Electricity. This affidavit was subsequently superseded by a Corrected Declaration of Joseph A. Peek, filed on February 7, 2003. Mr. Peek values the fair market value of UCEMC's electric distribution properties and service rights within the five annexed areas on the effective annexation dates in 2000 as $ 2,284,139.73. According to Cookeville, this amount equals 3.19% of UCEMC's net utility plant, which it is allowed to sell in a twelve-month period without the mortgagees' written consent. The Supreme Court of Tennessee has previously upheld the fairness and equity of using the formula set forth in *Tenn. Code Ann. § 6-51-112(a)(2)* (formerly, § 6-320(2)). *See Duck River Elec. Membership Corp. v. City of Manchester, 529 S.W.2d 202, 208 (Tenn. 1975)*. Thus, Cookeville argues, because the RUS has authorized UCEMC to dispose of less than 10% of net utility plant in any twelve-month period without consent, the RUS has no preemptive rights to interfere with the sale and no authority to remove the case. Cookeville contends that it has not sued the United States **[**9]** or any agency "in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for ... the collection of the revenue." *28 U.S.C. § 1442(a)(1)*. Because the RUS will not be "frustrated" unless UCEMC sells more than 10% of RUS security, Cookeville concludes, RUS's affirmative defense does not raise a colorable claim of a federal defense.

2 Additionally, Cookevile filed a "Response to Upper Cumberland Electric Membership Corporation's Opposition to Plaintiff's Motion to Remand the United States' Removal Under

28 U.S.C. § 1442(a)(1)" in which it refers to and restates its arguments in the Supplement to its Motion to Remand. Under *Fed. R. Civ. P. 15(d)*, Cookeville should have requested permission to supplement its Motion to Remand, but because the parties do not dispute that the supplement actually refers to the correct contract in force on the date the Complaint was filed, this fault is immaterial. UCEMC has filed a Response to Cookeville's Supplement, adopting and incorporating by reference its Response to Cookeville's original Motion to Remand.

[10]** D. RUS's Response

After receiving two extensions of time in which to respond, the RUS filed a Response to Cookeville's Motion to Remand on March 7, 2003. The RUS argues, as UCEMC does, that possible federal preemption is clearly a federal question justifying removal, and that RUS's pleadings were sufficient to provide notice to Cookeville of this federal question. In response to Cookeville's argument that the 1996 Agreement allows transfers of less than 10% of net utility plant without prior written approval, the RUS asserts that Cookeville misreads the mortgage agreement. First, the RUS emphasizes that the Court must look at all four requirements, not just the 10% of net utility one. *See supra*. Cookeville has not addressed the remaining **[*758]** three requirements at all. One of the requirements is that "fair market value is obtained for such property." According to the RUS, whether Tennessee state condemnation law provides fair market value, as construed under federal law, is one of the preemption issues that may come up in this case. In other words, Tennessee law might state that its condemnation laws provide fair payments, but whether those payments are sufficient so as not **[**11]** to frustrate the federal purpose behind the REA is a federal question. Second, the RUS argues that Cookeville has not even proven the 10% of net utility plant requirement, because it refers to assets sold in any 12-month period, not just the one condemnation at issue here.

E. Cookeville's Reply

Cookeville filed a Response to RUS's objection to its Motion to Remand on March 13, 2003. Cookeville argues that *28 U.S.C. § 1442(a)(1)* does not give the Court jurisdiction because the suit is not one against any "person" for the collection of revenue. Cookeville then cites extensively to *City of Stillwell v. Ozarks Rural Elec. Coop. Corp., et al., 79 F.3d 1038 (10th Cir. 1996)*. This case is discussed at length in the discussion of Cookeville's Motion for Summary Judgment, *infra*, and goes more to the merits of this suit and not whether or not the Court has jurisdiction.

F. Analysis

The current version of *§ 1442(a)(1)* provides for removal of any action commenced against "the United States or any agency thereof, or any officer (or any person under that officer) of the United States or of any agency thereof, sued in an official or **[**12]** individual capacity for any act under color of such office ....* *28 U.S.C. § 1442(a)(1) (2003)*. Clearly, the RUS is an agency of the United States being sued for acting under color of its office in this case. UCEMC and RUS are correct that a federal defense was adequately pled under the notice pleading requirements. The Defendants need not prove that federal law will in fact preempt state law, just that this question will be an issue the Court will need to decide. Cookeville has not adequately proven that the 1996 Agreement supersedes any federal preemption issues, so this Court has jurisdiction to hear the case. The Court DENIES the Motion to Remand, because the RUS adequately pled a federal defense, and this case will likely turn on questions involving a federal statute.

II. Motion for Summary Judgment

A. Cookeville's Motion

Cookeville seeks summary judgment on Count Five of its Complaint, involving the Shipley Road annexation area. [3] In its Motion for Summary Judgment, Cookeville simply lays out all of the facts as it sees them: (1) Cookeville is a municipality with the power to operate public utilities, (2) *Tenn. Code Ann. § 7-52-103(a)* **[**13]** authorizes municipalities to acquire and operate an electric plant to provide electric services to consumers, (3) *Tenn. Code Ann. § 6-51-102* authorizes Cookeville to annex the **[*759]** property at issue, (4) pursuant to *Tenn. Code Ann. § 6-51-112*, Cookeville offered to purchase the property and UCEMC was obligated to sell it, (5) a fair price under the statute of $ 5,342.93 cash plus annual installments of $ 1,901.62 was determined for the property, (6) UCEMC has continually refused to comply with this offer to purchase and consummate the sale as required by Tennessee law, and (7) thus, Cookeville is entitled to a judgment conveying UCEMC's electric distribution properties and rights in the annexed area upon Cookeville's payment of those sums. After UCEMC refused to sell, Cookeville filed this eminent domain action. The Tennessee Supreme Court has held that "a municipality has the exclusive power to control the distribution of electricity within its boundaries." *Duck River Elec. Membership Corp. v. City of Manchester, 529 S.W.2d 202, 206-07 (Tenn. 1975)*; *see City of South Fulton, et al. v. Hickman-Fulton Counties Rural Elect. Coop. Corp., et al., 976 S.W.2d 86, 89 (Tenn. 1998).* **[**14]**

3 The title of Cookeville's motion for summary judgment states that it is only a motion against Defendant UCEMC. All of the Defendants, however, are interrelated, and a judgment against UCEMC on any claim in effect would be a judgment against the other Defendants. Furthermore, Defendant CFC has replied to the motion for summary judgment, indicating its understanding that a ruling on the motion would apply to all Defendants. Defendant RUS, while never actually responding, did file a motion for extension of time to respond, indicating a similar understanding of the scope of the motion. Thus, the Court will treat the motion as one for summary judgment on count five as to all Defendants.

B. UCEMC's Response

UCEMC filed a Brief in Opposition to Plaintiff's Motion for Summary Judgment, correctly referring to the motion as actually one for partial summary judgment since it involves only one of five claims in this case. [4] UCEMC argues extensively that Cookeville is attempting to condemn in piecemeal fashion **[**15]** all of UCEMC's facilities and service rights in the area around Cookeville as part of a growth plan for the city. According to UCEMC, this is one of its most profitable areas and its loss would substantially hurt the revenues earned by UCEMC, and consequently its ability to pay back its mortgagees, RUS and CMC. Furthermore, such losses will ultimately be bourne by UCEMC's remaining customers in the form of higher charges for electricity, and would thus severely impair UCEMC's ability to provide reliable, low-cost service to its remaining customers. As to the actual legal dispute, UCEMC argues that the proposed taking by Cookeville would frustrate the purposes of the Rural Electrification Act of 1936 ("REA"), *7 U.S.C. §§ 901 et seq.*, and that such a transfer cannot take place without the consent of RUS under *7 U.S.C. § 907*. Any conflict between these federal statutes and Tennessee law cited by Cookeville, UCEMC argues, must be resolved in favor of federal law pursuant to the *Supremacy Clause, U.S. Const. art. VI, cl. 2.*

4 In a separate Response to Plaintiff's Motion for Summary Judgment on Count Five, Defendant CFC adopted and incorporated by reference UCEMC's Response. Despite an extension of time, the RUS never filed a response, so the Court will assume it also adopts UCEMC's Response.

[16]** First, UCEMC argues that the REA requires consent of the RUS before a borrower may sell or dispose of property or rights in which RUS holds a security interest, including involuntary disposition by condemnation. *7 U.S.C. § 907; see City of Morgan City v. South La. Elec. Coop. Assoc., 837 F. Supp. 194, 196 (W.D. La. 1993), aff'd, 31 F.3d 319 (5th Cir. 1994), reh'g denied, 49 F.3d 1074 (5th Cir.), cert. denied, 516 U.S. 908, 133 L. Ed. 2d 196, 116 S. Ct. 275 (1995).* UCEMC admits that Tennessee law authorizes municipalities to condemn electric distribution properties and service rights located within their municipal boundaries without regard to RUS consent. *Tenn. Code Ann. § 6-51-112; Duck River Elec. Membership Corp. v. City of Manchester, 529 S.W.2d 202, 205-07 (Tenn. 1975).* Thus, state and federal law directly conflict, and under the *Supremacy Clause* the federal provision must control.

Second, UCEMC argues that there remains a question of material fact as to whether Cookeville's proposed condemnations **[*760]** would frustrate the purposes of the REA, and thus should be preempted by **[**17]** it. The REA was enacted to ensure reliable and affordable electric service to rural America. *See City of Morgan City v. South La. Elect. Coop. Assoc., 31 F.3d 319, 322-23 (5th Cir. 1994), reh'g denied, 49 F.3d 1074, cert. denied, 516 U.S. 908, 133 L. Ed. 2d 196, 116 S. Ct. 275 (1995); Tri-State Generation & Transmission Ass'n v. Shoshone River Power Inc., 874 F.2d 1346, 1348 (10th Cir. 1989).* The proposed condemnation of a portion of federally subsidized rural electrification, even if compensated under state law, could impair this objective by weakening the remainder of the system and lessening its ability to function effectively. *See Morgan City, 31 F.3d at 323* (citing *Public Utility Dist. No. 1 of Pend Oreille County v. United States, 417 F.2d 200 (9th Cir. 1969)).* Economies of scale could be lost, resulting in higher rates to the remaining users and difficulties repaying federally secured debts, especially because municipalities would be annexing the parts of the system with the highest population density. *See City of Madison, Mississippi v. Bear Creek Water Assoc., Inc., 816 F.2d 1057, 1060 (5th Cir. 1987).* **[**18]** After the annexation, the remaining portions of the system must continue to operate with decent service and at decent rates. *See Public Utility Dist. No. 1 of Pend Oreille County v. United States, 417 F.2d 200, 201 (9th Cir. 1969).* In determining a utility's ability to continue providing reliable and efficient service, at least one court has not limited itself to the proposed condemnation in that case only, but looked to future annexations proposed by the city as part of a plan of annexations. *City of Morgan City, 49 F.3d at 324.* Otherwise, cities could accomplish by piecemeal what they could not accomplish all at once. *City of Morgan City v. South La. Elect. Coop. Assoc., 49 F.3d 1074, 1076 (5th Cir. 1995)* (denial of rehearing).

In this case, UCEMC emphasizes that Cookeville seeks to annex five tracts of service territory and has annexed four other tracts since filing this case. Cookeville admits that these annexations are part of its "Comprehensive Land Use Plan," providing for growth of the city pursuant to *Tenn. Code. Ann. §§ 6-58-101 et seq.* UCEMC asserts that the five tracts at issue in this suit encompass 520 UCEMC members **[**19]** and account for approximately $ 740,000 in annual revenue, with the four additional tracts encompassing 590 UCEMC members and accounting for approximately $ 1.15 million in revenues. [5] At this time, UCEMC estimates that under *Tenn. Code Ann. § 6-51-112*, if Cookeville condemns the nine tracts, it will owe UCEMC approximately $ 540,000 per year for 10 years -- about 29% of the annual revenue UCEMC would otherwise receive from this property.

UCEMC claims this decrease in revenue will frustrate its ability to meet its current long-term debt and operational commitments, especially because after ten years all payments will stop, yet most of UCEMC's debt does not mature until after 2018. Furthermore, under its Two-Year Work Plan developed pursuant to RUS requirements, UCEMC plans improvements to its electric distribution system which will require it to take on an additional $ 15 million in long-term debt financed through RUS and/or CFC and secured by a mortgage on UCEMC's plant and equipment. Yet Cookeville's growth plan intends ultimately to annex even more sections of UCEMC's most profitable service area. The net effect of these annexations, according to UCEMC, is to dramatically **[*761]** reduce **[**20]** UCEMC's current service area and density of its remaining service area, dramatically reduce UCEMC's revenues (a loss of approximately 4000 members and $ 3 million in annual revenues), cause severe financial consequences for UCEMC, and as a result greatly undermine its ability to meet its long-term debts without substantial rate increases. Such increases, UCEMC contends, would frustrate the policy behind the REA, so state law is preempted. [6] *See City of Morgan City v. South La. Elec. Coop. Assoc., 31 F.3d 319 (5th Cir. 1994), reh'g denied, 49 F.3d 1074, cert. denied, 516 U.S. 908, 133 L. Ed. 2d 196, 116 S. Ct. 275 (1995); Pend Oreille, 417 F.2d at 201 (9th Cir. 1969)*. UCEMC concludes by stating what it believes is the genuine issue of material fact remaining that makes summary judgment inappropriate: whether Cookeville's proposed condemnations "'stand as an obstacle' to the repayment of federal loans, to the financial viability of [the] federally financed electricity cooperative[], and ultimately, to the maintenance of electricity service to rural areas." *City of Morgan City, 31 F.3d at 324*. As **[**21]** far as state law would allow such a result, UCEMC maintains, it is preempted by federal law in the form of the REA.

