

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION AND COMPLAINT OF GRAYSON)	
RURAL ELECTRIC COOPERATIVE)	
CORPORATION FOR AN ORDER)	
AUTHORIZING PURCHASE OF ELECTRIC)	
POWER AT THE RATE OF SIX CENTS PER)	
KILOWATTS OF POWER VS A RATE IN)	CASE NO.
EXCESS OF SEVEN CENTS PER KILOWATT)	2012-00503
HOUR PURCHASED FROM EAST KENTUCKY)	
POWER COOPERATIVE UNDER A)	
WHOLESALE POWER CONTRACT AS)	
AMENDED BETWEEN GRAYSON RURAL)	
ELECTRIC COOPERATIVE CORPORATION)	
AND EAST KENTUCKY POWER)	
COOPERATIVE INC.)	

ORDER

On November 19, 2012, Grayson Rural Electric Cooperative Corporation ("Grayson") filed jointly a complaint against its wholesale power supplier, East Kentucky Power Cooperative, Inc. ("EKPC"), and a petition requesting in total the issuance of eight declarations arising under: (a) a contract for Grayson to purchase up to 9.4 MW of power from Magnum Drilling of Ohio, Inc. ("Magnum"); and (b) Amendment 3 of Grayson's wholesale power contract with EKPC. Grayson's complaint and petition were filed pursuant to KRS 278.260, which confers upon the Commission "original jurisdiction over complaints as to rates and service of any utility...." EKPC has filed an answer and motion to dismiss, to which Grayson has responded. In this Order we analyze the jurisdictional basis of the issues raised, accept for review all except two of those issues, and establish a procedure for reviewing the jurisdictional issues.

BACKGROUND

Grayson is a cooperative corporation that distributes electricity in six counties in northeastern Kentucky, and it is subject to the jurisdiction of the Commission pursuant to KRS 279.210(1). Grayson, along with 15 other distribution cooperatives, is a member/owner ("Member") of EKPC.¹ For many years, EKPC had what was known as "full requirements" contracts with each of its 16 Members. The full requirements contracts required each of the 16 Member distribution cooperatives to purchase and receive from EKPC all power and energy required for the Members' respective systems. These wholesale power contracts were required to be in place by EKPC's primary lender, the Rural Utilities Service ("RUS"), as security for the loans made by RUS to EKPC. In late 2003, Grayson and each of EKPC's 15 other Member distribution cooperatives entered into Amendment 3 to their full requirements power contracts with EKPC. Under Amendment 3, the Members' full requirements obligations were modified to allow the Members to purchase a limited quantity of power from alternative suppliers. It is the wording of Amendment 3, as set forth below, that gives rise to the majority of the relief requested in Grayson's complaint and petition.

Amendment 3 authorizes EKPC's Members to purchase power and energy from someone other than EKPC, within the following limits: (a) up to a total of 5 percent of EKPC's highest coincident peak demand in the past 36 months; and (b) up to 15 percent of each Member's highest coincident peak demand in the past 36 months.

¹ The 15 other Members of EKPC are: Big Sandy Rural Electric Cooperative Corporation; Blue Grass Energy Cooperative Corporation; Clark Energy Cooperative, Inc.; Cumberland Valley Electric, Inc.; Farmers Rural Electric Cooperative Corporation; Fleming-Mason Energy Cooperative, Inc.; Inter-County Energy Cooperative Corporation; Jackson Energy Cooperative Corporation; Licking Valley Rural Electric Cooperative Corporation; Nolin Rural Electric Cooperative Corporation; Owen Electric Cooperative, Inc.; Salt River Electric Cooperative Corporation; Shelby Energy Cooperative, Inc.; South Kentucky Rural Electric Cooperative Corporation; and Taylor County Rural Electric Cooperative Corporation.

Thus, while each Member has the right to purchase 15 percent of its coincident peak demand from a supplier other than EKPC, if each Member chose to do so, the total of all the Members' non-EKPC purchases would equal 15 percent of EKPC's peak demand; whereas Amendment 3 explicitly limits the aggregate of the Members' non-EKPC purchases to no more than 5 percent of EKPC's peak demand. The majority of the current controversy arises from this alleged inconsistency in the wording of Amendment 3, and that there appears to be no methodology or criteria, either contained in Amendment 3 or separately agreed to by the Members, to be used for allocating the right to purchase non-EKPC power among the 16 Members when one Member seeks to purchase more than 5 percent of its coincident peak load, thereby effectively limiting the other Members' total purchases to less than 5 percent of their respective coincident peak loads. Accordingly, if in fact such a methodology is required and is not present, the question arises of whether one should be imputed.

