

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE APPLICATION OF KENTUCKY UTILITIES)
COMPANY TO ASSESS A SURCHARGE UNDER KRS)
278.183 TO RECOVER COSTS OF COMPLIANCE) CASE NO. 93-465
WITH ENVIRONMENTAL REQUIREMENTS FOR COAL)
COMBUSTION WASTES AND BY-PRODUCTS)

O R D E R

On February 25, 1994, the Attorney General's office, Utility and Rate Intervention Division ("AG") filed a motion to dismiss Kentucky Utilities Company's ("KU") application to assess a surcharge to recover costs of compliance with coal combustion waste and other environmental requirements. The motion sets forth three arguments: 1) KU has not demonstrated its entitlement to impose an environmental surcharge pursuant to KRS 278.183; 2) the Commission's failure to promulgate a regulation to implement KRS 278.183 precludes KU from applying for an environmental surcharge; and 3) KU will suffer no deprivation of property by dismissing this case because it can file a general rate application based on a forecasted test year. The Lexington-Fayette Urban County Government and the Kentucky Industrial Utility Customers ("KIUC") filed responses in support of the AG's motion.

Jerry Hammond, an intervenor, also filed a motion to dismiss adopting the AG's arguments and presenting three additional ones: 1) KU has no need for additional revenue; 2) KU's application is premature and should await the results of a Commission-initiated

management audit; and 3) KU's proposed environmental surcharge formula is flawed. KU filed responses and the AG filed a reply.

Based on the pleadings and evidence of record, the Commission hereby finds that the motions should be denied for the following reasons.

The AG's first argument, also argued by KIUC, is based on the statutory provision that an electric utility may impose an environmental surcharge to recover specified categories of costs "that are not already included in existing rates." KRS 278.183(1). Noting the absence of an accompanying base rate case filing, the AG argues that he is unable to determine whether and to what extent the compliance costs sought to be recovered are included in KU's rates and, thus, KU's application is deficient on its face.

In response, KU asserts that its application demonstrates that the environmental compliance costs sought to be recovered are not included in existing rates; that the majority of the costs relate to projects completed subsequent to the establishment of its existing rates in 1983; and its proposed cost recovery is on a current, not cumulative basis since its last rate case. KU characterizes the AG's claim of inability to determine the extent to which environmental compliance costs are already included in existing rates as raising factual issues to be resolved at a hearing, not by a motion to dismiss. The Commission finds that the extent of KU's recovery of environmental costs in existing rates is a factual issue to be decided after an evidentiary hearing.

The AG's second argument is that the absence of a regulation to implement KRS 278.183 precludes KU from invoking the statute. The Commission's existing regulations, the AG opines, neither establish nor govern the process for adjudicating an environmental surcharge application. Citing KRS Chapter 13A, the AG claims that a regulation is necessary to establish the requirements for processing KU's surcharge application. The AG also cites Commonwealth of Kentucky, ex rel Cowan v. Kentucky Public Service Commission, Franklin Circuit Court, Civil Action 90-CI-798 (Slip Opinion July 10, 1991) as precedent to require a regulation in this instance.

KU maintains that no regulation is necessary because its proposed surcharge tariff is specific to KU, provides for the recovery of only those costs specified in KRS 278.183, and sets forth the surcharge formula mandated by the statute. Furthermore, KU states that proceeding on a case-by-case basis rather than by rule-making is appropriate since KRS 278.183 specifies the exact procedures to be followed.

The Commission finds that our existing regulations set forth the general requirements for processing applications. KRS Chapter 13A specifically exempts agency regulations when the governing statute prescribes the specific process for an application. Here, KRS 278.183 specifies the exact process. The General Assembly mandated that the Commission, after hearing, determine whether a utility's compliance plan and surcharge rate are reasonable and cost effective. The contents of the plan and rate surcharge are

for the utility to propose based on its individual environmental requirements and existing rates. The Commission also notes that while virtually every gas utility under our jurisdiction has an automatic adjustment clause to recover changes in gas commodity costs, no uniform clause is prescribed by statute or regulation.

Third, the AG argues that KU has no property right in an environmental surcharge. KU maintains that KRS 278.183 created a right for electric utilities to seek recovery of specified environmental compliance costs without filing a general rate case and dismissing its application without an adjudication on the merits would violate KRS 278.183. The Commission finds that the General Assembly stated clearly and without ambiguity that the environmental surcharge authorized by KRS 278.183 was to be available "notwithstanding any other provision" of KRS Chapter 278. KRS 278.183(1). Thus, the decision to apply for an environmental surcharge rather than a general rate adjustment is not reviewable by the Commission. Only the merits of the surcharge filing are reviewable in this forum.

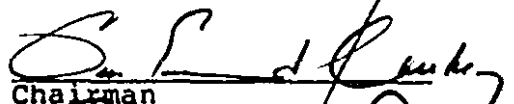
Intervenor Hammond raises three issues; two involve KU's financial condition and its need for additional revenues, the third challenges the specifics of KU's proposed surcharge tariff. The Commission finds that KRS 278.183 establishes neither financial condition nor revenue need as a prerequisite to an environmental surcharge. Our review in this case is limited to determining whether KU's compliance plan and surcharge are reasonable and cost effective, and whether the compliance costs are already included in

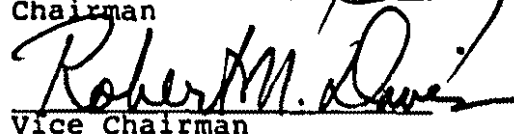
existing rates. These issues are factual in nature and can be resolved only upon hearing, not motion.

IT IS THEREFORE ORDERED that the motions to dismiss be and they hereby are denied.

Done at Frankfort, Kentucky, this 6th day of May, 1994.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director