

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

KENERGY CORP.)	
)	
COMPLAINANT)	
)	
v.)	CASE NO. 2002-00008
)	
KENTUCKY UTILITIES COMPANY)	
)	
DEFENDANT)	

O R D E R

Kentucky Utilities Company (KU) has moved to dismiss the complaint of Kenergy Corp. (Kenergy). At issue is whether Kenergy alleges sufficient facts in its complaint to establish a prima facie case. Finding in the affirmative, we deny the motion and direct KU to answer the complaint.

Kenergy is a corporation organized under KRS Chapter 279 and is, therefore, subject to the Commission s general supervision and jurisdiction. KRS 279.210. It owns and operates facilities that provide retail electric service to 50,545 customers in Daviess, Hancock, Henderson, Hopkins, McLean, Muhlenberg, Ohio, Webster, Breckinridge, Union, Crittenden, Caldwell, Lyon, and Livingston counties.¹ Accordingly, it is a utility and a retail electric supplier. KRS 278.010(3)(a); KRS 278.010(4).

KU is a corporation organized under KRS Chapter 271 that owns and operates facilities that generate, transmit, distribute, and sell electricity to approximately 489,784

¹ Annual Report of Kenergy Corp. to the Public Service Commission of Kentucky for the Year Ended December 31, 2000 at 17 and 19.

customers in all or portions of 77 counties in Kentucky.² Accordingly, it is a utility subject to Commission jurisdiction and a retail electric supplier. KRS 278.010(3)(a); KRS 278.010(4); KRS 278.040(1).

On December 7, 2001, Kenergy filed a formal complaint against KU in which it alleged that: (1) It and KU are retail electric suppliers; (2) It and KU have adjacent certified service territories in Union and Henderson counties, Kentucky; (3) Highland Mining Company (Highland Mining) has adopted plans and secured permits to conduct underground mining in the vicinity of the Henderson County-Union County boundary; (4) The mine s portal will be located entirely in Kenergy s certified territory; and (5) KU has entered into an agreement with Highland Mining to provide retail electric service to the proposed mining operation.

Upon receipt of this complaint, we made a preliminary determination that the complaint established a prima facie case and directed KU to satisfy or answer the

² Kentucky Utilities Company, FERC Form 1 (Mar. 31, 2001) at 304.

complaint.³ KU filed its Motion to Dismiss. In this motion, KU asserts that based upon the facts alleged in the complaint and the undisputed facts disclosed during the previous inquiry into this dispute, established legal precedent establishes that Kenergy is not entitled to provide electric service to the operations of Highland Mining.⁴

In its response to the motion, Kenergy advances two arguments. First, it argues that a motion to dismiss is not authorized under the Commission's rules of procedure and, therefore, KU is in default. Second, it argues that its complaint alleges sufficient facts to establish a prima facie case and that no established facts currently exist in this proceeding. It is not, Kenergy asserts, required to practice and prove its entire case in the complaint that has been filed.⁵

KU's filing of a motion to dismiss is not improper or contrary to our Order of January 11, 2002 and does not render KU in default. While the Commission's rules of

³ While we made no express finding that the complaint establishes a prima facie case, our action implies such finding. Administrative Regulation 807 KAR 5:001, Section 12(a), requires the Commission to examine a formal complaint upon its filing to ascertain whether it establishes a prima facie case and conforms to this administrative regulation [807 KAR 5:001]. Administrative Regulation 807 KAR 5:001, Section 12(b), provides:

If the commission is of the opinion that such complaint, either as originally filed or as amended, does establish a prima facie case and conforms to this administrative regulation, the commission will serve an order upon such corporations or persons complained of under the hand of its secretary and attested by its seal, accompanied by a copy of said complaint, directed to such corporation or person and requiring that the matter complained of be satisfied, or that the complaint be answered in writing within ten (10) days from the date of service of such order, provided that the commission may, in particular cases, require the answer to be filed within a shorter time.

⁴ KU's Motion to Dismiss at 1.

⁵ Kenergy's Response to Motion to Dismiss at 4.

procedure do not expressly permit motions to dismiss, such motions are consistent with the purpose of these rules. They represent a statement of a new matter constituting a defense to the requested relief. See Administrative Regulation 807 KAR 5:001, Section 12(6). Moreover, they are consistent with longstanding Commission practice. See, e.g., Dovie Sears v. Salt River Water District, Case No. 91-277 (Ky.PSC June 30, 1992); Kentucky Industrial Utility Customers, Inc. v. Big Rivers Electric Corp., Case No. 95-011 (Ky.PSC Apr. 1, 1997); City of Lawrenceburg, Ky. v. South Anderson Water District, Case No. 96-256 (Ky.PSC June 11, 1998).⁶

While KU did not act improperly in filing its motion, we find no basis to grant its requested relief. KU's arguments for dismissal are based upon evidence that is not in the record of this or any other formal proceeding, but that was presented at conferences with Commission Staff.⁷ It is axiomatic that the record of an administrative proceeding must include the entire evidentiary basis of that decision. 2 Am.Jur.2d Administrative Law § 386 (1994). As this evidence is not in the record of this proceeding and has not

⁶ Kentucky Civil Rule 11 permits such motions in lieu of an answer. While the Kentucky Civil Rules do not apply to administrative proceedings [See, e.g., 2 Am.Jur.2d Administrative Law § 266 (1994) (Statutes and rules, such as the Rules of Civil Procedure, relating to courts or actions, do not apply to administrative proceedings.)], this Commission has previously made reference to those Rules to determine procedural questions. See, e.g., Newman v. Salt River Rural Electric Cooperative Corp., Case No. 90-088 (Ky.P.S.C. June 28, 1990); Louisville Gas and Electric Company, Case No. 96-246 (Oct. 15, 1996).

⁷ Kenergy requested the conference to resolve the dispute over service rights to Highland Mining without a formal proceeding. See letter from Frank N. King, Jr., counsel for Kenergy, to Thomas M. Dorman, Executive Director, Public Service Commission (June 12, 2001). Conferences were held on July 31, 2001 and November 21, 2001. To the extent that these conferences represent an unsuccessful attempt to informally resolve a complaint regarding utility service, Administrative Regulation 807 KAR 5:001, Section 13(3), would appear to limit the use of any evidence adduced at those conferences unless that evidence would be subsequently obtained through other appropriate methods.

been formally presented to us, we cannot consider it unless it can properly be administratively noticed. Id. Given the nature of the evidence, the concept of administrative notice is not applicable. We agree with Kenergy that there are [currently] no established facts in this proceeding.⁸

Our review of Kenergy's complaint indicates allegations sufficient to establish a prima facie case. Kenergy alleges that a new electric-consuming facility (the Highland Mining mine) is locating in two adjacent service territories. These allegations are sufficient to trigger the requirement of KRS 278.018(1) that the Commission determine which retail electric supplier shall serve . . . [the] facility based on the criteria in KRS 278.017(3).

Accordingly, the Commission HEREBY ORDERS that:

1. KU's Motion to Dismiss is denied.
2. Within 10 days of the date of this Order, KU shall file with the Commission a written answer in which it addresses each allegation set forth in Kenergy's complaint.

Done at Frankfort, Kentucky, this 21st day of March, 2002.

By the Commission

ATTEST:


Executive Director

⁸ Kenergy's Response to Motion to Dismiss at 3.