5 For most of the figures and calculations pertaining to revenues, UCEMC relies on the affidavit of its General Manager, Carl V. Brandt, a copy of which has been filed with the Court.

6 UCEMC makes clear in its brief that it does not oppose Cookeville's growth plan as long as UCEMC is allowed to keep all of its current Putnam County facilities and service rights and maintain its territorial integrity and long-term viability.

C. Analysis

(1) Case Law

Congress may preempt state authority, within Constitutional limits, by so stating in express terms. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, et al., 461 U.S. 190, 203, 75 L. Ed. 2d 752, 103 S. Ct. 1713 (1983)*. Absent explicit language, Congress' intent to supersede state law may be found in two ways. *Id. at 204*. First, Congress may "occupy the field" **[**22]** by enacting legislation so pervasive and dominant that the federal system will be presumed to preclude enforcement of state laws on the same subject. *Id.* (citing *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 151, 73 L. Ed. 2d 664, 102 S. Ct. 3014 (1982))*. Second, "even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law ... when 'compliance with both federal and state regulations is a physical impossibility' ... or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (quoting *Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963); Hines v. Davidowitz, 312 U.S. 52, 67, 85 L. Ed. 581, 61 S. Ct. 399 (1941))*. It is this final version of preemption -- frustration of Congressional purpose -- on which UCEMC relies.

The resolution of conflicts between the REA and state condemnation law is a fairly unresolved area of the law. The first case dealing with the issue was from the **[**23]** Ninth Circuit, *Public Utility District No. 1 of Pend Oreille Cty. v. United States, 417 F.2d 200 (9th Cir. 1969)*. In *Pend Oreille,* the county, pursuant to state law, sought to acquire the facilities of a private non-profit membership corporation furnishing electricity in the county. *417 F.2d at 200*. The corporation was financed through the REA and had mortgaged all of its assets to RUS. *Id.* The Ninth Circuit held that the state law under which the county sought to condemn the facilities could not stand because it did not take into account the degree to which it interfered with the federal **[*762]** purpose behind the REA. *417 F.2d at 202*. The court noted the Congressionally-determined national interest in extending electricity to the farms of America, and the means of achieving this by offering low interest loans for rural electrification. *417 F.2d at 201*; *see Wabash Valley Power Assoc. v. REA, 988 F.2d 1480, 1489-90 (7th Cir. 1993)* (stating, as support for invalidating RUS regulations that attempted to control rates charged by a bankrupt cooperative, that the federal interest behind the REA is not solely the repayment **[**24]** of loans, but the goal of rural electrification). Then the court stated: "True, the United States, when the loan is paid, no longer has the same direct interest in the borrowing distributor, but so long as the United States is interested in keeping the electric lamps lit on the farms, it is of necessity interested in the vehicles distributing the electricity which will light those lamps." *Pend Oreille, 417 F.2d at 201*. The court distinguished normal condemnation cases where whatever is sought simply can be paid for, because "what is sought to be taken here is part of a system and even if the part taken is paid for, and if an award is made for the damage to the remaining portion, a question remains as to the capacity of the remaining portions of the system to function." *Id.* Finally, the Ninth Circuit specifically limited its holding: "We infer nothing as to the rule to be applied in a case where under governing state law it could be made to appear as a matter of fact that the taking for state purposes would not interfere with the federal purpose." *417 F.2d at 203*.

The Ninth Circuit affirmed this rule in *Public Utility District No. 1 of Franklin Cty. v. Big Bend Elec. Coop., Inc., 618 F.2d 601 (9th Cir. 1980).* **[**25]** Although the county disputed RUS' determination that the condemnation would interfere with the purposes behind the REA, the court announced a policy of deference to the federal agency's determination in its area of expertise "unless it is arbitrary, capricious, or an abuse of discretion." *619 F.2d at 603*. In the alternative, the court also suggested that under *7 U.S.C. § 907*, the cooperative could not dispose of the property, even involuntarily, without RUS approval. *618 F.2d at 602*.

A district court in Louisiana followed the Ninth Circuit's reasoning in *City of Morgan City v. South Louisiana Elec. Coop. Assoc., et al., 837 F. Supp. 194, 195 (W.D. La. 1993)*. The court stated the issue as follows: the RUS's "approval authority" under *§ 907* as to a condemnation by a state or city of electric facilities which are indebted to the REA. *Id.* The court cited *Pend Oreille* and *Big Bend* in holding that the RUS has the authority to approve or disapprove of any disposition of such property, even involuntary condemnation. *837 F. Supp. at 196*. The court reasoned that Congress gave the RUS "the right to protect a **[**26]** declared national interest in electrifying rural America and a small measure of safety for ensuring continued existence of the 'reasonably adequate' security upon which it bases its decision to make a long term loan." *Id. at 198*. Thus, under *§ 907*, approval of the RUS is a prerequisite to any proposed expropriation, "contrary state law notwithstanding." *Id.* Since the RUS had made a determination that the City of Morgan City's proposed condemnation would decrease the ability of the RUS to serve its purpose, the court granted the cooperative's and RUS's motion to dismiss. The court also cited extensively to an analogous Fifth Circuit opinion, *City of Madison v. Bear Creek Water Assoc., Inc., et al., 816 F.2d 1057 (1987). Bear Creek* in-

volved an eminent domain proceeding to condemn water facilities of an association indebted to the Farmers Home Administration ("FmHA"), under a statute with some language differing from that of the REA. *816 F.2d at 1059; 7 U.S.C. § 1926(b)*. For example, *7 U.S.C. § 1926(b)* provides **[*763]** that water services provided to rural areas through an association receiving **[**27]** federal loans under the act "shall not be curtailed or limited by the inclusion of the area served by such association within the boundaries of any municipal corporation or other public body ...." There is no comparable language in the REA. Nevertheless, as with the REA, the purpose behind the statute was to provide water to rural areas and to provide financial security to associations providing such services. *Bear Creek, 816 F.2d at 1060*. The *Bear Creek* court stated:

> The case at bar exemplifies the evil Congress wished to avoid .... Even if fair value is paid for the lost facilities, such an action would inevitably have an adverse effect on the remaining customers of Bear Creek, in the form of lost economies of scale and resulting higher per-user costs. To allow expanding municipalities to "skim the cream" by annexing and condemning those parts of a water association with the highest population density (and thus the lowest per-user cost) would undermine Congress's purpose of facilitating inexpensive water supplies for farmers and other rural residents and protecting those associations' ability to repay their FmHA debts.

816 F.2d at 1060 **[**28]** (citing *Public Utility Dist. No. 1 of Franklin Cty. v. Big Bend Elec. Coop., Inc., 618 F.2d 601 (9th Cir. 1980))*. Congress' intent with regard to the REA to avoid "skimming the cream" is not as clear, given the lack of a section comparable to that in *7 U.S.C. § 1926(b). See infra.*

On appeal, the Fifth Circuit affirmed on alternative grounds: that the state law condemnation would frustrate the federal purpose behind the REA. *City of Morgan City v. South Louisiana Elec. Coop. Assoc., et al., 31 F.3d 319, 320 (5th Cir. 1994)*. The Fifth Circuit specifically "saved for another day" the issue of whether *§ 907* confers authority on the RUS to withhold approval of an involuntary disposition. *Id. at 322*. The court noted that, in 1936, the purpose behind the REA was to ensure that electric service be provided to rural America by offering low interest insured loans and loan guarantees to cooperatives serving rural areas. *Id.* Louisiana, much like Tennessee, had a statute allowing any municipality to expropriate property whenever necessary for the public interest as determined by the municipality. The court, citing **[**29]** *Pend Oreille* and *Bear Creek,* held that the expropriation "would 'stand as an obstacle' to the repayment of federal loans, to the financial viability of federally financed electricity cooperatives, and ultimately, to the maintenance of electricity service to rural areas." *Id. at 324*. Morgan City had argued that the number of consumers was too small to have any such effect, but the court found that 252 users in a densely populated area would be significant to the cooperative. *Id.* The court held: "Permitting Morgan City to condemn these 252 users would pave the way for piecemeal erosion of other high-density service areas adjacent to Morgan City and other cities." *Id.*

The United States Supreme Court arguably altered the tone of the debate in 1983 with its decision in *Arkansas Elec. Coop. Corp. v. Arkansas Public Serv. Commission, 461 U.S. 375, 76 L. Ed. 2d 1, 103 S. Ct. 1905 (1983)*. The Court was faced with a challenge by an electric cooperative that received funding through the REA to the jurisdiction of the Arkansas Public Service Commission [Arkansas PSC] to control its rates. *Id. at 377*. The plaintiff cooperative **[**30]** in this case did not

actually provide power directly to rural individuals, but sold it to its member cooperatives who then distributed the power. *Id.* The Court first noted that, if the cooperative were not under the supervision of the RUS, then the rates it charged would be subject exclusively to federal regulation under the Federal **[*764]** Power Act. *461 U.S. at 381*. The Arkansas PSC asserted jurisdiction over the rates charged by the member cooperatives based on state statutes. *Id. at 382*. The cooperative asserted that state regulation of the rates was preempted by the REA. *Id.* The Arkansas Supreme Court upheld the Arkansas PSC's jurisdiction over rates, and the United States Supreme Court affirmed. *Id.* The Court initially held: "Nothing in the *Rural Electrification Act* expressly pre-empts state rate regulation of power cooperatives financed by the [RUS]." *Id. at 385*. As to the argument that the state's involvement would frustrate the important federal interest behind the REA, the Court responded that "the legislative history of the *Rural Electrification Act* makes abundantly clear that, although the [RUS] was expected to play **[**31]** a role in assisting the fledgling rural power cooperatives in setting their rate structures, it would do so within the constraints of existing state regulatory schemes." *Id. at 386*. The Court continued:

> There may come a time when the [RUS] changes its present policy, and announces that state rate regulation of rural power cooperatives is inconsistent with federal policy. If that were to happen, and if such a rule was valid under the *Rural Electrification Act*, it would of course pre-empt any further exercise of jurisdiction by the Arkansas PSC .... the PSC can make no regulation affecting rural power cooperatives which conflicts with particular regulations promulgated by the [RUS]. Moreover, even without an explicit statement from the [RUS], a particular rate set by the Arkansas PSC may so seriously compromise important federal interests, including the ability of [the cooperative] to repay its loans, as to be implicitly pre-empted by the *Rural Electrification Act*. We will not, however, in this facial challenge to the PSC's mere assertion of jurisdiction, assume that such a hypothetical event is so likely to occur as to preclude the setting of any rates **[**32]** at all.

Id. at 388-89 (internal citations omitted). Thus, *Arkansas Electric* involved a different set of facts -- setting rates instead of condemning facilities -- and was decided on a facial challenge to the state agency's jurisdiction. Nevertheless, the Court's reading of the REA is instructive. First, it is clear from the legislative history that the federal statute is meant to work within existing state regulatory frameworks. Second, it is clear that any action by a state that did in fact "seriously compromise important federal interests" might be pre-empted by the REA.

In a published denial of a petition for rehearing, the Fifth Circuit reaffirmed its holding in *Morgan City* and distinguished *Arkansas Electric* because it involved a facial challenge to the state's power to regulate a rural cooperative's wholesale electric rates. *City of Morgan City v. South Louisiana Elec. Coop. Assoc., et al., 49 F.3d 1074, 1075 (5th Cir. 1995)*. In other words, the Fifth Circuit announced that *Arkansas Electric* did not change its stance. *But see City of Morgan City v. South Louisiana Elec. Coop. Assoc., et al., 49 F.3d 1074, 1076 (5th Cir. 1995)* **[**33]** (Jones, J., dissenting) ("The panel opinion and opinion on rehearing in this case have, under the rubric of 'frustration preemption,' approved a breathtaking federal powergrab by REA from local government units that otherwise enjoy broad eminent domain authority."). The Supreme Court denied *certiorari. City of Morgan City v. South Louisiana Elec. Coop. Assoc., et al., 516 U.S. 908, 133 L. Ed. 2d 196, 116 S. Ct. 275 (1995)*. The Fifth Circuit has, however, held that the RUS does not have preemptive author-

ity to regulate the rates charged by a utility in default of its loans from RUS. *See In re Cajun Elec. Power* **[*765]** *Coop. Inc., 109 F.3d 248, 257 (5th Cir. 1997).*

The Tenth Circuit, on the other hand, held that the Ninth and Fifth Circuit views were in error after *Arkansas Electric. See City of Stillwell v. Ozarks Rural Elec. Coop. Corp., et al., 79 F.3d 1038 (10th Cir. 1996)*. The court was faced with a situation much like the one in the present case, and in *Morgan City* and *Pend Oreille,* in which the city under state law sought to condemn electric facilities and service rights of an electric cooperative receiving funding under the **[**34]** REA. *79 F.3d at 1040*. Relying on *Morgan City* and *Pend Orielle,* the district court held that the proposed condemnation would frustrate the purpose of the REA and granted summary judgment for the cooperative. *79 F.3d at 1041*. The Tenth Circuit reversed. *Id.* The court emphasized that the Supreme Court in *Arkansas Electric* specifically stated that the REA was supposed to assist rural cooperatives within the existing state regulatory schemes, and that there was no express language preempting state statutory schemes allowing condemnation by cities. *79 F.3d at 1044*. The court reasoned that regulation of utilities is one of the most important functions traditionally associated with the police power of the state, and the primary purpose of the REA is simply to electrify rural America at affordable rates. *Id.* The court refused to adopt the cooperative's argument that this purpose also encompassed "assurances that what is left after a proposed condemnation will be able to efficiently and economically continue its mission of providing reliable, low priced electric service in rural America." *Id.* (quoting the defendant's brief at 14). **[**35]** The Tenth Circuit instead asserted that, once an area is included within a municipality, it is no longer "rural" and clearly falls outside the ambit of the REA. *Id.* According to the court, the Supreme Court in *Arkansas Electric* endorsed exactly the type of federal/state interrelation exhibited in Oklahoma. *Id.* The REA was not meant to regulate the operation of rural electric cooperatives, "it merely assists their operation by offering low interest financing." *79 F.3d at 1045*. The state, by contrast, establishes the framework under which the REA works, and part of that framework is to place a limit on a rural cooperative's powers to extend beyond rural areas and into cities. *Id.* This limitation, the court held, did not "frustrate the purpose" of the REA at all. *Id.*

