

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

DAVID SHOUSE AND BRIAN SHOUSE, D/B/A)	
SHOUSE FARMS, AND BRYAN)	
HENDRICKSON, D/B/A HENDRICKSON GRAIN)	CASE NO.
AND LIVESTOCK, LLP)	2015-00417
)	
COMPLAINANTS)	
V.)	
)	
KENTUCKY UTILITIES COMPANY)	
)	
DEFENDANT)	

ORDER

This matter comes before the Commission on Kentucky Utilities Company's ("KU") motion to dismiss¹ with prejudice the Complaint filed by David Shouse and Brian Shouse, d/b/a Shouse Farms, and Bryan Hendrickson, d/b/a Hendrickson Grain and Livestock, LLP (collectively "Complainants"). Also before the Commission are KU's Reply to Complainants' Response to Defendant's Motion to Dismiss ("Motion to Strike Complainants' Response") and Objection to Complainants' Request for Information ("Motion to Strike Complainants' Request for Information"), filed jointly on January 19, 2016. Upon review of the record and applicable law, the Commission denies KU's Motion to Strike Complainants' Response, grants KU's Motion to Dismiss, and denies as moot KU's Motion to Strike Complainants' Request for Information.

¹ Motion to Dismiss for Failure to State a Claim Upon Which Relief can be Granted ("Motion to Dismiss") and Answer of Kentucky Utilities Company ("Answer") (jointly filed Dec. 28, 2015).

On November 19, 2015, Complainants filed a Complaint with the Commission seeking refunds for service KU provided to them. By Order issued December 18, 2015, the Commission directed KU to file a written Answer addressing the merits of the Complaint. On December 28, 2015, KU tendered an Answer and an accompanying Motion to Dismiss the Complaint. On January 11, 2016, Complainants filed a Response to Defendant's Motion to Dismiss ("Response to KU's Motion to Dismiss"), and issued Requests for Information on KU. In KU's Motions to Strike Complainants' Response and Request for Information, filed January 19, 2016, KU reiterated its grounds for dismissal, moved the Commission to strike as untimely Complainants' Response to KU's Motion to Dismiss, and also asked that Complainants' Request for Information be stricken.

First, regarding KU's Motion to Strike Complainants' Response as untimely, the Commission notes that 807 KAR 5:001, Section 5(2), requires a party to file a response to a motion no later than seven days after the motion's filing date.² Complainants filed their Response to KU's Motion to Dismiss on January 11, 2016, 14 days after KU filed its Motion to Dismiss on December 28, 2015. However, despite Complainants' failure to comply with the mandates of 807 KAR 5:001, Section 5(2), the Commission finds no prejudice to KU as a result of the untimely filing and accepts Complainants' Response to KU's Motion to Dismiss as filed. Accordingly, the Commission will deny KU's Motion to Strike Complainants' Response.

The Commission now turns to KU's Motion to Dismiss the Complaint. In their Complaint, Complainants assert that the demand rate structure of KU's Power

² 807 KAR 5:001, Section 5(2). ("Unless the commission orders otherwise, a party to a case shall file a response to a motion no later than seven (7) days from the date of filing of a motion.")

Service rate schedule (“Rate PS”) is not fair, just and reasonable, and seek refunds for service KU provided to them. Specifically, Complainants maintain that since their grain drying operations are seasonal in nature, with the equipment operating only two or three months out of the year, the demand rate charges they pay for electrical service under KU’s Rate PS exceed the actual cost of the production of the power to serve them over the course of the year or billing cycle, resulting in a windfall to KU.³ Complainants seek a refund for any monies KU purportedly unjustly received from the date Complainants began receiving electric service from KU, as well as any other monies that the Commission deems appropriate on utility charges that exceed the actual cost incurred by KU to provide electricity to Complainants over the course of the year or billing cycle.⁴

In response, KU submits that the allegations contained in the Complaint reflect Complainants’ misunderstanding of the demand rates and fail to state a claim upon which relief can be granted.⁵ While Complainants object to paying demand charges when their operations are not consuming electricity, KU states that the nature of the demand charge—a capacity cost essentially—is to ensure that the power will be available when Complainants want to use it, regardless of whether they use the capacity on occasion, or two to three months out of the year.⁶ KU points out that though Complainants might use their facilities only at certain times of the year, they need access to electricity at all times.⁷ Accordingly, KU builds the facilities necessary to meet

³ Complaint at 3–4.