The applicable language contained in Amendment 3 that establishes the limits on the quantities of alternative sourced power that can be purchased by Members is as follows:

[T]he Member shall have the option, from time to time, with notice to the Seller, to receive electric power and energy, from persons other than the Seller, or from facilities owned or leased by the Member, provided that the aggregate amount of all members' elections (measured in megawatts in 15-minute intervals) so obtained under this paragraph shall not exceed five percent (5%) of the rolling average of Seller's coincident peak demand for the single calendar month with the highest peak demand occurring during each of the 3 twelve month periods immediately preceding any election by the Member from time to time, as provided herein and further provided that no Member shall receive more than fifteen percent (15%) of the rolling average of its coincident peak demand for the single calendar month with the highest

average peak demand occurring during each of the 3 twelve month periods immediately preceding any election by the Member from time to time, as provided herein.

In addition to creating the right for Members to purchase power from alternative sources, Amendment 3 also established certain requirements for Members to give EKPC advance notice of their intent to enter into, or to cancel, the purchase of power from an alternative source. The applicable language in Amendment 3 governing such notice is as follows:

a. During any calendar year, the Member may make or cancel any such election or elections by giving at least 90 days' notice to the Seller with respect to any load or loads with an average coincident peak demand (calculated in the same manner as provided in the preceding paragraph) of 5.0 Megawatts or less, in the annual aggregate.

b. During any calendar year, the Member may make or cancel any such election or elections by giving at least 18 months or greater notice to the Seller with respect to any load or loads with an average coincident peak demand (calculated in the same manner as provided in the preceding paragraph) of 5.0 Megawatts or more, in the annual aggregate.

In establishing the requirement for a 90-day advance notice if the purchase is 5.0 MW or less, and the requirement for an 18-month advance notice if the purchase is 5.0 MW or more, Amendment 3 creates a significant ambiguity relative to Grayson's decision in this case to make an initial purchase of 5.0 MW, which falls within the ambit of both notice requirements.

GRAYSON'S COMPLAINT AND PETITION

Grayson has entered into a contract, dated August 24, 2012, with Magnum for the purchase of up to 9.4 MW of power to be generated by natural gas currently being produced in the Big Sandy field in eastern Kentucky. The contract provides that the

purchase is on a continuous basis, 24/7, for 5 MW in 2012, increasing by 4.4 MW in 2013 to a total of 9.4 MW. The initial term of the contract is for five years, with five successive three-year renewals, for a total of 20 years. The power is priced at six cents per kWh for the initial five years, and will be adjusted at each successive three-year renewals to be 85 percent of the average energy and demand charges paid by Grayson to EKPC. Grayson states that it gave two written notices to EKPC of this intent to purchase power from an alternative source. The first notice, dated June 22, 2012, referenced a purchase of 10.7 MW, an initial contract term of approximately five years, and an annual savings to Grayson of \$800,000, but the notice did not indicate when the purchase would commence. The second notice, dated August 9, 2012, is an amended notice reaffirming the earlier notice except for a notification that in 2012 Grayson would purchase 5 MW, with a corresponding decrease in savings due to the decrease in power purchased. The second notice, like the first, did not include a specific commencement date for the power purchase.

Grayson's complaint and petition first lists the specific relief being requested, followed by a list of the relevant facts and allegations. More specifically, Grayson requests that the Commission enter an order that:

1. Authorizes Grayson to purchase power from Magnum pursuant to the August 24, 2012 contract with Magnum, a copy of which is attached to the complaint and petition;
2. Authorizes Grayson to purchase up to 9.4 megawatts of power from Magnum at the rate of six cents per kWh;

3. Authorizes Grayson to purchase power from Magnum under the provisions of Amendment 3 of Grayson's power contract with EKPC;

4. Requires EKPC to comply with the terms and conditions of Amendment 3 by providing Grayson with transmission, substation, and ancillary services without discrimination or adverse distinction with regard to the rates, terms of service or availability of such service as between power supplies as provided for in Amendment 3, with Grayson paying the charges to EKPC for these services;

5. Requires EKPC to allow Grayson such additional interconnections as may be reasonably required for Grayson to receive the power purchased from Magnum;

6. Requires EKPC not to otherwise interfere with Grayson's purchase of power from Magnum;

7. Declares that Grayson's power purchase from Magnum is consistent with the provisions of Amendment 3 of Grayson's power contract with EKPC; and

8. Directs that there be no additional constraints, modifications, conditions, or other hindrances or interference with Grayson's purchase from Magnum at a rate at six cents per kWh verses the seven cents per kWh charged by EKPC.

