

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BULLDOG'S ENTERPRISES, INC. D/B/A)	
BULLDOG'S ROAD HOUSE)	
)	
COMPLAINANT)	CASE NO.
V.)	2010-00404
)	
DUKE ENERGY KENTUCKY, INC.)	
)	
RESPONDENT)	

O R D E R

The matter is before the Commission upon Defendant, Duke Energy Kentucky, Inc.'s, motion to dismiss and upon Complainant, Bulldog's Enterprises, Inc. d/b/a Bulldog's Road House's, motion to voluntarily dismiss its complaint. For the following reasons, the Commission will deny both motions and establish a procedural schedule for the processing of this matter.

BACKGROUND

On October 15, 2010, Complainant filed a formal complaint against Defendant asserting the following causes of action: (1) fraud; (2) breach of contract; (3) breach of good faith and fair dealing; (4) violation of KRS 367.170; and (5) unjust enrichment. The complaint requested that the matter be certified as a class action and sought, inter alia, compensatory and punitive damages, attorney's fee, and trial by jury. Complainant alleged that, despite the fact that its restaurant had closed its doors to the public on June 1, 2010, Complainant's combined electric and gas bills for June and July of 2010

were in excess of \$3,900 and \$3,600, respectively. Complainant asserts that the allegedly excessive billings establish either a meter defect or that Defendant's policy for estimating bills was fraudulently flawed.

On November 15, 2010, the Commission issued an Order finding that Complainant failed to establish a prima facie case with respect to the request for class action certification as well as each of the five causes of action listed above. We noted in the November 15, 2010 Order that the Commission did not have authority to award the relief requested in the complaint for each of the claims asserted and, therefore, dismissed those claims for failure to state a prima facie case. The Commission, however, found that the complaint did establish a prima facie claim with respect to the underlying factual assertion regarding the improper billing, and directed Defendant to file an answer.

Defendant filed an answer on November 29, 2010 addressing the allegations contained in the complaint as well as moving to dismiss the improper billing allegation. Complainant subsequently filed a response to the motion to dismiss. On January 13, 2011, Defendant filed its reply in support of its motion to dismiss.

On February 4, 2011, Complainant filed a motion to voluntarily dismiss without prejudice its complaint against Defendant. Complainant asserts that its intent is to prosecute the original causes of action, those which were dismissed by the Commission for lack of jurisdiction, in the appropriate Kentucky Circuit Court¹ and to withdraw its complaint before the Commission.

¹ In its response, Defendant identified the venue as Kenton Circuit Court.

Defendant filed a response objecting to the dismissal. Defendant argued that the basis for Complainant's claims, both in the instant matter before the Commission and in Kenton Circuit Court, arose from the same factual predicate – a dispute over the amount of the June 2010 and July 2010 electric and gas bills. Defendant maintains the resolution of the civil action would first require a determination as to whether Defendant's rates have been applied to Complainant in an unfair, unjust or unreasonable manner and that such a controversy falls squarely within the Commission's exclusive jurisdiction pursuant to KRS 278.040(2). Thus, in the interests of administrative efficiency and judicial economy, Defendant urges the Commission to deny Complainant's motion to dismiss and resolve the matter on the merits.

Complainant subsequently filed a reply in support of its motion to voluntarily dismiss the complaint, asserting that the civil claims are "distinct from a simple billing dispute, and consequently the most appropriate forum for those claims is a Circuit Court." Complainant cites to *Carr v. Cincinnati Bell, Inc.*, 651 S.W.2d 126 (Ky. App. 1983) for the proposition that the Commission is without authority to adjudicate the original causes of action mentioned above and, thus, its decision to withdraw the instant complaint should be granted in order for these issues to be properly resolved by Kenton Circuit Court.

Defendant filed a motion on March 3, 2011 for leave to file a sur-reply in further opposition to Complainant's motion to dismiss. In its sur-reply, which was filed with the motion for leave, Defendant contends that the averments in the civil complaint arise from the same operative facts as set forth in the instant complaint. Because the specific causes of action in the civil complaint relate back to the underlying billing dispute,

Defendant asserts that such an issue is within the Commission's exclusive jurisdiction and, therefore, the issue should be adjudicated by the Commission.