⁴ *Id.* at 4.

⁵ KU’s Motion to Strike Complainants’ Response at 5–6.

⁶ *Id.* at 8.

⁷ *Id.*

the instantaneous demand of all customers at any time, regardless of when, or whether, the customers consume electricity, and KU's demand rate structure is designed to fully recover those costs, which include both capital and fixed operating costs.⁸

Since the Commission found the demand rate structure of Rate PS to be reasonable in KU's most recent base rate case, Case No. 2014-00371,⁹ and considered Complainants' arguments against Rate PS at that time, KU asserts that Complainants are barred under the doctrine of *res judicata* from re-litigating the reasonableness of Rate PS.¹⁰ KU further emphasizes that the Complaint does not allege or demonstrate that KU deviated from its schedule of Commission-approved rates in serving or billing Complainants, and states that KU in fact did not deviate.¹¹ As a result, KU asserts that Complainants' contentions are also precluded by the filed-rate doctrine.¹² Lastly, KU contends that the Commission should not review the Complaint since such a review would constitute single-issue ratemaking, which is prohibited.¹³

KU requests that the Complaint be dismissed on these grounds, and presents similar arguments as affirmative defenses in its Answer.¹⁴ The Commission will address each argument in turn.

⁸ *Id.* at 8–9.

⁹ Case No. 2014-00371, *Application of Kentucky Utilities Company for an Adjustment of Its Electric Rates* (Ky. PSC June 30, 2015).

¹⁰ KU's Motion to Dismiss at 5.

¹¹ *Id.* at 2–3.

¹² *Id.*

¹³ *Id.* at 4.

¹⁴ KU's Answer at 12–15.

Collateral Estoppel

KU contends that the doctrine of *res judicata*, in particular collateral estoppel, bars Complainants from re-litigating the reasonableness of the rate structure of Rate PS, because that issue was raised by Complainants in KU's most recent base rate case, Case No. 2014-00371, and the issue was fully considered and decided by the Commission in that proceeding. In Case No. 2014-00371, Complainant David Shouse twice submitted the same oppositions to Rate PS demand rates that Complainants now advance in their Complaint.¹⁵ KU asserts that the doctrine of *res judicata* bars the adjudication of issues that have already been litigated or should have been litigated in a prior case between the same or similar parties.¹⁶ *Res judicata* applies to quasi-judicial acts of an administrative agency acting within its jurisdiction unless a significant change of conditions or circumstances has occurred between the administrative proceedings.¹⁷

Res judicata has two subparts: claim preclusion and issue preclusion.¹⁸ Issue preclusion, also known as collateral estoppel,

bars the parties from relitigating any issue actually litigated and finally decided in an earlier action. The issues in the former and latter actions must be identical. The key inquiry in deciding whether lawsuits concern the same controversy is whether they both arise from the same transactional nucleus of facts. If the two suits concern the same

¹⁵ Case No. 2014-00371, *Kentucky Utilities Company*, Public Comments of David Shouse ("Shouse Public Comments") (filed May 1, 2015 and June 16, 2015).

¹⁶ 47 Am. Jur.2d, *Judgments*, Section 464.

¹⁷ *Bank of Shelbyville v. Peoples Bank of Bagdad*, 551 S.W.2d 234, 236 (Ky. 1977). The Commission has applied the doctrine of *res judicata* in dismissing complaints. See, e.g., Case No. 97-311, *Orbin and Margie Brock v. Western Rockcastle Water Association* (Ky. PSC Feb. 25, 1998), Order; Case No. 91-277, *Dovie Sears v. Salt River Water District and Kentucky Turnpike Water District* (Ky. PSC June 30, 1992), Order.

¹⁸ *Yeoman v. Commonwealth*, 983 S.W.2d 459, 464-65 (Ky. 1998).

controversy, then the previous suit is deemed to have adjudicated every matter which was or could have been brought in support of the cause of action.

...

