

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF LOUISVILLE GAS AND)
ELECTRIC COMPANY AND KENTUCKY) CASE NO. 2007-00192
UTILITIES COMPANY FOR A NEW TARIFF-)
BROWNFIELD DEVELOPMENT RIDER)

O R D E R

On May 11, 2007, Louisville Gas and Electric Company and Kentucky Utilities Company (collectively "Applicants") filed an application for approval of new rate schedules for a Brownfield Development Rider ("BDR") tariff. The Attorney General of the Commonwealth of Kentucky ("AG") is the only intervenor in this proceeding. A procedural schedule was established for the filing of written comments on the proposed tariff. On September 21, 2007, the AG filed comments in opposition to the proposed tariff. The Applicants filed response comments on October 5, 2007. The parties did not request a hearing and the matter stands submitted to the Commission for a decision. For the reasons stated below, the Commission approves the Applicants' request for new rate schedules for a BDR tariff.

BACKGROUND

The Commission formally established guidelines for economic development rates in Administrative Case No. 327 ("Admin. 327").¹ Economic development rates ("EDRs")

¹ Administrative Case No. 327, An Investigation into the Implementation of Economic Development Rates by Electric and Gas Utilities (Ky. PSC Sept. 24, 1990).

were intended to promote economic development efforts by offering rate, or other incentives, to utility customers. The motivation for EDRs, as set out in Admin. 327 is to provide “incentives to new large commercial and industrial customers to locate facilities in Kentucky . . . thereby bringing much needed jobs and capital investment into Kentucky.”² One of the guidelines established in Admin. 327 was that EDRs should be offered by special contract rather than by general tariffs. Another of the guidelines was that the length of a contract should be at least twice the length of the incentive period set forth in the contract.

In 2004, The Union Light, Heat and Power Company (“ULH&P”) (now Duke Energy Kentucky, Inc.) filed an application for approval of three EDR tariffs, including a proposed BDR.³ ULH&P proposed to depart from the guidelines established in Admin. 327. ULH&P’s request to establish a BDR tariff was based on its belief that there had been significant changes in circumstances since the 1990 decision in Admin. 327. The most significant of those changes, according to ULH&P, is that most customers use the Internet to research a utility’s available tariffs. The absence of a tariffed incentive rate might discourage a new or existing customer from making further inquiry, particularly when utilities in other states have incentive rate tariffs.

Although the Commission determined in Admin. 327 that EDRs should be offered by special contract rather than by a tariff, the Commission ultimately concluded that ULH&P’s proposed EDR tariffs, including the BDR tariff, were consistent with that

² *Id.*, Finding No. 1, at 25.

³ Case No. 2004-00253, Application of The Union Light, Heat and Power Company for Approval of Its Proposed Economic Development Riders (Ky. PSC Apr. 19, 2005).

guideline. The Commission noted that ULH&P's tariffs condition the incentive rates on the negotiation of a customer-specific contract, which would help to ensure that incentives would be offered only when necessary. It is important to note that while the Commission approved ULH&P's request to establish EDRs within the framework of its existing tariff, the pre-existing requirement that EDRs should be implemented only through special contracts remained. In other words, ULH&P's EDRs could be fairly characterized as mere offers to contract with qualifying customers.

The Commission further noted that ULH&P had shown that its proposed incentive EDRs were designed to recover the variable costs of serving the new or expanded load and make a contribution to its fixed costs. With the incentive rates designed in this manner, the other customers of ULH&P would be expected to benefit from the new or expanded load during the incentive period.

The AG, an intervenor in the ULH&P EDR proceeding, appealed the Commission's Order to the Franklin Circuit Court. The circuit court affirmed the Commission's Order, holding that KRS 278.170(1) merely prohibits the Commission from giving unreasonable preferences or advances. The circuit court could not declare the tariffs unreasonable in light of the contract restrictions and voluntary nature of the programs involved. The circuit court did not find KRS 278.170(2) and (3) written as an exclusive list for free or reduced rate services, noting that "the plain and permissive language of those sections did not lend itself to such an interpretation."⁴

The circuit court also held that the Commission's Order had statutory support pursuant to KRS 278.030(3). It noted that the Commission considered economic

⁴ Franklin Circuit Court Opinion and Order, June 15, 2006, at 5.

development and brownfield redevelopment as a reason for reduced rate service. The circuit court stated that it could not declare such consideration unlawful or unreasonable in light of that language.

