

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN INVESTIGATION INTO THE FUEL)
PROCUREMENT PRACTICES OF KENTUCKY) CASE NO. 9631
UTILITIES COMPANY)

O R D E R

On December 28, 1988, Kentucky Utilities Company ("KU") filed a motion requesting the Commission to: (1) file and make part of the record a November 28, 1988 Initial Decision of the Federal Energy Regulatory Commission ("FERC") determining that KU's fuel procurement practices were prudent; (2) limit further proceedings in this investigation to issues other than the prudence of the 1973 River Processing coal supply contract, the 1976 renegotiation of that contract, and the 1980 decision to not seek a price review of the South East coal supply contract since these issues were addressed in the FERC Initial Decision; and (3) schedule oral argument on this motion. KU supports its motion by arguing that the FERC Initial Decision represents a litigated adjudication on the merits of the coal contract issues pending in this case and should be given binding effect under principles of collateral estoppel. In the alternative, KU claims that the FERC Initial Decision should be accorded determinative weight based on considerations of administrative economy, comity, and basic fairness.

On January 12, 1989, the Attorney General's office, Utility and Rate Intervention Division ("AG") filed a response in opposition to KU's motion. The AG argues that: (1) granting KU's motion would not merely limit the issues in this case but would result in a dismissal of the case; (2) the same arguments were previously made by KU and rejected by the Commission's September 10, 1987 Order; and (3) oral argument is not needed since principles of collateral estoppel, judicial economy, and equity bar KU's relitigation of issues previously adjudicated by the Commission. Further, the AG claims that since it shares no legal right with either KU or the complainants in the FERC proceeding, there is a lack of privity between it and the participants at the FERC. Absent this element of privity, the Commission is precluded from applying collateral estoppel to give the FERC Initial Decision binding effect. However, the AG does not oppose the FERC Initial Decision being filed and made part of the record in this case.

On January 13, 1989, Kentucky Industrial Utility Customers ("KIUC") also filed a response in opposition to KU's motion to limit the issues. KIUC argues that collateral estoppel is not applicable to this case because the parties have not had an opportunity to litigate the issues of prudence. KIUC notes that the FERC has exclusive regulatory jurisdiction over KU's wholesale rates only, and consequently the FERC proceeding extended to KU's actions only with respect to their impact on KU's wholesale rates. This Commission, however, has exclusive jurisdiction over KU's retail rates and is therefore the only forum with authority to

determine the justness and reasonableness of KU's retail rates. KIUC does support the inclusion in the record of the FERC Initial Decision on the ground that it will allow for a more narrow, focused investigation in this case.

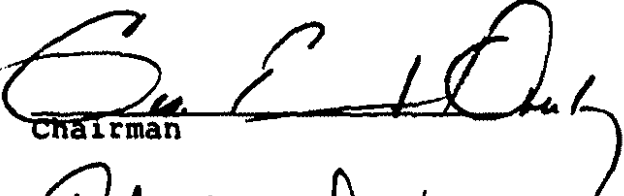
Based on KU's motion, the responses, and the evidence of record, the Commission is of the opinion and hereby finds that KU's motion to limit the issues presents substantially the same arguments previously considered and rejected by the Commission's September 10, 1987 Order in this case. The Commission heard oral arguments on KU's prior motion and, based on the similarity of the issues, finds that another oral argument is not now necessary. The FERC has expressly ruled that its own finding of imprudency with respect to a utility's wholesale rates would not be binding on a state commission proceeding involving retail rates. Monongahela Power Company, 39 FERC §61,350 (1987). Further, KU has failed to demonstrate that the parties to this case are in privity to those in the FERC proceeding.

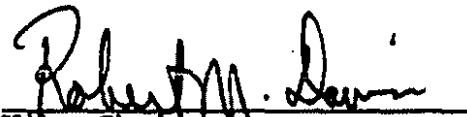
The Commission has a statutory responsibility to investigate KU's fuel procurement practices and the resulting impact on retail rates. The parties to this case have due process rights which encompass the presentation of testimony and the examination of witnesses. Those rights must not now be abridged. The Commission therefore finds that it is appropriate to include the FERC Initial Decision in the record of this case but that decision is neither binding nor entitled to determinative weight on the issues being investigated. The Commission will proceed to an independent adjudication based on the evidence in this case.

IT IS THEREFORE ORDERED that KU's motion to limit the issues be and it hereby is denied and the FERC Initial Decision be and it hereby is accepted as part of the record in this case.

Done at Frankfort, Kentucky, this 10th day of February, 1989.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director