

BY-2006-3763

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
CERCLA SECTION 122(h)(1) AGREEMENT
FOR RECOVERY OF PAST RESPONSE COSTS
AT THE P&W ELECTRIC SUPERFUND SITE
YORKVILLE, GIBSON COUNTY, TENNESSEE**



10303293

**CERCLA SECTION 122(h)(1) AGREEMENT
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**CERCLA SECTION 122(h)(1) AGREEMENT
FOR RECOVERY OF PAST RESPONSE COSTS**

IN THE MATTER OF:)	AGREEMENT FOR RECOVERY
)	OF PAST RESPONSE COSTS
P&W ELECTRIC SUPERFUND SITE)	
YORKVILLE, GIBSON COUNTY, TENNESSEE)	U.S. EPA Region 4
)	CERCLA Docket No. _____
Huntsville Utilities)	
SETTLING PARTY)	PROCEEDING UNDER SECTION
)	122(h)(1) OF CERCLA
)	42 U.S.C. § 9622(h)(1)

*CERCLA-04-
2006-3763*

I. JURISDICTION

1. This Agreement is entered into pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9622(h)(1), which authority has been delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D and further delegated to the chief of the Waste Program Branch¹ by EPA Region 4 Delegation No. 14-14-D.

2. This Agreement is made and entered into by EPA and Huntsville Utilities ("Settling Party"). Settling Party consents to and will not contest EPA's authority to enter into this Agreement or to implement or enforce its terms.

II. BACKGROUND

3. This Agreement concerns the P&W Electric Superfund Site ("Site") located in Yorkville, Gibson County, Tennessee. EPA alleges that the Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

4. In response to the release or threatened release of hazardous substances at or from the Site, EPA undertook response actions at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604.

5. In performing response actions, EPA has incurred response costs at or in connection with the Site.

¹ Now known as the Superfund Enforcement and Information Management Branch.

6. EPA alleges that Settling Party is a responsible party pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is jointly and severally liable for response costs incurred or to be incurred at or in connection with the Site.

7. EPA and Settling Party recognize that this Agreement has been negotiated in good faith and that this Agreement is entered into without the admission or adjudication of any issue of fact or law.

III. PARTIES BOUND

8. This Agreement shall be binding upon EPA and upon Settling Party and its heirs, successors and assigns. Any change in ownership or corporate or other legal status of Settling Party, including but not limited to, any transfer of assets or real or personal property, shall in no way alter Settling Party's responsibilities under this Agreement. Each signatory to this Agreement certifies that he or she is authorized to enter into the terms and conditions of this Agreement and to bind legally the party represented by him or her.

IV. DEFINITIONS

9. Unless otherwise expressly provided herein, terms used in this Agreement that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meanings assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Agreement or in any appendix attached hereto, the following definitions shall apply:

a. "Agreement" shall mean this Agreement and any attached appendices. In the event of conflict between this Agreement and any appendix, the Agreement shall control.

b. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*

c. "Day" shall mean a calendar day. In computing any period of time under this Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

d. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.

e. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

f. "Paragraph" shall mean a portion of this Agreement identified by an Arabic

numeral or a lower case letter.

g. "Parties" shall mean EPA and Settling Party.

h. "Past Response Costs" shall mean all costs, including but not limited to direct and indirect costs, that EPA or the U.S. Department of Justice on behalf of EPA has paid at or in connection with the Site through the effective date of this Agreement, plus accrued Interest on all such costs through such date.

i. "Section" shall mean a portion of this Agreement identified by a Roman numeral.

j. "Settling Party" shall mean Huntsville Utilities.

k. "Site" shall mean the P&W Electric Superfund site, encompassing approximately 2.5 acres, located in a rural residential area on Shady Lane, north of Highway 77 in Yorkville, Gibson County, Tennessee, and generally shown on the maps included in Appendix A.

l. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

V. PAYMENT OF RESPONSE COSTS

10. Within 5 business days after Settling Party receives notice from EPA that this Agreement has been signed by EPA and approved by the Attorney General or his designee, Settling Party shall deposit \$10,000 into an escrow account bearing interest on commercially reasonable terms, in a federally-chartered bank (the "Escrow Account"). If the Agreement is not made effective after public comment, the monies placed in escrow, together with accrued interest thereon, shall be returned to Settling Party. If the Agreement is made effective after public comment, Settling Party shall, within 15 days of EPA issuing written notice thereof, cause the monies and accrued interest in the Escrow Account to be paid to EPA in accordance with Paragraphs 11 and 12 below.