The *City of Stillwell* court also specifically rejected the cooperative's "skimming the cream" argument by distinguishing *Morgan City, Bear Creek,* and *Pend Oreille. Id.* Initially, the court pointed out that *Bear Creek* involved a different federal statute and was not applicable. *Id.* As for *Morgan City* and *Pend Oreille,* the court emphasized that in both of those cases **[**36]** the RUS had come forward to oppose the proposed condemnation and asserted that it would result in substantial harm to the federal rural electrification program. *Id.* In *City of Stillwell,* the RUS did not oppose the condemnation and specifically described the impact of the proposed condemnation as "minimal." *Id.* Citing *Arkansas Electric,* the court also rejected the "skimming the cream" argument because it relied on an interpretation of the REA as contemplating a system where rural customers are subsidized by relying on revenues generated from urban customers. *79 F.3d at 1046*. The Tenth Circuit could not find any such express or implied intent in the REA; rather, the intent was to subsidize rural cooperatives by offering low-interest financing, not by making available to them more lucrative markets for electric power. *Id.* (citing *Wabash Valley Power Ass'n v. REA, 988 F.2d 1480, 1483-84 (7th Cir. 1993)* (invalidating RUS regulations attempting to control rates for a bankrupt cooperative in order to ensure that its loans were repaid)). **[*766]** Congress could have chosen to have urban electricity consumers subsidize its aims of rural electrification, **[**37]** and thus eliminate the need to offer low-interest loans to cooperatives, but it did not, and "it is not the province of

the courts to design new methods of financing rural electrification that Congress never contemplated." *Id.*

More recently, the Supreme Court of Alaska has considered each of the different views and adopted the *City of Stillwell* holding. *Tlingit-Haida Regional Electrical Authority v. Alaska, et al., 15 P.3d 754 (Alaska 2001)*. The court held that a public utility commission, which had granted rights to serve a city to two different utilities, one of which had received loans under the REA, was not preempted by the REA because the utility could still repay its loans. *15 P.3d at 768*. The court initially noted that the RUS is more of a lending agency than a classic public utility regulatory body, whose central purpose is to lend money to promote rural electrification. *15 P.3d at 767* (citing *Arkansas Electric, 461 U.S. at 386*). The court stated that, because the REA was designed to promote rural electrification, direct interference with property mortgaged to the RUS "could conceivably frustrate the purposes **[**38]** of the Act." *Id.* Such is not the case, however, if the state regulation is legitimate and allows the utility to recoup its investments. *Id.* The court specifically referred to *City of Stillwell* as the "better view" than *Morgan City*. *Id. at 767* & n.44. The cooperative attempted to distinguish *City of Stillwell* because in *Tlingit-Haida,* an RUS officer testified that losing the disputed service area would doom the utility and its ability to repay the loans. *Id. at 768*. The court, however, refused to rely on such a personal prediction, but instead deferred to the state commission's determination that the utility would be capable of surviving the loss of the contested service area. *Id.* [7]

7 There has also been academic support for the proposition that the REA was never intended to preempt state condemnation law in the manner permitted in *Morgan City*. *See* Joel A. Youngblood, "Alive and Well; The Rural Electrification Act Preempts State Condemnation Law: *City of Morgan City v. South Louisiana Electric Cooperative Ass'n," 16 Energy L.J. 489 (1995)*. The author states: "The Fifth Circuit Court of Appeals, in a direct affront to legislative intent, has created a far-reaching and dangerous precedent favoring unwarranted interference with the most fundamental of states' rights." *16 Energy L.J. at 490*. Youngblood also fears that, without authority to annex and condemn outlying areas, cities will be limited in their ability to promote growth and economic development. *16 Energy L.J. at 508*.

[39]** *(2) Application*

There are good policy arguments on both sides of this debate. Defendants argue in favor of the overarching policy of rural electrification and the broad needs of farming communities. Cookeville, on the other hand, argues for deference to states in their traditional arena of utilities, and in favor of allowing cities to grow with their needs. The Ninth and Fifth Circuits have adopted views favorable to the Defendants, while the Tenth Circuit has sided with Cookeville's arguments. The Sixth Circuit has yet to address the matter. After *Arkansas Electric,* the Tenth Circuit's arguments are quite persuasive, based on the fact that the REA was meant only to lend money to support ruralization of electricity. *See City of Stillwell v. Ozarks Rural Elec. Coop. Corp., et al., 79 F.3d 1038, 1045 (10th Cir. 1996)*. The REA does specifically say it will work within the constraints of existing state regulatory schemes, and logically once a municipality condemns property under state law then it is no longer "rural" and covered by the REA. *79 F.3d at 1044*. Similarly, the conclusions of the **[*767]** *City of Stillwell* court against the "skimming the **[**40]** cream" argument are particularly persuasive -- Congress could have adopted legislation aiding rural electricity by forcing urbanites to subsidize it, but instead opted for low-interest loans. *79 F.3d at 1045*.

In *City of Stillwell,* however, the RUS did not oppose the condemnation and came forward to argue that it would not frustrate the purposes of the REA. *Id.* This fact by itself distinguishes that case from the one at bar. *But see Tlingit-Haida Regional Electrical Authority v. Alaska, et al., 15 P.3d 754, 768 (Alaska 2001)* (following *City of Stillwell* despite the fact that an RUS officer testified against the condemnation). In the present case, the RUS has not actually filed a Response to Cookeville's Motion to Dismiss or otherwise taken a stance on the issue of frustration of the REA. [8] The key point at this time is that the RUS has not come out to say that it does *not* oppose the condemnation, as it did in *City of Stilwell.* UCEMC and CFC, on the other hand, have argued that the condemnation would frustrate the purposes of the REA. The Court is left with conflicting arguments, each of which offers compelling factual and legal analyses, **[**41]** and no firm position taken by the relevant federal agency. [9]

8 Failure to file a response is usually viewed as non-opposition to the motion. Given the tenor of the RUS's Response to the Motion to Remand, however, it appears likely that the RUS will argue that this condemnation would indeed frustrate the purposes of the REA. As noted earlier, UCEMC has filed a lengthy response taking this position on which the other Defendants could rely. In any event, it is not necessary for the Court to speculate as to the RUS' position at this time.

9 The Ninth and Fifth Circuits correctly give deference to the RUS's determination in this area of their expertise. *See Public Utility District No. 1 of Franklin Cty. v. Big Bend Elec. Coop., Inc., 618 F.2d 601, 603 (9th Cir. 1980). But see Tlingit-Haida, 15 P.3d at 768* (deferring to the state commission's view that the utility would survive the condemnation over the testimony of an RUS officer that it would not).

Ultimately, this case will **[**42]** come down to just that factual question: whether *this* annexation will frustrate the purposes of the REA. Because this is a factual question to which the Court needs more discovery and proof, Cookeville's Motion for Summary Judgment is DENIED.

III. Conclusion

For the foregoing reasons, the Court DENIES both Cookeville's Motion for Remand and Cookeville's Motion for Summary Judgment.

It is so ORDERED.

3/24/03

Thomas A. Wiseman, Jr.

Senior United States District Judge

ORDER

Before the Court are two motions filed by Plaintiff State of Tennessee ex rel. City of Cookeville, Tennessee ("Plaintiff"). The first is Plaintiff's Motion to Remand the Case for Lack of Subject Matter Jurisdiction (Doc. No. 14), asking the Court to remand the case to the state court from which it was removed by Defendant Rural Utilities Service. The second is Plaintiff's Motion for Summary Judgment Against Upper Cumberland Electric Membership Corporation on Plaintiff's Count Five

(Doc. No. 29). For the reasons set forth in the accompanying memorandum, both of Plaintiff's motions are DENIED.

It is so ORDERED.

Thomas A. Wiseman, Jr.

Senior United States District Judge

LAW OFFICES
MOORE, RADER, CLIFT AND FITZPATRICK, P.C.
46 NORTH JEFFERSON AVENUE
COOKEVILLE, TENNESSEE
38501

L. DEAN MOORE
DANIEL H. RADER III
MICHAEL E. CLIFT
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FACSIMILE
(931) 526-3092

RECEIVED
OCT 10 2007
ASB

October 9, 2007

Mr. W. Brantley Phillips, Jr.
Bass, Berry & Sims PLC
315 Deaderick Street, Suite 2700
Nashville, TN 37238-3001

RE: City of Cookeville v. UCEMC, et al.

Dear Brantley:

Thank you for your letter of September 28, 2007.

First, I am enclosing a copy of the Resolution passed by the City Council authorizing the City to proceed with the acquisition of six additional annexed areas from Upper Cumberland Electric Membership Corporation. It is my understanding, pursuant to Tennessee Code Annotated § 6-51-112 we have ninety (90) days to negotiate price and an acquisition plan. We are anxious to work with Upper Cumberland Electric Membership Corporation to do that and provide a smooth transition for these electric customers.

In regard to the nine areas that the City of Cookeville was permitted to acquire by Judge Wiseman's Order, we obviously have a fundamental difference of opinion on the interpretation of Judge Wiseman's original Memorandum Opinion and Order; the subsequent clarification Order which Judge Wiseman entered; and the specific finding at the Sixth Circuit Court of Appeals regarding this.

At our last meeting at Cookeville City Hall it was my distinct impression that Upper Cumberland Electric Membership Corporation could not make any firm commitments with respect to either a timetable or a cost of any of the proposals under discussion. In fact, you went out of your way, on several occasions, to make clear that no definitive timetable or costs could be established and you mentioned a myriad of potential obstacles that would, in effect, totally preclude any reasonable expectation that the City might have to work with Upper Cumberland Electric Membership Corporation to move the electric service line to Cookeville's urban growth boundary and agree to a 20 year moratorium. You raised the spectre of environmental protests such as those associated with the projected power line over Buck Mountain and into Algood, and you also raised the spectre of objections from RUS and other governmental agencies.

Accordingly, the City felt that it had no alternative but to proceed as expeditiously as possible with acquiring the nine areas which are the subject of this litigation and to commence the process to acquire the customers of the six additional annexed areas.

As I mentioned in my previous letter, I understand that there have been several meetings and several proposals have been discussed. However, it is the City's belief that Upper Cumberland Electric Membership Corporation has purposefully delayed the implementation of the acquisition of this property - - and in fact, it was Upper Cumberland Electric Membership Corporation - - together with the other Defendants - - that procured an injunction that precluded the City from commencing the acquisition of this property. So not only was Upper Cumberland Electric Membership Corporation uncooperative in facilitating this transfer, they obtained a specific Court Order precluding it. Of course, the Sixth Circuit has reversed that injunction.

It was our considered opinion, that the Sixth Circuit Court of Appeals had affirmed Judge Wiseman's monetary judgment and reversed the injunction allowing the City to proceed with acquisitions. The City commenced to do so. Accordingly, we sent the letter to Upper Cumberland Electric Membership Corporation giving September 15th as a target date to commence that acquisition. We were hopeful that Upper Cumberland Electric Membership Corporation would accede to this request and work with the City in the timely and orderly transfer of the other five annexed areas through a specific time based reintegration process.

Of course, Upper Cumberland Electric Membership Corporation objected. Rather than send the Cookeville Electric Department to physically acquire these areas again, since you objected, we felt that the most prudent course of action was to ask Judge Wiseman to conduct a hearing and establish a protocol for the implementation of his Order. We feel that the timetable and procedure that was outlined in our last letter to you was very reasonable, but if you have an alternative suggestion, we would be more than happy to consider it. But, as yet, Upper Cumberland Electric Membership Corporation has not put forth a proposed time table, nor has it put forth any specifics regarding any alleged increased costs that it thinks it might be entitled to receive.

We believe that Judge Wiseman's Order is very clear that the $5.8 million dollars is a maximum, and we do feel that Upper Cumberland Electric Membership Corporation is responsible for any increased costs since it specifically obtained the injunction and precluded the acquisition of the four areas that do not require reintegration and did not immediately begin the reintegration process.

MOORE, RADER, CLIFT AND FITZPATRICK, P.C.

Mr. Carl V. Brandt
October 9, 2007
Page 3

I might be in error, but I do not recall that there was any stay in Judge Wiseman's Order pending the appeal and the only Order obstructing the implementation of his Order was the injunction procured by UCEMC.

In fact, it is my distinct understanding that UCEMC did not contest or appeal the portion of his Order permitting the City of Cookeville to acquire the customers in the nine areas which it had annexed so its implementation was, essentially, a foregone conclusion.

It is my understanding that it is the philosophy of the City of Cookeville that its Electric Department should serve the citizens of Cookeville within its City limits. Tennessee law permits this. It will serve no purpose for Upper Cumberland Electric Membership Corporation to be obstructionists in this procedure other than increase the rates to its own customers and ultimately increase the potential rates to City of Cookeville customers. It is my belief that Upper Cumberland Membership Corporation has a fiduciary duty to attempt to minimize those rates but their tactics have served just the opposite purpose.

