

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

WALTER CALLIHAN AND GOLDIE CALLIHAN, HIS WIFE)	
)	
COMPLAINANTS)	
VS.)	CASE NO. 10233
)	
GRAYSON RURAL ELECTRIC COOPERATIVE CORPORATION)	
)	
DEFENDANT)	

O R D E R

This case involves a complaint filed pursuant to KRS 278.260(1).¹ Complainants, Walter and Goldie Callihan, allege that Grayson Rural Electric Cooperative Corporation, Inc. ("Grayson RECC") wrongfully refuses to furnish them with electric service. They seek an Order from the Commission directing Grayson RECC to furnish such service to them "without demand of an enormous deposit or connection fee." Grayson RECC admits its refusal to provide service but maintains that, because the Callihans are indebted to it for service previously furnished, its refusal is in accord with Commission regulations. After holding

¹ "[U]pon any complaint in writing made against any utility by any person that any rate in which the complainant is directly interested is unreasonable or unjustly discriminatory, or that any regulation, measurement, practice or act affecting or relating to the service of the utility or any service in connection therewith is unreasonable, unsafe, insufficient or unjustly discriminatory or that any service is inadequate or cannot be obtained, the commission shall proceed, with or without notice to make such investigation as it deems necessary or convenient."

an evidentiary hearing at which the parties appeared and presented evidence, the Commission finds for Grayson RECC and denies the complaint.

Walter and Goldie Callihan are residents of Argillite, Kentucky. As such, they reside within the certified service territory of Grayson RECC. From February 1952 to October 1982, Walter Callihan was a member and customer of Grayson RECC. On October 8, 1982, Grayson RECC discontinued Callihan's service for alleged nonpayment. It subsequently revoked his membership. Since October 8, 1982, the Callihans have been without electric service.² Grayson RECC refuses to restore their service unless the alleged debt is paid. Unwilling to pay, the Callihans filed a complaint with the Commission on April 28, 1988.³

Although Grayson RECC is the defendant in this proceeding, it bears the burden of proof. As a public utility, it has an obligation to serve all applicants for service located within its

² Goldie Callihan was not a member of the cooperative nor has she entered into any contract with it for electric service. Under the provisions of Grayson RECC's tariff, however, "[i]f an application is received by a person residing with a delinquent member at the premises where power was supplied to the delinquent member, the application will be denied on the grounds that the applicant is applying as the agent of the delinquent member" Grayson RECC Tariff, Tariff Sheet No. 18, Rule 5. Accordingly, any debt owed by Walter Callihan to Grayson RECC may be imputed to Goldie Callihan and serve as proper basis for refusing service to her.

³ On two prior occasions, Walter Callihan has filed a complaint against Grayson RECC for its refusal to provide service. Callihan v. Grayson RECC, Case No. 9246 (1985); Callihan v. Grayson RECC, Case No. 9619 (1986). In each instance, Callihan subsequently withdrew his complaint and the case was dismissed without prejudice.

service territory. 64 Am.Jur.2d Public Utilities §16 (1972). Grayson RECC admits that the Callihans are located within its service territory and that it refuses to provide them with electric service. It must, therefore, show that it is justified in refusing to provide service to them.

In support of its refusal to provide service, Grayson RECC relies upon Commission Regulation 807 KAR 5:006, Section 11(1)(d), which provides:

. . . a utility shall not be required to furnish service to any applicant when such applicant is indebted to the utility for service furnished until such applicant shall have paid such indebtedness.

Grayson RECC asserts that between July 1977 and October 1982 the Callihans accumulated a debt of \$2,009.65 for electric service. When they refused to pay this debt, it discontinued service. Grayson RECC further asserts that the debt remains unpaid and that Commission regulations, therefore, relieve it of any obligation to provide service.

As proof of this debt, Grayson RECC offered monthly account ledgers for the Callihan accounts. These ledgers list each account's monthly meter readings, kilowatt usage, energy and fuel adjustment charges, school tax charges, payments received, and the monthly account balance. They show that between July 1977 and October 1982 Callihan frequently failed to pay his monthly bills and that he fell \$2,014.65 in arrears on his accounts.⁴

⁴ Transcript, page 86. These records were originally filed in Case No. 9246. Upon motion of Grayson RECC, they were incorporated by reference into the record of the current case.

Grayson RECC also offered the testimony of Mike Kays, its general manager. Kays described the cooperative's efforts to induce payment from Callihan. Grayson RECC's tariff requires each member-customer to read his meter and to mail or deliver this reading to the cooperative's office. When a customer fails to read his meter or to notify the cooperative for 3 months, a Grayson RECC employee is sent to read the meter and a special charge is assessed.⁵ As no cooperative employees are authorized to collect payments for monthly bills, Grayson RECC member-customers must mail or deliver payment to the cooperative's office. According to Kays, Callihan refused to comply with these requirements. Rather than terminate Callihan's service, however, Grayson RECC in 1976 assigned an employee, Dale Atkins, to read Callihan's meters monthly and to accept payment from Callihan at the meter.⁶ Kays suggested that this arrangement was in part due to the cooperative's reluctance to discontinue

⁵ Grayson RECC Tariff, Tariff Sheet No. 26, Rule 30. Grayson RECC's tariff has contained this provision in some form since the cooperative's inception.

