

Mark David Goss
Member
859.244.3232
mgoss@fbtlaw.com

February 9, 2011

Via Hand-Delivery

Mr. Jeffrey Derouen
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
P. O. Box 615
Frankfort, Kentucky 40602-0615

RECEIVED

FEB 09 2011

PUBLIC SERVICE
COMMISSION

Re: Bulldog Enterprises, Inc. vs. Duke Energy Kentucky, Inc.
PSC Case No. 2010-00404

Dear Mr. Derouen:

Attached for filing by hand-delivery is an original and five (5) copies of Duke Energy Kentucky, Inc.'s Response to Complainant's Motion to Dismiss Without Prejudice.

Please file this document of record and provide a file-stamped copy to me.

Sincerely yours,



Mark David Goss

Enclosures

cc: Eric C. Deters
James Y. Moore
Brian P. Gillan

LEXLibrary 0106219 0581334 444121v1

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

FEB 09 2011

BULLDOG'S ENTERPRISES, INC. d/b/a)
BULLDOG'S ROAD HOUSE)
COMPLAINANT)
VS.)
DUKE ENERGY KENTUCKY, INC.)
RESPONDENT)

PUBLIC SERVICE
COMMISSION

Case No. 2010-00404

RESPONDENT'S RESPONSE TO COMPLAINANT'S
MOTION TO DISMISS WITHOUT PREJUDICE

Comes now the respondent, Duke Energy Kentucky, Inc. ("Duke"), by counsel, for its response in opposition to the complainant's motion to dismiss without prejudice and respectfully requests the Commission to deny the motion to dismiss without prejudice filed by the complainant, Bulldog's Enterprises, Inc. ("Bulldog").

Bulldog's claims arise from a billing dispute. Bulldog alleges that Duke over-billed it for the months of June and July, 2010 – a period when Bulldog claims that it was closed to customers. Following the filing of Bulldog's complaint on October 15, 2010, the Commission entered an order on November 15, 2010 in which it dismissed most of Bulldog's complaint on the basis that it made claims which were beyond the scope of the Commission's jurisdiction.¹ The Commission did order Duke to file an answer with regard to the billing dispute, however. Duke filed its response and a motion to dismiss on November 29, 2010. The Commission gave Bulldog an opportunity to file

¹ Bulldog's initial complaint included, among other things, allegations of fraud, breach of contract, breach of good faith and fair dealing, violation of KRS 367.170, and unjust enrichment as well as a request for class action certification.

a response to the motion to dismiss, which it did on January 3, 2011. Duke filed its reply in support of its motion to dismiss on January 13, 2011.

Following the filing of the reply brief by Duke, Bulldog filed a civil action against Duke in the Kenton County Circuit Court.² Bulldog's complaint contains causes of action that are identical to those dismissed by the Commission for lack of jurisdiction on November 15, 2010. The allegations contained in the civil action are based upon the underlying billing dispute. It is therefore very clear that all of Bulldog's causes of action arise from and relate to the billing dispute which is the subject matter of this administrative proceeding. And that billing dispute is wholly jurisdictional to this Commission.

Clearly, Bulldog does not agree that it has been billed in accordance with Kentucky law for the two months in question. Nevertheless, it has not offered any substantive evidence to show that its position is supported by the facts of this billing dispute or Kentucky law as a whole. For the reasons set forth in Duke's motion to dismiss and reply in support of its motion to dismiss, Duke is entitled to having the complaint dismissed with prejudice and on the merits.

Resolving the case on the merits is especially important in light of the fact that Bulldog has once again commenced a civil action against Duke on claims arising out of the same operative facts. Thus, the resolution of the civil action will first necessitate a formal determination as to whether Duke's rates have been applied to Bulldog in an unfair, unjust or unreasonable manner. Only the Commission has the statutory authority under Kentucky law to make such a determination. See KRS 278.040(2). The

² A copy of Bulldog's complaint is attached as Exhibit 1.