Grayson then sets forth a discussion of its existing EKPC power contract and amendments thereto, its power contract with Magnum, and then describes the current controversy as follows:

1. EKPC has failed to act in accordance with its obligations under Amendment 3;

2. EKPC has stated that it will not comply with Amendment 3;

3. EKPC's Chief Executive Officer ("CEO") has refused to perform his duties by failing to honor EKPC's responsibilities under Amendment 3;

4. Absent the relief requested herein, Grayson will be forced to seek increased rates;

5. EKPC's failure to comply with Amendment 3 is a willful violation of its contractual obligations thereunder;

6. EKPC's failure to comply with Amendment 3 is an unfair and illegal restraint of trade;

7. EKPC's failure to comply with Amendment 3 constitutes willful violations of previous Commission orders regarding a directive to maintain transparency with one of its members; and

8. EKPC should be subject to civil penalties, under KRS 278.990, for willful contract violations, unfair and illegal restraint of trade, and violating orders requiring transparency with members.

EKPC'S ANSWER AND MOTION TO DISMISS

The Commission issued an Order on December 19, 2012, directing EKPC to file an answer or to satisfy Grayson's complaint. In response to that Order, EKPC filed a very detailed answer and motion to dismiss on January 11, 2013. EKPC readily acknowledges that Amendment 3 has been a source of controversy among its Members, and states that absent agreement among its Members as to a proper interpretation of the allocation percentages, EKPC welcomes the Commission's review and interpretation. EKPC's answer included a lengthy counter-statement of facts which discusses the history of its power contracts with its Members and states that in early

2003, RUS was unwilling to loan additional funds to EKPC for construction of generating facilities absent an extension of EKPC's full requirements contracts with its Members. At the same time, some Members were interested in purchasing power from alternative suppliers. EKPC's answer references minutes of its Directors meetings in 2003, and characterizes the alternative supplier option as an economic development tool, designed to give its Members "an opportunity to procure economic power for the purpose of attracting new load to their system and retaining existing load."

Noting that its Members' power contracts are used by RUS as security for its loans, EKPC states that Amendment 3 was principally drafted by RUS for the primary purpose of extending the Members' purchase obligations. The lack of a methodology to allocate each Member's share of power purchased from alternative suppliers was discussed at an October 2003 Directors meeting, at which EKPC's then CEO suggested a plan whereby each Member would have a certain amount of time to submit a proposal for using an initial allocation of 5 percent of the alternative sourced power. If any Member did not submit a plan, or if a submitted plan was not enacted upon as presented, that Member's initial allocation of 5 percent would go back into a pool to be available to any other Member interested in purchasing more than its initial 5 percent allocation. The pool would be managed by a Member group consisting of a mix of Member system managers, EKPC Directors, and EKPC staff. This plan was presented to the Members in 2003, and described at that time as having the following advantages: (1) each Member has the opportunity to participate; (2) such a pool is intended to be used as RUS wanted it to be; and (3) the plan prescribed an orderly system of

administration. EKPC's Directors adopted this pool allocation plan by Board Policy 305 in March 2004.

The first Member to invoke Amendment 3 was Jackson Energy Cooperative Corporation ("Jackson Energy") in 2010, for a purchase of .375 MW from Wellhead Energy. EKPC's Directors approved the purchase in July 2010. Two months later, Jackson Energy proposed a second purchase which was to be from Owensboro Municipal Utilities for 40 MW. That purchase would have equaled approximately 15 percent of Jackson Energy's average coincident peak demand. Jackson Energy subsequently withdrew that proposal prior to any decision by EKPC's Directors. EKPC's answer references another purchase of 1 MW by Owen Electric in late 2011.

According to EKPC, the purpose and impact of Amendment 3 and proper allocation procedures were discussed by EKPC Directors' committees and EKPC Directors at meetings throughout 2011. These discussions led to the drafting of a proposed Amendment 5, which has taken various forms and was scheduled for a Directors' vote in November 2011. That vote was delayed when three Members requested time to conduct an independent analysis of power purchased from alternative sources. That independent analysis was presented to EKPC's management in June 2012, and Members were given 60 days to reach consensus on a Memorandum of Understanding ("MOU") that would establish a procedure for allocating among the Members the quantity of non-EKPC power that each can purchase. The Members subsequently requested additional time, and a tentative MOU was filed with EKPC in December 2012. The adoption of this MOU would obviate the need for the Members to adopt Amendment 5.