For issue preclusion to operate as a bar to further litigation, certain elements must be found to be present. First, the issue in the second case must be the same as the issue in the first case. Second, the issue must have been actually litigated. Third, even if an issue was actually litigated in a prior action, issue preclusion will not bar subsequent litigation unless the issue was actually decided in that action. Fourth, for issue preclusion to operate as a bar, the decision on the issue in the prior action must have been necessary to the court's judgment.¹⁹

The Commission finds that the principle of issue preclusion, or collateral estoppel, applies in this case so as to bar Complainants' assertions concerning the reasonableness of KU's Rate PS. In Case No. 2014-00371, the Commission considered the reasonableness of KU's demand charges under Rate PS, including the two public comments submitted by Complainant David Shouse which presented identical issues concerning KU's Rate PS as those presented in the Complaint. Although Complainant David Shouse was not formally a party to that proceeding, the Commission finds that it duly considered his objections and that his interests, as a consumer, were represented by the Office of the Attorney General who did intervene, actively participated, and was a signatory to the settlement agreement.²⁰

Specifically, the June 11, 2015 letter that Complainant David Shouse's counsel sent to the Commission in Case No. 2014-00371 stated:

¹⁹ *Id.* at 465–66.

²⁰ KRS 367.150(8)(a) makes the Attorney General's Consumer Protection Division the representative of all customers of a particular utility whenever that office chooses to intervene in a rate case before the Commission.

It is understood and appreciated the necessity for certain demand charges; however, the seasonal work, i.e., farming, and the utilities associated with farming that are operated on a very limited seasonal basis enable KU to realize a windfall situation with respect to the customer that is, as a practical legal term, unjust enrichment, concerning the electrical charges made against Mr. Shouse.²¹

Paragraph 12 of the Complaint in this proceeding is substantively identical:

Additionally, on opinion and belief, the 50 percent minimum demand rate equates to a sum substantively greater over the course of the year than the utilities that are actually used if paid for directly; therefore, resulting in a windfall for Defendant and/or otherwise unjustly enriching the Defendant, and/or contrary to the intent and spirit of the statutes and regulations.²²

In Case No. 2014-00371, the Commission sent a letter to Mr. Shouse's counsel stating that the Commission understood Mr. Shouse's concerns regarding KU's demand rates, and that it would take into account Mr. Shouse's concerns when rendering a final Order in that proceeding:

The Commission acknowledges receipt on June 16, 2015 of your letter, a copy of which is attached hereto, addressed to one of our rate analysts, regarding the above referenced case and your client's objection to the amount of demand charges he pays to Kentucky Utilities Company for the seasonal operation of his farming activities. Your letter is being treated as an official protest and will be placed in the case file of this proceeding. The Commission will take your concerns into consideration in its review and decision in this matter.²³

²¹ Case No. 2014-00371, *Kentucky Utilities Company*, Shouse Public Comments (filed June 16, 2015).

²² Complaint at 4.

²³ Case No. 2014-00371, *Kentucky Utilities Company*, Correspondence from Commission Staff to David Shouse (filed into the record on June 25, 2015).

Thus, the issues in the Complaint were presented in KU's most recent base rate case, and the record shows the Commission considered those issues and fully adjudicated the reasonableness of KU's proposed rates, including Rate PS. The Final Order in Case No. 2014-00371 reflects that the Commission thoroughly reviewed the schedule of rates in the proffered settlement agreement in that proceeding and applied its expertise to make an independent decision as to the level of rates to be approved, rather than simply deferring to the parties as to what constitutes fair, just and reasonable rates.²⁴ In the Final Order, the Commission noted that it had "performed its traditional ratemaking analysis, which consists of reviewing the reasonableness of each revenue and expense adjustment proposed or justified by the record, along with a determination of a fair return on equity."²⁵ As reflected in a letter, filed into the record on June 25, 2015, from the Commission to Complainant David Shouse, the Commission's review included the public comments addressing the rate design issues now presented in the Complaint. The Final Order addressing the merits of Case No. 2014-00371 considered the concerns Complainants raise in their Complaint and concluded that the settlement was in the public interest and that the rates were fair, just and reasonable.

In other words, the Commission addressed the reasonableness of KU's current Rate PS, including its demand rate, as a necessary component of its decision in Case No. 2014-00371. KRS 278.030 permits utilities to assess only "fair, just and reasonable rates" for their services, and prohibits the Commission from authorizing any rate that is not "fair, just and reasonable." Therefore, in fulfilling its statutory obligation and in

²⁴ *Id.* (Ky. PSC June 30, 2015), Order at 7.

²⁵ *Id.*

applying its traditional ratemaking analysis, the Commission necessarily determined the reasonableness of each rate, including Rate PS, in approving the rates and charges set forth in the settlement agreement in Case No. 2014-00371.

