

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN EXAMINATION OF THE APPLICATION OF THE )  
FUEL ADJUSTMENT CLAUSE OF KENTUCKY )  
UTILITIES COMPANY FROM NOVEMBER 1, 2004 ) CASE NO. 2006-00509  
TO OCTOBER 31, 2006 )

AN EXAMINATION OF THE APPLICATION OF THE )  
FUEL ADJUSTMENT CLAUSE OF LOUISVILLE )  
GAS AND ELECTRIC COMPANY FROM ) CASE NO. 2006-00510  
NOVEMBER 1, 2004 TO OCTOBER 31, 2006 )

O R D E R

Kentucky Utilities Company ("KU") and Louisville Gas and Electric Company ("LG&E") (collectively "Companies") objected to, and filed separate motions to strike, Question No. 14 and its Attachment ("Attachment") of the First Data Request of Kentucky Industrial Utility Customers, Inc. ("KIUC").

The Companies object to KIUC's reference in its discovery request to a document distributed during an informal conference in the Duke Energy Kentucky ("Duke Kentucky") base rate proceeding before the Commission in Case No. 2006-00172.<sup>1</sup> None of the parties in Case No. 2006-00172 are parties in the case at bar.

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<sup>1</sup> Case No. 2006-00172, The Application of The Union Light, Heat and Power Company d/b/a Duke Energy Kentucky for an Adjustment of Electric Rates, Order dated December 21, 2006.

In their objections and their motions to strike, the Companies argue that Question No. 14 should be stricken because they claim that it violates the terms of the written unanimous Duke Kentucky Settlement Agreement approved by the Commission.<sup>2</sup>

The Companies object to the following Question No. 14 posed by KIUC in its First Set of Data Requests:

Q-14. At a January 11, 2007 Informal Conference in Case No. 2006-00172, Duke Kentucky presented the attached document outlining its proposal to deal with MISO make whole payments.

a. Duke Kentucky's Alternative 1 was:

*"If MISO dispatches a unit that would not otherwise dispatch on an economic basis, any resulting generation from this unit will be stacked in order of economic merit without adjustment. Neither the associated fuel costs nor the MISO make-whole revenue will be included in the FAC."*

Please indicate whether [the Companies] would be willing to accept Duke Kentucky Alternative 1. Please explain.

b. Duke Kentucky's Alternative 2 was:

*"Alternatively, out-of-merit generation dispatched on by MISO will be deemed to be dispatched for reliability purposes, and will be forced to the bottom of the economic dispatch order. Any make-whole revenue will be used to offset the fuel costs associated with the forced generation."*

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<sup>2</sup> Motion of Kentucky Utilities Company to Strike Kentucky Industrial Utilities Customers, Inc.'s First Set of Data Requests Question No. 14, Case No. 2006-00509 (February 23, 2007) at 2; Motion of Louisville Gas and Electric Company to Strike Kentucky Industrial Utilities Customers, Inc.'s First Set of Data Requests Question No. 14, Case No. 2006-00510 (February 23, 2007) at 2.

Please indicate whether [the Companies] would be willing to accept Duke Kentucky Alternative 2. Please explain.<sup>3</sup>

The Companies objected to the question, but without waiving any objection or prejudice to their motions to strike, responded as follows:

No. The ratemaking mechanisms identified in the [Duke Kentucky] settlement agreement are inconsistent with the ratemaking scheme and mechanisms in place for LG&E/KU, including the treatment of OSS margins as a credit to the cost of service included in base rates, the treatment of MISO costs and revenues as base rate items, the calculation of Company's FAC using the After-The-Fact billing system to force the highest cost units to off-system sales, and the rejection of the proposed MISO Tracker of Day-2 costs and revenues.<sup>4</sup>

The issue now before the Commission is whether to strike a discovery request that references a document from an unrelated case that resulted in a Settlement Agreement. The Agreement contained language making the Agreement inadmissible and without precedential effect.

#### ARGUMENT

The Companies rely on the following provisions of the Duke Kentucky Settlement Agreement in support of their motions and objections:

33. Admissibility and Non-Precedential Effect. Neither the Settlement Agreement nor any of the terms shall be admissible in any court or Commission except insofar as such court or Commission is addressing litigation arising out of the implementation of the terms herein or the approval of this Settlement Agreement. This Settlement Agreement shall not have any precedential value in this or any other jurisdiction.

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<sup>3</sup> Kentucky Utilities Company Response to First Set of Data Requests of Kentucky Industrial Utility Customers, Inc., Response to Question No. 14 at 1-3, Case No. 2006-00509 (February 8, 2007); Louisville Gas and Electric Company Response to First Set of Data Requests of Kentucky Industrial Utility Customers, Inc., Response to Question No. 14, at 1-3, Case No. 2006-00510 (February 8, 2007).

<sup>4</sup> Id.