On June 22, 2012, Grayson sent EKPC notice of intent to purchase 10.7 MW of power from Magnum. EKPC states that Grayson's notice omits a date on which the power will start to be purchased and a description of the load to be served by Magnum, as expressly required under Amendment 3. Grayson's notice was discussed at a July 16, 2012 committee meeting of EKPC's Directors, and on August 9, 2012, Grayson sent an amended notice of its intent to purchase only 5 MW in 2012. EKPC states that it did not receive a copy of Grayson's contract with Magnum until Grayson filed its complaint and petition with the Commission on November 19, 2012.

According to EKPC's answer, while the Members were working on the MOU, the Strategic Issues Committee of EKPC's Directors deferred any action on Grayson's contract with Magnum. EKPC states that Grayson's President and CEO was a member of this committee, was present when the vote was taken to defer action on the Magnum contract, and agreed with the decision to defer any action on the contract. At a November 2012 meeting of the Strategic Issues Committee, the absence of any action on Grayson's contract with Magnum was discussed, and Grayson requested that the contract again be tabled. Approximately two weeks later, Grayson filed with the Commission this action alleging, among other things, that EKPC has failed to act in accordance with its obligations under Amendment 3.

EKPC's answer also discusses an action filed in October 2012 by Grayson against EKPC in the Mason Circuit Court. In that action, Grayson is seeking a distribution of assets as a result of EKPC's dissolution of a subsidiary corporation known as Charlestown Bottoms RECC ("Charlestown Bottoms"). EKPC notes that none of its other 15 members have joined Grayson in that action, and that EKPC has filed a

counterclaim in the Mason Circuit Court alleging that Grayson filed that action to obtain leverage in negotiating unrelated matters over which it has been unable to gain a consensus among EKPC's Directors.

EKPC claims that Grayson has failed to state a prima facie complaint within the Commission's jurisdiction under KRS 278.260. Citing the specific subjects listed in that statute, EKPC claims that Grayson does not allege that: (1) any rate is unreasonable or unjustly discriminatory; (2) any regulation, measurement, practice or act affecting or relating to the services of the utility or any service connection therewith is unreasonable, unsafe, insufficient, or unjustly discriminatory; (3) any service is inadequate; or (4) any service cannot be obtained. EKPC argues that there is no allegation that it violated any Commission statute, regulation, order, or tariff, and absent such allegation, Grayson's complaint must be dismissed. EKPC also challenges Grayson's calculation of cost savings under the purchase of power from Magnum and claims that Grayson's notice of intent to purchase pursuant to Amendment 3 was deficient for omitting a starting purchase date, not identifying the load to be served, and not providing the requisite advance notice.

In moving to dismiss this case, EKPC asserts that there is no nexus between its actions with respect to Amendment 3 and the Commission's authority to impose a penalty under KRS 278.990(1). Claiming that neither its wholesale power contract with Grayson nor Amendment 3 thereto is a Commission statute, regulation, or order, EKPC argues that there is no statutory basis for the Commission to impose a civil penalty under KRS 278.990(1). Citing prior Commission precedent as discussed below, EKPC also argues that Grayson's allegations of an unfair and illegal restraint of trade by EKPC

must be dismissed for lack of jurisdiction since KRS Chapter 278 expressly limits the Commission's jurisdiction to the regulation of utility rates and service.

In response to Grayson's claim that EKPC has failed to act in accordance with its obligations under Amendment 3, EKPC asserts that its Directors have made no decision on the Magnum contract and that Grayson has not merely consented to the deferral of a decision but has expressly requested that no decision be made. EKPC explains that Grayson's power purchase raises questions of first impression relating to each Member's proper share of the allocation under Amendment 3, and EKPC desires to reasonably accommodate Grayson without prejudicing the rights of other Members, while acting in a manner consistent with the intent of Amendment 3 to promote economic development. Due to the quantity of power to be purchased by Grayson, EKPC asserts that Amendment 3 requires an 18-month advance notice, so the earliest that Grayson can begin receiving power from Magnum is January 2014. For these reasons, EKPC seeks dismissal of this claim as not being ripe for a decision by the Commission.

