

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

JEFF M. SHORT)	
)	
COMPLAINANT)	
)	
v.)	CASE NO.
)	2013-00287
KENTUCKY UTILITIES COMPANY)	
)	
DEFENDANT)	

ORDER

On May 15, 2013, the Commission received a letter from Jeff Short (“Complainant”), a Kentucky Utilities (“KU”) residential customer in Berea, Kentucky. The Commission treated the letter as a formal complaint and opened the instant case. In his letter, Complainant stated that he utilizes KU’s Low Emission Vehicle tariff, (“Rate LEV”), which provides for time-of-use rates to encourage the use of off-peak power on the part of the residential customers owning low emission vehicles. Complainant also stated that he has shifted a significant portion of his energy load to off-peak periods. Complainant expressed a desire to install a photovoltaic solar generating system to use in conjunction with KU’s net-metering rider, (“Rider NMS”). Upon inquiry, KU informed Complainant that in accordance with its net-metering tariffs, he would receive credits for any excess generation produced by his solar system, and the credits would be available for use only in the time period in which they are generated. Thus, credits generated on-peak may only be used on-peak, and credits generated off-peak may solely be applied off-peak. Because Complainant has shifted the majority of his load to off-peak periods,

his complaint seeks to compel KU to either (1) provide a monetary credit for the value of the excess credits generated on-peak or (2) apply excess credits generated on-peak to off-peak usage.

KU countered in its Answer and prehearing comments that Kentucky's Net Metering of Electricity statute, KRS 278.466, is quite clear in referring solely to "electricity credits," which shall be "accounted for at the specific time it is fed back to the electric grid." KU stated that if the legislature had intended to permit the monetization of electricity credits, it could have explicitly worded the statute to permit such action. KU argued that because the time-of-use rates do not account for its marginal cost of generating electricity, monetizing the value of the power generated by Complainant at the full on-peak rate would detrimentally impact other ratepayers by forcing KU to buy from Complainant at a rate more than three times the cost of its marginal generation cost. Finally, KU stated that if Complainant wishes to maximize the financial advantages of net metering, his remedy is to cease utilizing the time-of-use rate and switch back to the standard residential rate, which would permit excess electricity credits to be used any time during the day, rather than restricting their use to specific time periods.

A formal hearing was held on March 27, 2014. Prior to the hearing, KU submitted two motions. First, it tendered a motion *in limine* to exclude the proposed testimony of Complainant's two witnesses, Andy McDonald and Joshua Bills. KU stated that neither individual has firsthand knowledge of the issues in this case. KU noted that the Commission previously denied Mr. Bills's motion to intervene in this case and his testimony was akin to a collateral attack on the Commission's Order denying his

intervention. It argued that Mr. Bills's proposed testimony was based largely upon hearsay dating back to the original debate on and passage of the net-metering legislation. Similarly, KU argued that Mr. McDonald did not have any firsthand knowledge regarding the instant dispute, and that his testimony regarding how KRS 278.466 should be interpreted by the Commission was improper for evidentiary purposes and should be treated only as public comment.

In a separate motion, KU also moved to dismiss the complaint. It advanced several arguments. First, it argued that because Complainant is not taking service under Rider NMS, he lacks standing to bring the instant complaint. Second, it stated that the complaint is not ripe for adjudication for the reason that Complainant has not yet elected to receive service under Rider NMS and he consequently has not suffered any harm because he has not yet received a bill while on Rate LEV and Rider NMS. Finally, KU stated that Complainant is improperly attempting to represent the interests of others. KU asserted that because Complainant stated that his complaint is on behalf of other similarly situated customers, his actions constitute the unauthorized practice of law and should not be permitted. Moreover, KU stated that no customers are currently taking service under Rate LEV and Rider NMS, and therefore the issue raised in the complaint remains hypothetical.