11. Payment shall be made to EPA by Electronic Funds Transfer ("EFT") to the following address:

Mellon Bank
 SWIFT address = MELNUS3P
 ABA 043000261
 Account 9109125
 22 Morrow Drive
 Pittsburgh, PA 15235

Payment shall be accompanied by a statement identifying the name and address of the party making payment, the Site name, the EPA Region and Site/Spill ID Number A4H4, and the EPA

Docket Number for this action.

12. At the time of payment, Settling Party shall also send notice that payment has been made to EPA in accordance with Section XII (Notices and Submissions). Such notice shall reference the EPA Region and Site/Spill ID Number A4H4 and the EPA Docket Number for this action.

13. The total amount to be paid pursuant to Paragraph 10 shall be deposited in the EPA Hazardous Substance Superfund.

VI. FAILURE TO COMPLY WITH AGREEMENT

14. Interest on Late Payments. If Settling Party fails to make any payment required by Paragraph 10 by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment.

15. Stipulated Penalty.

a. If any amounts due to EPA under Paragraph 10 are not paid by the required date, Settling Party shall be in violation of this Agreement and shall pay to EPA, as a stipulated penalty, in addition to the Interest required by Paragraph 14, \$1,000 per violation per day that such payment is late.

b. Stipulated penalties are due and payable within 30 days of the date of demand for payment of the penalties by EPA. All payments to EPA under this Paragraph shall be made to EPA by Electronic Funds Transfer ("EFT") to the following address:

Mellon Bank
SWIFT address = MELNUS3P
ABA 043000261
Account 9109125
22 Morrow Drive
Pittsburgh, PA 15235

Payment shall be accompanied by a statement identifying the payments under this Paragraph as "stipulated penalties" and identifying the name and address of the party making payment, the Site name, the EPA Region and Site/Spill ID Number A4H4, and the EPA Docket Number for this action.

c. At the time of each payment, Settling Party shall also send notice that payment has been made to EPA in accordance with Section XII (Notices and Submissions). Such notice shall identify the EPA Region and Site/Spill ID Number A4H4 and the EPA Docket Number for this action.

d. Penalties shall accrue as provided in this Paragraph regardless of whether EPA has notified Settling Party of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment is due and shall continue to accrue through the date of payment. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Agreement.

16. In addition to the Interest and Stipulated Penalty payments required by this Section and any other remedies or sanctions available to EPA by virtue of Settling Party's failure to comply with the requirements of this Agreement, a Settling Party who fails or refuses to comply with the requirements of this Agreement shall be subject to enforcement action pursuant to Section 122(h)(3) of CERCLA, 42 U.S.C. § 9622(h)(3). If the United States, on behalf of EPA, brings an action to enforce this Agreement, Settling Party shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

17. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Agreement. Payment of stipulated penalties shall not excuse Settling Party from payment as required by Section V (Payment of Response Costs) or from performance of any other requirements of this Agreement.

VII. COVENANT NOT TO SUE BY EPA

18. Covenant Not to Sue by EPA. Except as specifically provided in Section VIII (Reservations of Rights by EPA), EPA covenants not to sue or take administrative action against Settling Party pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Response Costs. This covenant shall take effect upon receipt by EPA of all amounts required by Section V (Payment of Response Costs) and any amounts due under Section VI (Failure to Comply with Agreement). This covenant not to sue is conditioned upon the satisfactory performance by Settling Party of its obligations under this Agreement. This covenant not to sue extends only to Settling Party and does not extend to any other person.