Grayson's complaint and petition names only itself and EKPC as parties to this case. Asserting that the issues being raised by Grayson involve the proper methodology for allocating to each Member a share of the alternative source power authorized under Amendment 3, EKPC argues that its other 15 Members are indispensable parties. If the Commission were to adopt Grayson's methodology, which is to allow Members on a first-come, first-served basis to purchase alternative sourced power for up to 15 percent of their individual respective peak loads, some Members would be denied a share of the alternative sourced power because the total of all

Members' purchases cannot exceed 5 percent of EKPC's peak load. Thus, EKPC argues that the real issue in this case is whether it is appropriate to require some of its Members to give up their rights to purchase any alternative sourced power under Amendment 3 to enable Grayson and other Members to purchase their entire 15 percent allocations, and since this issue affects the rights of EKPC's 15 other Members, a decision cannot be made in this case without affording the other Members the opportunity to participate. Due to Grayson's failure to name and join as parties the other 15 EKPC Members, EKPC requests that Grayson's complaint and petition be dismissed.

Further, EKPC notes that while Grayson has requested approval of the Magnum contract the complaint and petition do not reference KRS 278.300, which is the statute that requires prior Commission approval of such evidences indebtedness. EKPC goes on to state that Grayson's contract does not provide sufficient security to protect its ratepayers in the event of nonperformance by Magnum, Grayson's supporting economic analysis does not include all appropriate direct costs or the indirect costs that will be imposed on other EKPC Members as a result of this alternative power contract, and Grayson has not shown that tying the rates to be paid to Magnum to the rates to be charged by EKPC is a fair and just rate methodology.

PENDING MOTIONS

After the filing of EKPC's answer and its motion to dismiss, Grayson filed a motion requesting the establishment of a procedural schedule providing for discovery, including the taking of depositions of EKPC's executive officers, and the setting of a hearing date. EKPC then filed a response, asserting that Grayson's motion for a

procedural schedule should be denied as premature since the Commission has not yet ruled on EKPC's motion to dismiss certain claims in Grayson's complaint and petition. Further, EKPC states that there is a need to know the nature and extent of the issues to be investigated in this case so that the proper scope of discovery can be determined, that Grayson should be required to state the names of any individuals that it seeks to depose prior to the right to take depositions being granted under KRS 278.340, and that if depositions are to be taken, Commission Staff counsel should be allowed and encouraged to attend. Grayson then filed a reply which: (1) denies that setting a procedural schedule now would be premature, because the Commission should have before it all of the facts before dismissing any of its claims; (2) asserts that it would be inappropriate to dismiss any of its claims before discovery is conducted; and (3) requests a hearing on the merits, at which the Commission could determine whether there are any issues over which the Commission does not have jurisdiction.

On April 29, 2012, EKPC filed a second motion to dismiss Grayson's complaint and petition, now arguing that the entire case is moot. EKPC states that under the terms of Grayson's contract with Magnum, Magnum was required to obtain EKPC's approval by March 1, 2013 for the delivery of power to Grayson, and that Magnum has failed to request any such approval from EKPC. Grayson filed a response to EKPC's second motion to dismiss, stating that: (1) the dates in the Magnum contract have been extended by agreement of the contracting parties; (2) there is an actual controversy between Grayson and EKPC that needs to be adjudicated by the Commission; and (3) Grayson's economic position is being adversely impacted by EKPC's interpretation of Amendment 3.

COMMISSION FINDINGS

The Commission begins its analysis by determining whether all of the issues raised and the relief requested in Grayson's complaint and petition are within the scope of the Commission's "exclusive jurisdiction over the regulation rates and service of utilities," as prescribed in KRS 278.040(2). The issues raised by Grayson arise substantially from two separate contracts: (1) Grayson's Wholesale Power Contract with EKPC, dated October 1, 1964, as modified by Amendment 3 thereto, dated November 21, 2003; and (2) Grayson's 2012 power purchase contract with Magnum.

