

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF KENTUCKY FRONTIER)	CASE NO.
GAS, LLC FOR A DECLARATORY ORDER)	2016-00287

ORDER

On August 3, 2016, Kentucky Frontier Gas, LLC (“Frontier”) filed a petition for a declaratory Order (“Petition”), pursuant to 807 KAR 5:001(19), requesting that the Commission determine the service status of Belfry First Baptist Church of Forest Hills (the “Church”) pursuant to an “abandoned right of way agreement”¹ between the Church and Belfry Gas Company, Inc. (“Belfry”), a company whose assets Frontier acquired in 2008.² By Order entered September 28, 2016, the Commission granted the Church’s motion to intervene in this matter, accepted its pleadings as filed, and denied its motion to dismiss. Both parties have now submitted this case for a decision based upon the record.

BACKGROUND

Belfry and the Church entered into an agreement in 1971 (“1971 Agreement”) which provided for the sale and assignment of a pipeline (2-inch and 1.5-inch in diameter) from the Church to Belfry. The pipeline connected from the Church to a point on the City Service Company pipeline, and extended a total distance of approximately 3,000 feet. Under the terms of the 1971 Agreement, in exchange for the sale and assignment of the pipeline, Belfry paid the Church \$1,100.00 and agreed to furnish gas

¹ Petition at 1.

² *Id.* at 2.

to the Church and parsonage “as long as they [Belfry] have service available in this area at a price of 35 cents per thousand cubic foot (“Mcf”).” The 1971 Agreement further provided that in the event Belfry no longer had gas available in the area, Belfry would sell the pipeline back to the Church for \$500.00.³

In December 2008, Frontier acquired the assets, but not the stock, of Belfry.⁴ After purchasing the assets of Belfry, Frontier continued to serve the Church at the same rate as set forth in the 1971 Agreement (\$0.35 per Mcf), and did so for eight years. By letter dated July 13, 2016, Frontier notified the Church that it would no longer serve the Church gas under the rate set forth in the 1971 Agreement, because Frontier was no longer using the pipeline that traversed the Church’s property and therefore considered the pipeline right-of-way void. Frontier stated that it has been systematically replacing uncoated steel pipelines, such as the one through the Church’s property, with modern polyethylene (“PE”) pipe, and has recently replaced a pipeline along Forest Hills Road. As a result, Frontier stated that it no longer has a need for the pipeline that runs through the Church’s property, and it will no longer transport gas through that pipeline. Frontier’s letter further informed the Church that it would continue to provide gas to the Church if the Church so desired, but would do so under Frontier’s current tariffed rates applicable to all customers (\$8.55 per Mcf). Frontier’s letter also stated that it was releasing all rights to the ownership and use of the pipeline and right-of-way agreement, and that it was not asking for any payment in exchange for the release of the pipeline back to the Church.

³ *Id.*, Exhibit 1

⁴ Case No. 2008-00394, *Application of Kentucky Frontier Gas, LLC for Approval of Financing and Transfer of Control* (Ky. PSC Nov. 25, 2008).

On August 3, 2016, Frontier filed its Petition requesting a declaratory Order from the Commission that, based on the termination of the 1971 Agreement with the Church, Frontier can provide service only pursuant to its filed tariffs, and that continued service at the rate of \$0.35 per Mcf is a violation of its tariffs and discriminatory to other customers in the same class of service. In its response to Frontier's Petition, the Church raises a number of issues, each of which will be addressed in turn.

DISCUSSION

Jurisdiction

The Church first argues that the Commission lacks jurisdiction to adjudicate a commercial contract dispute such as the current dispute over the terms and enforceability of the 1971 Agreement. The Church maintains that pursuant to KRS 278.040(2), the Commission has jurisdiction only over rates and services of utilities such as Frontier, and that the price of gas at issue is not a "rate," but instead is part of the consideration supporting a contract for the sale of property (the pipeline). The Church further asserts that the Commission does not have jurisdiction to adjudicate property rights under the contract at issue, and that the proper forum for resolving this conflict is circuit court.

In its reply, Frontier argues that the issue presented in its Petition is not one of contract interpretation, but whether the rate for gas provided to the Church is \$0.35 per Mcf, or the currently approved \$8.55 per Mcf tariffed rate, which all other similarly situated customers pay. Regardless of any other provisions in the 1971 Agreement, Frontier asserts that only the rate is being challenged—a matter exclusively within the Commission's jurisdiction.

