

not use the grain bin facility ten months out of the year, and the only electricity used in those months is to power a night light. However, he pays the 50 percent ratchet during those low-use months.² Mr. Shouse requests that the Commission establish a seasonal, or demand rate, for agriculture-related power.³

In response, KU argues that Mr. Shouse's requested relief is barred under the doctrine of *res judicata*, and therefore, the allegations contained in the Complaint fail to state a claim upon which relief can be granted.⁴ Because the Commission found the demand rate structure of Rate PS, including the demand ratchets, to be reasonable in KU's most recent base rate case, Case No. 2016-00370,⁵ KU asserts that Mr. Shouse is barred under the doctrine of *res judicata* from re-litigating the reasonableness of Rate PS and its demand ratchets.⁶ KU further contends that Mr. Shouse does not allege any changed circumstances, material or otherwise, occurring in the five weeks between the Commission's final Order in Case No. 2016-00370 and the filing of his complaint in this proceeding that would require the Commission to further investigate at this time.⁷

KU requests that the Complaint be dismissed on this ground, and presents the same argument as an affirmative defense in its Answer.⁸

² Complaint at 1–2.

³ *Id.*

⁴ KU's Motion to Dismiss at 1.

⁵ Case No. 2014-00371, *Application of Kentucky Utilities Company for an Adjustment of Its Electric Rates* (Ky. PSC June 30, 2015).

⁶ KU's Motion to Dismiss at 5.

⁷ *Id.* at 7–8

⁸ KU's Answer at 10.

Collateral Estoppel

KU contends that the doctrine of *res judicata*, in particular collateral estoppel, bars Mr. Shouse from re-litigating the reasonableness of the rate structure of Rate PS because that issue was fully considered and decided by the Commission in KU's two most recent base rate cases, Case No. 2014-00371 and 2016-00370. In Case No. 2014-00371, Mr. Shouse twice submitted the same oppositions to Rate PS demand rates that he now advances in his Complaint.⁹ Mr. Shouse did not seek to intervene, or file any comments, in the most recent proceeding, Case No. 2016-00370, yet KU asserts it was evident that Mr. Shouse was capable of participating in and filing comments in that proceeding if he had wished to, having done so in KU's prior rate case.¹⁰ KU asserts that the doctrine of *res judicata* bars the adjudication of issues that have already been litigated or should have been litigated in a prior case between the same or similar parties.¹¹ *Res judicata* applies to quasi-judicial acts of an administrative agency acting within its jurisdiction unless a significant change of conditions or circumstances has occurred between the administrative proceedings.¹²

⁹ Case No. 2014-00371, *Kentucky Utilities Company*, Public Comments of David Shouse ("Shouse Public Comments") (filed May 1, 2015, and June 16, 2015).

¹⁰ KU's Motion to Dismiss at 7.

¹¹ 47 Am. Jur.2d, *Judgments*, Section 464.

¹² *Bank of Shelbyville v. Peoples Bank of Bagdad*, 551 S.W.2d 234, 236 (Ky. 1977). The Commission has applied the doctrine of *res judicata* in dismissing complaints. See, e.g., Case No. 97-311, *Orbin and Margie Brock v. Western Rockcastle Water Association* (Ky. PSC Feb. 25, 1998); Case No. 91-277, *Dovie Sears v. Salt River Water District and Kentucky Turnpike Water District* (Ky. PSC June 30, 1992).

Res judicata has two subparts: claim preclusion and issue preclusion.¹³ Issue preclusion, also known as collateral estoppel:

[B]ars the parties from relitigating any issue actually litigated and finally decided in an earlier action. The issues in the former and latter actions must be identical. The key inquiry in deciding whether lawsuits concern the same controversy is whether they both arise from the same transactional nucleus of facts. If the two suits concern the same controversy, then the previous suit is deemed to have adjudicated every matter which was or could have been brought in support of the cause of action.

For issue preclusion to operate as a bar to further litigation, certain elements must be found to be present. First, the issue in the second case must be the same as the issue in the first case. Second, the issue must have been actually litigated. Third, even if an issue was actually litigated in a prior action, issue preclusion will not bar subsequent litigation unless the issue was actually decided in that action. Fourth, for issue preclusion to operate as a bar, the decision on the issue in the prior action must have been necessary to the court's judgment.¹⁴

The Commission finds that the principle of issue preclusion, or collateral estoppel, applies in this case so as to bar Mr. Shouse's assertions concerning the justness of KU's Rate PS and demand ratchet.

In Case No. 2014-00371, the Commission considered the reasonableness of KU's demand charges under Rate PS, including the two public comments submitted by David Shouse,¹⁵ which presented identical issues concerning KU's Rate PS as those presented

¹³ *Yeoman v. Commonwealth*, 983 S.W.2d 459, 464-65 (Ky. 1998).

¹⁴ *Id.* at 465-66.

