COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

GREEN RIVER ELECTRIC CORPORATION APPLICATION FOR AN ORDER APPROVING PROPOSED RESOLUTION OF UNDERBILLING TO TOWN AND COUNTRY MOBILE HOME PARK	))))	CASE NO. 10205

O R D E R

Before the Commission is the application of Green River Electric Cooperative Corporation ("Green River") for Commission approval of a settlement with Charles R. Whitaker on a disputed bill. This application presents the question of whether a utility, to resolve a billing dispute, may agree to accept less compensation for service rendered than its filed rate schedule prescribes. The Commission answers this question in the negative and denies Green River's application.

Background

Charles R. Whitaker owns and operates Town & Country Mobile Home Park ("Town & Country"), a 154-lot mobile home trailer park located on the outskirts of Owensboro, Kentucky and within the certified service territory of Green River. Mr. Whitaker acquired ownership of the park in 1979. His father opened the park in 1966 and operated until 1979.

Green River has provided electric service to Town & Country since the park's opening. It does not serve Town & Country's

tenants, but instead provides service to a master meter within the park. Mr. Whitaker purchases the electricity at this meter. He then resells it to the park's tenants through distribution facilities which he owns and maintains. Each tenant's usage is metered and each tenant is billed monthly at Green River's rates.

In February 1986, Green River employees discovered that the internal wiring of one of the two potential transformers used to provide service to Town & Country had been improperly wired.[1] The polarity of the transformer's secondary terminals had been reversed, thus causing the master meter to register only the difference in the two transformers' loads, not the total amount of electricity received by Town & Country. Because the miswired transformer was in service at the Town & Country site from the park's opening and was never altered or repaired, Green River believes that Town & Country's usage was never properly recorded or billed prior to the discovery of the wiring defect.

After discovering the defect, Green River attempted to determine Town & Country's unbilled usage of electricity. It compared its billing records with those of Town & Country for the period from February 1984 to January 1986. This comparison revealed that Town & Country's sales of electricity to its tenants had exceeded its billed purchases from Green River by 2,183,219

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[1] Mr. Whitaker suspected metering problems after Town & Country's bill for usage in December 1985 appeared unusually low. He contacted Green River which tested Town & Country's master meter. When no irregularities were found, Green River changed out the potential transformers. Subsequent laboratory testing on the transformer revealed the wiring defect.

KWH, or 276 percent.[2] Green River accordingly recomputed all of Town & Country's monthly bills for the 5 year period preceding the discovery of the defect assuming that Town & Country's actual electricity usage was 276 percent greater than the previously billed amount. Based on this recomputation, Green River determined that Town & Country owed it $213,837.32 for unbilled service during the 5 year period.

On March 7, 1988, Green River tendered Mr. Whitaker a bill for $213,837.32 for all unbilled service received prior to the wiring defect's discovery. When Mr. Whitaker disputed the bill and refused to pay, Green River initiated this case to obtain Commission approval to bill Town & Country this amount over a 60 month period.[3]

While this case was pending, Green River on August 18, 1988, advised the Commission of another instance of underbilling involving Town & Country.[4] In late February 1986 after removing the defective transformer, Green River installed a check meter rigged to simulate the conditions of the defective transformer as

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2 Application (March 25, 1988), Exhibit 1. The only meter affected by the wiring defect was the master meter. Town & Country's metering equipment was not affected.

3 At the time of Green River's application, an action for a declaratory judgment on this matter was pending before Daviess Circuit Court. Ronald W. Whitaker d/b/a Town and Country Mobile Homes v. Green River Electric Corporation, Civil Action No. 88-CI-834. Mr. Whitaker was seeking a declaratory judgment that he did not owe the sums claimed by Green River. Upon Green River's motion, the Court dismissed the action for lack of subject matter jurisdiction. No appeal was taken.

4 Letter from James M. Miller to George S. Wilson II (August 17, 1988) (discussing problem with check meter).

part of an effort to determine Town & Country's unbilled electricity usage. The check meter, however, was improperly installed, causing the master meter to register only 45 to 48 percent of Town & Country's actual usage.[5] The underbilling was discovered in August 1988 after Town & Country's complaints that sales of electricity (in KWH) to its tenants were double its purchases from Green River.[6] Green River estimates that the faulty meter installation prevents Town & Country from being billed for electricity totalling $54,772.98.[7] Green River's application was not amended, however, to recover this sum.

