

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE REASONABLENESS OF DELAYED)
PAYMENT CHARGES PURSUANT TO)
VARIOUS TARIFFS OF KENTUCKY POWER) CASE NO. 2000-062
COMPANY D/B/A AMERICAN ELECTRIC)
POWER WITH RESPECT TO LATE)
PAYMENTS BY AK STEEL CORPORATION)

O R D E R

The Commission has pending before it the petition of Kentucky Power Company d/b/a American Electric Power (“Kentucky Power”) requesting the initiation of an investigation pursuant to KRS 278.260(1) of the reasonableness of the Delayed Payment Charge contained in many of its tariffs and, more specifically, as applied to billings for service rendered to AK Steel Corporation (“AK Steel”). Kentucky Power’s petition alleges that AK Steel failed to timely pay its monthly power bills on a number of occasions from November 1998 through October 1999. Consequently, Kentucky Power has billed AK Steel Delayed Payment Charges of \$87,062 for the late payments. The petition further alleges that AK Steel’s refusal to pay the Delayed Payment Charge is based on a claim that Kentucky Power does not have the right to assess such charges under the applicable tariffs and power contracts. The petition ultimately requests the Commission to issue a declaration that Kentucky Power is entitled to collect its Delayed Payment Charges and that AK Steel is indebted to Kentucky Power in the amount of \$87,062 for such charges.

Upon receipt of the petition, the Commission entered an Order directing AK Steel to file a response. In conformity with that Order, AK Steel filed a motion to dismiss on the grounds that the Commission lacked jurisdiction to entertain a complaint by a utility against a customer. Specifically, AK Steel cites the statute authorizing the Commission to entertain complaints, KRS 278.260(1), which provides in pertinent part, that, “The Commission shall have original jurisdiction over complaints as to rates or service of any utility, and upon a complaint in writing against any utility by a person. . . .” Claiming that the Commission does not have before it a “complaint in writing against any utility,” AK Steel argues that the Commission lacks jurisdiction and must dismiss the complaint. Further, AK Steel argues that Kentucky Power’s request for the Commission to initiate an investigation does not establish a jurisdictional basis for this petition because Kentucky Power is seeking recovery of a money judgment against a customer.

Kentucky Power filed a response in opposition to the motion to dismiss, claiming that the purpose of its petition is not to recover a money judgment but to clarify the validity and enforceability of those provisions in its filed tariffs providing for the imposition of a Delayed Payment Charge. Kentucky Power states that such a charge clearly falls within the broad definition of “rate” in KRS 278.010(12), and it is thus within the Commission’s exclusive jurisdiction over rates of a utility to initiate an investigation pursuant to KRS 278.260(1) to determine the applicability of such a rate.

In support of its position, Kentucky Power cites Carr v. Cincinnati Bell, Inc. Ky.App., 615 S.W.2d 126 (1983), for the proposition that while the Commission lacks the jurisdiction to award monetary damages, the Commission does have exclusive jurisdiction over any challenge to a utility’s rates or service. As the Court of Appeals

stated in Carr, “If Carr is to contest the validity of Bell’s policy (or regulation) concerning the assignment of exchange areas based upon ‘the primary entrance’ test, it must be through the PSC. . . .” *Id.* at 128. Kentucky Power asserts that its petition conforms with the Carr decision; its claim for the collection of unpaid charges is not being asserted at the Commission, while its request for an investigation of the reasonableness of a utility rate is within the exclusive jurisdiction of the Commission.

Further, Kentucky Power argues that there is no basis for AK Steel’s interpretation of KRS 278.260(1) as authorizing the Commission to initiate investigations only when there is an underlying complaint against a utility. Rather, Kentucky Power asserts that the Commission has been empowered under KRS 278.260(1) with “original jurisdiction over complaints as to rates or service of any utility,” and that this jurisdiction can be invoked either by a complaint against a utility or, as is being requested here, by the Commission on its own motion. Kentucky Power states that its petition was grounded on both KRS 278.260(1), which grants the Commission original jurisdiction over complaints, and KRS 278.040(2), which grants the Commission “exclusive jurisdiction over the regulation of rates and service of utilities.” Reading these two statutes together, Kentucky Power concludes that only the Commission can review the reasonableness of its Delayed Payment Charge. Finally, Kentucky Power notes that while AK Steel argues that the Commission lacks jurisdiction to initiate an investigation of the Delayed Payment Charges, AK Steel fails to state what forum does have jurisdiction to review those charges.

