COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

BULLDOG'S ENTERPRISES, INC. d/b/a BULLDOG'S ROAD HOUSE COMPLAINANT	)	
VS.	)	Case No. 2010-00404
DUKE ENERGY KENTUCKY, INC. DEFENDANT	)	

DUKE'S REPLY IN SUPPORT OF MOTION TO DISMISS

Comes now Duke Energy Kentucky, Inc. ("Duke"), by counsel, and for its reply in support of its motion to dismiss, respectfully states as follows:

I. Background

Complainant filed its complaint on October 15, 2010 alleging five claims against Duke. In an order entered on November 15, 2010, the Commission found that the Complainant failed to state a *prima facie* case with regard to all but one of its claims. The Commission concluded that "the underlying claim of improper billing constitutes a *prima facie* case and will require [Duke] to answer or satisfy this claim." Specifically, Complainant alleged that it had closed its business to retail customers on June 1, 2010, but despite "virtually no utilities being used, [Duke] billed Complainant over $3,600 for June and over $3,800 for July." Complaint, ¶¶ 10-11.

Duke filed its answer on November 29, 2010 and moved for dismissal of the improper billing claim on the basis that: 1) it complied with its tariff; 2) the Complainant's billing records demonstrated a substantial decrease in usage for the months of May

through August of 2010 when compared to the same periods in 2008 and 2009; 3) Duke's rates had increased twice in the intervening year to help explain the amount of the bills; and 4) Duke's substantial efforts to satisfy the Complainant (which included cancelling disconnection and forgiving amounts owed) had been unsuccessful. In an order entered on December 22, 2010, the Commission gave Complainant twenty days in which to file a response to Duke's motion to dismiss.

Complainant filed its response on January 3, 2011. Instead of offering any affirmative evidence that it was improperly billed for the months of June and July of 2010, Complainant raised new claims. Complainant alleged that Duke violated its tariff in 2009, sought to shift the burden of proof to Duke for proving the Complainant used the amount of electricity billed and alleged that Duke had imposed "illegal rate hikes." Because neither the original claim for improper billing nor the new issues Complainant alleges in its response have merit, the Commission should dismiss the complaint.

II. Argument

A. Duke Adhered to its Tariff in 2009

The Complainant's first argument is that Duke improperly applied its tariff to the Complainant's bills in the period of July – October 2009. This is a new claim that is unrelated to the allegation in the complaint that Complainant's bills for June and July of 2010 were too high. The argument is also incorrect as it arises from an apparent confusion regarding the calculation and apportionment of kWh under Duke's tariff.

On June 2, 2009, the Commission issued the final order in its evaluation of Duke's fuel adjustment clause mechanism for the period ending October 31, 2008. The Commission approved rates that were "designed to reflect the transfer (roll-in) to base

rates of the differential between the old base fuel cost of 21.619 mills and the new base fuel cost of 33.760 mills per kWh." *In the Matter of An Examination of the Application of the Fuel Adjustment Clause of Duke Energy Kentucky, Inc. from January 1, 2006 through October 31, 2008*, Order, Case No. 2008-00522, p. 3 (Ky. P.S.C. Jun. 2, 2009). The new rates were to be "effective with Duke Kentucky's first billing cycle for July 2009." *Id.* Duke filed its revised tariff sheet on June 10, 2009, which was accepted by the Commission and effective as of July 1, 2009.

Complainant's confusion arises with regard to amounts billed at $0.06004200 per kWh – the middle tier of Duke's Rate DS01 energy charge. The confusion is resolved by reference to Duke's tariff which sets forth three declining rate tiers for the energy charge of the DS01 rate. The first rate tier is for the first 6000 kWh. The second tier's application is calculated by multiplying the customer's actual KW by 300. This calculated value is then added to 6000 (from the first step) to determine the upper limit of the second step. Any kWh over and above the upper limit of the second tier is calculated at the third rate tier. Since the customer's kW factor will change from month to month, the range of the second tier of the DS01 energy charge will also fluctuate. This fully resolves the issues raised with the Complainant's bills for 2009. The reason the October bill omits the third tier of the DS01 Rate ($.0050966) is because the Complainant's total kWh usage was only 34,840, which was insufficient to exhaust both the first and second tiers of the rate structure. Thus, the Complainant's bills conclusively demonstrate that Duke properly calculated the energy charge for the months in question. Despite the Complainant's misunderstanding of the equation used to calculate rates, it is evident that Duke faithfully adhered to its tariff.

B. Complainant Cannot Shift the Burden of Proof to Duke

Complainant then seeks to shift the burden of proof to Duke to "give a reason that could adequately account for why Complainant allegedly used so much electricity and gas to operate a closed restaurant." Response, p. 3. This argument fails for the simple reason that it is not Duke's obligation to explain a customer's usage. Duke has no knowledge, control or dominion over the appliances and appurtenances that lie on the other side of the Complainant's meter. Moreover, it is well established that the applicant bears the burden of proof in an administrative proceeding. *See Energy Regulatory Commission v. Kentucky Power Company*, 605 S.W. 2d 46, 50 (Ky. App. 1980). In the context of a complaint filed against a utility, the Commission has held that the complainant is the "applicant":

> The Commission disagrees with the AG's contention that he does not bear the burden of proof in this proceeding. The AG argues that, pursuant to KRS 278.260, once the Commission determined that his complaint established a *prima facie* case, the complaint became an investigation by the Commission and he was relieved of his burden of proof. The Court of Appeals of Kentucky clearly stated in *Energy Regulatory Commission v. Kentucky Power Company*, that "[a]pplicants before an administrative agency have the burden of proof." While the term "applicant" is not defined in KRS Chapter 278, it is generally held to mean "[o]ne who requests something; a petitioner...."