On October 6, 1988, an informal conference was held to hear both parties' positions on the billing dispute. At this conference Green River argued that KRS 278.160 required full payment for all unbilled service. In response Mr. Whitaker advanced three arguments for limiting backbilling to 12 months prior to the discovery of the underbilling: 1) Commission Regulation 807 KAR 5:006, Section 9(3) expressly limited recovery of any underbilling to 12 months preceding discovery of a billing error; 2) Green River failed to maintain accurate metering equipment as required by Commission Regulation 807 KAR 5:006, Section 9(5) and therefore should suffer the consequences of its

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5 Letter from R. W. Armstrong to Dean Stanley (August 25, 1988) (discussing installation of the check meter at Town & Country)

6 Compliance with Order, August 17, 1989.

7 Letter from James M. Miller to Forest Skaggs (August 25, 1988) (discussing the amount of underbilling to Town & Country since February 1986).

failure; and 3) equitable considerations precluded backbilling in excess of 12 months.

Following the informal conference, the parties negotiated and presented to the Commission for its approval an agreement in which Green River agreed to accept a lump sum payment of $52,343 in satisfaction of all unbilled electricity received by Town & Country prior to September 1, 1988. Green River explained its action[8] by noting its concern that Mr. Whitaker, lacking sufficient assets to pay the backbilled amount, might invoke the protection of federal bankruptcy laws. In such an event, full recovery of the backbilled amount would not occur for several years. Green River also expressed concern that the Commission would accept Mr. Whitaker's arguments and limit recovery of the underbilling to the 12 months prior to its discovery.

Discussion

The agreement conflicts with KRS 278.160(2) and KRS 278.170(1) in that it requires Green River to accept less compensation for service rendered than Green River's filed rates prescribe. Under the agreement, Green River receives $52,343 for previously unbilled service. Based on Green River's calculations, Mr. Whitaker owes $268,610.30. The Commission's review of the evidence of record indicates that Mr. Whitaker was underbilled well in excess of $52,343.

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8 Letter from James M. Miller to Forest Skaggs (November 29, 1988) explaining settlement agreement.

KRS 278.160(2)[9] prohibits a utility from accepting less compensation than prescribed by its filed rates. Although no reported cases on this statute exist, courts in other jurisdictions, interpreting similar statutes, have held that utilities are proscribed from entering agreements which establish rates which differ from their filed rate schedules. Haverhill Gas Co. v. Findlen, 258 N.E.2d 204 (Mass. 1970); Laclede Gas Co. v. Solon Gershman, Inc., 539 S.W.2d 574 (Mo. 1976); Capital Properties v. Public Service Comm'n., 457 N.Y.S.2d 635 (A.D. 1982); West Penn Power Co. v. Nationwide Mutual Insurance Co., 228 A.2d 218 (Pa. 1967); Wisconsin Power & Light Co. v. Berlin Tanning & Mfg. Co., 52 N.W.2d 147 (Wis. 1957).

This proscription is based upon the notion that filed rate schedules have attained the status of law. "The rate when published becomes established by law. It can be varied only by law, and not by act of the parties. The regulation. . . of. . .rates takes that subject out of the realm of ordinary contract in some respects, and places it upon the rigidity of a quasi-statutory enactment." New York N.H. & H.R. Co. v. York & Whitney, 102 N.E. 366, 368 (Mass. 1913). Having published its rates, a utility has no authority to depart from them.

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9 No utility shall charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed schedules, and no person shall receive any service from any utility for a compensation greater or less than that prescribed in such schedules.

This inflexibility is in large measure the result of a strong public interest in ensuring rate uniformity. Equality among customers cannot be maintained if enforcement of published rates is relaxed. For this reason, neither equitable considerations nor a utility's negligence may serve as a basis for departing from filed rate schedules. See Chesapeake & Potomac Tel. Co. v. Bles, 243 S.E.2d 473 (Va. 1978); Memphis Light Gas & Water v. Auburndale School, 705 S.W.2d 652 (Tenn. 1986). To do so would increase the potential for fraud, corruption and rate discrimination.