AK Steel then filed a reply, arguing that while KRS 278.040(2) empowers the Commission with exclusive jurisdiction over utility rates, KRS 278.260(1) only empowers

the Commission to hear complaints against utilities, not by utilities. AK Steel notes the absence of any case in Kentucky where a utility was permitted to bring a complaint against anyone except another utility. AK Steel then states that issues between a utility and an individual customer, such as the one that Kentucky Power now seeks to raise at the Commission, should be left to the courts to decide. In support of this position, AK Steel cites Louisville Gas and Electric Co. v. Dulworth, 279 Ky. 309, 130 S.W.2d 753 (1939), Benzinger v. Union Light, Heat and Power, 293 Ky. 747, 170 S.W.2d 38 (1943), and Bee's Old Reliable Shows, Inc. v. Kentucky Power Company, Inc., Ky., 334 S.W.2d 765 (1960). AK Steel concludes by asserting that issues particular to an individual customer, as opposed to broad or general issues, are more appropriately resolved by a court rather than the Commission.

Based on the pleadings and being otherwise sufficiently advised, the Commission finds that under KRS 278.040, our jurisdiction is to regulate utilities, with exclusive jurisdiction over rates and service. In addition, KRS 278.260(1) grants the Commission original jurisdiction over complaints against utilities, as well as the explicit jurisdiction to initiate on its own motion an investigation of the rates or service of any utility. No provision of KRS Chapter 278 extends the Commission's jurisdiction to a customer of a utility or otherwise empowers the Commission to direct a customer to take, or refrain from taking, any action.

However, the Commission is authorized by KRS 278.230 to issue subpoenas and, thus, a customer can be compelled to provide evidence on any issue relating to a utility's rates or service. Consequently, while KRS Chapter 278 does not authorize the Commission to adjudicate complaints by a utility against a particular customer, a utility

does have the right to invoke the Commission's exclusive jurisdiction over utility rates and service, KRS 278.040(2), by requesting the initiation of an investigation pursuant to KRS 278.260(1). While the initiation of such an investigation is within the sound discretion of the Commission, there must be some showing that a utility's rates or service is in some manner unreasonable or unjustly discriminatory to justify a formal investigation.

Here, Kentucky Power has made no showing that the Delayed Payment Charge is not set forth in a duly filed tariff or that such charge is in any respect unreasonable or unduly discriminatory. Once a utility has a rate on file with the Commission, the utility has no discretion but to charge that filed rate. This proposition, commonly known as the "Filed Rate Doctrine," is set forth in KRS 278.160(2), which provides as follows:

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.

To the extent that Kentucky Power has on file a specific rate which by its own terms is imposed when a customer does not timely pay its utility bill, the utility has no discretion but to impose that charge. Even a utility's negligence in billing will not bar a subsequent action under KRS 278.160(2) to collect the proper balance due under the filed rate. See, Boone County Sand & Gravel v. Owen County RECC, Ky.App., 779 S.W.2d 224 (1989).

AK Steel's pleadings to date have been limited to challenging the Commission's jurisdiction over Kentucky Power's petition. AK Steel has filed no pleading on the merits of the petition, insisting that Kentucky case law authorizes customer-specific disputes to

be initiated in a court. The Commission finds no merit in this claim. The three cases cited by AK Steel in support of its position were all decided under a markedly different version of KRS 278.260(1).

In creating the Public Service Commission in 1934, the Kentucky General Assembly enacted the following provision respecting the jurisdiction and procedure over complaints:

Upon a complaint in writing made against any utility by any mercantile, agricultural or manufacturing society, or by any body politic or municipal organization, or by any public utility, or by ten persons, firms, corporations or associations, all of which persons, firms, corporations or associations shall be customers of the utility complained of, or ten complainants of all or any of the aforementioned classes, that any of the rates, tolls, charges or schedules or any joint rate or rates in which such petitioner is directly interested, are in any respect unreasonable or unjustly discriminatory, or that any regulation, measurement, practice or act whatsoever affecting or relating to the service of any utility or any service in connection therewith is in any respect unreasonable, unsafe, insufficient or unjustly discriminatory, or that any service is inadequate or cannot be obtained, the commission shall proceed upon such complaint or upon its own motion, with or without notice, to make such investigation as it may deem necessary or convenient.

1934 Kentucky Acts, Chapter 145, Section 6(a).

Three years after the General Assembly created this regulatory scheme, Kentucky's highest court discussed the statutory requirement that there be a minimum of 10 persons to support the filing of a complaint under KRS 278.260(1). The Court explained the underlying philosophy as follows:

We think the Legislature had the authority to invest some discretion in the commission as the representative of the public in the number of persons necessary to make a complaint and also to state that the number of ten was reasonable to make said complaint, because to give a single subscriber the authority to make the complaint would lead to confusion as well as unnecessary annoyance and might affect the duties and purposes of the commission in representing the best interest of the subscribers of the telephone company. If, in fact, any single subscriber had a real and

substantial ground or reason for complaint, the act authorizes the commission of its own motion, acting in the interest of the public and the individual subscriber, to hear the complaint and after due investigation and hearing, to correct any unreasonable situation that might exist. However, the statute does not make it mandatory for the commission to hear the complaint of a single subscriber.