⁶ Atkins was Grayson RECC's superintendent of construction. His normal duties did not include meter reading or bill collection. According to Kays, Atkins was chosen to perform this task because "he seems to be the only one that could get along with Mr. Callihan without causing him to get angry." Transcript, pages 51-52.

service and to some fear about Callihan's belligerent and violent behavior.⁷

Despite these efforts, Kays testified, Callihan failed to keep his three accounts current.⁸ By the end of 1977, one of his accounts was in arrears. Eventually all were. Throughout this period Grayson RECC continued to mail him monthly bills for each account and, when an account was delinquent, notices threatening discontinuance of service.⁹ It refrained, however, from discontinuing service. In fact, according to Kays, the cooperative attempted to allocate Callihan's payments among his three accounts to prevent any account from falling significantly in arrears. By April 1982, however, the arrears of each account had grown too large to ignore. That month Callihan was advised by letter to make arrangements to pay the arrears or face the loss of service.¹⁰ Similar letters were sent to Callihan each month thereafter until August 1982. After the April 1982 letter, Callihan appeared in person at Grayson RECC's offices to pay

⁷ Kays testified that the arrangement for personal collection of Callihan's bills was the result of a meeting between Callihan and Harold Haight, then general manager at Grayson RECC. Callihan appeared at the meeting toting a pistol. When asked if there was a general fear among Grayson RECC employees that Callihan was violent, Kays answered in the affirmative. Transcript, pages 52, 94-95.

⁸ Grayson RECC kept separate accounts for Callihan's residence, slaughterhouse, and water pump. Each structure was separately metered. Transcript, page 54.

⁹ Id., page 99.

¹⁰ Id., page 54.

his bills and to report his meter readings. He made no effort, however, to reduce his arrears. Finally, on October 8, 1982, Grayson RECC discontinued his service. A final accounting of Callihan's accounts showed that Callihan owed Grayson RECC \$2,014.95. After his membership fee of \$5 was credited, a debt of \$2,009.65 remained. According to Kays' testimony, Callihan has made no payment to reduce that amount.¹¹

To counter Grayson RECC's claim of an outstanding debt, the Callihans assert the defense of payment. They argue that payment was made for all service received from Grayson RECC and that no debt exists. Their argument rests entirely upon the testimony of Walter Callihan. Callihan testified that for much of the 20 years prior to the discontinuance of his service, a Grayson RECC employee would monthly come to his property, read his meters, calculate his bill and then request and demand payment. Each month the payment demand was a denomination of \$100. Each month Callihan would tender the requested amount in cash. Callihan was unable to produce receipts of these payments. He claims that the employee ceased providing receipts in 1977. Under questioning, Callihan conceded that he never requested a receipt or sought a reason for the lack of receipts. Callihan further testified that he never received any billing statements or delinquent notices through the mail. He insists that he was totally unaware of any

¹¹ Id., page 76.

problem with his accounts until Atkins told him of it in April 1982.¹²

In asserting payment as a defense to the cooperative's claims, the Callihans assume the burden of proving payment. Massie's Ex'x v. Massie's Ex'x, 156 S.W.2d 195 (Ky. 1941); Phillips' Ex'r v. Reid, 104 S.W.2d 1093 (Ky. 1937); 60 Am.Jur.2d Payment §171 (1987). They have not met this burden. They offer no documentary evidence - no receipts, cancelled checks or accounting records - to prove payment. Their only proof is Walter Callihan's testimony. His testimony is inconclusive, unconvincing and unpersuasive. It lacks the substance necessary to sustain the burden of proof. Based upon the evidence presented, the Commission is of the opinion that Callihan is indebted to Grayson RECC and that his debt has not been paid.

Unable to prove payment, the Callihans argue that the statute of limitations precludes Grayson RECC's right to refuse service. They contend that any debt owed to Grayson RECC is based upon an unwritten contract. KRS 413.120 requires a cause of action based upon an unwritten contract to be brought within 5 years from the time which the action accrues. A cause of action for an unpaid debt accrues when a demand for payment is made. Because Grayson RECC's demand for payment is over 5 years old and no action has yet been brought to collect the debt,¹³ any action to

¹² In his questioning of Kays, Callihan alleged that the collecting employee, Dale Atkins, was embezzling the receipts. Callihan has presented no evidence to support his allegations.