EKPC is a generation and transmission cooperative utility organized under KRS Chapter 279, and it is subject to the jurisdiction of the Commission as specified under KRS 279.210(1). The Wholesale Power Contract extends for a term ending January 1, 2010 and includes provisions that: (1) obligate EKPC to sell, and Grayson to buy, all the electric power and energy required to operate Grayson's system; (2) specify the points of delivery of EKPC's power and energy; (3) require EKPC to install, own, and maintain substation equipment at points of connection, and meters and metering equipment at points of delivery; and (4) specify the rates to be paid by Grayson to EKPC and the criteria to be used to determine when rates need to be adjusted. Amendment 3 modifies the Wholesale Power Contract by, among other things, extending the term through January 1, 2041, and creating a right for Grayson (and EKPC's other Members) to purchase a limited quantity of power from alternative sources. Since the Wholesale Power Contract contains provision relating to utility rates and service, as those terms are defined under KRS 278.010(12) and (13) respectively, the contract is within the Commission's jurisdiction. In addition, KRS 278.160(1)

requires a utility to have on file with the Commission “schedules showing all rates and conditions for service established by it and collected or enforced,” while Commission regulation 807 KAR 5:011, Section 13, requires each utility to file with the Commission “a copy of all special contracts entered into governing utility service that establish rates, charges, or conditions of service not included in its general tariff.” Thus, any complaint or issue that arises under a rates and service contract between a utility and a customer is subject to the exclusive jurisdiction of the Commission.

Under Amendment 3, a Member of EKPC has a right, within certain quantitative limits and after giving proper notice, to purchase power from an alternative source. Grayson claims that it is attempting to purchase power from an alternative source within Amendment 3's quantitative limits and upon proper notice, but EKPC has failed to approve the purchase. However, a review of Amendment 3 does not reveal any requirement that a Member's purchase of power from an alternative source be approved by EKPC. Further, under the terms of Amendment 3, it is not clear whether Grayson has provided proper advance notice of its alternative sourced power purchase, and there appears to be an issue as to whether the Commission should impose a methodology to share the allocation of alternative sourced power that the parties themselves did not contract for. Thus, while Grayson's complaint and petition does not set forth sufficient allegations to support a prima facie case that it is entitled to the relief requested, it does set forth sufficient allegations to support an investigation of whether its contract with Magnum is reasonable, whether its advance notice was proper under Amendment 3, whether there is an actual ambiguity under Amendment 3 relating to how the allocation of alternative sourced power is to be shared by Members, whether if

Amendment 3 is not ambiguous, the Commission should nonetheless impose an allocation sharing requirement, and whether any additional relief is warranted. Consequently, Grayson's complaint and petition should not be dismissed for failure to state a claim on which relief can be granted.

Turning to EKPC's request to dismiss certain of Grayson's claims for lack of jurisdiction, the Commission finds that two of Grayson's claims should be dismissed now, since no additional facts gathered through the discovery process will cure the jurisdictional infirmities. The first is Grayson's claim that EKPC's failure to comply with Amendment 3 constitutes an unfair and illegal restraint of trade. The Commission has previously held that it lacks jurisdiction over similar claims. In a 2005 complaint case that was filed against Grayson by one of its customers, the Commission dismissed claims that Grayson's actions violated the Sherman Anti-Trust Act and the Clayton Act on the grounds that such claims are beyond our jurisdiction, which is limited to the regulation of utilities and the enforcement of the provisions of KRS Chapter 278.² Issues of whether or not EKPC's actions with respect to Grayson's power contract with Magnum constitute unfair and illegal restraints of trade are similarly beyond the scope of the Commission's jurisdiction under KRS Chapter 278.

The second claim presented by Grayson that should be dismissed now is its request that the Commission impose civil penalties on EKPC for willful contract violations, unfair and illegal restraint of trade, and violating orders requiring transparency with Members. Although the Commission will dismiss this claim now, we do so for reasons other than those presented by EKPC. In its motion to dismiss the

² Case No. 2005-00280, *Walter and Goldie Callihan v. Grayson Rural Electric Cooperative Corporation* (Ky. PSC Aug. 1, 2005).

claim for civil penalties, EKPC asserts that neither its wholesale power contract with Grayson nor Amendment 3 thereto is a Commission statute, regulation, or order and, therefore, there is no statutory basis for the Commission to impose a civil penalty under KRS 278.990(1). While it is true that the wholesale power contract and Amendment 3 are not statutes, regulations, or orders, the wholesale power contract and Amendment 3 do constitute a special contract that governs utility service and establishes rates. Thus, if EKPC takes any action that is either contrary to the terms of its special contract with Grayson or otherwise not in compliance with that special contract, EKPC would not have on file with the Commission "schedules showing all rates and conditions of service established by it and collected or enforced," as required by KRS 278.160(1). If sufficient facts are brought forth to show that EKPC, or any other utility under the Commission's jurisdiction, is not in compliance with the terms of its filed tariffs and special contracts, and if, after the Commission's initiation of a show cause proceeding, the non-compliance is determined by the Commission to be willful, penalties can be imposed under KRS 278.990(1) for violating the requirements of KRS 278.160(1).