At the commencement of the formal hearing, the Commission held that it would rule on the above motions at a later date. In the course of the hearing, Complainant testified regarding his belief that KU's declination to permit him to utilize credits generated on-peak to offset off-peak usage creates a financial disincentive to load-shifting and furthering his environmental objectives. Complainant conceded that he is

not precluded from load-shifting and that the issue is essentially one of economics, as he would reap a larger financial benefit if he were able to expend credits earned from excess generation on-peak to offset his electricity use during off-peak time periods.

Robert Conroy, KU Director of Rates, testified that the design of Rate LEV was intended to be revenue neutral and was not intended as a traditional time-of-use rate to encourage extensive load-shifting, although it does provide an incentive to load shifting. Mr. Conroy demonstrated that under any set of facts, regardless of whether Complainant does or does not continue to shift his load, he will accrue a monetary benefit through participating on Rider NMS.¹

In his post-hearing brief, Complainant contended that the phrase “accounted for” in KRS 278.466 means that kilowatt hours are accounted for and valued monetarily at the time of their generation and are thereby able to be applied during any time-of-use period. This results in credits generated on-peak receiving the on-peak monetary value and therefore being able to off set off-peak credits on a more than 1:1 basis.

In its brief, KU presented several arguments. First, it stated that KRS 278.466 precludes Complainant’s desired billing treatment. It argued that the statute explicitly provides only for electricity credits and wholly forecloses the viability of monetary credits or values. Addressing Complainant’s alternative request to utilize credits across time periods, KU quoted KRS 278.466(3), which states, “If time-of-day or time-of-use metering is used, the electricity fed back to the electric grid . . . shall be net-metered and accounted for at the specific time it is fed back to the electric grid in accordance with the time-of-day or time-of-use billing agreement currently in place.” Therefore, it argued

¹ KU Exhibit 7 from Mar. 27, 2014 Hearing.

that it is required to account for the credits in the time-of-use period in which they are generated and it cannot increase their value and permit higher value on-peak credits to off-set lower individual value off-peak kilowatt-hour charges.

KU suggested that Complainant's remedy more properly rests with the legislature. Should the Commission grant Complainant's request, KU asserted, other KU ratepayers would effectively subsidize Complainant's energy usage because he would be consuming several times more energy than he would hypothetically generate.

Motions in Limine

Complainant presented two witnesses to support his case, Messrs. McDonald and Bills. KU moved to exclude both individuals' testimony. The Commission previously denied Mr. Bills's request to intervene in this matter, holding that Mr. Bills does not possess pertinent knowledge regarding this issues in this case that would aid the Commission's resolution of the case.² The Commission noted that Mr. Bills may instead submit comments to the record.³

Messrs. McDonald and Bills testified largely to state legislators' intent in passing the net-metering bill.⁴ Such testimony, offered to prove the truth of the statements asserted, which here is the legislators' intent, fits the plain definition of hearsay.⁵ While the Commission is not bound to and does not strictly follow the Kentucky Rules of Evidence, in the absence of any verification of the witnesses' statements, the Commission is unable to discern the truth or accuracy of the testimony.

² Order at 3 (Ky. PSC Sept. 26, 2013).

³ *Id.*

⁴ See Short Exhibit 2 from Mar. 27, 2014 Hearing.

⁵ See KRE 801(a)(c).

The testimony of Messrs. McDonald and Bills is more properly construed as public comments, wherein individuals are free to give their opinions and beliefs, which may include their opinions regarding the legislative intent in passing the net-metering statute. The issue complained of herein is predominantly one of statutory interpretation, while the testimony of Messrs. McDonald and Bills sets forth their respective opinions as to thoughts and conversations occurring nearly a decade ago. This opinion testimony is of minimal probative value in adjudicating the issue of statutory interpretation. Accordingly, the Commission will grant KU's motion to exclude as evidence the testimony of Messrs. McDonald and Bills and to accord their testimony the evidentiary value and weight of public comments.

