

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN EXAMINATION OF THE)
APPLICATION OF THE FUEL)
ADJUSTMENT CLAUSE OF DUKE) CASE NO. 2010-00494
ENERGY KENTUCKY, INC. FROM)
NOVEMBER 1, 2008 THROUGH)
OCTOBER 31, 2010)

O R D E R

On March 17, 2011, Duke Energy Kentucky (“Duke”) filed an Affidavit of Publication which indicated the notice of the March 22, 2011 hearing had been published in the *Kentucky Enquirer* (“*Enquirer*”) and at Cincinnati.com. Duke’s electric service territory includes the counties of Boone, Campbell, Grant, Kenton, and Pendleton.

At the hearing of this matter conducted on March 22, 2011, the Commission allowed Duke ten business days in which to brief the issue of why publication in the *Enquirer* meets the notice requirements set forth in KRS 424.120 for its entire service territory. KRS 424.300 requires that when the Commission has a hearing involving rates, notice except where advertised by mail, “shall be advertised by the applicant utility . . . by newspaper publication in the areas that will be affected.”

For a newspaper to qualify to publish notice, it must meet the requirements of KRS 424.120(1). That provision states that:

If a publication area consists of a district, other than a city, which extends into more than one (1) county, the part of the district in each county shall be considered to be a separate publication area for the purposes of this section, and an advertisement for each separate publication area shall be published in a newspaper qualified under this section to publish advertisements for the area.

Duke states that the *Enquirer* is a qualified newspaper pursuant to KRS 424.120 and that its publication of the notice in that newspaper substantially complies with the Commission's publication directive and the intent of 807 KAR 5:001, Section 4(2). The Affidavit of Mark Woodruff, Vice President of Circulation for the *Kentucky Enquirer*, filed on April 5, 2011, indicates that the *Enquirer* maintains its principal office for the purpose of gathering news and soliciting advertisements and other general business in Ft. Mitchell, Kenton County, Kentucky.¹

The Affidavit further states that the *Enquirer* maintains additional offices it uses for "general business"² in Ft. Thomas, Campbell County, Kentucky; and in Erlanger, Boone County, Kentucky. These offices are shared with weekly publications that are owned by the parent company of the *Enquirer*.

KRS 424.120(1) states that:

Except as provided in subsection (2) of this section, if an advertisement for a publication area is required by law to be published in a newspaper, the publication shall be made in a newspaper that meets the following requirements:

¹ Affidavit of Bona Fide Circulation of Mark Woodruff, Vice President of Circulation for the *Kentucky Enquirer*, filed April 5, 2011, page 1.

² Id.

- (a) It shall be published in the publication area. A newspaper shall be deemed to be published in the area if it maintains its principal office in the area for the purpose of gathering news and soliciting advertisements and other general business of newspaper publications, and has a periodicals class mailing permit issued for that office

The *Enquirer* maintains its principal office for the purpose of gathering news, soliciting advertisements and other general business at its location at 226 Grandview Drive, in Ft. Mitchell, Kenton County, Kentucky. That office has a periodicals class mailing permit.

The *Enquirer* shares an office at 654 Highland Avenue, in Ft. Thomas, Campbell County with the weekly publications which are owned by its parent company. That office is used by the *Enquirer* for general business. There is no evidence that the *Enquirer* has a periodicals class mailing permit for its Campbell County office.

The *Enquirer* shares an office at 3635 O'Hara Road, Erlanger, Boone County with the weekly publications which are owned by its parent company. That office is used by the *Enquirer* for general business. There is no evidence that the *Enquirer* has a periodicals class mailing permit for its Boone County office.

Under KRS 424.120(1)(a), in order for a newspaper to be deemed to be published in the publication area, the office from which the gathering of news, the solicitation of advertisements, and the conducting of business occurs, must also maintain a periodicals class mailing permit issued for that office.

Pursuant to KRS 424.120(1)(a), the *Enquirer* is deemed to be published in the Kenton County publication area because it maintains an office for the purpose of gathering news, soliciting advertisements, and the conduct of other general business, in addition to having a periodicals class mailing permit.

The *Enquirer* fails to meet the requirements set out at KRS 424.120(1)(a) to be deemed to be published in the Campbell County publication area. There is no evidence that the *Enquirer's* Campbell County office is utilized for the purpose of gathering news or soliciting advertisements. Further, there is no evidence that the *Enquirer* has a periodicals class mailing permit for its Campbell County office.

The *Enquirer* fails to meet the requirements set out at KRS 424.120(1)(a) to be deemed to be published in the Boone County publication area. There is no evidence that the *Enquirer's* Boone County office is utilized for the purpose of gathering news or soliciting advertisements. Further, there is no evidence that the *Enquirer* has a periodicals class mailing permit for its Boone County office.