The AG appealed the Franklin Circuit Court's ruling to the Kentucky Court of Appeals, raising the same arguments. In reversing the circuit court's decision, the appellate court held that the Commission's Order was both unlawful and unreasonable. The Commission and ULH&P have filed a petition for rehearing. The petition for rehearing is pending before the Court of Appeals and has the effect of staying the ruling of the appellate court.⁵

STATEMENT OF THE CASE

The Applicants offer the proposed BDR tariff for the following reasons: (1) to promote reclamation of environmentally contaminated sites; (2) to promote economic development efforts within the Commonwealth of Kentucky; and (3) to increase efficient utilization of the Applicants' facilities for the benefit of all their customers.⁶ Additionally, the Applicants state that they are aware of other similar tariffs and offer the BDR so as not to be at a competitive disadvantage.⁷

The Applicants characterized the BDR as a companion schedule to any of the Applicants' power rate schedules — schedules with a separate demand charge as a

⁵ CR 76.30(2).

⁶ Filed Testimony of Fred Howard Bush, Jr., Manager, Tariffs/Special Contracts, E.ON U.S. Services, Inc. ("Bush Testimony") at 1.

⁷ Louisville Gas and Electric Company and Kentucky Utilities Company Response to Request for Information Posed by the Attorney General, No. 1.

part of the billing charges.⁸ As proposed, the BDR would reduce the demand component of such billings by 50 percent during each of the first 12 months, 40 percent during each of the next 12 months, and continuing on a declining scale of 10 percent for each 12-month period of the first 60 months of the customer's contract.⁹ All billings after the first 60 months of the contract period would be at the normal rate.¹⁰

Following the practice of ULH&P in Case No. 2004-00253, the Applicants proposed that the BDR be implemented as a tariff. The Applicants contend that the proposed BDR tariff is consistent with the Commission's guidelines in Admin. 327.¹¹ The Applicants believe having a BDR tariff on file with the Commission allows potential customers to be aware of incentives that may be available for future development.¹² The Applicants further contend that without such publicly available information, potential customers for electric service within the Applicants' service territories may eliminate these areas from consideration before the Applicants become aware of the potential opportunity.¹³

The Applicants state that service under this schedule would only be rendered following approval by the Commission of a special contract between the Applicants and

⁸ Bush Testimony at 2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Louisville Gas and Electric Company and Kentucky Utilities Company Response to the First Data Request of Commission Staff, No. 2 at 2.

¹² *Id.*

¹³ *Id.*

any prospective customer. Similar to ULH&P's terms of contract as set forth in Case No. 2004-00253, the Applicants set the length of the special contract at 8 years,¹⁴ meaning that the prospective customer would take service under the standard rate schedule for a minimum of 3 years following the 5-year reduced billing period.¹⁵

The Applicants note that the BDR will be available to any prospective customer being billed on a power rate schedule subject to the following two specific parameters.¹⁶

First, the BDR is available only to billing loads of 500 kW or greater where the Applicants have facilities in place to serve the prospective customer.¹⁷ The Applicants state that this minimum load parameter is to encourage larger prospective customers that will provide an economic benefit to the area.¹⁸ According to the Applicants, if a smaller customer should occupy a brownfield site, there may not be jobs or revenues to justify providing an incentive.¹⁹ The Applicants also assert that limiting the incentive to sites where the Applicants have existing facilities improves efficient utilization of the Applicants' facilities and existing infrastructure and minimizes the risk that the Applicants' other customers are subsidizing the brownfield sites through the incentive.²⁰

¹⁴ Louisville Gas and Electric Company and Kentucky Utilities Company Response to the First Data Request of Commission Staff, No. 9.