Motion to Dismiss

KU raises two primary issues in arguing for dismissal: first, that the complaint is not yet ripe because Complainant has not installed a solar array and has not been billed under Rider NMS; and second that Complainant is improperly attempting to represent the interests of others.

The Commission has routinely held that the practice of law includes representation of a party before a state administrative agency.⁶ The Commission has required that those representing the interests of others must be licensed attorneys. The Commission has previously held:

[A]ny attorney who is not licensed to practice in the State of Kentucky and who seeks to represent a client or employer before this Commission must engage a member of the Kentucky Bar Association. It logically follows that if an

⁶ *Kentucky State Bar Association v. Henry Vogt Machine Co.*, 416 S.W.2d 727, 728 (Ky. 1967).

unlicensed attorney may not represent a client before this Commission, neither may a layman.⁷

More recently, Commission regulations have been amended to preclude a person other than an attorney from filing papers on behalf of another person in the course of a formal proceeding.⁸ Furthermore, an appearance before the Commission on behalf of another person in the course of a formal hearing constitutes the practice of law. Consequently, the services of an attorney licensed in the Commonwealth of Kentucky would be required for Complainant to represent the interests of other individuals. However, because Complainant is entitled to represent himself and he is receiving service from KU under Rate LEV, his complaint does present an actual controversy which directly impacts him. Therefore, KU's motion to dismiss should be denied.

Despite protestations that Complainant must first install solar panels and apply for service under Rider NMS before asserting his claim, the complaint is not wholly hypothetical. Were KU's argument accepted, the resultant effect would be to impose a significant monetary burden upon Complainant and similarly situated individuals. It would require an upfront investment in a costly solar system with the prospect of an unknown recovery or rate treatment. The issue herein is not a mere billing dispute, but instead requires examination of KU's current application of its tariffs. Complainant was put on notice by KU that his desired application of net metering would not be permitted and, based upon that representation, purportedly put off his installation of solar panels

⁷ Case No. 2004-00348, *Howard B. Keen v. Carroll County Water District* (PSC Ky. Oct. 15, 2004) (citing Administrative Case No. 249, *Practice Before the Commission by Attorneys Non-Licensed in the Commonwealth of Kentucky* (Ky. PSC June 15, 1981)).

⁸ 807 KAR 5:001, Section 4(4).

and use of Rider NMS. Therefore, the Commission finds that Complainant need not wait until being billed for service under Rider NMS and Rate LEV before bringing his complaint. Complainant has presented a controversy ripe for adjudication on the merits and KU's motion to dismiss should be denied.

Net-Metering Statute

This dispute centers upon the interpretation of KRS 278.466(3), which provides:

The amount of electricity billed to the eligible customer-generator using net metering shall be calculated by taking the difference between the electricity supplied by the retail electric supplier to the customer and the electricity generated and fed back by the customer. If time-of-day or time-of-use metering is used, the electricity fed back to the electric grid by the eligible customer-generator shall be net-metered and accounted for at the specific time it is fed back to the electric grid in accordance with the time-of-day or time-of-use billing agreement currently in place.

The parties present alternative theories for interpreting the phrase "accounted for at the specific time it is fed back to the electric grid."⁹ Complainant contends that generated credits should be *accounted for* and netted on a monthly basis, as the monetary value of credits consumed minus the monetary value of credits generated. As an alternative he suggests *accounted for* to mean the number of credits (in kilowatt hours of energy) consumed minus number of credits generated. Under either scenario, he argues, he should be permitted to use energy generated on-peak to offset energy consumed off-peak, whereas KU would permit offsetting against energy or credits only within the each respective time-of-use period.

⁹ KRS 278.466(3).