Duke requests that in the event the Commission finds the *Enquirer* does not qualify as a newspaper published in the publication area in each of the five counties in which it provides electric service that the Commission finds that the Company has substantially complied with the January 26, 2011 Order and grant it a deviation and waiver of the publication requirements. In support of its Motion, Duke states that the *Enquirer* has a bona fide circulation in each of the five counties it serves and has regular business offices in three of those five counties. Duke maintains that, as a result of the scope of the *Enquirer's* distribution, publication in that newspaper is a cost-effective method of meeting the publication requirement.

Duke cites Conrad v. Lexington-Fayette Urban County Government, Ky. 659 S.W.2d 190, (1983) in maintaining that substantial compliance with publication requirements has been authorized. In that case, two newspapers in Fayette County qualified under KRS 424.120(1)(a) and the issue before the Court was which newspaper had the largest circulation as required by KRS 424.120(1)(d). The current matter is distinguishable in that the *Enquirer* qualifies under KRS 424.120(1)(a) as a newspaper published in Kenton County, but does not qualify as a newspaper published in Boone, Campbell, Grant, or Pendleton counties. As such, Duke's publication of notice of the public hearing in this matter in only the *Enquirer* does not constitute substantial compliance with the notice requirements.

The Woodruff Affidavit further outlines the weekly newspapers published by the *Enquirer's* parent company in Boone, Kenton, and Campbell counties. The Campbell County Recorder and the Boone County Recorder have periodicals class mailing permits. An Opinion of the Attorney General of Kentucky addressed the issue of which newspaper is qualified to publish notice under KRS 424.120 in Campbell County. The Opinion stated:

It is our understanding that the Campbell County Recorder meets the requirements set forth in KRS 424.120(1)(a), (b), and (c), and that it is the only newspaper in Campbell County which does so

We understand that the Campbell County Recorder newspaper maintains its principal office for gathering news, soliciting advertisements, and other general business of newspaper publications (424.120(1)(a), above), in Suite 27, 654 Highland Avenue in Ft. Thomas, which is in Campbell County, Kentucky.

Additionally, it is our understanding that the Campbell County Recorder has a second-class mailing permit as issued by the U.S. Postal Service, for that office.³

The Commission is in agreement with Duke that publication in the *Enquirer* would be cost effective to provide notice to its customers; however, the Commission is obligated to follow the requirements of KRS 424.120. Under those specific requirements, the *Enquirer* does not qualify for any county other than Kenton.

Based on the evidence in the record, the Commission finds that:

1. The *Enquirer* qualifies under KRS 424.120(1)(a) as a newspaper published in the Kenton County publication area.

2. The *Enquirer* does not meet the requirements under KRS 424.120(1)(a) as a newspaper published in the publication areas of Boone, Campbell, Grant, and Pendleton Counties.

3. Duke's publication only in the *Enquirer* for its entire service territory does not constitute substantial compliance with the publication requirements of KRS 424.120 and 807 KAR 5:011, Section 8(5).

4. An additional hearing should be scheduled to provide an opportunity for customers in Duke's service territories of Boone, Campbell, Grant, and Pendleton Counties to provide comments on the Fuel Adjustment Clause issues in this case.

5. Duke should publish notice of the public hearing in a newspaper of general circulation in each of its Kentucky service territories of Boone, Campbell, Grant, and Pendleton Counties in newspapers that qualify under KRS 424.120.

³ 1994 Ky. O.P. Atty. Gen. 2-25, Ky. OAG 94-9, 1994 WL 65228 (Ky. A.G.), pp. 3-4.

IT IS THEREFORE ORDERED that:

1. Duke's Motion for a Waiver from the publication requirements of KRS 424.120 is denied.


2. A public hearing shall be held on May 23, 2011, at 10:00 a.m., Eastern Daylight Time, in Hearing Room 1, of the Commission's offices in Frankfort, Kentucky, to allow customers in Boone, Campbell, Grant, and Pendleton Counties an opportunity to examine the application of the Fuel Adjustment Clause of Duke Energy Kentucky for the period November 1, 2008 through October 31, 2010. Customers interested in attending this hearing shall notify the Commission in writing of their intent to attend no later than May 19, 2011. If no notices of intent to attend are received by that date, the hearing shall be cancelled and the matter shall be considered submitted for decision based on the evidence in the record.

3. Not less than 7 days nor more than 21 days prior to the scheduled hearing, Duke shall publish in a newspaper of general circulation in each of its Kentucky service territories of Boone, Campbell, Grant, and Pendleton Counties, notice of the May 23, 2011 hearing, including the due date for filing notice of intent to attend and that the hearing shall be cancelled if no notices of intent to attend are filed by May 19, 2011.

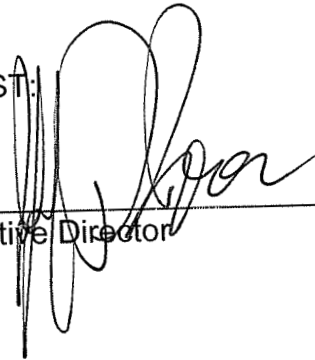
4. Duke shall file with the Commission, no later than May 19, 2011, proof of publication of its notice for the hearing.

5. The official record of the proceeding shall be by video only.

By the Commission

ENTERED 
APR 29 2011
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:



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