In its sur-reply, the Church avers that under the terms of the 1971 Agreement, the Church accepted a lower upfront payment for the pipeline (\$1,100.00) in exchange for monthly payments from Belfry in the form of gas purchase savings (the \$0.35 per Mcf rate). Thus, the Church states that the contract in plain terms was an agreement for the sale of an asset (the pipeline), and not merely an easement. The Church states that ownership of the pipeline changed hands in exchange for bargained-for consideration, and that the terms of the 1971 Agreement are unambiguous and need to be enforced in a court of law. According to the terms of the contract, the Church argues that the condition which would cause the contract to expire (Belfry's no longer having gas service available in the area) has not occurred, and thus Frontier remains obligated to continue to serve the Church under the \$0.35 per Mcf rate. The Commission finds that it has jurisdiction to address the issue presented in Frontier's Petition. KRS 278.040(2) provides, in relevant part, that "[t]he jurisdiction of the commission shall extend to all utilities in this state. The commission shall have exclusive jurisdiction over the regulation of rates and services of utilities[.]" Moreover, "[s]trictly speaking, the Commission ha[s] the right and duty to regulate rates and services, no matter what a contract provided."⁵ Here, the rate charged for gas service by a utility clearly falls within the Commission's jurisdiction, despite the terms of the 1971 Agreement, and thus this remains the proper forum in which to address Frontier's Petition.

⁵ *Bd. of Education v. Dohrman*, 620 S.W.2d 328, 329 (Ky. App. 1981).

Rate for gas service

The next issue is whether Frontier should charge the Church the \$0.35 per Mcf rate under the 1971 Agreement, or Frontier's \$8.55 per Mcf⁶ Residential and Small Commercial tariffed rate on file with the Commission. Frontier claims that having relinquished its interest in the pipeline right-of-way used to serve the Church, Frontier has no right to access the property or to use the pipeline to serve the Church. Accordingly, Frontier maintains that it can provide service to the Church only pursuant to the terms and conditions of service filed in its tariff. Frontier directs us to KRS 278.160, which states that utilities can charge only rates that have been filed with and approved by the Commission, as well as to KRS 278.170, which prohibits utilities from discriminating as to rates or services. Specifically, KRS 278.170 states:

No utility shall, as to rates or service, give any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage, or establish or maintain any unreasonable difference between localities or between classes of service for doing a like and contemporaneous service under the same or substantially the same conditions.

In response, the Church points out that Frontier concedes that under the 1971 Agreement, the Church is entitled to gas service at the \$0.35 per Mcf rate, and that Frontier has been providing gas service to the Church under that rate for eight years. The Church emphasizes that since continued service in the area is the only requirement for continuation of gas service at the \$0.35 per Mcf rate, pursuant to the plain meaning of the contract, Frontier must honor its obligations, since Frontier has not shown that it no longer is providing gas service in that area. Furthermore, the Church argues that if

⁶ The Commission notes that Frontier's Residential and Small Commercial tariffed volumetric rate effective November 1, 2016, is \$9.5913 per Mcf.

the Commission does view the \$0.35 per Mcf price as a “rate,” Belfry included the 1971 Agreement in its approved tariff on file with the Commission, prior to Frontier’s acquiring Belfry. The Church argues that KRS 278.170 prohibits only an unreasonable preference or advantage, unreasonable prejudice or disadvantage or unreasonable difference for providing the same type of service under similar conditions. Thus, the Church avers that reasonable differences are allowed. In this instance, the Church states that it is reasonable that it would receive a savings on its natural gas usage because it sold a pipeline which it owned to Belfry for a low upfront payment. The Church argues that had it not negotiated for this savings, the upfront cost for the pipeline would have been considerably more than the amount paid.

In its reply, Frontier contends that the Church’s assertion that the extremely favorable gas rate is merely part of the purchase price for a short segment of gathering pipeline, which was sold to Belfry at a discount, is irrelevant for two reasons. First, Frontier clarifies that it is not claiming ownership of the pipeline; rather, Frontier has bypassed the old, corroded pipeline with a new PE gas main off Church property and has disclaimed any right to the pipeline traversing the Church’s property and any associated easement. Secondly, Frontier notes that the purchase price (\$1,100.00) and the cost of gas (\$0.35 per Mcf) are two separate provisions in the contract, and the continuation of gas service at that rate is contingent upon the availability of gas—a factor which Frontier asserts is unrelated to the acquisition of the pipeline or its purchase price. Based on the Church’s annual usage, Frontier states that if service continues at \$0.35 per Mcf, Frontier will lose \$3,280 in revenue annually. Furthermore, Frontier states that if the Church’s allegation is correct, just since the acquisition of

Belfry's assets in 2008, assuming similar annual gas usage by the Church, the cost to Frontier alone for that pipeline has been over \$20,000. Frontier maintains that the case before the Commission involves the reasonableness of the rate charged to the Church, and whether the rate established in the now relinquished easement for a pipeline across the Church's property conforms to the statutory provisions set forth in KRS 278.170.