¹⁵ Bush Testimony at 3.

¹⁶ *Id.* at 2.

¹⁷ *Id.*

¹⁸ *Id.* at 3.

¹⁹ *Id.*

²⁰ *Id.*

Second, the service location must have been idle for 2 years and must have been designated by the state of Kentucky as a brownfield site.²¹ A brownfield site is a property that is abandoned or underutilized due to real or perceived contamination.²² The Applicants maintain that these sites are not often viewed as desirable operating locations by prospective customers because of the investment necessary to remove contamination or because of liability issues.²³ The Applicants state that requiring the site to be idle for 2 years identifies a need.²⁴ The Applicants do not believe an incentive should be provided to potential service sites that might be utilized without such an incentive.²⁵

The Applicants also state that there would be no revenue impact from the BDR because this is a new offering and because no customers are currently on the rate schedule.²⁶

DISCUSSION

Although the AG states that he generally is supportive of initiatives that promote economic development within the state and of efforts to reclaim environmentally damaged sites, he objects to the proposed BDR tariff. The AG “renews his long-standing objection to offering discounts from the standard cost of service-based rates

²¹ *Id.* at 2.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 3.

²⁵ *Id.*

²⁶ *Id.* at 4.

for customers for any reason not specifically enumerated in KRS 278.170.”²⁷ The AG contends that discounts given to customers to promote economic development, reclamation of environmentally contaminated sites and/or efficient use of the Applicants’ facilities are not among those specifically enumerated in KRS 278.170.²⁸ Therefore, the AG argues that the proposed BDR tariff is illegal.

The AG further argues that the tariff will have little or no effect toward attaining the purposes stated in the application. First, the AG contends that the application should be denied because the Applicants have failed to provide any studies or research to support their assertion that the BDR will promote economic development within the state. The AG notes that the Applicants’ rates for commercial and industrial customers are competitive with other utilities without the proposed discount. Second, the AG asserts that the Applicants have not submitted any evidence indicating a correlation between a discount on electrical rates and the stated purpose of reclamation of contaminated sites. Third, the AG posits that the proposed tariff would not lead to

²⁷ The Attorney General’s Comments at 2. The AG raised an identical objection in Case No. 2004-00253.

²⁸ KRS 278.170 provides, in relevant part, as follows:

(2) Any utility may grant free or reduced rate service to the United States, to charitable and eleemosynary institutions, and to persons engaged in charitable and eleemosynary work, and may grant free or reduced rate service for the purpose of providing relief in case of flood, epidemic, pestilence, or other calamity....

(3) Upon obtaining commission approval of a tariff setting forth terms and conditions of service the commission deems necessary, a utility as defined in KRS 278.010(3)(d) may grant free or reduced rate service for the purpose of fighting fires or training firefighters to any city, county, urban-county, charter county, fire protection district, or volunteer fire protection district....

increased efficient use of the Applicants' facilities and infrastructure. The AG argues that the lower demand resulting from these sites being not utilized would be more beneficial to society and existing customers than the re-utilization of these sites because, as the AG reasons, the demand upon the Applicants' system is lower resulting in less coal being burned, which, in turn, introduces less pollution and green-house gases into the environment.

The AG maintains that, in the event that the tariff is approved, the taxes charged should reflect the amount due under standard rates. The AG contends that any discount in the tax paid resulting from the proposed tariff is beyond the scope of the Commission's authority. The AG argues that it is inappropriate for the Commission to allow any method of discounting electrical rates to affect the tax paid as this would negatively affect the revenues of local school boards, the general fund, or other governing body.

In response to the AG's objections, the Applicants state that the Commission's decision in Case No. 2004-00253 renders the AG's objection, based upon KRS 278.170, without merit. In Case No. 2004-00253, the Commission stated that utilities have authority under KRS 278.030(3) to create suitable and reasonable classification of its rates on the basis of any reasonable consideration. The Applicants note that their proposed BDR tariff is substantially identical to the one approved by the Commission in Case No. 2004-00253.