34. No Admissions. Making this Settlement Agreement shall not be deemed in any respect to constitute an admission by any Party hereto that any computation, formula, allegation, assertion or contention made by any other Party in these proceedings is true or valid. Nothing in this Settlement Agreement shall be used or construed for any purpose to imply, suggest or otherwise indicate that the results produced through the compromise reflected herein represent fully the objectives of a Party.<sup>5</sup>

The Companies argue that “neither the Settlement Agreement nor any of its terms are admissible in any other case” and that, according to the terms of the Settlement Agreement, “it does ‘not have any precedential value in this or any other jurisdiction.’”<sup>6</sup> The Companies further note that, based on the terms of the Settlement Agreement, it could not be deemed an admission by any party and cannot be used for any other purposes beyond the scope of the case for which it was intended.<sup>7</sup>

KIUC posits that admission of the Attachment itself is not barred by the terms of the Agreement and that: (1) Question No. 14 and its Attachment are admissible; (2) no claim is made by KIUC that the Attachment has precedential effect; and (3) the Companies were not parties to the Case No. 2006-00172 Agreement.<sup>8</sup> KIUC further points to KRS 278.240, “Certified copies of commission's records; use as evidence,” which states:

Copies of official documents and orders filed or deposited according to law in the office of the commission, certified by a commissioner, or by the executive director under the seal of the

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<sup>5</sup> Supra, note 1.

<sup>6</sup> Companies' Motions to Strike, supra, note 2.

<sup>7</sup> Id.

<sup>8</sup> Reply of KIUC to the Motion to Strike of Kentucky Utilities Company, Case No. 2006-00509 (March 9, 2007) at 2; Reply of KIUC to the Motion to Strike of Louisville Gas and Electric Company, Case No. 2006-00510 (March 9, 2007) at 2.

commission, to be true copies of the originals, shall be evidence in like manner as the originals in all matters before the commission and in courts of competent jurisdiction.<sup>9</sup>

While the Companies point out that KIUC's counsel in this proceeding signed the Duke Kentucky Settlement Agreement in Case No. 2006-00172,<sup>10</sup> it is important to distinguish that none of the Agreement's signatories are parties in the case sub judice, specifically KIUC.

Finally, the Companies admit that KIUC does not claim that the Attachment is precedent. However, they state that KIUC's reference to the Agreement "imbues" the contents of the Attachment with the authority of precedent.<sup>11</sup>

#### DISCUSSION

Neither the Companies nor KIUC have claimed that the Attachment has any precedential value. KIUC is asking the Companies, through a discovery request, if they would agree to one of two options that were discussed during an unrelated case. Without waiving any objection, the Companies have explained their position concerning KIUC's couching of Question 14 in the terms and context of the Duke Kentucky Settlement Agreement. The two alternative proposals contained in the subject Attachment are conceptual ideas to which the Companies have responded that they

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<sup>9</sup> Id., quoting KRS 278.240.

<sup>10</sup> Companies' Motions to Strike, supra, note 2 at 1.

<sup>11</sup> Reply to Kentucky Industrial Utility Customers, Inc.'s Response to Kentucky Utilities Company's Motion to Strike Kentucky Industrial Utility Customers, Inc.'s First Set of Data Requests Question No. 14, Case No. 2006-00509 (March 23, 2007); Reply to Kentucky Industrial Utility Customers, Inc.'s Response to Louisville Gas and Electric Company's Motion to Strike Kentucky Industrial Utility Customers, Inc.'s First Set of Data Requests Question No. 14, Case No. 2006-00510 (March 23, 2007).

would not be willing to accept as consistent with the rate-making mechanisms that are in place for either KU or LG&E. KIUC could have asked the same question without reference to the Duke Kentucky Settlement Agreement or to any other unrelated case.

Generally, control of discovery is a matter of discretion by the tribunal.<sup>12</sup> It is well-settled that discovery rules are to be liberally construed so as to provide the parties with relevant information fundamental to proper litigation.<sup>13</sup> While not binding on the Commission,<sup>14</sup> nonetheless, the Commission finds persuasive Kentucky Civil Rule 26.02(1), Scope of Discovery, which provides in part:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discovery matter. **It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.**

(Emphasis added.)

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<sup>12</sup> Primm v. Isaac, 127 S.W.3d 630 (Ky. 2004), referring to Wal-Mart Stores, Inc. v. Dickson, 29 S.W.3d 796 (Ky. 2000) and Morrow v. Brown, Todd & Heyburn, 957 S.W.2d 722 (Ky. 1997).

<sup>13</sup> Primm, *supra*, citing Hickman v. Taylor, 329 U.S. 495 (1947).

<sup>14</sup> See generally, 807 KAR 5:001, Rules of Procedure.

KIUC is referencing a public document in its Question No. 14. As part of a discovery request, the issue is not whether the item is admissible. The reference to the Attachment does not cloak the document with precedence in the instant case.

CONCLUSION

The Commission finds that the terms of the Settlement Agreement entered in Case No. 2006-00172 by Commission Order do not prevent reference to the subject Attachment in a discovery request herein and should not be stricken from the record in this case.

IT IS THEREFORE ORDERED that:

1. The Companies' motions to strike and their objections to Question No. 14 of KIUC's First Data Requests and the Attachment are denied.
2. The Commission makes no ruling regarding the relevance or admissibility of the Attachment or of Question No. 14 as propounded in KIUC's First Data Request.

Done at Frankfort, Kentucky, this 9th day of May, 2007.

By the Commission

ATTEST



Executive Director