In summary, the Complainants' concerns with KU's Rate PS and demand charge were raised during KU's prior base rate case proceeding, and the Commission clearly considered the objections during the course of its approval of the settlement agreement and KU's rates. The record does not indicate any changes of fact or circumstances since Case No. 2014-00371 that would require the Commission to further investigate this rate at this time. Accordingly, the doctrine of *res judicata*, particularly collateral estoppel, bars Complainants from re-litigating in their Complaint the identical issues that were raised and fully adjudicated in Case No. 2014-00371.

Filed-Rate Doctrine

KU further contends that the filed-rate doctrine prohibits the Commission from granting Complainants' requested refund because the Complaint does not allege that KU violated, and KU asserts that it did not violate, its tariff in serving or billing Complainants.²⁶ Consequently, KU avers that the relief Complainants request (a refund with interest and attorney's fees) is precluded by the filed-rate doctrine.²⁷ In their Response to KU's Motion to Dismiss, Complainants maintain that unjust, unfair, unreasonable and/or discriminatory rates are always subject to review pursuant to KRS 278.260 and KRS 278.270.²⁸

²⁶ KU's Motion to Dismiss at 2-3.

²⁷ *Id.*

²⁸ Complainants' Response to KU's Motion to Dismiss, paragraph 11.

The filed-rate doctrine, codified in KRS 278.160, requires a utility to file with the Commission “schedules showing all rates and conditions for service established by it and collected or enforced” once a utility’s rates are approved by the Commission.²⁹

Under that statute,

[n]o utility shall charge, demand, collect, or receive from any person a greater or less compensation for any services rendered or to be rendered than that prescribed in its filed schedules, and no person shall receive any service from any utility for a compensation greater or less than that prescribed in such schedules.³⁰

Twenty years ago, the Commission interpreted KRS 278.160 as follows:

Simply put, the statute demands that a utility strictly adhere to its published rate schedules and not, either by agreement or conduct, depart from them. While KRS 278.160(2) limits a utility’s authority to depart from its filed rate schedules, KRS 278.160(1) imposes an affirmative obligation upon a utility to charge and collect its prescribed rates. KRS 278.170(1) requires a utility to treat all similarly situated customers in the same manner. If a utility fails to collect from a customer the full amount required by its filed rate schedule, it effectively grants a preference in rates to that customer as it allows him to pay less than other customers for the same service.”³¹

In applying KRS 278.160, the Commission emphasized that “[t]he filed rate doctrine is the bedrock of utility rate regulation” and “the basic bulwark against rate discrimination and arbitrary utility action.”³² In the present case, the Complaint does not allege that KU

²⁹ KRS 278.160(1).

³⁰ KRS 278.160(2).

³¹ Case No. 95-107, *In the Matter of North Marshall Water District* (Ky. PSC Oct. 13, 1995), Order at 2.

³² *Id.* at 3.

charged Complainants a rate other than one in KU's schedule of rates on file with the Commission for the service Complainants received. Rather, the Complaint simply reflects Complainants' displeasure with KU's rates, in particular the demand-rate structure of Rate PS. Yet, a customer's dissatisfaction with a utility's filed rate schedule does not provide grounds for lawfully ordering, or allowing, a utility to collect from that customer a rate different from that collected from other customers who are similarly situated.³³ Since neither the Complaint nor the Response to KU's Motion to Dismiss allege that KU deviated from its schedule of rates in serving or billing Complainants, KRS 278.160 and the filed-rate doctrine prohibit the Commission from granting Complainants' requested refund. In addition, the Commission notes that the only provision in KRS Chapter 278 authorizing the award of interest on refunds applies when a utility has placed new rates into effect subject to refund pursuant to KRS 278.190, a situation inapplicable to the facts of this case. Further, no provision of KRS Chapter 278 bestows upon the Commission the statutory authority to grant the legal relief that Complainants seek in the form of attorney fees.³⁴

³³ *City of Russellville v. Public Service Commission of Kentucky*, 2005 WL 385077 at *3 (Ky. App. 2005) ("[t]he purpose of the filed rate doctrine, in other words, '[i]s to preserve the authority of the legislatively created agency to set reasonable and uniform rates and to insure that those rates are enforced, thereby preventing price discrimination.'" (quoting *Sun City Taxpayers' Association v. Citizens Utilities Company*, 847 F.Supp. 281, 288 (1994) (citations omitted))).