With respect to the AG's belief that the Applicants' proposed BDR tariff would not achieve its stated purpose of encouraging economic development and reclamation of state-designated brownfield sites, the Applicants again rely on Case No. 2004-00253 for

the proposition that the Commission approved several different ULH&P EDRs, including a BDR, for which ULH&P had no studies to support a rational link between discounted rates and economic development. The Applicants note that ULH&P did provide anecdotal evidence of a BDR being offered by Cincinnati Gas & Electric Company stimulating property development and business growth in the affected area. The Applicants further assert that extensive evidence is not required “to demonstrate that discounting electricity costs provides an incentive to a rational economic actor for whom electricity is a useful input.”²⁹ Assuming, *arguendo*, that the AG’s assertion is correct, the Applicants contend that the AG’s objection is without merit because “[i]f no one takes service under the riders, then they will be mere surplusage at worst, doing neither good nor harm.”³⁰ However, the Applicants note that if the AG is incorrect and the riders do stimulate businesses to reclaim brownfield sites and use otherwise unused electric facilities, such benefits will inure to the Applicants’ customers and to the public as a whole.

With respect to the AG’s objection to the impact of BDR tariffs on the Applicants’ utilization efficiency, the Applicants state that economic efficiency results from prospective customers locating on sites where currently unused electric facilities exist. Such a scenario allows the Applicants to offer discounted demand charges under the proposed tariffs without placing a cost burden on other customers. In contrast, the Applicants point out that if such customers were to locate on sites with no existing

²⁹ Louisville Gas and Electric Company and Kentucky Utilities Company’s Response to the Comments of the Attorney General at 3.

³⁰ *Id.*

facilities, the Applicants would have to construct the facilities necessary to serve such customers. The result would be “an economically inefficient multiplicity of facilities.”³¹ The Applicants also state that they have always maintained and operated their generation fleet in an efficient and environmentally responsible manner. They note that, within reasonable operational limits, it is more cost-efficient to generate more, not less, electricity.

Turning to the AG’s comments regarding the tax treatment for potential customers under the BDR tariff, the Applicants contend that such a position is inconsistent with the tax treatment afforded to customers under other riders, such as merger surcredit and the curtailable service rider, which reduce customers’ cost of service. Arguing that the AG has failed to provide justification or authority for such inconsistent treatment, the Applicants request that the Commission afford discounts under the proposed tariff riders the same tax treatment as their customers currently enjoy under other applicable riders.

Based on the evidence of record and being otherwise sufficiently advised, the Commission finds that the proposed BDR tariffs offered by the Applicants should be approved as filed. Pursuant to KRS 278.170(1), the Commission is authorized to permit reasonable preferences and advantages as to rates and services. Similarly, KRS 278.030(3) allows a utility to make reasonable classifications of its service, patrons, and rates. The proposed BDRs make reasonable classifications of the Applicants’ rates. The Commission further finds that the terms of the Applicants’

³¹ *Id.* at 4.

proposed BDR tariffs are consistent with the guidelines set forth in Admin. 327 and the findings of the Commission in Case No. 2004-00253.

The AG's objection to the approval of the proposed BDR tariffs premised upon KRS 278.170 has already been addressed and rejected by the Commission in Case No. 2004-00253. In that proceeding, ULH&P filed an application for approval of certain EDR tariffs, one of which was a BDR substantially similar to the BDR tariffs proposed by the Applicants in this case. The AG raised an identical objection to the approval of ULH&P's tariffs pursuant to the language of KRS 278.170. In declining to accept the AG's argument, the Commission determined as follows:

The Commission does not agree with the AG's argument that economic development rates can be approved only if they pass muster under the provisions of KRS 278.170, which specify the conditions for a utility to grant free or reduced-rate service. To the contrary, utilities are expressly authorized by KRS 278.030(3) to:

[E]mploy in the conduct of its business suitable and reasonable classifications of its service, patrons and rates. The classifications may, in any proper case, take into account the nature of the use, the quality used, the quantity used, the time when used, the purpose for which used, and any other reasonable consideration.

