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FEB 28 2011

PUBLIC SERVICE
COMMISSION

February 25, 2011

Kentucky Public Service Commission
211 Sower Blvd.
Frankfort KY, 40601

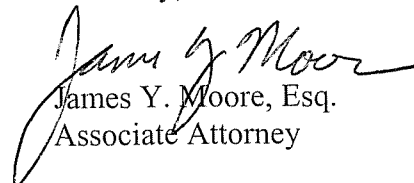
**RE: BULLDOG'S ENTERPRISES INC. d/b/a BULLDOG'S ROAD HOUSE v.
DUKE ENERGY KENTUCKY, INC.
Case No. 2010-00404**

Dear Commission:

Please find enclosed an original and eleven (11) copies of Complainant's Reply to Defendant's Response to Complainant's Motion to Dismiss without Prejudice. Please file as necessary, and return the remaining copy in the self addressed, stamped envelope.

Thank you.

Sincerely,



James Y. Moore, Esq.
Associate Attorney

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

BULLDOG'S ENTERPRISES INC. d/b/a)
BULLDOG'S ROAD HOUSE)
)
COMPLAINANT)
)
vs.)
)
DUKE ENERGY KENTUCKY, INC.)
)
DEFENDANT)
)

FEB 28 2011
PUBLIC SERVICE
COMMISSION

CASE NO. 2010-00404

REPLY TO DEFENDANT DUKE ENERGY'S RESPONSE TO COMPLAINANT'S
MOTION TO DISMISS

Comes now Bulldog's Enterprises Inc., d/b/a Bulldog's Road House ("Complainant"), by and through counsel, and replies to Defendant Duke Energy Inc.'s ("Defendant") response to Complainant's motion to dismiss:

Complainant has filed suit in Circuit Court complaining of fraud, breach of contract, breach of the covenant of good faith and fair dealing, a violation of KRS 367.170, and unjust enrichment ("Circuit Court Claims"). The Kentucky Public Service Commission ("Commission") concluded it did not have jurisdiction over these claims. The only element the Commission found that it had jurisdiction over was a generic billing dispute. Complainant now seeks to dismiss its complaint without prejudice so it may properly pursue its claims in Circuit Court.

Defendant contends that, what it characterizes as, the "underlying" billing dispute must be determined on the merits, because the Commission has sole jurisdiction of the matter. However, the Commission has already ruled it does not have jurisdiction over the Circuit Court

Claims. Defendant's contention that "the resolution of the civil action will first necessitate a formal determination as to whether Duke's rates have been applied to Bulldog in an unfair, unjust, or unreasonable manner" is simply not true. Complaint has alleged claims that are distinct from a simple billing dispute, and consequently the most appropriate forum for those claims is a Circuit Court. If it were otherwise, KRS § 289.040(2) would have included jurisdiction over more than "rates" and "service." Indeed, the Commission recognizes as much where it cites to *Carr v. Cincinnati Bell, Inc.*, 651 S.W.2d 126 (Ky. App. 1983) and its holding that the Commission was neither delegated authority over claims like the Circuit Court Claims, nor was it designed to handle them.

Defendant's goal is clearly to get a preclusive judgment on an issue that is related to Complainant's Circuit Court Claims so it can attempt to use that judgment against Defendant in Circuit Court. It hopes to do this before Complainant has the opportunity to utilize the broad tools of discovery available to it under the Civil Rules of Procedure. While Complainant has already demonstrated Defendant could not have been properly billing it, the substance of Complainant's claims against Defendant are more complex than the straight forward billing dispute the General Assembly intended the Commission to hear. Indeed, the Commission has recognized this by correctly declining jurisdiction over the Circuit Court Claims.

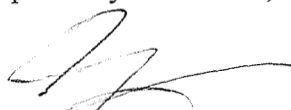
Defendant next posits that the "interests of administrative efficiency and judicial economy" are best served by making a substantive determination on the merits of Complainant's claim. This line of thought is at the very least disingenuous. It was at Defendant's request that Complainant dismissed its original claims in Kenton Circuit Court and brought them before the Commission (see Exhibit A). The Commission then dismissed those claims, and now Defendant seeks to prevent them from being brought back before the Circuit Court where they belonged in

the first place. Additionally, stronger policy concerns for substantial justice and fairness require that Complainant be allowed to dismiss its complaint before the Commission, and not forced to shoehorn its Circuit Court Claims into the type of straightforward billing dispute the Commission is best equipped to handle.

Finally, Defendant claims that without a dismissal with prejudice, the Circuit Court will have to dismiss the Circuit Court Claims for failing to exhaust administrative remedies. What administrative remedies? The Commission has *already* determined that it has no jurisdiction over the Circuit Court Claims. There is no Circuit Court Judge in the Commonwealth who will dismiss Complainant's Circuit Court Claims in the face of *Carr* and this Commission's order conclusively stating it does not have jurisdiction over those claims. The circular logic of Defendant's argument is apparent, and should be disregarded by the Commission.

For the above reasons, Complainant respectfully requests this Commission Grant Complainant's Motion to Dismiss without Prejudice.

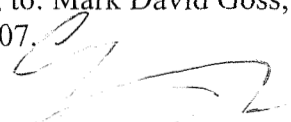
Respectfully Submitted,



Eric C. Deters
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Independence, KY 41051
(859) 363-1900
(859) 363-1444 – Fax
Counsel for Complainant

CERTIFICATE OF SERVICE

I Eric C. Deters, do hereby certify that a true and exact copy of the foregoing was sent by US Mail, postage paid this 25th day of February, 2011, to: Mark David Goss, Frost Brown Todd LLC, 250 W. Main St., Suite 2800, Lexington, KY 40507.



ERIC C. DETERS

You replied on 9/4/2010 11:49 AM.

Eric Deters

From: McLean, James E [James.McLean@duke-energy.com] **Sent:** Fri 9/3/2010 2:02 PM
To: Eric Deters
Cc: D'Ascenzo, Rocco O; Ball, Pam; Rolfes, Minna; Steven Martin
Subject: Bulldog's Roadhouse
Attachments:

Eric, we suspended the disconnection orders in August so we could investigate further. Nothing unusual was found during our walkthrough at the restaurant. Further, as you know, the meter was tested and was found to be properly recording usage. These things were all done as a courtesy to you. You have not disputed the gas usage or the fixed charges, but you have paid nothing since June. As a result, your service is scheduled for disconnection on September 9.

We are willing to continue to try to work with you on this dispute, but the proper forum is the Kentucky PSC. We will continue to investigate, but I am asking that you file your complaint with the Kentucky PSC, pay the undisputed portion of the charges, and dismiss the action you have filed against Duke Energy in Kenton County as the Court does not have jurisdiction over this dispute. If you are unwilling to do so, we will proceed with disconnection on September 9.

Again, we are willing to continue to work with you and trust you will agree to proceed as set forth above so that we can continue to investigate. Please let me know your intentions on or before September 8.

James E. McLean, Jr
Assistant General Counsel



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