I hope that Upper Cumberland Membership Corporation will reconsider its position and present a proposal to the City of Cookeville with a specific timetable for the reintegration and acquisition and will permit the City to begin serving the customers in the four areas that require no reintegration.

I look forward to hearing from you regarding this.

Yours very truly,

MOORE, RADER, CLIFT
AND FITZPATRICK, P. C.

Daniel H. Rader III

DHRIII/hsj
cc: Mr. Jack O. Bellar
Ms. Andree Blumstein

Case 2:02-cv-00093 Document 243-1 Filed 10/25/2007 Page 4 of 5

RESOLUTION

A RESOLUTION OF THE COUNCIL OF THE CITY OF COOKEVILLE, TENNESSEE, TO PROVIDE FORMAL NOTIFICATION TO UPPER CUMBERLAND ELECTRIC MEMBERSHIP CORPORATION RELATIVE TO THE PURCHASE OF SERVICE RIGHTS IN SIX (6) ANNEXED AREAS

RESOLUTION NUMBER: R07-10-17
REQUESTED BY: TONY PEEK
PREPARED BY: TONY PEEK
APPROVED AS TO FORM AND CORRECTNESS:
(City Attorney)
ADOPTED 10-4-07
MINUTE BOOK ____ PAGE _____

WHEREAS, the City of Cookeville, Tennessee (the "Municipality"), desires to provide formal notification to Upper Cumberland Electric Membership Corporation of the City of Cookeville's intent to purchase, pursuant to T.C.A 6-51-112, the Upper Cumberland customers and facilities in the following six (6) areas that have been annexed into the City of Cookeville: Putnam County/North Washington Avenue Area; Hall/Salem Road Area; Shag Rag Road Area; Gaw/Dodson Branch Road Area; Rebecca Place/Bunker Hill Road Area; and the Bunker Hill Road/Lovelady Road Area.

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF COOKEVILLE, TENNESSEE, AS FOLLOWS:

That the City Council (the "Council") of the Municipality authorizes the City of Cookeville Electric Department to proceed with necessary steps in order to provide electrical service to the customers in the aforementioned annexed areas of the City of Cookeville and to formally notify UCEMC and begin the purchase process pursuant to T.C.A § 6-51-112.

Adopted, this the 4th day of October, 2007. This resolution shall take effect from and after its final passage, the public welfare requiring it.

(Mayor)

ATTEST:

(City Clerk)

Case 2:02-cv-00093 Document 243-1 Filed 10/25/2007 Page 5 of 5

CITY OF COOKEVILLE
TENNESSEE
"Where good things happen"

COOKEVILLE ELECTRIC DEPARTMENT
55 West Davis Road
Cookeville, TN 38506
(931) 526-7411 Fax (931) 526-2835

April 19, 2004

Mr. Carl V. Brandt
Upper Cumberland EMC
P.O. Box 159
S. Carthage, TN 37030-0159

Dear Mr. Brandt:

On March 21, 2003 I sent you a letter stating that the Cookeville City Council approved on second and final reading Ordinance # O030203 annexing 86 acres of property at 2353 Hillham Road (Parcel 144, Map 27) owned by Putnam County. This annexation area became effective on April 19, 2003. This is the remainder of the Cookeville High School property. There appears to be a couple of buildings receiving electrical service from UCEMC on this property.

Pursuant to TCA 6-51-112 the City of Cookeville desires to purchase your facilities in this area.

Should you need additional information or additional maps of the area, please do not hesitate to call.