There is nothing illegal or unreasonable about creating a special class consisting of customers who locate or expand facilities in Kentucky and, by doing so, satisfy minimum job creation and capital investment levels. Similarly, there is nothing illegal or unreasonable about creating a special class consisting of customers who locate within a designated urban redevelopment or brownfield site. These factors clearly fall within the 'any other reasonable consideration' for classifying customers under KRS 278.030(3).³²

³² Case No. 2004-00253 (Ky. PSC Apr. 19, 2005) at 7.

The Commission has previously found in Admin. 327 that “[EDRs] will provide important incentives to new large commercial and industrial customers to locate facilities in Kentucky and to existing large commercial and industrial customers to expand their operations, thereby giving much needed jobs and capital investment into Kentucky.” This explicit finding was reiterated in Case No. 2004-00253.

Concerning the tax treatment issue, the AG has failed to provide any authority to support the claim that “it is inappropriate for the Commission to allow any method of discounting electrical rates to affect the tax paid”³³ While the proposed BDR tariff in this instance will have the effect of reducing the monthly electrical rate of a prospective customer, the approval of such riders will not disturb whatever tax rate has been set by the appropriate legislative body and imposed upon the prospective customer. Although the AG contends that the instant method of discounting of electrical rates “would negatively affect the revenues of local school boards, the general fund, or other governing body,”³⁴ the proposed BDR tariff, if successful, would have the effect of increasing the tax revenues by acting as an incentive to attract large commercial concerns and industries to locate in designated brownfield sites, which sites would have remained unoccupied and unutilized in the absence of such incentives.

The proposed BDR tariff has specific, measurable guidelines which must be met in order to be applied. The BDR is available to customers locating in a qualified brownfield redevelopment area as defined by Kentucky and served by existing primary service lines. Customers who qualify for the BDR are eligible to receive a declining

³³ The Attorney General’s Comments at 5.

³⁴ *Id.*

reduction in their demand charge for a period of 5 years and they must enter into a service agreement which obligates them to continue to take service for 3 years following the incentive period. The proposed BDR tariffs make reasonable preferences as to rates and are based upon reasonable considerations in the classification of the Applicants' qualifying customers. The requirement that BDRs should be implemented only through special contracts places an additional check for reasonableness. These specific and measurable guidelines are clearly targeted to accomplish the goals and purposes of the tariffs — economic development and brownfield redevelopment resulting in job creation and capital investment.

Lastly, the Applicants have shown that their proposed tariffs are designed to recover the variable costs of serving the new or expanded load and make a contribution to their fixed costs. With the incentive rates designed in this manner, the Applicants' other customers will be expected to benefit from the new or expanded load during the incentive period. Accordingly, the Commission approves the Applicants' proposed rate schedules for a BDR tariff.

In rendering a decision in this matter, the Commission is cognizant of the Court of Appeals' Opinion in the ULH&P proceedings. As the Opinion is not yet final, however, the Opinion does not carry the weight of law and is not binding.³⁵ Depending upon the final outcome of the ULH&P litigation, the Commission recognizes that it may

³⁵ See, e.g., Kohler v. Com., Trans. Cabinet, 944 S.W.2d 146 (Ky. App. 1997) (trial court could not place any reliance on nonfinal opinion of appellate court); and Restatement (Second) of Judgments § 28 (even final judgments of courts other than highest court of record do not necessarily preclude agency from re-litigating a legal interpretation in future proceedings).

need to reconsider this determination either upon its own motion or in accordance with the procedures of KRS 278.260 and other applicable law.

IT IS THEREFORE ORDERED that:

1. The Applicants' BDR tariff is approved effective on and after the date of this Order.

2. Within 20 days from the date of this Order, the Applicants shall file its BDR tariff as approved herein, showing the date of issue and that it was issued by authority of this Order.

Done at Frankfort, Kentucky, this 7th day of March, 2008.

By the Commission

Commissioner Clark Abstains.

ATTEST:


Executive Director