The clear language of KRS 278.466 does not provide for monetizing energy credits as requested by Complainant. To the contrary, the statute specifically states that:

- (c) If the electricity fed back to the retail electric supplier by the customer-generator exceeds the electricity supplied by the supplier during a billing period, the customer-generator shall be credited for the excess kilowatt hours in accordance with subsections (3) and (4) of this section. This electricity credit shall appear on the customer-generator's next bill. Credits shall carry forward for the life of the customer-generator's account;
- (d) If a customer-generator closes his account, no cash refund for residual generation-related credits shall be paid;

In instances wherein a customer generates more energy than is supplied, KRS 278.466(c) requires, first, that the customer be credited for the "excess kilowatt hours" and, second, that excess "electricity credit[s]" carry forward on the customer's bill. Thus, in addition to not expressly providing for the monetization of electricity credits, the statute explicitly requires that a customer-generator receive only "credits" to be applied against kilowatt hours consumed. Complainant's contention that he should receive the monetary value of credits generated at the significantly higher on-peak price and be able to use them to off-set the lower-cost off-peak consumption on a dollar value basis is therefore statutorily precluded. Such monetization would also impermissibly inflate the value of Complainant's generation and unjustly permit him to increase the value of his generation simply through use of the time-of-use rate. Reinforcing this premise is KRS 278.466(5)(d), which states that no cash refund shall be paid. Accordingly, there is no basis for either monetizing electricity credits that result from net metering or

increasing the value of the on-peak credits in an effort to offset significantly more off-peak usage.

As electricity credits may not be converted to a cash value, they must be accounted for as *credits* rather than *dollars*. KRS 278.466(3) makes special provision for accounting for electricity generated and consumed while utilizing time-of-use rates. It plainly requires that the electricity be “accounted for at the time it is fed into the grid.”¹⁰ The statute does not provide for totaling the credits in each time period and then netting the total credits against the total consumption. Instead, it mandates accounting for the electricity in each specific individual time-of-use period. Thus, in conjunction with time-of-use rates, electricity generated on-peak is accounted for separately from the electricity consumed off-peak. There is no provision for offsetting the off-peak consumption with on-peak generation via net metering either on a 1:1 basis or through a hypothetical ratio approach whereby Complainant would use on-peak credits to off-set off-peak usage in proportion with the value or cost of the energy for each individual time period.

The Commission commends Complainant’s efforts to utilize energy in an efficient and environmentally friendly manner. Complainant’s significant load shifting and stated goals are laudable. However, Complainant is not precluded by KU’s tariffs from continuing to shift his energy consumption to off-peak periods, or from utilizing time-of-use rates in conjunction with net metering. KU will not and may not prevent Complainant from utilizing both Rate LEV and Rider NMS. Indeed, should Complainant choose to install solar panels and participate on Rider NMS while continuing to shift his

¹⁰ KRS 278.466(3).

load, he would still receive a significant monetary benefit¹¹ while potentially furthering his stated environmental goals.¹²

Accordingly, the Commission finds that KRS 278.466 is clear and unambiguous in requiring surplus electricity generated through net metering to be accounted for in the specific time-of-use period in which it was generated and that the credits from excess generation may offset only those kilowatt hours consumed in the same time-of-use block on a one for one basis. The Commission therefore finds that the Complaint of Jeff Short should be dismissed.

IT IS THEREFORE ORDERED that:

1. KU's motion to exclude the testimony of Messrs. Andy McDonald and Joshua Bills is granted.
2. The proffered testimony of Messrs. Andy McDonald and Joshua Bills shall be treated as public comment.
3. KU's motion to dismiss is denied.
4. The Complaint of Jeff Short is dismissed.

¹¹ KU Exhibit 7 from Mar. 27, 2014 Hearing.

¹² KU contended that instead of lowering emissions, in shifting his load to off-peak periods, Complainant is possibly increasing emissions because KU's off-peak generation is predominantly provided by coal fired generation, whereas its peaking units utilize natural gas. Thus while load shifting does decrease KU's peak load, it may not necessarily have a positive impact on emissions. KU Post-Hearing Brief at 11 (Ky. PSC filed Apr. 24, 2014).

By the Commission

ENTERED
SEP 11 2014
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:



Executive Director

Case No. 2013-00287

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