However, KRS 278.040(1) creates the Commission and empowers it to enforce the provisions of KRS Chapter 278, while KRS 278.260(1) specifically authorizes the Commission to investigate complaints by "any person" that: (1) a utility's rates are unreasonable or unjustly discriminatory; or (2) a utility's service is unreasonable, unsafe, insufficient, unjustly discriminatory, inadequate, or unavailable. But there is no authorization in KRS 278.260 for a person to file a complaint seeking to impose a penalty on a utility. Further, after investigating a complaint by any person, the Commission's statutory authority with respect to rates is expressly limited by KRS

278.270 to “prescrib[ing] a just and reasonable rate to be followed in the future,” and its statutory authority with respect to service is expressly limited by KRS 278.280(1) to “determin[ing] the just, reasonable, safe, proper, adequate or sufficient rules, regulations, practices, equipment, appliances, facilities, service or methods to be observed, furnished, constructed, enforced or employed, and ... fix[ing] the same by its order, rule or regulation.”

Thus, there is no provision in KRS Chapter 278 for a complainant to request that a penalty be imposed, and there is no provision in KRS Chapter 278 for the Commission to impose a penalty in response to a complaint. Rather, the penalty provisions under KRS 278.990 are to be applied by the Commission on its own motion and investigation, since penalty cases require the determination of unique facts relating to whether or not actions (or inactions) were willful, whereas complaint cases require no findings of willfulness. Further, penalty cases involve matters that solely relate to the Commission’s duty to enforce the provisions of KRS Chapter 278 and the Commission’s regulations and orders, and such enforcement does not involve the utility’s customers or any other third parties. Therefore, any issue relating to penalizing EKPC under KRS 278.990(1) for its actions relating to Amendment 3 should be considered in a separate proceeding that would be initiated by the Commission if the facts as developed in this case indicate that there may have been a willful violation of the special contract with Grayson.

As to Grayson’s claim that EKPC should be penalized for violating previous Commission orders directing EKPC to act in a transparent manner with one of its Members, Grayson cites no order setting forth such a directive. If the facts as

developed in this case indicate that such a directive was established by Commission Order, any issue relating to the imposition of penalties will be considered in a separate proceeding that would be initiated by the Commission on its own motion, as discussed above. Finally, based on our finding that Grayson's claim of an unfair and illegal restraint of trade should be dismissed as beyond the scope of the Commission's jurisdiction, Grayson's request for penalties arising from that claim is rendered moot.

With respect to Grayson's having named only EKPC as a party to this case, the rights of all other Members of EKPC may be impacted by a Commission decision regarding whether Amendment 3 requires or a need exists for a methodology for sharing among all Members the allocation of alternative sourced power authorized under Amendment 3. But Grayson's failure to name all other EKPC Members does not support dismissal of the complaint and petition as requested by EKPC. Rather, this procedural issue can and should be remedied by the Commission's providing notice of this case to the other 15 Members of EKPC and affording them an opportunity to individually or jointly intervene and participate on the issue of whether Amendment 3 requires or a need exists for a Commission imposed methodology to share the allocation of alternative sourced power authorized under Amendment 3. Based on the EKPC allegation that EKPC's Members have been debating this issue for some time and have been unable to reach consensus, and the substantial likelihood that this issue will arise again if not resolved in this case, administrative efficiency will be achieved by addressing the allocation issue now among all interested Members, rather than either dismissing this issue or addressing it piecemeal, one Member at a time.

Grayson's contract with Magnum extends for a term of 20 years and obligates Grayson to pay for all power provided by Magnum. The Commission previously held in 1993 that there was no requirement that all purchase power contracts be submitted for our approval, but such contracts might constitute evidences of indebtedness and, if they do, prior approval would be required under the financing statute, KRS 278.300.³ Specifically, the Commission stated in that case, "[T]he inclusion in [purchase power] contracts of minimum payment obligations or take/pay provisions may necessitate prior approval."⁴ The Commission went on to encourage all electric utilities to file long-term purchase power contracts for prior approval even if the contracts do not constitute evidences of indebtedness because, absent prior approval, there is a significant risk that the contracts will be subject to subsequent review in rate cases and the contracts' costs could be subject to rate disallowances if the Commission finds the costs to be unreasonable or not prudent. The Commission has previously reviewed the reasonableness of a purchase power contract.⁵ Thus, based on our prior practice, the Commission finds that the reasonableness of the Magnum contract should be investigated in this case to determine whether or not it should be approved. The Commission notes in passing that neither Grayson nor EKPC have filed as part of this case any of the pleadings or other documents that have been filed in the Mason Circuit Court in Grayson's action for a distribution of assets in connection with EKPC's

³ Administrative Case No. 350, *The Consideration and Determination of the Appropriateness of Implementing a Ratemaking Standard Pertaining to the Purchase of Long-Term Wholesale Power by Electric Utilities as Required in Section 712 of the Energy Policy Act of 1992* (Ky. PSC Oct. 25, 1993).