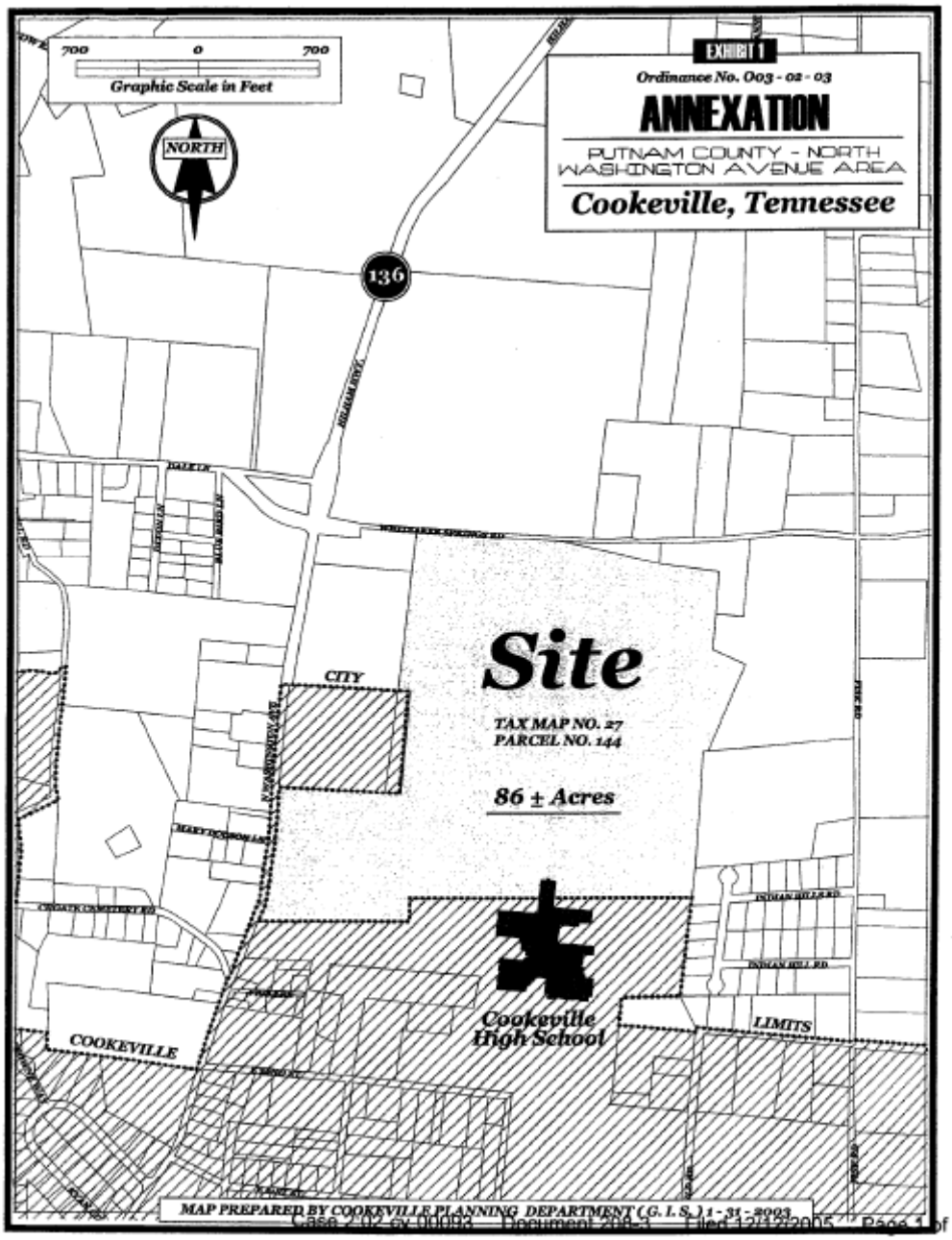
Sincerely,

Joseph A. Peek
Electric Director

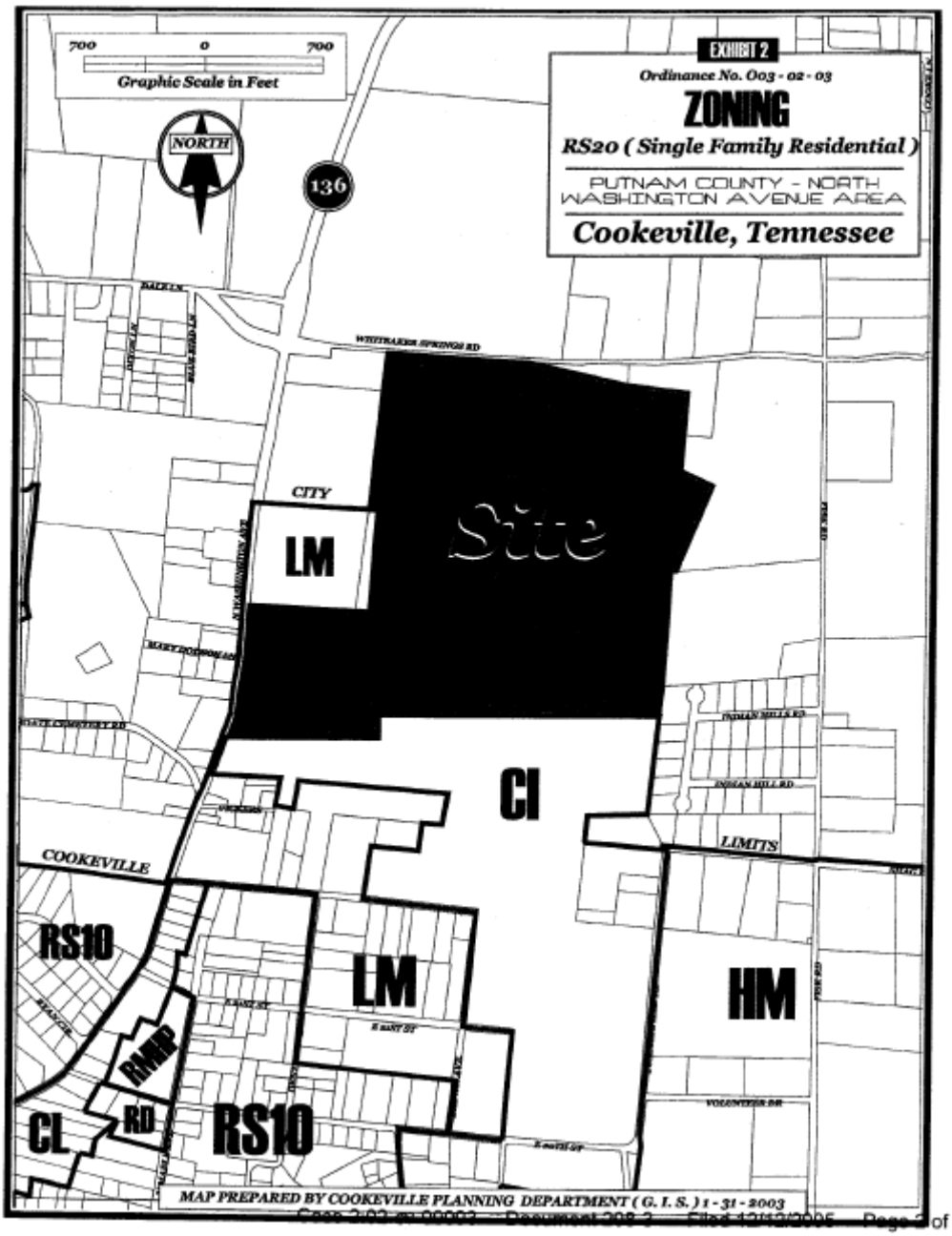
cc: Regina Walker, CED

Case 2:02-cv-00093 Document 208-4 Filed 12/12/2005 Page 2 of 2

Davis – page 139

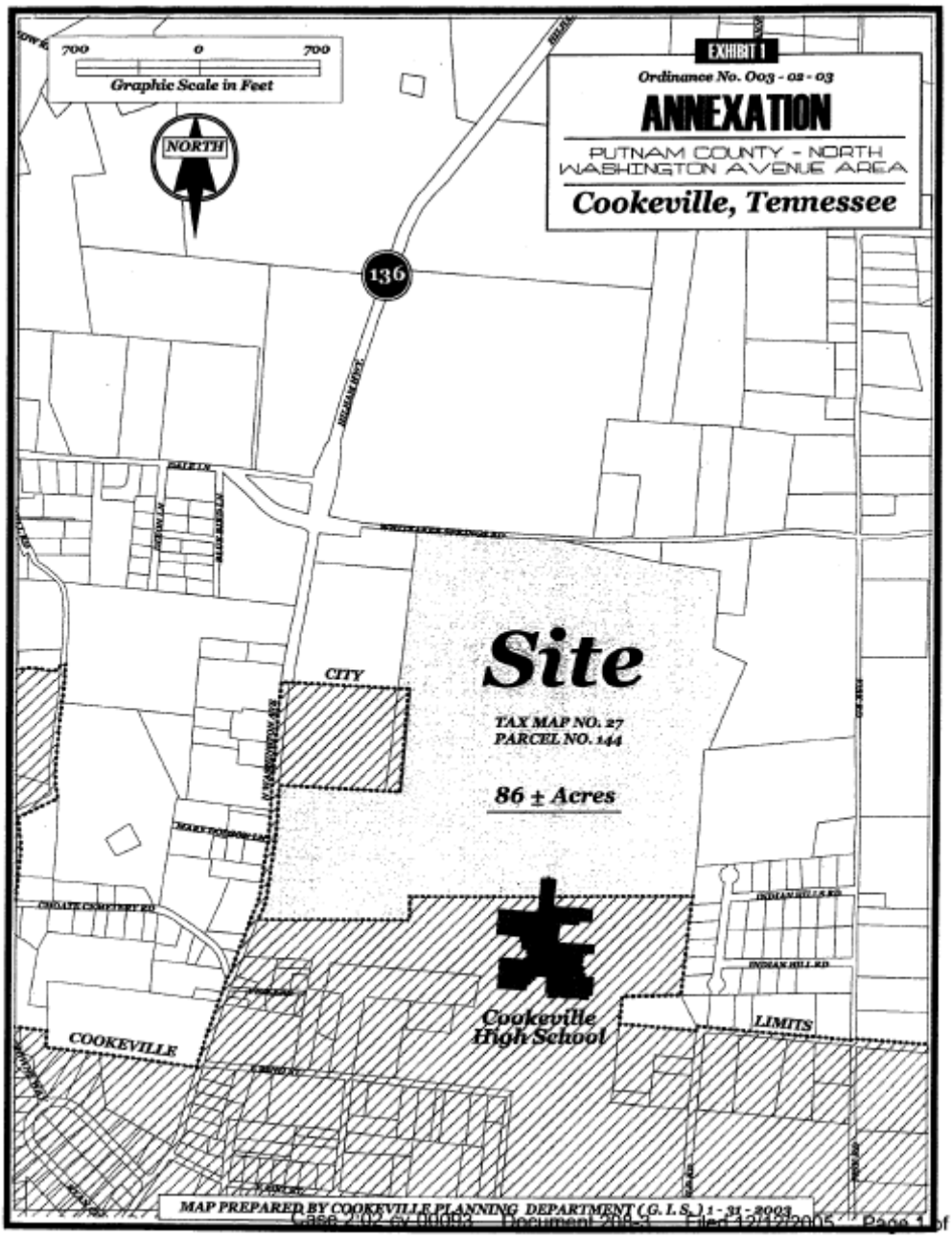


Davis – page 140

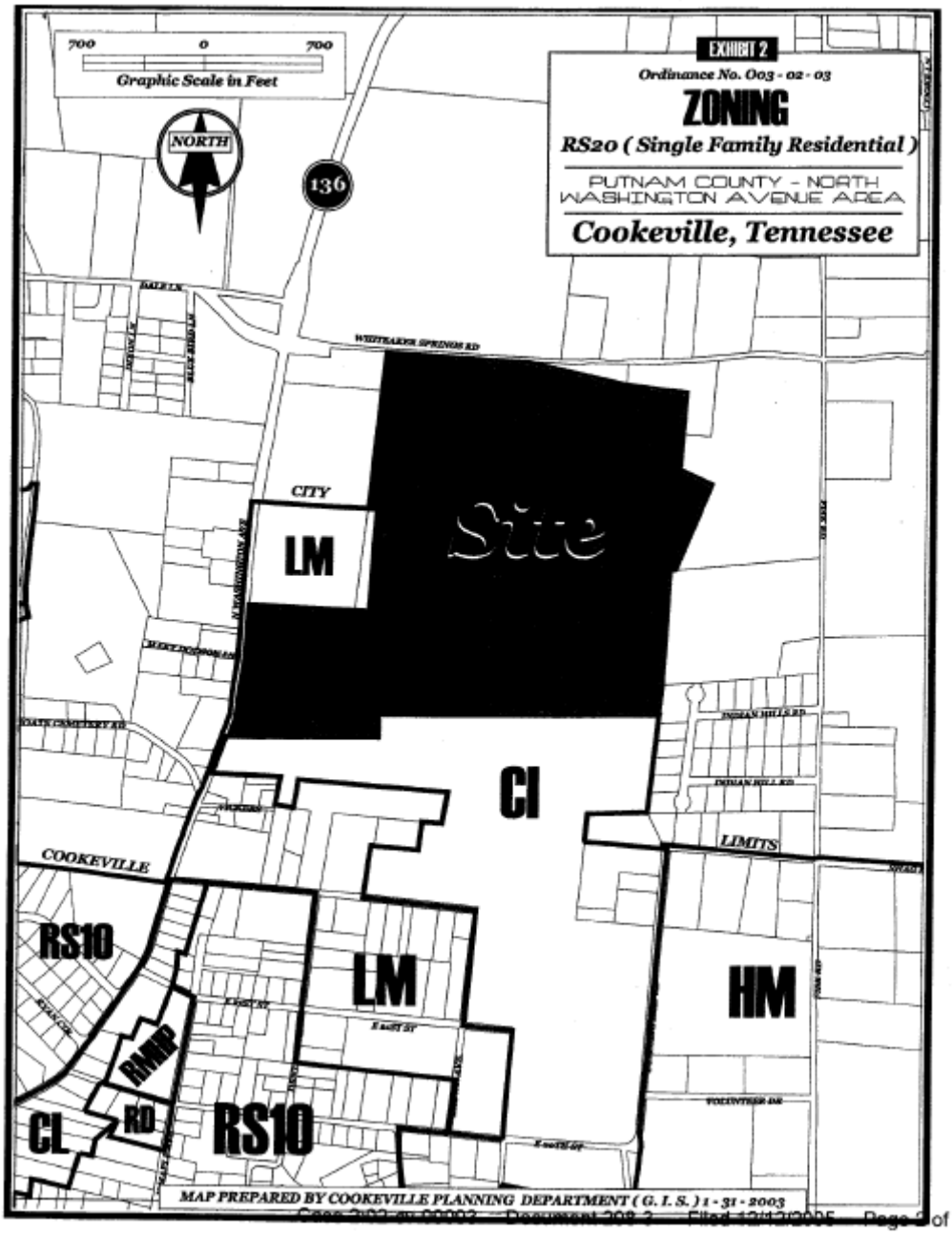


Case 2:03-cv-00002 Document 208-2 Filed 12/12/2005 Page 2 of 2

Davis – page 141



Davis – page 142



Case 2:02-cv-00003 Document 209-2 Filed 12/12/2005 Page 2 of 2

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CITY OF COOKEVILLE, TENNESSEE,	)
Plaintiff	) No. 2:02-0093
	) Consolidated with
	) No. 2:03-0042
VERSUS	)
	) Senior Judge Wiseman
	) Magistrate Judge Brown
UPPER CUMBERLAND ELECTRIC MEMBERSHIP CORPORATION, ET AL.,	)
Defendants	)

AFFIDAVIT OF JOSEPH A. PEEK

STATE OF TENNESSEE

COUNTY OF PUTNAM

Joseph A. Peek, being first duly sworn, makes oath as follows:

1. My name is Joseph A. Peek. I am an adult resident citizen of Cookeville, Tennessee. I am the Director for the Cookeville Electric Department, and I am an employee of the City of Cookeville.

2. I am familiar with the electrical distribution system in the City of Cookeville, and I am familiar with the Upper Cumberland Electrical Distribution System immediately adjacent to the City of Cookeville and as it presently exists within the Cookeville city limits.

3. I am familiar with the nine annexation areas which the City of Cookeville elected to acquire from Upper Cumberland Electric Membership Cooperation pursuant to *Tennessee Code Annotated* § 6-51-112, and which are the areas involved in this particular suit.

4. Four of the nine annexation areas in the northwestern quadrant of the City of Cookeville are small areas. Attached as Exhibit 1 is a color map on which these four areas have been circled in red. These areas are currently served by Upper Cumberland Electric Membership Cooperation. No reintegration of Upper Cumberland Electric Membership Cooperative is required for these areas to be served by the City of Cookeville and transferred to the City of Cookeville Electric Department. These four areas are as follows:

A. Matheney/Cora Road: This area consisted of one customer at the time of annexation. The one customer was a City of Cookeville Sewer Pumping Station. After the initial judgment, the City was approached by a developer desiring power from the City for an assisted living facility. Since this was a new customer, the City constructed new facilities and began providing electrical service. The Court required that this customer be given to Upper Cumberland Electric. To avoid inconvenience to the customer, the City agreed to allow Upper Cumberland Electric Membership Cooperation to feed power to the new customer through the City's electrical facilities. Upper Cumberland Electric Membership Cooperation facilities to this area are radially fed and can be easily detached without modifications to their main feeder. Accordingly, no reintegration would be required at this particular area since the existing Upper Cumberland distribution loop would not be affected.

B. Presley/West 12th Street: This area is fed by a single phase line and can be easily detached from Upper Cumberland Electric Membership Cooperation's main feeder without any modifications. Accordingly, no reintegration would be required at this particular area since the existing Upper Cumberland distribution loop would not be affected.

C. O'Neil/West 12th Street: This area is contiguous to the Presley/West 12th Street area previously mentioned. This area is fed by a single phase line and can be easily detached from UCEMC's main feeder without any modifications. Accordingly, no reintegration would be required at this particular area since the existing Upper Cumberland distribution loop would not be affected.

D. Shipley Road: This area consists of 10 customers. They are served by transformers attached to UCEMC's main feeder but can be easily detached and

transferred to an existing City of Cookeville power line without any modifications to UCEMC's main feeder. Accordingly, no reintegration would be required at this particular area since the Upper Cumberland distribution loop would not be affected.

4. This information is true and is based upon my own personal knowledge and my experience in electrical service for 32 years.

Further Affiant saith not.

JOSEPH A. PEEK

STATE OF TENNESSEE

COUNTY OF PUTNAM

Sworn to and subscribed before me this 24th day of September, 2007.

NOTARY PUBLIC

HEATHER JONES STATE OF TENNESSEE NOTARY PUBLIC PUTNAM COUNTY

My Commission Expires:

9.23.08

3

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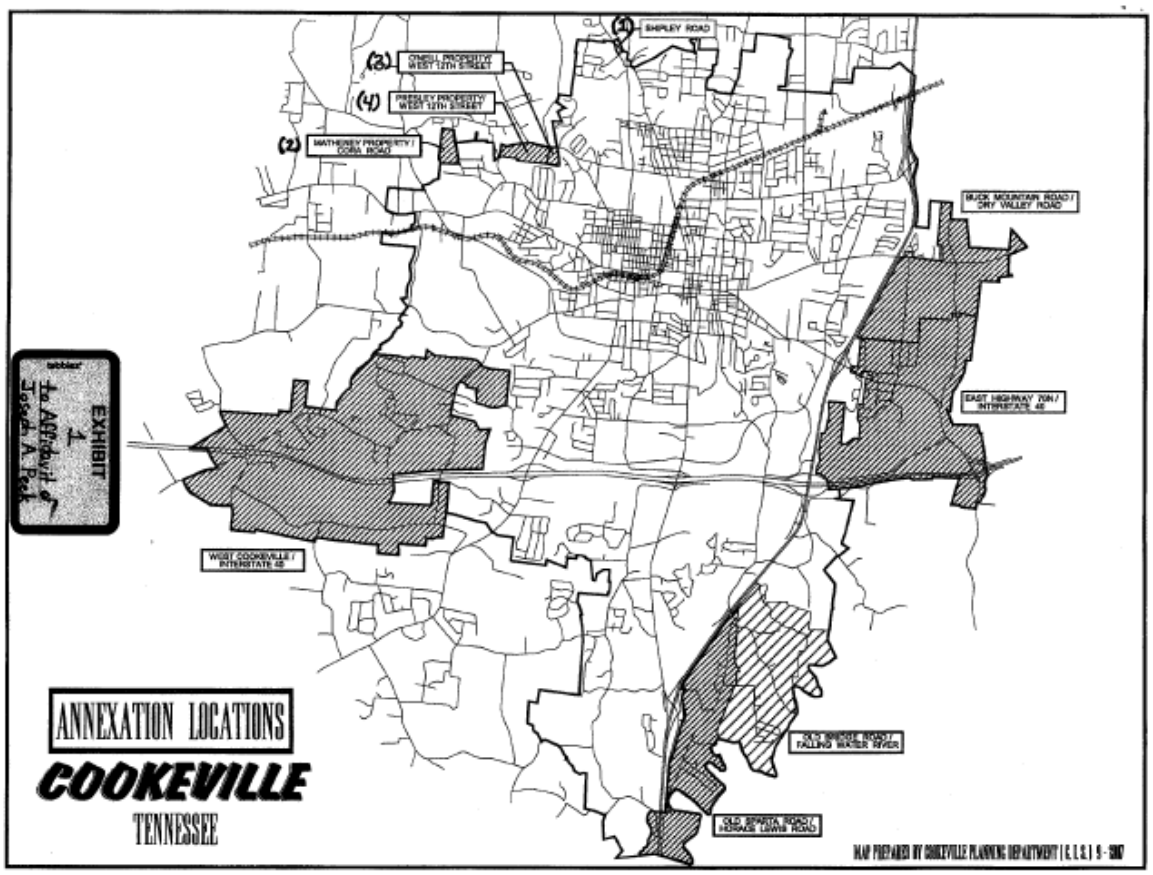
Davis – page 146



Case 2:02-cv-00093 Document 236-1 Filed 09/24/2007 Page 5 of 5

Tennessee Valley Authority
400 West Summit Hill Drive
Knoxville, Tennessee 37902-1401

Anda A. Ray
Vice President
Environmental Stewardship and Policy

January 14, 2008

Gary A. Davis & Associates
Attorneys at Law
61 North Andrews Avenue
Post Office Box 649
Hot Springs, North Carolina 28743

Re: Power Supply Upgrade - Algood 161-kV Transmission Line, Putnam County, Tennessee

Dear Mr. Davis:

We appreciate the time the members of the Buck Mountain Community Organization took to meet with us on January 8 to express their concerns about the proposed Algood transmission line routing.

Below are responses to the items you requested in your January 9 letter to us.

1. Data on load for the TVA West Cookeville substation.

   - Under your recent Freedom of Information Act (FOIA) request, an annual summary of the peak load on the West Cookeville transformer bank was provided. We now have additional data for 2007. The West Cookeville transformer bank's loading capacity is 153 megavoltampere (MVA), and the 2007 loading on the bank was 150.4 MVA, which is close to its maximum rated capacity. Due to the operational sensitivity of substation meter loading data, we will not be providing data at a lower level. However, the data that were provided to you earlier and the 2007 data clearly indicate that immediate action is needed to provide some loading relief for the West Cookeville transformer bank.

2. Data on load for the Upper Cumberland Electric Membership Cooperative (UCEMC) substation, unless there is a valid claim that this is subject to an exception for disclosure under the Freedom of Information Act, as amended.