VIII. RESERVATIONS OF RIGHTS BY EPA

19. EPA reserves, and this Agreement is without prejudice to, all rights against Settling Party with respect to all matters not expressly included within the Covenant Not to Sue by EPA in Paragraph 18. Notwithstanding any other provision of this Agreement, EPA reserves all rights against Settling Party with respect to:

- a. liability for failure of Settling Party to meet a requirement of this Agreement;
- b. liability for costs incurred or to be incurred by the United States that are not within the definition of Past Response Costs;
- c. liability for injunctive relief or administrative order enforcement under Section

106 of CERCLA, 42 U.S.C. § 9606;

d. criminal liability; and

e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments.

20. Nothing in this Agreement is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States may have against any person, firm, corporation or other entity not a signatory to this Agreement.

IX. COVENANT NOT TO SUE BY SETTLING PARTY

21. Settling Party covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to Past Response Costs or this Agreement, including but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claims arising out of the response actions at the Site for which the Past Response Costs were incurred, including any claim under the United States Constitution, the Constitution of the State of Tennessee, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; and

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to Past Response Costs.

22. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

23. Settling Party agrees not to assert any claims and to waive all claims or causes of action that it may have for all matters relating to the Site, including for contribution, against any person where the person's liability to Settling Party with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if all or part of the disposal, treatment, or transport occurred before April 1, 2001, and the total amount of material containing hazardous substances contributed by such person to the Site was less than 110 gallons of liquid materials or 200 pounds of solid materials.

24. The waiver in Paragraph 23 (Non-Exempt De Micromis Waiver) shall not apply with

respect to any defense, claim, or cause of action that Settling Party may have against any person meeting the above criteria if such person asserts a claim or cause of action relating to the Site against Settling Party. This waiver also shall not apply to any claim or cause of action against any person meeting the above criteria if EPA determines:

a. that such person has failed to comply with any EPA requests for information or administrative subpoenas issued pursuant to Section 104(e) or 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) or 9622(e), or Section 3007 of the Solid Waste Disposal Act (also known as the Resource Conservation and Recovery Act or "RCRA"), 42 U.S.C. § 6972, or has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the Site, or has been convicted of a criminal violation for the conduct to which this waiver would apply and that conviction has not been vitiated on appeal or otherwise; or

b. that the materials containing hazardous substances contributed to the Site by such person have contributed significantly, or could contribute significantly, either individually or in the aggregate, to the cost of response action or natural resource restoration at the Site.

X. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

25. Except as provided in Paragraph 23 (Non-Exempt De Micromis Waiver), nothing in this Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Agreement. Except as provided in Paragraph 23 (Non-Exempt De Micromis Waiver), the Parties expressly reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that they may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

26. EPA and Settling Party agree that the actions undertaken by Settling Party in accordance with this Agreement do not constitute an admission of any liability by Settling Party. Settling Party does not admit, and retains the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Agreement, the validity of the facts or allegations contained in Section II (Background) of this Agreement.

27. The Parties agree that Settling Party is entitled, as of the effective date of this Agreement, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Agreement. The "matters addressed" in this Agreement are Past Response Costs.

28. Settling Party agrees that with respect to any suit or claim for contribution brought by it for matters related to this Agreement, it will notify EPA in writing no later than 60 days prior to the initiation of such suit or claim. Settling Party also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Agreement, it will notify EPA in writing within 10 days of service of the complaint or claim upon it. In addition, Settling Party shall notify EPA within 10 days of service or receipt of any Motion for Summary Judgment and

within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Agreement.

29. In any subsequent administrative or judicial proceeding initiated by EPA, or by the United States on behalf of EPA, for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Party shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue by EPA set forth in Section VII (Covenant Not to Sue by EPA).

XI. RETENTION OF RECORDS

30. Until 10 years after the effective date of this Agreement, Settling Party shall preserve and retain all records, reports, or information (hereinafter referred to as "records") now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at the Site or to the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary.