While KRS 278.160(2) limits a utility's authority to depart from its filed rate schedules, KRS 278.170(1)[10] imposes an affirmative obligation upon the utility to charge and collect its prescribed rates. KRS 278.170(1) requires a utility to treat all similarly situated customers in substantially the same manner. If a utility fails to collect from a customer the full amount required by its filed rate schedule, it effectively grants a preference in rates to that customer as it allows him to pay less than other customers for the same service. In Corp. De Gestron Ste-Foy v. Florida Power & Light Company, 385 So.2d 124 (Fla App. 1980), an action involving underbilling resulting from an employee's misreading of a meter, the Florida Court of Appeals

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10 "No utility shall, as to rates or service, give any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage, or establish or maintain any unreasonable difference between localities or between classes of service for doing a like and contemporaneous service under the same or substantially the same conditions."

reviewed a statute[11] very similar to KRS 278.170(1) and declared:

> The public policy embodied in this and similar statutory provisions precludes a business whose rates are governmental regulated from granting a rebate or other preferential treatment to any particular individual. Accordingly, it is universally held that a public utility or common carrier is not only permitted but is required to collect undercharges from established rates, whether they result from its own negligence or even from a specific contractual undertaking to charge a lower amount. (Emphasis supplied.)

Id., at 126.

Based upon the foregoing, the Commission is of the opinion that a utility may not agree to accept less compensation for its service rendered than its filed rate schedule prescribes to settle a billing dispute but has a statutory duty to collect the full amount due for such service. Insofar as the agreement between Green River and Mr. Whitaker violates this principle, it cannot be approved.

Findings and Orders

The Commission, after reviewing the evidence and being sufficiently advised, if of the opinion and finds that:

1. KRS 278.160(2) prohibits a utility from accepting less compensation for service rendered than that prescribed in its filed rate schedules.

2. KRS 278.170(1) imposes an affirmative duty upon a utility to collect undercharges from established rates.

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11 "No public utility shall make or give any undue or unreasonable preference or advantage to any person or locality or subject the same to any undue or unreasonable prejudice or disadvantage in any respect." Fla. Stat. §366.03 (1977).

3. Prior to September 1, 1988, Green River underbilled Mr. Whitaker for electricity provided to Town and Country in an amount in excess of $52,343.

4. Under the terms of the agreement presented for Commission approval, Green River agrees to accept a lump sum payment of $52,343 in satisfaction of all unbilled electricity received by Town & Country prior to September 1, 1988.

5. As the agreement presented for Commission approval would require Green River to accept less compensation for service rendered than that prescribed in its filed rate schedule and would preclude Green River from recovering all undercharges from Mr. Whitaker, it is inconsistent with KRS 278.160(2) and KRS 278.170(1) and cannot be approved.

IT IS THEREFORE ORDERED that:

1. Green River's application for approval of its settlement agreement with Mr. Whitaker is denied.

2. Within 20 days of receipt of this Order, Green River shall amend its original application in this case to reflect the full amount of underbilling to Town & Country since Mr. Whitaker acquired ownership and file this amended application with the Commission. It shall also serve a copy of the amended application upon Mr. Whitaker. The amended application shall include an exhibit showing the total amount of underbilling based upon a comparison of Green River's and Town and Country's billing records.

3. Within 20 days of his receipt of the amended application, Mr. Whitaker shall file his response to it. This response

shall include all affirmative defenses which he intends to assert against Green River.

4. A hearing in this matter shall be held on August 23, 1989, at 1:30 p.m., Eastern Daylight Time, at the Commission's offices in Frankfort, Kentucky, for the purposes of giving testimony and presenting other evidence on the amount of the underbilling and possible methods of its payment.

Done at Frankfort, Kentucky, this 6th day of June, 1989.

PUBLIC SERVICE COMMISSION

Chairman

Vice Chairman

Commissioner

ATTEST:

Executive Director