   - The existing Algood substation is owned and operated by UCEMC. Therefore, the data associated with the operation of the substation is managed by UCEMC. Please direct your request for data on the Algood substation to UCEMC. Our preliminary assessment is that a FOIA request to TVA for the Algood substation meter loading data would be subject to agreement from UCEMC to release the information.

printed on recycled paper

3. Any reserve requirements for the West Cookeville substation.

   - Transmission line loading levels are closely monitored by TVA. Numerous factors influence both loading forecasts and actual load. Therefore, TVA does not establish a single level for transmission line reserve margins. However, we typically look for loading relief options when loads approach the maximum operating capacity. As indicated in the response to item No. 1, the West Cookeville substation is already peaking very close to its maximum loading capacity, and mitigating actions need to be in place by the summer of 2008.

4. Any cost evaluation of alternatives in the Draft Environmental Assessment (other than that contained in the One Ownership Study)

   - All cost evaluations performed by Transmission Planning or TVA Cost Estimators were a direct part of the One Ownership Study. This study was previously provided to you. It is important to remember that the cost criterion is only one component used in evaluating alternatives. Other factors, such as environmental, archaeological, existing infrastructures (such as pipelines), etc., eliminate or make some alternatives less desirable.

5. Any documents pertaining to the matrix of siting criteria used to evaluate the alternative routes for the transmission line.

   - There is additional information regarding the siting criteria on the following Web site. This site also contains links to a map and a fact sheet entitled "FACT SHEET TRANSMISSION LINE PREFERRED ROUTE, ALGOOD, TENNESSEE" which provides the rankings for the various alternative routes.

     www.tva.gov/power/projects/cookeville_tn/

Again, we appreciate the sincerity of those we met with on January 8 to strive for greater understanding about the decision process associated with the siting of the Algood transmission line route.

As we committed in the January 8 meeting, we will be providing written acknowledgement of the concerns expressed by the attendees to Ada Haynes.

Sincerely,

Anda A. Ray

Anda A. Ray

Davis – page 149

Herald-Citizen

The Daily Newspaper of the Upper Cumberland

Wednesday

18 Pages — 2 Sections • 50¢

ber 5, 2007

www.herald-citizen.com

TVA says businesses interested in locating in Algood

By LIZ ENGEL
HERALD-CITIZEN Staff

ALGOOD — Three new industries, a bank and a 400-unit apartment complex are just a few of the new businesses expected in the Algood area over the next several years.

Except that it doesn't seem anybody knows anything about them.

"To my knowledge, unless there's something on the drawing board I don't know about, I'm not familiar with it," Algood City Manager Freddie Maxwell said of the growth.

But those additional businesses have been released by the Tennessee Valley Authority (TVA) on its Web site as justification for a new transmission line in the Cookeville and Algood area.

Officials at TVA reached by telephone yesterday said that the information listed on their Web site came from an Upper Cumberland Membership Corporation (UCEMC) report and that generally power distributors like UCEMC know about projects like these before the public — mainly because they have to plan for it.

"They are sort of out in front of big power demanding developments, so that's common," TVA's Allen Miller said. "Companies that are interested in a location, they need to know that (power) can be supplied.

"Of course some of this speculative in some way," Miller said.

Miller said specifically Home Depot, a medical

See TVA, Page A-2

Herald-Citizen Photo/Ty Kennes

Cookeville resident Paul Isbell walks along a portion of his property off Buck Mountain Road this morning. Isbell is one of five property owners refusing to let TVA survey his land. Isbell was served with a court order last week he said surveying work began over the weekend.

FALL

Sleep disorder group

www.herald-citizen.com — Wednesday, September 5, 2007

LOCAL

Lengthy agenda set for Cookeville council meeting

By LINDSAY McREYNOLDS
HERALD-CITIZEN staff

COOKEVILLE — The Cookeville City Council will consider a lengthy agenda tomorrow night at 6 when it meets at city hall on Broad Street.

Under old business, the council will consider the following:

•The second and final reading of an ordinance to rezone 2160 Denton Ave. from RM8 multi-family residential zone to a higher density multi-family residential zone, RM14.

The request to rezone that area was submitted by Charlie Soard and was previously rejected by the Cookeville Planning Commission, but the council agreed in a 3-2 vote back in July to approve the rezoning on the condition of a compromise plan that would presumably limit the number of apartments that could be built there.

The request would allow 65 apartment units on the property up from the 36 located there now.

Tony Kennedy, who represents Soard, said back in July that he was willing to compromise on the number of apartment units. He said he would build 20 instead of 25.

•The second and final reading amending budgets of various city funds and departments for the previous fiscal year.

•The second and final reading of an ordinance to amend the city code pertaining to sewer use ordinance.

Under new business, the council will consider the following:

•Setting a date of Oct. 4 for a public hearing on a rezoning request at 900 N. Washington Avenue from single-family residential to local commercial at the request of developer Chris Dawson for property owned by Martin Medley and L.A. Allen.

•Authorizing the city manager to execute an engineering contract for Capshaw Water Tank removal.

•Amending the city's official street map.

•A resolution to approve one or more loan agreements for providing funds for public works projects.

•Amending the city's personnel policies and procedures manual pertaining to military leave.

•Approval of the 2007 employee wellness screening agreement.

•Approval of property purchase at 428 N. Walnut Ave. by Cookeville Regional Medical Center.

•Approval of the engineering agreement for the comprehensive master plan for Gould Drive extension and commercial park business development.

•Amendment of the power contract for the revisement of the enhanced growth credit program.

TVA: Power company says businesses coming to Algood

From Page A-1

center, Walgreens, a Christian school and the large apartment complex were all listed as potential businesses looking at the Algood area.

Maxwell said at one time last year there were plans to develop 23-acres off Highway 111 for apartments and housing, but that the deal had fallen through.

Institutional Wholesale is planning a 60,000 square foot expansion, and Putnam County School Director Kathleen Airhart has said there are plans to build a new elementary school in the area.

But it's the speculative part that has residents in the path of the transmission line worried — several residents around and along the route have been fighting the line since it was first proposed back in February.

"I've checked with every public official I can find, and nobody knows about three new industries coming in anywhere," Paul Isbell, a resident in the line's path, said. "I don't know where they're getting their information, so we're still questioning that."

But the TVA is continuing along its schedule for construction, regardless.

Surveying work began in July, but TVA spokeswoman Myra Ireland wrote in an e-mail last month that five homeowners had failed to give TVA permission to enter onto their property.

Isbell, who lives along Buck Mountain, was one of them, and said he was served last week with a court order that would grant TVA the temporary right to enter the land to conduct surveys, core drilling and related activities in connection with the transmission line. The order said Isbell had 20 days to file an objection, but Isbell said TVA has already begun the process of cutting trees and laying survey markers along his property.

The transmission line, once completed, will upgrade an Algood substation from 69-kilovolts to 161 kilovolts. Without the upgrade, officials have said, that facility would be overloaded and power outages would be likely. The line is scheduled to be in service by June.

FACT SHEET

TRANSMISSION LINE PREFERRED ROUTE
ALGOOD, TENNESSEE

Based on preliminary environmental review, engineering surveys, and public input, TVA has selected transmission line alternative route 1 as the preferred route for the new transmission line that will power Upper Cumberland EMC's upgraded Algood Substation. TVA will conduct field studies, as required under the National Environmental Policy Act (NEPA), on the preferred transmission line route.

Evaluation Criteria

TVA uses several tools to evaluate alternative routes for new transmission lines and to identify a preferred route:

- Information from property owners, open house participants, interest groups, elected officials, subject matter experts and others
- Topographic maps
- Aerial photography
- Geographic Information System (GIS) constraint maps
- Field reconnaissance surveys
- Professional experience

Ultimately, in making the final decision, TVA weighs and balances public input and all pertinent environmental, engineering, land use, and cultural considerations. The final decision may not always be the shortest or least expensive route, and though individual property owners may feel significantly affected, the objective of the process is to ensure that the project objectives are realized and that overall project impacts, as well as impacts to the community at large, are minimized.

Assessment of Alternative Routes

Eighteen route segments were identified for the Algood project. Seventeen alternative route corridors were developed from the segments as shown below. These alternative routes can also be seen on the map (see www.tva.com/power/projects/index.htm).

Alternative Route	Segments	Alternative Routes	Segments
1	1	14	2,3,5,7,11,14,18
2	2,3,5,6,8,13,16	15	2,3,5,7,11,15,18
3	2,4,5,6,8,13,16	16	2,4,5,7,11,14,18
4	2,3,5,6,8,13,17	17	2,4,5,7,11,15,18
5	2,4,5,6,8,13,17		
6	2,3,5,6,9,12,13,17		
7	2,3,5,6,9,12,13,16		
8	2,4,5,6,9,12,13,16		
9	2,4,5,6,9,12,13,17		
10	2,3,5,7,10,12,13,16		
11	2,3,5,7,10,12,13,17		
12	2,4,5,7,10,12,13,16		
13	2,4,5,7,10,12,13,17		

Each alternative offers different opportunities and constraints for power line construction. Opportunities include characteristics such as open land, areas less suitable for development and lack of sensitive environmental areas and land use conflicts. The assessment of the opportunities and constraints for these seventeen alternative routes are summarized in table 1 (see page 5) by engineering, environmental, land use, and cultural impacts.

Environmental
Environmental resources include archaeological sites, caves, cemeteries, historic areas, historic structures, or sensitive environmental areas.

From the initial environmental review, we found no threatened or endangered species along any of the alternative route corridors. The major environmental constraint for alternative routes 2-17 relate to wetlands -- Booger Swamp, in particular. Booger Swamp is managed cooperatively by the property owners and Tennessee Department of Environmental and Conservation. Booger Swamp may qualify as an *Exceptional Tennessee Water*. In general, these characteristics are streams with good water quality, important ecological values, valuable recreational uses, and outstanding scenery. These areas should be avoided if possible.

Engineering
After evaluating the alternative routes for the number of road crossings, railroad crossings, and/or existing transmission lines affected, no significant constraints were found along any of the alternative routes. The existence of underground utilities in line segment No. 5, which is common to alternative routes 2-17, makes these routes less desirable than alternative route 1. This is due to potential conflicts between pole locations and underground utilities, constraints to line location, and proximity of the line to nearby homes.

Land Use
Parks, schools, and dwellings are considered to be constraint features; however, none of the alternative routes are in close proximity to these features.

TVA looks at the total number of parcels affected, as well as the number of residential and commercial properties affected by the alternative routes. The results show these constraints to be more prevalent on route alternatives 2-17. By making adjustments to route 1, the number of affected parcels can be reduced from 46 to 32. Since alternative route 1 goes through a less developed area, the number of affected property owners has been reduced to approximately 25. This makes alternative route 1 more desirable than alternative routes 2-17.

Cultural
Cultural resources include features such as archaeological sites, cemeteries, historical sites, historic structures, churches, and recreational areas. At this point in the evaluation process TVA has not identified any known archeological or historical sites within any of the alternative route corridors. None of the alternative routes fall within the buffer zones for churches, cemeteries, or recreational areas.

Preferred Route
Table 2 below ranks the results of the top six alternative routes based on the features shown in table 1.

Table 2
Alternative Route Ranking

Alternative Route	Rankings by Criteria			
	Engineering	Environmental	Land Use	Cultural
1	2	1	2	1
11	1	4	3	3
12	3	4	1	3
14	2	2	5	2
15	2	3	5	2
16	4	2	4	2

Based on the information evaluated, alternative route 1 presents the greatest opportunities and fewest constraints of all the alternative routes considered. As a result, route 1 has been identified as TVA's preferred route. Even though route 1 is ranked second with respect to overall engineering and land use, it is still preferred as a result of the following route characteristics. Route 1:

- Is within the 50- to 300-foot buffer of fewer homes
- Crosses fewer land parcels
- Affects fewer property owners
- Avoids the environmentally sensitive Booger Swamp area
- Avoids impact to wetland areas
- Avoids conflicts with other utilities such as pipelines

Improvements to the Preferred Route
Alternative route 1 has been modified from its original path in an effort to further minimize overall project and community impacts. The modifications were based on comments received from property owners, public officials and subject matter experts, along with field surveys and available data sources. TVA's proposed route includes the following adjustments, which reduces the total number of property owners and parcels that are affected:

- adjusting route 1 away from an existing AM radio tower to minimize possible transmission interference
- adjusting route 1 to minimize impacts to new residential construction on Parragon Road
- adjusting route 1 to minimize impacts to developable residential parcels
- adjusting route 1 to minimize impacts to existing residential properties (reduced from 46 parcels to 32 parcels)

The presence of several caves and sinkholes was noted within the study area. Based on TVA experience with these types of features, they should not be a barrier to transmission line construction nor result in any environmental impacts. During construction, TVA would ensure that standard design and Best Management Practice (BMP) techniques are implemented, as well as any specific state or federal requirements.

BMP techniques consist of practices and procedures used during construction to minimize impacts to the environment. These measures would also minimize impacts to ground water. However, any effects on ground water should be insignificant and temporary.

Other Possible Adjustments

TVA will conduct a detailed environmental review of the proposed route. During the review, onsite environmental data will be collected and analyzed as part of the decision-making process. This may lead to further minor modifications of the route to minimize impacts.