³⁴ Case No. 2008-00199, *Jim Devers v. Kentucky Utilities Company* (Ky. PSC Dec. 30, 2008), Order at 5. ("[T]he Commission is without jurisdiction to award compensatory damages and attorney fees. Pursuant to KRS 278.040, the Commission has jurisdiction of only the 'rates' and 'services' of utilities as defined by KRS 278.010. Mr. Devers' request for damages and fees falls under neither category.")

Single-Issue Ratemaking

In its Motion to Dismiss, KU argues that in effect Complainants are asking the Commission to change KU's Rate PS to better suit their desires.³⁵ KU maintains that this requested relief violates the long-standing rule against single-issue ratemaking and should be denied.³⁶

The rule against single-issue ratemaking recognizes that the revenue formula is designed to determine the revenue requirement based on the aggregate costs and demand of the utility. Therefore, it would be improper to consider changes to components of the revenue requirement in isolation. Often times a change in one item of the revenue formula is offset by a corresponding change in another component of the formula.³⁷

Specifically, KU contends that to address Complainants' opposition to the current structure of KU's Rate PS demand rates outside the context of a general rate proceeding would ignore the impact that changing one rate would have on KU's revenue requirement, as well as its impact on KU's many other Rate PS customers who are not parties to this proceeding and who have had no notice of it or opportunity to participate in it. While the Commission has on prior occasion rejected a utility's attempt to adjust a rate based on a single issue under KRS 278.190 and 807 KAR 5:001, Section 16, for a complaint filed under KRS 278.260 and KRS 278.270, the Commission is statutorily authorized to review the rate complained of and grant relief as

³⁵ KU's Motion to Dismiss at 3–4.

³⁶ *Id.* at 4.

³⁷ Case No. 94-453, *In the Matter of Big Rivers Electric Corporation's Proposed Mechanism to Credit Customers Amounts Recovered in Judicial Proceedings Involving Fuel Procurement Contracts* (Ky. PSC Feb. 21, 1997), Order at 7.

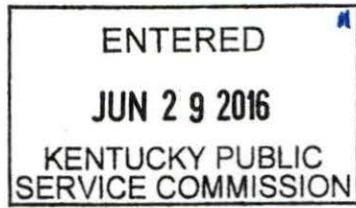
appropriate.³⁸ Thus, the prohibition against single-issue ratemaking does not preclude the Commission from addressing the Complaint. That said, dismissal of the Complaint is justified under the doctrine of *res judicata* and the filed-rate doctrine and, as a result, there is no need for the parties to conduct any discovery in this case. The Commission also finds that a hearing is not necessary in the public interest or for the protection of substantial rights. However, the Commission will re-examine the reasonableness of KU's Rate PS during KU's next base rate case, at which time KU should present testimony in support of the minimum billing demand provisions of Rate PS.

IT IS HEREBY ORDERED that:

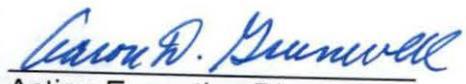
1. KU's Motion to Strike Complainants' Response to KU's Motion to Dismiss is denied.
2. KU's Motion to Dismiss the Complaint with prejudice is granted.
3. KU's Motion to Strike Complainants' Request for Information is denied as moot.
4. KU shall include in its next application for a general adjustment in rates testimony in support of the monthly billing demand provisions of Rate PS.
5. This case is closed and removed from the Commission's docket.

³⁸ See, e.g., Case No. 2006-00510, *An Examination of the Application of the Fuel Adjustment Clause of Louisville Gas and Electric Company from November 1, 2004 to October 31, 2006* (Ky. PSC Oct. 12, 2007), Order at 7–8. ("While the Commission's FAC regulation establishes a single-issue rate-making mechanism for fuel cost recovery, RSG [Revenue Sufficiency Guarantee] Make Whole Payments are neither fuel costs nor fuel related and, therefore, are not appropriate for inclusion in the FAC); and Case No. 2004-00459, *Application of Louisville Gas and Electric Company for Approval of New Rate Tariffs Containing a Mechanism for the Pass-Through of MISO-Related Revenues and Costs Not Already Included in Existing Base Rates* (Ky. PSC Apr. 15, 2005), Order at 7. ("[A]bsent specific statutory authorization, the Commission can only exercise its authority to adopt rate surcharges in the context of a general rate case.").

By the Commission



ATTEST:


Acting Executive Director

Case No. 2015-00417

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