¹⁵ KU's Motion to Dismiss at 3. As pointed out by KU, either the same individual, David Shouse, has filed complaints following both Case No. 2014-00371 and 2016-003701, or someone also named David Shouse, who operates grain bins in Morganfield, Kentucky, and therefore similarly situated to the current complainant, filed those complaints.

in the Complaint. Although David Shouse was not formally a party to that proceeding, the Commission finds that it duly considered his objections and that his interests, as a consumer, were represented by the Office of the Attorney General who did intervene, actively participated, and was a signatory to the settlement agreement.¹⁶

Specifically, the June 11, 2015 letter that Complainant David Shouse's counsel sent to the Commission in Case No. 2014-00371 stated:

It is understood and appreciated the necessity for certain demand charges; however, the seasonal work, i.e., farming, and the utilities associated with farming that are operated on a very limited seasonal basis enable KU to realize a windfall situation with respect to the customer that is, as a practical legal term, unjust enrichment, concerning the electrical charges made against Mr. Shouse.¹⁷

Paragraph 12 of the Complaint in Case No. 2015-00417 was substantively identical:

Additionally, on opinion and belief, the 50 percent minimum demand rate equates to a sum substantively greater over the course of the year than the utilities that are actually used if paid for directly; therefore, resulting in a windfall for Defendant and/or otherwise unjustly enriching the Defendant, and/or contrary to the intent and spirit of the statutes and regulations.¹⁸

In Case No. 2014-00371, the Commission sent a letter to Mr. Shouse's counsel stating that the Commission understood Mr. Shouse's concerns regarding KU's demand

¹⁶ KRS 367.150(8)(a) makes the Attorney General's Consumer Protection Division the representative of all customers of a particular utility whenever that office chooses to intervene in a rate case before the Commission.

¹⁷ Case No. 2014-00371, *Kentucky Utilities Company*, Shouse Public Comments (filed June 16, 2015).

¹⁸ Complaint at 4.

rates, and that it would take into account Mr. Shouse's concerns when rendering a final Order in that proceeding:

The Commission acknowledges receipt on June 16, 2015 of your letter, a copy of which is attached hereto, addressed to one of our rate analysts, regarding the above referenced case and your client's objection to the amount of demand charges he pays to Kentucky Utilities Company for the seasonal operation of his farming activities. Your letter is being treated as an official protest and will be placed in the case file of this proceeding. The Commission will take your concerns into consideration in its review and decision in this matter.¹⁹

The final Order in Case No. 2014-00371 reflects that the Commission thoroughly reviewed the schedule of rates in the proffered settlement agreement in that proceeding and applied its expertise to make an independent decision as to the level of rates to be approved, rather than simply deferring to the parties as to what constitutes fair, just and reasonable rates.²⁰ In the final Order, the Commission noted that it had "performed its traditional ratemaking analysis, which consists of reviewing the reasonableness of each revenue and expense adjustment proposed or justified by the record, along with a determination of a fair return on equity."²¹ The final Order addressing the merits of Case No. 2014-00371 noted that the Commission would review the reasonableness of Rate PS in KU's next base rate case and required KU to present testimony in support of the minimum billing demand provisions of Rate PS in its next rate case.

¹⁹ Case No. 2014-00371, *Kentucky Utilities Company*, Correspondence from Commission Staff to David Shouse (filed into the record on June 25, 2015).

²⁰ *Id.* at 7.

²¹ *Id.*

Following KU's rate Case No. 2014-00371, David Shouse filed a complaint in Case No. 2015-00417,²² regarding the same issue presented in his comments tendered in the rate case. The Commission ultimately dismissed that complaint with prejudice, as barred by the doctrine of *res judicata*.

In Case No. 2016-00370, KU presented testimony to support its Rate PS and its demand ratchets and provided discovery in response to Commission Staff requests concerning the testimony presented on demand ratchets. Again, the Commission fully considered and decided the reasonableness of KU's Rate PS and demand ratchet

The Commission has addressed the reasonableness of KU's current Rate PS, including its demand rate, as a necessary component of its decisions in both Case No. 2014-00371 and Case No. 2016-00370. KRS 278.030 permits utilities to assess only "fair, just and reasonable rates" for their services and prohibits the Commission from authorizing any rate that is not "fair, just and reasonable." Therefore, in fulfilling its statutory obligation and in applying its traditional ratemaking analysis, the Commission necessarily determined the reasonableness of each rate, including Rate PS, in approving the current rates and charges set forth in KU's settlement agreement in Case No. 2016-00370.

In summary, Mr. Shouse's concerns with KU's Rate PS and demand charge were raised during KU's two prior base rate case proceedings, and the Commission clearly considered the objections during the course of its approval of the respective settlement agreements and KU's rates. The record does not indicate any changes of fact or

²² Case 2015-00417, *David Shouse and Brian Shouse, d/b/a Shouse Farms, and Bryan Hendrickson, d/b/a Hendrickson Grain and Livestock, LLP v. Kentucky Utilities Company* (Ky. PSC Nov. 19, 2015).

circumstances since Case No. 2016-00370 that would require the Commission to further investigate this rate at this time. Accordingly, the doctrine of *res judicata*, particularly collateral estoppel, bars Mr. Shouse from re-litigating in his Complaint the identical issues that were raised and fully adjudicated in Case No. 2016-00370.

The Commission finds that dismissal of the Complaint is justified under the doctrine of *res judicata*.

IT IS HEREBY ORDERED that:

1. KU's Motion to Dismiss the Complaint with prejudice is granted.
2. Mr. Shouse's Complaint is dismissed with prejudice.
3. This case is closed and removed from the Commission's docket.

By the Commission



ATTEST:



Executive Director

Case No. 2017-00325

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