⁴ *Id.* at 9.

⁵ Case No. 2000-00079, *Application of East Kentucky Power Cooperative, Inc. for Approval of a Power Purchase Agreement with Kentucky Pioneer Energy, L.L.C.* (Ky. PSC Jul. 11, 2000).

dissolution of its subsidiary, Charlestown Bottoms. Absent a review of these documents, it is impossible to determine whether there is any merit to EKPC's claim that Grayson filed the court action merely to gain some leverage in its negotiations with EKPC on unrelated issues. Although EKPC does not name the unrelated issues, the inference is that they relate to the Magnum power contract and Grayson's efforts to gain approval from EKPC's Directors. In any event, whatever Grayson's motives may have been in filing its action in the Mason Circuit Court, its complaint and petition as filed here do raise proper issues that are within the Commission's jurisdiction and which we will investigate in this case.

In summary, the Commission will dismiss for lack of jurisdiction two of Grayson's claims: (1) that EKPC's actions with respect to Amendment 3 constitutes an unfair and illegal restraint of trade; and (2) that civil penalties should be imposed on EKPC under KRS 278.990(1). The Commission will also deny EKPC's request to dismiss Grayson's complaint for failure to state a claim upon which relief can be granted. EKPC's Wholesale Power Contract and Amendment 3 thereto is a special contract governing utility rates and service which is within the Commission's exclusive jurisdiction, and Grayson has raised substantial questions relating to its rights expressed or implied thereunder sufficient to require an investigation. Because the issues raised by Grayson may implicate the rights of EKPC's other 15 Members, the Commission will serve a copy of this Order on each Member and allow them to individually or jointly file by July 30, 2013 a request for intervention and a response to the issues of: (a) whether Amendment 3 expressly requires a methodology for Members to share the allocation of alternative power, and if not expressly required, should the Commission nonetheless

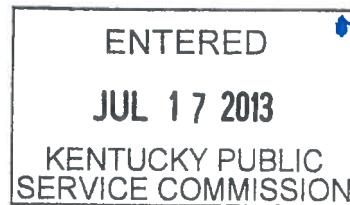
impute such a methodology for the Members to share the allocation of alternative power under Amendment 3; and (b) the proper form of advance notice to EKPC for an alternative sourced power purchase. Further, Grayson's motion to establish a procedural will be granted to the extent that an informal conference should be held at the Commission's offices on the afternoon of August 8, 2013 for the purpose of setting dates for conducting discovery and the filing of testimony. Finally, EKPC's second motion to dismiss as moot Grayson's complaint and petition should be denied because that motion raises factual issues not in the record as to the current status of the Magnum contract and, even if the Magnum contract is no longer valid, Grayson has properly invoked the Commission's jurisdiction to investigate and interpret the terms and conditions of utility service set forth in Amendment 3.

IT IS THEREFORE ORDERED that:

1. An investigation shall be conducted on the issues raised in Grayson's complaint and petition relating to Amendment 3 and the Magnum contract, except for the claims of unfair and illegal restraints of trade and imposition of civil penalties.
2. EKPC's initial motion to dismiss is partially granted to the extent that Grayson's claims of unfair and illegal restraints of trade and imposition of civil penalties are dismissed and is denied with respect to all other claims and issues.
3. EKPC's second motion to dismiss as moot is denied.
4. EKPC's 15 other Members may, by July 30, 2013, file individually or jointly a request to intervene supported by a response to the issues discussed in the findings above.

5. Grayson's motion to establish a procedural schedule is granted to the extent that an informal conference shall be held on Thursday, August 8, 2013, at 1:30 p.m. Eastern Daylight Time, Conference Room 1 at the Commission's offices, 211 Sower Boulevard, Frankfort, Kentucky, for the purpose of setting dates for discovery and the filing of testimony.

By the Commission



ATTEST:



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