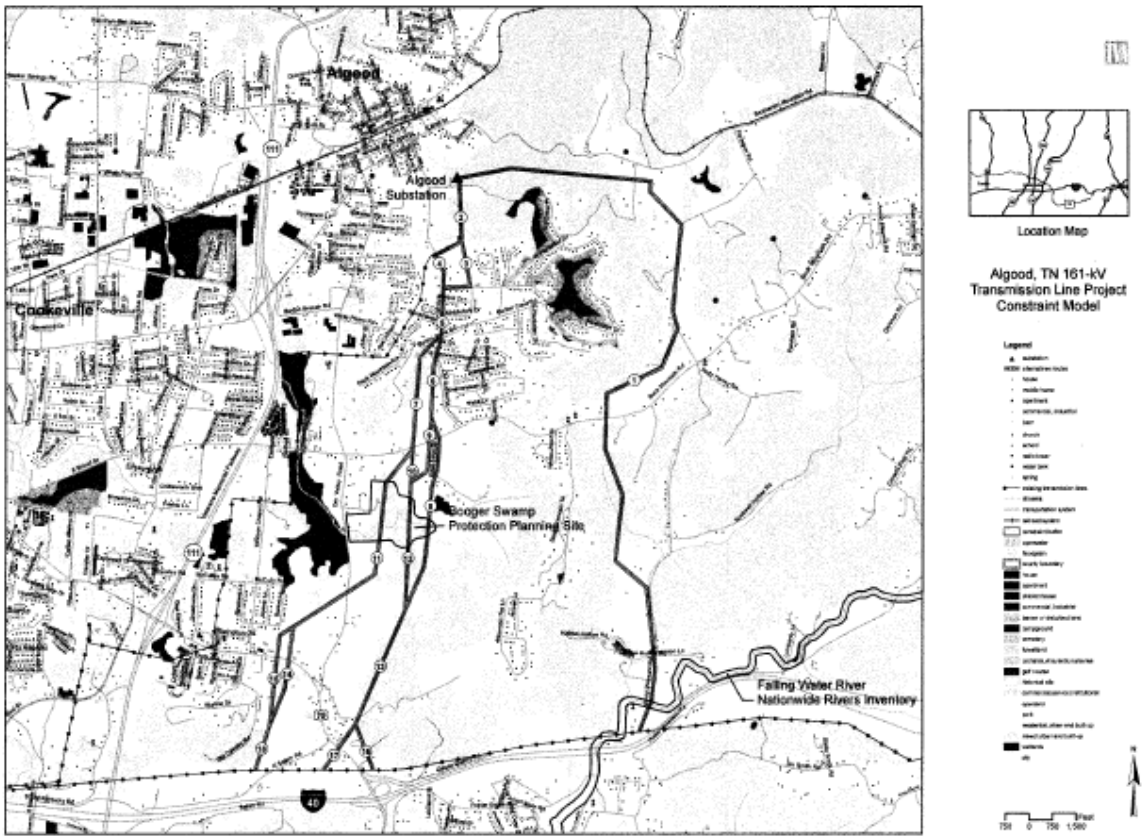
The preferred route begins at the tap point which is on the South Cookeville-Monterey transmission line just north of interstate I-40 and east of Popular Grove road. The route runs north crossing Popular Grove road and continues along Mount Pleasant road for approximately 3/4 of mile before leaving the road where it then crosses Buck Mountain road approximately 3/4 of a mile west of the intersection of Buck Mountain, Mount Pleasant, and Parragon road. From there the route continues northeast crossing Parragon road before continuing north for approximately 3/4 of a mile. The route then turns northeast, crossing Parragon road and the White Plains Plantation & Golf Course subdivision before heading due east to the Algood Substation.

Table 1
Assessment of Alternative Routes*

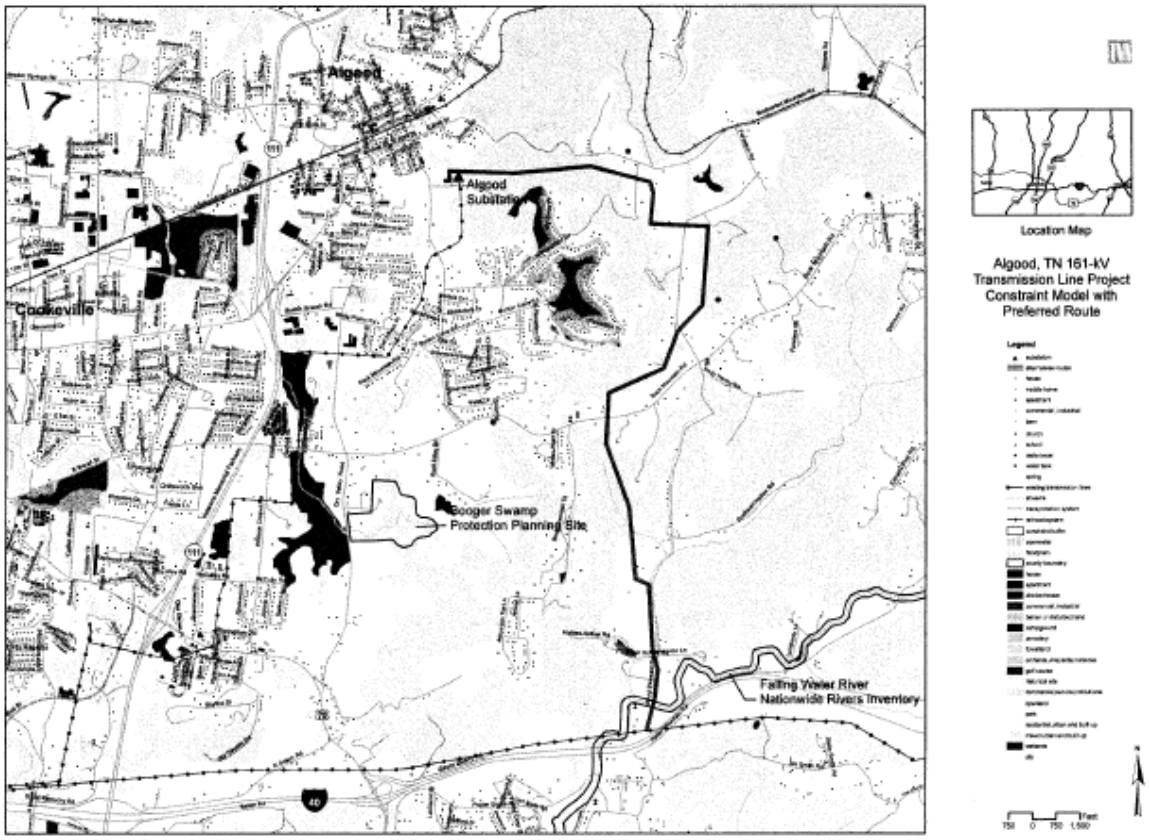
CRITERIA																								
Engineering									Environmental								Land Use							Cultural
Alternative Routes	Length of Route - Miles	Road Crossings - roads/streets	Pipeline Parallel -Length	Transmission Line Underbuild	Transmission Line Parallel	Water Main Parallel-Length	Slope 20%-Acres	Slope 30%-Acres	Right of Way-Acres	Forest Acres	Floodplain Crossing-Acres	Stream Crossings	River Crossings	Wetland-Acres	Special Protected Areas-Acres	Natural Areas-Acres	Houses within 300 ft.	Houses within 200 ft.	Houses within 100 ft.	Houses within 50 ft.	Barns within ROW	Commercial within 300 ft.	Parcels Crossed	Caves within 300 ft.
1	4.9	11.0	0.0	0.0	0.0	0.0	10.7	9.5	59.6	26.0	1.6	2	1	0.0	0.0	0.5	11	7	1	1	0	0	46	1
2	3.8	21.0	0.4	0.78	0.37	0.3	5.3	0.8	46.3	14.1	0.0	0	0	4.8	2.6	2.6	49	36	5	2	0	0	59	1
3	3.8	21.0	0.4	0.99	0.55	0.4	5.3	0.8	45.8	14.1	0.0	0	0	6.7	2.6	2.6	45	32	5	2	0	0	59	1
4	3.9	19.0	0.7	0.78	0.37	0.3	5.3	0.8	46.9	15.0	0.0	0	0	6.7	2.6	2.6	49	36	5	2	0	5	59	1
5	3.8	19.0	0.4	0.99	0.55	0.4	5.3	0.8	46.4	15.0	0.0	0	0	6.7	2.6	2.6	46	32	5	2	0	5	59	1
6	3.9	17.0	0.7	0.92	0.37	0.3	4.9	1.2	47.1	16.3	0.0	1	0	7.6	5.4	5.4	48	31	4	2	0	5	55	1
7	3.8	19.0	0.4	0.92	0.37	0.3	5.0	1.2	46.5	15.4	0.0	1	0	7.6	5.4	5.4	47	31	4	2	0	0	55	1
8	3.8	19.0	0.4	1.13	0.55	0.4	5.0	1.2	45.9	15.3	0.0	1	0	9.4	5.4	5.4	44	27	4	2	0	0	55	1
9	3.8	17.0	0.7	1.13	0.55	0.4	4.9	1.2	46.5	16.3	0.0	1	0	9.4	5.4	5.4	43	27	4	2	0	5	55	1
10	3.8	14.0	0.7	0.27	0.37	0.3	4.9	1.2	46.4	16.1	0.0	1	0	8.3	5.4	5.4	30	19	0	0	0	0	44	1
11	3.9	12.0	0.3	0.27	0.37	0.3	4.8	1.2	47.0	17.1	0.0	1	0	8.3	5.4	5.4	30	19	0	0	0	5	44	1
12	3.8	14.0	0.5	0.48	0.55	0.4	4.9	1.2	45.9	16.1	0.0	1	0	10.2	5.4	5.4	24	15	0	0	0	0	44	1
13	3.8	12.0	0.5	0.48	0.55	0.4	4.8	1.2	46.4	17.1	0.0	1	0	10.2	5.4	5.4	26	15	0	0	0	5	44	1
14	4.1	11.0	0.3	0.27	0.37	0.3	0.2	0.1	49.9	9.1	0.0	1	0	8.4	5.4	5.4	32	19	0	0	0	1	53	0
15	4.2	11.0	0.3	0.27	0.37	0.3	0.4	0.3	50.3	10.9	0.0	1	0	8.4	5.4	5.4	36	22	0	0	0	0	53	0
16	4.1	11.0	0.5	0.48	0.55	0.4	0.2	0.1	49.4	9.1	0.0	1	0	10.2	5.4	5.4	28	15	0	0	0	1	53	0
17	4.1	11.0	0.5	0.48	0.55	0.4	0.4	0.3	49.7	10.9	0.0	1	0	10.2	5.4	5.4	32	18	0	0	0	0	53	0
Proposed Route (Preferred route with adjustments)																								
1	5.2	11.0	0.0	0.0	0.0	0.0	11.8	9.3	63.2	31.6	1.6	2	1	0.0	0.0	0.5	11	8	0	0	1	0	32	1

*This table reflects the major considerations which affected the final site rankings.

Davis – page 156



Davis – page 157



Tennessee Valley Authority, One Massachusetts Avenue, NW, Suite 300, Washington, DC 20444

Justin Maierholer
Director
Government Relations

March 16, 2007

Dr. Ada Haynes
4299 Buck Mountain Road
Algood, Tennessee 38506

Dear Dr. Haynes:

This is in response to your comments concerning the Tennessee Valley Authority's (TVA) transmission line project in Algood, Tennessee.

The Algood area is experiencing significant residential and commercial growth. Studies commissioned by Upper Cumberland Electric Membership Corporation (UCEMC) show this increase demand for electricity will overload existing power facilities by summer 2008. To help meet the demand, UCEMC plans to upgrade the 69-kV Algood Substation to 161-kV. TVA must build about five miles of new 161-kV transmission line to provide power to the upgraded substation.

TVA initially considered and eliminated routes other than the one selected for the reasons noted below:

Highway 111 - TVA and the Tennessee Department of Transportation (TDOT) have always worked together concerning the shared use of highway right-of-way (ROW). We considered and eliminated the Highway 111 corridor early in the evaluation process. Sharing a ROW with an existing highway is considered only when there are no other desirable options available. Other factors which contributed to the elimination of the Highway 111 option included the following:

- A transmission line represents a major investment. To protect TVA's investment (construction, operation, maintenance, and safety), a dedicated ROW is necessary.
- Any future road work resulting in relocation of the transmission line would be at TVA's expense.
- Locating transmission structures near vehicular traffic exposes them to greater risk of being damaged, resulting in power outages to the area.
- The Highway 111 alternative would be longer and would impact more parcels, businesses, and residences.
- The constraints posed by the development at two interchanges.

Dr. Ada Haynes
Page 2
March 16, 2007

- The environmental concerns regarding impacts to several wetland areas.

- Due to the nature of the rugged terrain, there is not an acceptable location for a tap point on the South Cookeville-Monterey 161-kV transmission line in the vicinity of Highway 111.

Existing ROW – Under one alternative route option, TVA's plan is to share a portion of the exiting ROW as it enters the Algood Substation site. However, use of the entire ROW is not a feasible alternative. The line presently serving the Algood Substation site is the only source of power to the Algood Substation and cannot be taken out of service to build the new transmission line on the existing ROW. Paralleling the existing ROW is not a desirable option because it would:

- Result in greater impacts to a larger number of property parcels and owners.
- Cause the possible relocation of homes and businesses.
- Be in close proximity to a school.
- Result in impacts to wetland areas.

Old Kentucky Road and Rail Road - Use of either of these alternative corridors would:

- Result in additional line length.
- Impact a larger number of property parcels and owners.
- Cause the possible relocation of homes and businesses.

TVA extended the comment period for this project until Friday, March 16, 2007. We are currently reviewing all the public comments and additional information gathered during the comment period to help determine a preferred route.

If you need more information concerning this project, please contact Todd Moore, Location Engineer, toll-free at 800-362-4355; write him at TVA, 1101 Market Street (MR 4G), Chattanooga, Tennessee 37402-2801; send an email to newtransline@tva.gov; send fax to 423-751-4098; or visit our website at www.tva.com/power/projects.htm.