¹³ Testimony of Mike Kays, Transcript, page 106.

collect the debt would be barred. Since the debt cannot be collected through legal process, the Callihans appear to argue, it may not be used as a basis for the refusal of service.¹⁴

Although their reliance upon KRS 413.120 is mistaken, the Callihans' argument is not without merit. In Anderson v. Berea College, No. 82-CA-1953-MR (Ky. Ct. App., June 10, 1983), Berea College Utilities brought an action against a customer for past due unbilled electric service. Rejecting the customer's argument that a portion of the utility's claim was barred by the statute of limitations found in the Kentucky Uniform Commercial Code, KRS 355.2-725, the trial court entered judgment for the utility in the full amount. On appeal, the Court of Appeals reversed that portion of the trial court's decision which dealt with the statute of limitations. It held that: (1) electricity comes within the definition of "goods" as defined by KRS 355.2-105(1); (2) the sale of electricity was a sale of goods governed by the provisions of KRS Chapter 355; and (3) any action involving the sale of electricity was governed by the 4-year statute of limitations contained in KRS 355.2-725. The decision is in accord with neighboring jurisdictions. See, e.g., Helvey v. Wabash County

¹⁴ In opposition to this argument, Grayson RECC argues that the appropriate statute of limitations is KRS 413.090, which provides that an action upon a written contract must be brought within 15 years of the action's accrual. Grayson RECC contends that the debt is based upon a written membership agreement signed on Callihan's behalf. Callihan responded by claiming he did not authorize anyone to enter into an agreement on his behalf. For the reasons discussed below, the Commission has chosen not to address this argument.

REMC, 278 N.E.2d 608 (Ind. Ct. App. 1972); Cincinnati Gas & Electric Co. v. Goebel, 502 N.E.2d 713 (Ohio Mun. 1986). Based upon the holding in Anderson, supra, the Commission concludes that any legal proceedings to collect the Callihans' debt are barred by KRS 355.2-725.

Grayson RECC's right to receive payment, however, remains. "[A] statute of limitations does not extinguish the legal right but merely affects the remedy." Ley v. Simmons, 249 S.W.2d 808 (Ky. 1952), at 809. As the right to receive payment on the debt still exists, Commission Regulation 807 KAR 5:006, Section 11(1)(d), permits Grayson RECC to refuse service.

While legal authority exists for the Commission to extend the effect of a statute of limitations to a utility's right to refuse service, Horning v. Elizabethtown Gas Light Co., PUR 1920E 890 (N.J. Bd. of Pub. Util. Commiss'ers 1920), apparently the only reported case involving this precise issue, it seems paramount that the party aggrieved by the utility's action must come before the Commission with clean hands. "[D]enial of service cannot be permitted unless it clearly appears that the party desiring it because of dereliction on his part, is not entitled to receive it." Id., at 896. While the record in Horning, supra, is not clear as to what, if anything, the utility undertook to do in order to accommodate its customer, the record in this case reflects that Grayson RECC went to great lengths to accommodate the demands and claims of Walter Callihan. The cooperative arranged for an employee to read Callihan's meters and to accept payment at the pole. It demonstrated great restraint in

exercising its right to discontinue service, giving Callihan numerous opportunities to bring his accounts current. It endured Callihan's belligerent and erratic behavior without seeking legal sanctions against him. In view of the parties' conduct, the Commission does not believe that Horning mandates a finding that the statute of limitations extinguished Grayson RECC's right under Commission regulation to refuse utility service to the Callihans.

After review of the evidence of record and being sufficiently advised, the Commission finds:

1. Walter Callihan is indebted to Grayson RECC in the amount of \$2,009.65 for electric service previously received.

2. Under the Rules and Regulations contained in Grayson RECC's Tariff, any person who applies for service and who resides with a delinquent member at the premises where power was supplied to a delinquent member is considered an agent of that delinquent member. Accordingly, Goldie Callihan is acting as an agent of Walter Callihan in requesting service from Grayson RECC and in filing this complaint.

3. Commission Regulation 807 KAR 5:006, Section 11(1)(d) permits a utility to refuse service to an applicant who is indebted to it for prior service.

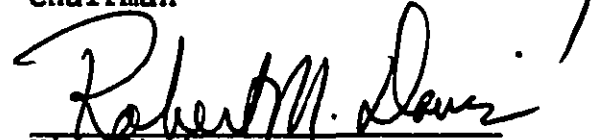
4. Commission Regulation 807 KAR 5:006, Section 11(1)(d) permits Grayson RECC to refuse service to Walter and Goldie Callihan. Therefore Grayson RECC's refusal of service to the Callihans is neither wrong nor improper nor contrary to law.

IT IS THEREFORE ORDERED that the Callihans' complaint is denied.

Done at Frankfort, Kentucky, this 1st day of May, 1989.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:

Executive Director