In its sur-reply, the Church argues that the \$0.35 per Mcf rate was an essential item of the bargained-for consideration for the sale of the pipeline, in addition to the lower upfront purchase price, and is not subject to change by the Commission. The Church asserts that so long as gas service is available in the area, the \$0.35 per Mcf rate is valid and enforceable, and Frontier remains obligated to serve the Church at that rate. The Church reasserts that the 1971 Agreement is not merely an agreement for an easement. The sur-reply also cites *Fern Lake Co. v. Public Service Commission*, 357 S.W.2d 701 (Ky. App. 1962), a case in which the Court held that where a contract for sale of water and ice properties to a water company included a payment of \$17,700 annually to the seller, such annual payment for a term of 20 years was not a "rate" and was not subject to change by the Commission during the primary term of the contract.

Based on review of the parties' positions, the record, and applicable law, the Commission finds that the Church should be charged Frontier's tariffed Residential and Small Commercial rate on file with the Commission, just the same as similarly situated customers. Frontier is no longer using the pipeline traversing the Church's property to transport gas and has abandoned its right-of-way. As a result, it is reasonable for Frontier to charge the Church its tariffed rate for gas service. Additionally, the Church ignores established law when it argues that the \$0.35 per Mcf amount is not subject to

change by the Commission because the 1971 Agreement was filed with the Commission, and therefore is a tariffed rate. The Commission's authority to change rates upon a proper showing is not limited by a contract, nor does prior approval of a contract prevent the Commission from subsequently changing the rate.⁷

Here, the 1971 Agreement was never approved by the Commission. For an agreement or rate to be approved by the Commission, KRS 278.370 requires that there be a written order or finding by the Commission. There has never been a written Order or finding by the Commission that the 1971 Agreement or the rate contained therein was "fair, just and reasonable" under KRS 278.030(1). Rather, the 1971 Agreement was filed with the Commission by Belfry in 2002, and it became effective pursuant to 807 KAR 5:011, Section 6(2)(b), without a finding or Order by the Commission that either the 1971 Agreement or the rate was "fair, just and reasonable." Thus, the Commission now makes no finding as to whether the 1971 Agreement was "fair, just and reasonable" when entered into in 1971 or when it was filed here as a tariff in 2002.

Based on the evidence in this case, Frontier has made a showing that it is no longer using the pipeline pursuant to the 1971 Agreement and that continuing to charge

⁷ *National-Southwire Aluminum Co. v. Big Rivers Elec. Corp.*, 785 S.W.2d 503, 517 (Ky. App. 1990). See also *Smith v. Southern Bell Tel. & Tel. Co.*, 268 Ky. 421 (1937) (Act vesting exclusive jurisdiction with Public Service Commission to regulate telephone company's rates and services was constitutional); *Kentucky Indus. Utility Customers, Inc. v. Kentucky Utilities Co.*, 983 S.W.2d 493 (Ky. 1998) (environmental surcharge statute delegating ratemaking authority to Public Service Commission was constitutional); *Fern Lake Co. v. Public Service Commission*, 357 S.W.2d 701 (Ky. App. 1962) (holding that where contract for sale of water and ice properties to a water company included payment of \$17,700 annually to the seller, such annual payment for a term of 20 years was not a "rate" and was not subject to change by the Public Service Commission during the primary term of the contract). Here, the monthly charge was based on usage (\$0.35 per Mcf), and was for an indefinite period of time, thereby making it a rate subject to the Commission's jurisdiction.


the Church a rate of \$0.35 per Mcf, which is substantially less than the currently tariffed rate of \$9.5913 per Mcf, results in an annual loss in revenue to Frontier of \$3,280. Charging the Church a rate which is less than 5 percent of Frontier's tariffed rate violates KRS 278.170 by both creating an unreasonable preference in favor of the Church and subjecting Frontier's other customers to an unreasonable disadvantage due to the shift in revenue responsibility to them. Further, the Commission finds that the decision in *Fern Lake* is not controlling here. In *Fern Lake*, the payment made annually by the utility under a contract for the purchase of facilities was not a "rate," as defined under KRS 278.010(12), because the payment was not for service rendered or to be rendered by the utility to the seller of the facilities, and the payment did not vary with the quantity of service provided by the utility. In fact, the Court noted that the utility "has an absolute obligation to pay . . . \$17,700 annually whether or not it takes a drop of water . . ." That contrasts with the Church's 1971 Agreement, where the payments are based on, and do vary with, the quantity of gas service rendered each month by the utility to the seller of the facilities. Under the 1971 Agreement, if Frontier renders no utility service, the Church makes no payment. Thus, the \$0.35 per Mcf payment is a rate.

IT IS THEREFORE ORDERED that Frontier shall provide gas service to the Church on and after the date of this Order pursuant to the rates in Frontier's filed Residential and Small Commercial tariff.

By the Commission

ENTERED
DEC 14 2016
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:


Executive Director

Case No. 2016-00287

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