Sincerely,

Justin Maierhofer
Director, Government Relations

cc: The Honorable Lamar Alexander
United States Senator
455 Dirksen Senate Office Building
Washington, DC 20510

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FACSIMILE: 828-622-7610

July 25, 2007

Ms. Denise Smith
TVA FOIA Officer
400 West Summit Hill Dr., WT 7D
Knoxville, TN 37902-1499

FREEDOM OF INFORMATION ACT REQUEST

By Certified Mail/Return Receipt Requested

Re: FOIA Request Regarding Proposed TVA Transmission Line to the Algood Substation, Algood, Tennessee

Dear Ms. Smith:

I am submitting this request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2000), on behalf of Buck Mountain Community Organization (4399 Buck Mountain Road, Cookeville, TN 38506).

The requests in this letter result from the proposed plan to build a new transmission line across Buck Mountain in order to service an intended upgrade of the Algood Substation by Upper Cumberland Electric Membership Corporation (UCEMC).

The Buck Mountain Community Organization is concerned that the proposed route will have an adverse effect on natural, wildlife and cultural resources in the Buck Mountain area.

REQUESTED DOCUMENTS

When the term "document" is used below, you should assume it to include any and all information, including but not limited to all reports, letters, e-mails, surveys, memos, informal notes, etc., including sidebars and handwritten or typed margin notes, sent to, from, or among any TVA staff, as well as any personal knowledge or information gained through personal communication or otherwise.

When the term "Buck Mountain" is used below, you should assume it to mean not only the right of way area directly surrounding the proposed transmission line, but also the Poplar Grove and Hidden Hollow areas as well as all potentially affected underground aquifers which are connected to various bodies of water throughout the region.

Specifically, the Buck Mountain Community Organization requests the following:

1) All documents in the possession or control of the TVA pertaining to the evaluation of the need for the proposed power line which would extend from TVA's existing South Cookeville-Monterey transmission line to the Algood Substation.

2) All documents in the possession or control of the TVA pertaining to the evaluation of different routes for the proposed power line which would extend from TVA's existing South Cookeville-Monterey transmission line to the Algood Substation.

3) All documents in the possession or control of the TVA pertaining to the environmental assessment of the proposed transmission line route and alternative routes.

4) All other documents in the possession or control of the TVA pertaining to the proposed power line which would extend from TVA's existing South Cookeville-Monterey transmission line to the Algood Substation.

FEE WAIVER REQUEST

We further request that any fees associated with this request be waived because disclosure of the records is "likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii).

Released information concerns the operations or activities of the government:

The information we request concerns the proposed construction of an electrical transmission line by the TVA. As the TVA is a governmental agency, the choice of the line's route as well as its construction can be characterized as operations or activities of the government.

Disclosure of the requested documents will serve the public interest:

The public has an expressed interest in TVA's compliance with environmental regulations which exist to ensure that federal agencies consider the environmental

implications of their decisions. The members of the Buck Mountain Community Organization, like many others, enjoy the natural beauty of Putnam County and wish to work for the protection and preservation of the area surrounding Buck Mountain.

Disclosure will contribute to an understanding of TVA's policy by the public at large:

Disclosure of the requested records will contribute to the understanding of the public at large, as opposed to the understanding only of the requesters or a narrow segment of interested persons. The Buck Mountain Community Organization is a nonprofit organization advocating environmentally sound government policies for the location of transmission lines in the Buck Mountain area as well as exploring alternatives to the creation of new transmission lines and power plants that adversely affect the environment and property values.

Congress has recognized the important institutional service watchdog groups provide, and expanded FOIA's fee waiver provision specifically to facilitate access to agency records by citizen "watchdog" organizations, which utilize FOIA to monitor and mount challenges to governmental activities. See Better Gov't Ass'n v. Department of State, 780 F.2d 86, 88-89 (D.C. Cir. 1986) (fee waiver intended to benefit public interest watchdogs). Fee waivers are essential to such groups, which:

> rely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities - publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions...
>
> The waiver provision was added to FOIA "in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests," in a clear reference to requests from journalists, scholars and, most importantly for our purposes, nonprofit public interest groups.
>
> Better Gov't Ass'n, 780 F.2d at 93-94.

Congress was particularly concerned that agencies were using search and copying costs to prevent critical monitoring of their activities.

> Indeed, experience suggests that agencies are most resistant to granting fee waivers when they suspect that the information sought may cast them in a less than flattering light or may lead to proposals to reform their practices. Yet that is precisely the type of information which the FOIA is supposed

> to disclose, and agencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information.
>
> 132 Cong. Rec. S14298 (Statement of Senator Leahy).

The public benefit of releasing these documents is significant:

Information that could "support oversight of [an agency's] operations" is precisely the type of information that Congress considered to have a "high potential for contribution to public understanding." McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1286 (9th Cir. 1987). Watchdog public advocacy groups--organizations which actively monitor and challenge agency actions and policies--help provide this oversight function in our system of government:

> A requester is likely to contribute significantly to public understanding if the information disclosed is new; supports public oversight of agency operations; or otherwise confirms or clarifies data on past or present operations of the government.
>
> 132 Cong. Rec. H9464 (Representatives English and Kindness). Better Government Association arrived at a comparable conclusion. 780 F.2d at 94. Our current request clearly meets this standard.

The material released in response to this FOIA request should offer important insight into the actions and decision-making process of the TVA, especially concerning its choice to construct the power line on Buck Mountain.

Requesters are non-profit organizations who have *no* commercial interest in the requested information:

This request is not primarily in the commercial interest of the requesters, as the requesters have NO commercial interest whatsoever in these materials.

CONCLUSION

If you determine that portions of any records covered by this request are exempt from disclosure, please separate the exempt portions from the nonexempt portions and provide us with copies of the nonexempt portions. For any records that you determine to be exempt from release, please provide us with a specific description of the record or portion of the record along with a particularized description of the legal basis for withholding it as is required. *See* Vaughn v. Rosen, 484 F.2d 820, 827(D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

If any of the requested documents are available electronically, you may send them to bkaman@enviroattorney.com or you may send them on a CD. If there are not electronic versions available, please send paper copies to Gary A. Davis & Associates at the address contained in this request.

In sum, application of the statute to this request compels the conclusion that a fee waiver is appropriate. If, however, you determine that a fee waiver is not appropriate, please contact us to discuss the approximate cost of obtaining the requested documents.
If you anticipate any delay for valid legal reasons in processing this request or if you foresee any problem relating to our request for a fee waiver, please notify me as soon as possible. I look forward to your response.

Sincerely,

Rebecca C. Kaman

Rebecca C. Kaman

Brandt September 20, 2007

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FACSIMILE: 828-622-7610

September 20, 2007

Mr. Carl Brandt
General Manager
Upper Cumberland Electric Membership Corporation
138 Gordonsville Hwy.
Carthage, TN 37030
Certified Mail # 7006 0100 0004 8424 2585

Re: Request by Members for Inspection of Documents of UCEMC

Dear Mr. Brandt:

I represent the following members of the Upper Cumberland Electric Membership Corporation ("UCEMC"):

Paul Isbell
4399 Buck Mountain Rd.
Algood, TN 38506

Bob Johnston
198 Paragon Rd.
Algood, TN 38506

Barry Stein
4299 Buck Mountain Rd.
Algood, TN 38506

Pursuant to Tenn. Code Ann. § 48-66-102, these members wish to inspect and copy the following records of the UCEMC on October 3, 2007 beginning at 10:00 a.m.

1. A complete version of the report, One Ownership Study, Upper Cumberland EMC, Algood Substation, by Powertech Engineering (July 2006), including the Description of Loads for Feeders 234, 244, and 254, on page 6.
2. A complete version of the document, Project Justification Data, Algood, Tennessee, 161-kv Substation, Upper Cumberland Electric Membership Corporation, Provide 161-kv

Delivery Point (W0693), Estimated In-Service Date June 1, 2008, including Table 1, Load Description, and pages 6-9.

3. All documents identifying and quantifying new loads anticipated for the Algood Substation during the next 3-5 years, including, but not limited to, loads for Feeders 234, 244, and 254.
4. All documents showing any planned or projected commercial, residential, and industrial growth over the next 3-5 years in the area served by the Algood Substation.
5. All documents identifying any loads or areas of service of the Algood Substation that have been annexed during the past six years and are being or will be served by the City of Cookeville.
6. Any system maps showing transmission facilities, such as substations, and transmission lines in the vicinity of Algood.
7. All documents showing the detailed breakdown of costs estimated for the proposed new transmission line and new Algood substation.
8. All documents showing the detailed breakdown of costs estimated for any alternatives to the proposed new transmission line and new Algood substation.
9. All documents showing the detailed breakdown of costs estimated for increasing the capacity of the Algood 69 kV substation at 69 kV, and how much additional capacity could be obtained.
10. All documents showing the detailed breakdown of costs estimated for rebuilding the existing Cookeville - Algood 69 kV transmission line with higher capacity conductor, and how much additional capacity could be obtained.
11. All documents showing the detailed breakdown of costs estimated for rebuilding the existing Cookeville - Algood 69 kV transmission line with two 69 kV circuits, and how much additional capacity could be obtained.
12. Any maps showing the location of other 69 kV circuits in the vicinity of the Algood substation, including, but not limited to, circuits serving the City of Cookeville.

These members wish to inspect and copy these records in order to determine the basis for the Corporation's claimed need for the proposed Algood transmission line. These members are entitled to information that is being used by the Corporation to justify the expenditure of over $2 million for a new substation requiring a new transmission line which would directly impact their property. They do not intend to use the information for any improper purpose.

Please contact me if there are any questions about this request and the time for inspection and copying of the documents.

Sincerely,

Gary A. Davis

cc: Paul Isbell
Bob Johnston
Berry Stein

Bellar & Winkler

Jacky O. Bellar
e-mail: bellarj@bellsouth.net

Jamie D. Winkler
e-mail: jdwinkler@bellsouth.net

Attorneys At Law
212 Main Street
P.O. Box 332
Carthage, Tennessee 37030-0332

Phone 615-735-1684
Fax 615-735-1138

September 28, 2007

*****DELIVERED VIA FACSIMILE & U.S. MAIL*****
828-622-7610

Mr. Gary A. Davis
Gary A. Davis & Associates
61 North Andrews Avenue
Hot Springs, NC 28743

RE: Request by Members for Inspection of Documents of UCEMC

Dear Mr. Davis:

This office presently serves as counsel to Upper Cumberland Electric Membership Corporation. General Manager, Carl Brandt, has recently forwarded your letter of September 20, 2007, wherein you make certain requests to inspect and copy records pursuant to Tennessee Code Annotated § 48-66-102.

In reviewing your requests along with the statute, it appears as if the documents your clients seek to review are not covered under the statute. Tennessee Code Annotated § 48-66-102 allows inspection of records described in § 48-66-101(e). Those records generally include the corporate charter or restated charter; corporate by-laws or restated by-laws; resolutions adopted by the Board of Directors relating to the characteristics, qualifications, rights, limitations and obligations of members; the minutes of all meetings of members for the past three (3) years; all written communications to members generally within the past three (3) years; a list of the names and business or home addresses of the current directors and officers; and the most recent annual report. Tennessee Code Annotated § 48-66-102 further allows the inspection of the following documents: excerpts from all meetings of the members and Board of Directors; accounting records in a corporation; and the membership list.

In reviewing the list you have requested in your letter it does not appear that those items fall in these specific statutory categories.

Please allow this letter, therefore, to serve as notice to your clients that the significant volume of documents you have requested will not be made available on October 3, 2007.

Page 2
September 28, 2007

If you should have any questions, please feel free to contact me.

I remain,

Yours very truly,

Jack C. Bellar

JOB:hb

cc: Mr. Carl Brandt

Tennessee Valley Authority, 400 West Summit Hill Drive, Knoxville, Tennessee 37902-1401

October 17, 2007

Rebecca C. Kaman
Gary A. Davis & Associates
61 North Andrews Avenue
Hot Springs, NC 28743

Dear Ms. Kaman:

This responds to your letter of July 25, 2007, requesting information under the Freedom of Information Act (FOIA) 5 U.S.C. § 552 (2000). You requested all documents related to the proposed TVA transmission line to the Algood substation in Algood, Tennessee.

Enclosed are hard copy and a CD containing electronic records responsive to your request. We have redacted some information from the enclosed records pursuant to FOIA exemptions 3, 4, 5 and 6. In addition, we are withholding 171 pages of records responsive to your request pursuant to FOIA exemptions 3, 5 and 6.

FOIA exemption 3 protects information that is prohibited from disclosure by another statute. The Archeological Resources Protection Act at 16 U.S.C. § 470hh (2000) prohibits agencies from disclosing records concerning the nature and specific location of protected archeological resources.

FOIA exemption 4 protects confidential commercial and financial information submitted to the Government by an outside source.

The deliberative process privilege incorporated within FOIA exemption 5 protects, among other things, pre-decisional draft documents and internal agenc communications containing opinions, analyses, and recommendations that are part of an agency's decision-making process.

Exemption 6 protects an individual's right to privacy.

You may appeal this initial determination of your FOIA request by writing to Ms. Emily J. Reynolds, Senior Vice President, Communications, Government &

Rebecca C. Kaman
Page 2
October 17, 2007

Valley Relations, Tennessee Valley Authority, One Century Plaza, Suite 100, 26 Century Boulevard, Nashville, TN 37229-2409. See 18 C.F.R. § 1301.9 (2003). Any appeal must be received by Ms. Reynolds within 30 days of the date of this letter.

Sincerely,

Denise Smith

Denise Smith
TVA FOIA Officer

Enclosures