31. After the conclusion of the 10-year document retention period in the preceding paragraph, Settling Party shall notify EPA at least 90 days prior to the destruction of any such records and; upon request by EPA, Settling Party shall deliver any such records to EPA. Settling Party may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Party asserts such a privilege, it shall provide EPA with the following: 1) the title of the record; 2) the date of the record; 3) the name, title, affiliation (*e.g.*, company or firm), and address of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. If a claim of privilege applies only to a portion of a record, the record shall be provided to EPA in redacted form to mask the privileged information only. Settling Party shall retain all records that it claims to be privileged until EPA has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in Settling Party's favor. However, no records created or generated pursuant to the requirements of this or any other settlement with the EPA pertaining to the Site shall be withheld on the grounds that they are privileged.

32. Settling Party hereby certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or information relating to its potential liability regarding the Site since notification of potential liability by the United States or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

XII. NOTICES AND SUBMISSIONS

33. Whenever, under the terms of this Agreement, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Agreement with respect to EPA and Settling Party.

As to EPA:

Matthew L. Hicks, Associate Regional Counsel
US EPA Region 4
61 Forsyth Street, SW
Atlanta, GA 30303-3104

John Zimmerman, Enforcement Project Manager
US EPA Region 4
61 Forsyth Street, SW
Atlanta, GA 30303-3104

Paula V. Batchelor, Environmental Protection Specialist
US EPA Region 4
61 Forsyth Street, SW
Atlanta, GA 30303-3104

As to Settling Party:

Gregory Revera
200 Clinton Avenue West
Suite 900
Huntsville, AL 35801-4900

XIII. INTEGRATION/APPENDICES

34. This Agreement and its appendix constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Agreement. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Agreement. The following appendix is attached to and incorporated into this Agreement: "Appendix A" includes two maps of the Site.

XIV. PUBLIC COMMENT

35. This Agreement shall be subject to a public comment period of not less than 30 days pursuant to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i). In accordance with Section 122(i)(3) of CERCLA, EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper or inadequate.

XV. ATTORNEY GENERAL APPROVAL

36. The Attorney General or his designee has approved the settlement embodied in this Agreement in accordance with Section 122(h)(1) of CERCLA, 42 U.S.C. § 9622(h)(1).

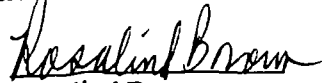
XVI. EFFECTIVE DATE

37. The effective date of this Agreement shall be the date upon which EPA issues written notice that the public comment period pursuant to Paragraph 35 has closed and that comments received, if any, do not require modification of or EPA withdrawal from this Agreement.

IT IS SO AGREED:

U.S. Environmental Protection Agency

By:



Rosalind Brown
Chief, Superfund Enforcement and
Information Management Branch
U.S. EPA, Region 4

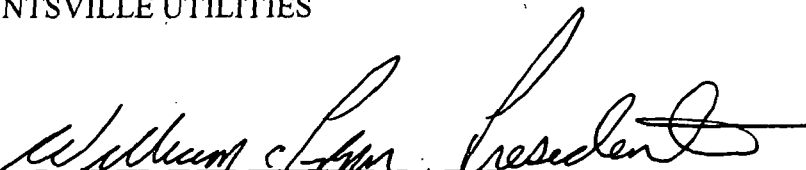
4-11-06
Date

THE UNDERSIGNED SETTLING PARTY enters into this Agreement in the matter of the P&W Electric Superfund Site, Yorkville, Gibson County, Tennessee, EPA Docket Number _____

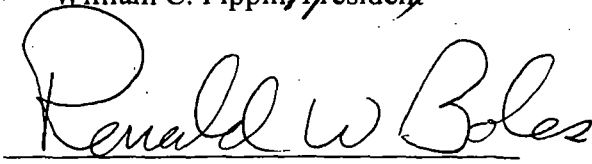
FOR SETTLING PARTY:

HUNTSVILLE UTILITIES

By

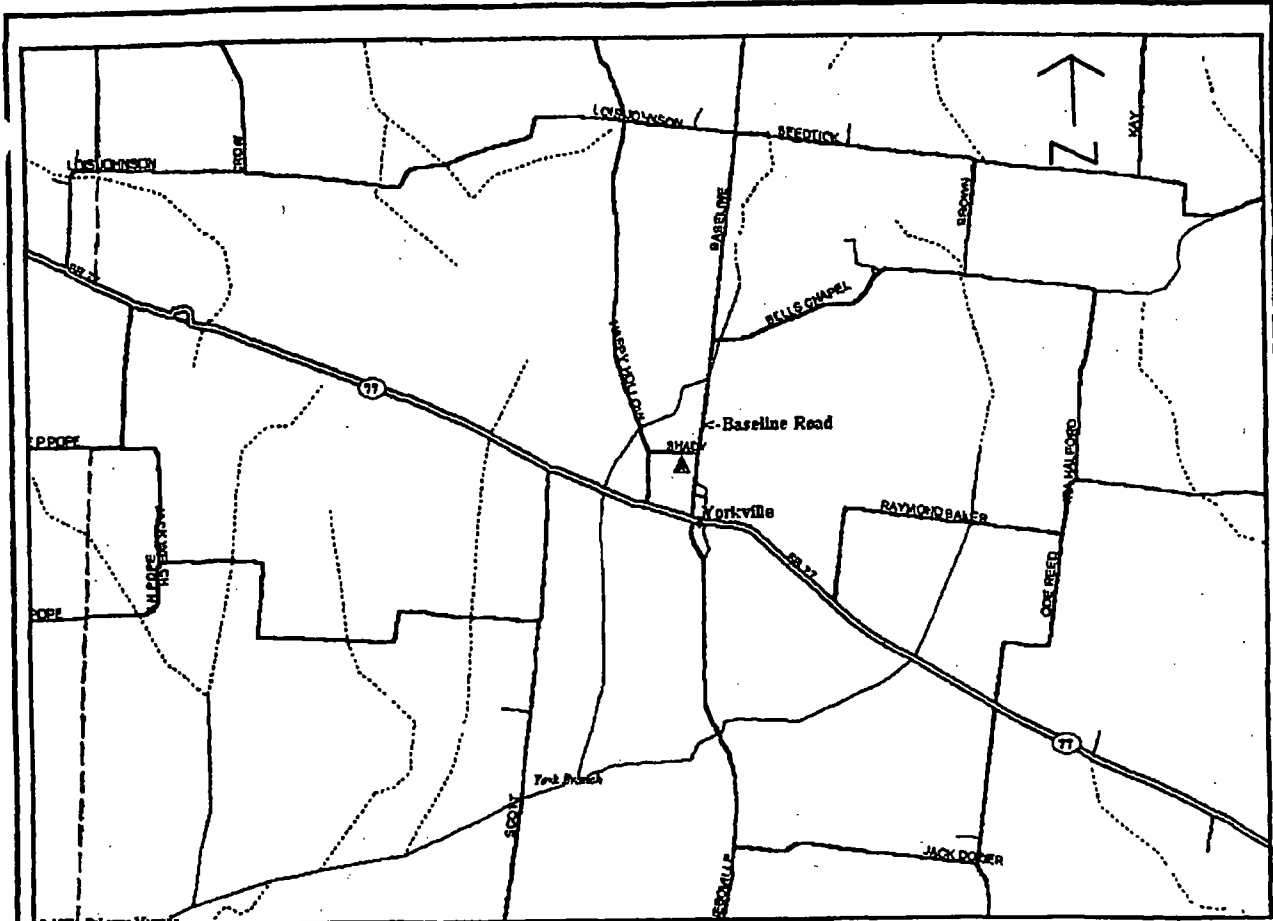

William C. Pippin, President

By


Ronald W. Boles, Secretary
Huntsville Utilities Electric Board

March 7, 2006
Date

112 Spragins Street SW
Huntsville, Alabama 35801



© 1977 DeLorme Maps

DIRECTIONS:

From the intersection of State Route 77 and Baseline road, take Baseline Road north to Shady Road and turn left. The site is located south of Shady Road, approximately 300' west of Baseline Road.

**P & W ELECTRIC SITE
YORKVILLE, GIBSON COUNTY, TENNESSEE
TDD# 04-9709-0012**



**FIGURE 2
SITE LOCATION MAP**