DISCUSSION

As Defendant noted, the Commission has exclusive jurisdiction over the regulation of rates and service of utilities as provided under KRS 278.040(2).² Pursuant to KRS 278.260(1),³ the Commission is also vested with original jurisdiction over complaint matters relating to rates or service of any utility. The lone allegation over which the Commission exercised jurisdiction in this instance concerned purported excess billing for electric and gas services rendered by Defendant. Because the allegation touches upon an issue relating to the rates of Defendant, and because this issue is within our exclusive jurisdiction, the Commission finds it necessary and appropriate to continue to investigate this claim.

² KRS 278.040(2) provides in full as follows:

The jurisdiction of the Commission shall extend to all utilities in this state. The commission shall have exclusive jurisdiction over the regulation of rates and service of utilities, but with that exception nothing in this chapter is intended to limit or restrict the police jurisdiction, contract rights or powers of cities or political subdivisions.

³ KRS 278.260(1) provides, in relevant part, as follows:

The commission shall have original jurisdiction over complaints as to rates or service of any utility, and upon a 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.

The Commission further finds that, based on a review of the complaint and the answer, issues of fact are in dispute and that a procedural schedule should be established to process this case.

IT IS THEREFORE ORDERED that:

1. Defendant's motion for leave to file a sur-reply is granted.
2. Defendant's sur-reply is deemed filed and part of the official record of this case.
3. Defendant's motion to dismiss is denied.
4. Complainant's motion to voluntarily dismiss its complaint without prejudice is denied.
5. The procedural schedule set forth in the Appendix attached to this Order shall be followed in this proceeding.
6. All interrogatories and requests for production of documents shall be appropriately bound, tabbed, and indexed. Responses shall include the name of the individual responsible for responding to the questions related to the information provided, with copies to all parties of record and 10 copies to the Commission.
7. A party shall make timely amendment to any prior response if it obtains information which indicates that the response was incorrect when made or, though correct when made, is now incorrect in any material respect.
8. For any request to which a party fails or refuses to furnish all or part of the requested information, that party shall provide a written explanation of the specific grounds for its failure to completely and precisely respond.

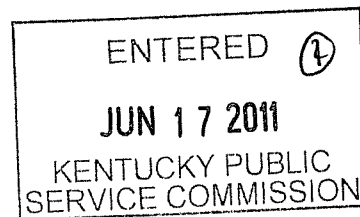
9. All parties shall respond to any interrogatories and requests for production of documents that Commission Staff submits in accordance with the procedural schedule set forth in the Appendix.

10. Motions for extensions of time with respect to the schedule herein shall be made in writing and will be granted only upon a showing of good cause.

11. At any public hearing in this matter, neither opening statements nor summarization of direct testimony shall be permitted.

12. Nothing contained herein shall prevent the Commission from entering further Orders in this matter.

By the Commission



ATTEST:

Stephanie Bell for Jeff Deroven
Executive Director

APPENDIX

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE
COMMISSION IN CASE NO. 2010-00404 DATED JUN 17 2011

Each party may serve upon any other party an initial request
for production of documents and written interrogatories
no later than07/01/11

Each party served with initial requests for production
of documents and written interrogatories shall file responses
thereto no later than07/15/11

Each party may serve upon any other party a
supplemental request for production of documents and
written interrogatories no later than07/29/11

Each party served with supplemental requests for
production of documents and written interrogatories
shall file responses thereto no later than08/12/11

Formal hearing is to begin at 10:00 a.m., Eastern Daylight Time,
in Hearing Room 1 of the Commission's offices
at 211 Sower Boulevard, Frankfort, Kentucky,
for the purpose of cross-examination of witnesses
no later than..... To be scheduled

Rocco D'Ascenzo
Senior Counsel
Duke Energy Kentucky, Inc.
139 East 4th Street, R. 25 At II
P. O. Box 960
Cincinnati, OH 45201

Eric C Deters
Eric Deters & Associates
5247 Madison Pike
Independence, KENTUCKY 41051

Brian P Gillan
917 Main Street, Suite 400
Cincinnati, OHIO 45202

Mark David Goss
Frost, Brown, Todd, LLC
250 West Main Street
Suite 2800
Lexington, KENTUCKY 40507