Smith v. Southern Bell Tel. Co., 268 Ky. 421, 104 S.W.2d 961, 963 (1937). In Smith, a utility was sued in circuit court by one customer seeking modifications in the type of service being offered. In upholding dismissal of the complaint for lack of jurisdiction, the Court declared that, “[T]he primary jurisdiction and authority to fix rates [and] establish reasonable regulation of service . . . is exclusively and primarily in the commission. . . .” Smith at 963.

Just two years later, the Court recognized an exception to the Commission’s exclusive jurisdiction to hear complaints. In Louisville Gas and Electric Co. v. Dulworth, 130 S.W.2d at 753, one customer whose service was terminated for alleged meter tampering sought an injunction in circuit court to require the utility to reconnect and continue service. The injunction was issued and on appeal the Court denied a jurisdictional challenge, holding that the Commission did not have exclusive jurisdiction “on a complaint made by an individual in cases of this character.” Dulworth at 755. The decision in Dulworth was followed in Bee’s Old Reliable Shows, Inc. v. Kentucky Power Co., 334 S.W.2d at 767, where the Court stated, “Although the Public Service Commission has jurisdiction over questions concerning rates and services generally, nevertheless, when a question arises which is peculiar to the individual complainant, the courts will assume jurisdiction and hear the matter.”

Kentucky Courts also have jurisdiction to adjudicate disputes involving utilities when the issue sued upon is outside the statutory definitions of “rates” and “service”

under KRS 278.010(12) and (13). As discussed in Benzinger v. Union Light, Heat and Power, 170 S.W.2d at 38, a municipal ordinance requiring utility lines to be located underground, rather than overhead, did not affect the service of a utility because the ordinance did not “obstruct, prevent, or interfere with the quality or quantity of the finished product” furnished by the utility. *Id.* at 41. This exception would appear to have no application to Kentucky Power’s petition since its Delayed Payment Charge is embodied in a filed tariff and has been billed as a rate.

Apparently, out of concern that the number of individual customers filing complaints against utilities over rates and service could result in conflicting decisions and interpretations for utilities that operate in numerous counties, the General Assembly amended KRS 278.260(1) in 1982. The requirement for 10 persons was eliminated, thus authorizing Commission jurisdiction over a complaint by just one person. The complaint statute now provides, in pertinent part, as follows:

The Commission shall have original jurisdiction over complaints as to rates and service of any utility, and upon a complaint in writing made against any utility by any person . . . the commission shall proceed, with or without notice, to make such investigation as it deems necessary or convenient.

KRS 278.260(1) (emphasis added).

Subsequently, in Carr v. Cincinnati Bell, Inc., 651 S.W.2d 126, one customer filed an action in circuit court against a telephone utility seeking a change in service and damages for breach of contract. The circuit court dismissed both claims for lack of jurisdiction, finding jurisdiction rested in the Commission. The Court of Appeals reversed the dismissal on the claim for damages, holding that the Commission lacked jurisdiction “to adjudicate contract claims for unliquidated damages.” *Id.* at 128.

However, the Court affirmed the dismissal on the claim for a change in utility service, holding such claim to be within the Commission's exclusive jurisdiction as relating to "the type and quality of service." *Id.* Significantly, the Court's decision was based on an analysis of whether the complaint involved issues within the Commission's jurisdiction, i.e., service, not an analysis of whether the issues were purely a private concern to one customer.

The issue set forth in Kentucky Power's petition relating to the reasonableness and enforceability of its Delayed Payment Charge is clearly within the Commission's exclusive jurisdiction over rates, as the term "rate" is defined in KRS 278.010(12). Further, the fact that a resolution of the issues raised by Kentucky Power may require an analysis of specific contracts between Kentucky Power and AK Steel does not divest the Commission of jurisdiction. As the Court stated in Board of Education of Jefferson County v. William Dohrman, Ky.App., 620 S.W.2d 328, 329 (1981), "Strictly speaking, the Commission had the right and duty to regulate rates and service, no matter what a contract provided."

To the extent that Kentucky Power's petition seeks an investigation by the Commission of the specific facts surrounding AK Steel's billing payment history, whether payments were in fact untimely so as to trigger the Delayed Payment Charge, and whether such charges now amount to \$87,062, the petition lacks sufficient facts upon which the Commission can determine how those charges were calculated or that there is a valid controversy regarding such charges. Thus, while KRS 278.260(1) clearly authorizes the Commission to initiate the type of investigation requested here by Kentucky Power, the information provided to date does not convince the Commission


that it should initiate an investigation to determine whether the requested declaratory Order should be granted.

IT IS THEREFORE ORDERED that Kentucky Power's petition requesting the Commission to initiate an investigation is denied without prejudice, and this case is closed.

Done at Frankfort, Kentucky, this 31st day of August, 2000.

By the Commission

ATTEST:

A handwritten signature in black ink, appearing to read "Thomas W. [unclear]", written over a horizontal line.

Executive Director