See In the Matter of: Office of the Attorney General, Commonwealth of Kentucky v. Atmos Energy Corporation, Order, Case No. 2005-00057, pp. 3-4 (Ky. P.S.C. Feb. 9, 2007) (citations omitted).

The chart included within Duke's motion to dismiss made clear that the Complainant's usage dropped by over 10,000 kWh from June 2008 to June 2010 and by over 19,000 kWh from July 2008 and July 2009 to July 2010. The only outlier for the

period in question is the bill rendered in June 2009, which was among the lowest of any bill received by Complainant during the late spring and summer any year in question. Complainant's usage was abnormally low, however, due to a defective meter that was replaced. In other words, Complainant most certainly *benefitted* from the defective meter in 2009 – it was a meter error in its favor.

Complainant's additional argument that he should not have to pay any of the undisputed balance of $24,553.41 is also unavailing. Under 807 KAR 5:006, Section 11, Complainant's bill is only considered current so long as it is making payment on the undisputed portion of its bill. Here, Complainant has indicated that it has no intention of paying its indebtedness.

C. Duke Issues Bills to Complainant in Accordance with the Filed Rate Doctrine

Complainant's final argument is that Duke somehow imposed an unlawful rate hike upon its customers, including Complainant. The Complainant's reliance upon the "used and useful" doctrine and *National-Southwire Aluminum Company v. Big Rivers Electric Corporation*, 785 S.W.2d 503 (Ky. App. 1990) is misplaced. While the used and useful doctrine is one principle of ratemaking, the Commission is well aware that it is but one such principle and cannot be given an "overriding, all encompassing application." *See id.* at 510 ("A determination of what is used and useful is one of many factors which should be considered when establishing rates."). The applicable rule in this case is the filed rate doctrine. *See Cincinnati Bell Telephone Co. v. Public Service Comm'n*, 223 S.W.3d, 829, 837 (Ky. App. 2007) ("the filed rate defines the legal relationship between the regulated utility and its customer with respect to the rate that the customer is obligated to pay and that the utility is authorized to collect.") *citing Big Rivers Elec. Corp.*

v. Thorpe, 921 F.Supp. 460 (W.D.Ky. 1996). The filed rate doctrine is codified in KRS 278.160, which requires a utility to file "schedules showing all rates and conditions of service established by it and collected or enforced." KRS 278.160(1). The record demonstrates that Duke has charged the rates set forth in its tariff and the Complainant offers no affirmative evidence to the contrary.

Likewise, the Complainant's allegation that Duke employs "meters that are up to 2% fast," is wholly unsupported. Duke's meters are tested for accuracy and compliance with 807 KAR 5:041, Section 17 which establishes a 2% accuracy margin of performance for distribution meters. To the extent that the Complainant is challenging the regulation itself, it offers no evidence that the regulation is unreasonable or falls beyond the scope of the Commission's plenary jurisdiction over rates and services. *See Lovern v. Brown*, 390 S.W.2d 448, 449 (Ky. 1965) ("To be valid it must be within the limits contemplated by the...statutes, and it must be reasonable."). Complainant also ignores the fact that the only documented occasions of defective meters were instances where the amount of usage actually billed was substantially lower than that which would be supported by resort to historical usage patterns. To the extent that anyone has been detrimentally affected by a malfunctioning meter, it would be Duke.

Finally, to the extent that the Complainant seeks to argue that other customers have voiced similar concerns, its evidence is unpersuasive. Of the articles and emails attached to the response, most, if not all, are not customers of Duke Energy Kentucky.

III. Conclusion

Complainant misunderstands the application of Duke's tariff; seeks to improperly shift the burden of proof to Duke; disregards the benefit it received from having

malfunctioning meters on its premises; cites an inapplicable principle of ratemaking and aggressively refuses to pay a substantial undisputed balance owed. There is no evidence supporting the Complainant's claim that it was improperly billed for the period of June and July 2010 or any other period. Accordingly, there is no reason to hold a hearing and the complaint should be dismissed with prejudice. *See In the Matter of Patricia Conner v. BellSouth Telecommunications, Inc.*, Order, Case No. 2005-00220, p. 2 (Ky. P.S.C. May 19, 2006) ("Finding that Ms. Connor has failed to meet her burden of proof and that a hearing is not necessary in the public interest or for the protection of substantial rights, the Commission hereby orders that this case is dismissed and is removed from the Commission's docket.").

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that a true and correct copy of the foregoing was served by depositing same in the custody and care of the U.S. Mail, postage prepaid, on this 13th day of January, 2011, addressed to the following:

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