Kenton Circuit Court lacks such statutory authority. In the interests of administrative efficiency and judicial economy, the Commission should overrule Bulldog's motion to dismiss its administrative complaint without prejudice and should make a substantive determination as to the merits of Bulldog's complaint.³

The February 1, 2011 lawsuit is not the first time that Bulldog has filed a complaint against Duke in the Kenton Circuit Court over this same billing dispute. On August 3, 2010, Bulldog filed its first civil action against Duke and then subsequently withdrew it voluntarily in order to file the present administrative complaint with the Commission. Thus, Bulldog has initiated three proceedings in the last six months against Duke over the same billing dispute – two in the Kenton Circuit Court and one at the Commission.

In the event that the Commission grants Bulldog's motion and dismisses the administrative complaint without prejudice, the same question will very likely be re-presented to the Commission within a few weeks. In the absence of a final order from the Commission with regard to the underlying billing dispute, the Kenton Circuit Court action will have to be dismissed without prejudice or stayed until Bulldog has exhausted its administrative remedies.

WHEREFORE, on the basis of the foregoing, Duke respectfully requests the Commission to deny Bulldog's motion to dismiss its complaint without prejudice and to issue a final order on the merits of this billing dispute.

³ The Commission also has the ability to proceed with the case on its own motion should it not be satisfied that Duke properly adhered to its tariff with regard to Bulldog's account. See *Walter Callihan and Goldie Callihan v. Grayson Rural Electric Cooperative Corporation*, Order, Case No. 2005-00280 (Ky. P.S.C., Mar. 15, 2006) ("The Commission further finds, on its own motion, that this proceeding should continue as an investigation into Defendant's efforts to provide electric service to the Complainants.").

Respectfully submitted



Mark David Goss
FROST BROWN TODD, LLC
250 W. Main Street, Suite 2800
Lexington, KY 40507-1749
(859) 231-0000
(859) 231-0011 (facsimile)

Counsel for Duke Energy-Kentucky, Inc.

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 day of February, 2011, addressed to the following: 9th

Eric C. Deters
James Y. Moore
Eric Deters & Associates
5247 Madison Pike
Independence, KY 41051

Brian P. Gillan
917 Main Street, Suite 400
Cincinnati, OH 45202



Counsel for Duke Energy-Kentucky, Inc.

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

BULLDOG'S ENTERPRISES, INC. d/b/a
BULLDOG'S ROADHOUSE
2015 Declaration Drive
Independence, KY 41051-7983,

Complainant,

vs.

DUKE ENERGY KENTUCKY, INC
139 EAST 4TH STREET
ATTN: TERI O'NEILL EA025
CINCINNATI, OH 45202

Respondent.

Case No.

RECEIVED

OCT 15 2010

PUBLIC SERVICE
COMMISSION

CLASS ACTION COMPLAINT

RECEIVED

OCT 15 2010

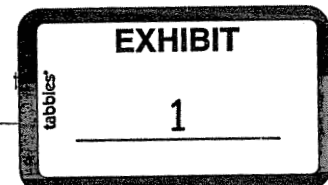
PSC Consumer Services

Comes now the Complainant in the above-captioned action, by and through counsel, and states as follows:

I. THE PARTIES

1. At all times relevant, Bulldog's Enterprises, Inc. was a corporation incorporated and doing business in the Commonwealth of Kentucky as Bulldog's Roadhouse, with a location at 2015 Declaration Drive, Independence, Kentucky.

2. At all times relevant, Duke Energy Kentucky Inc. was a wholly-owned subsidiary of Duke Energy Ohio, Inc. Duke Energy Ohio, Inc. was a wholly-owned subsidiary of Cinergy Corp., which is a wholly-owned subsidiary of Duke Energy Corporation, Inc. which operated as an energy company in the Americas, including the United States. Duke Energy Kentucky, Inc. supplies the energy requirements of commercial users in the Commonwealth, such as the Complainant.



II. JURISDICTION AND VENUE

3. This Commission has original jurisdiction in this matter, under K.A.R. 278.260.

III. THE FACTS

4. On or about May 24, 2010, Complainant received a letter from Respondent's "Customer Service Department" stating that Respondent's electric meter at Complainant's "was not registering properly for the time period of 4/21/10 through 4/30/10," which led to the meter being replaced on April 30, 2010.

5. The letter went on to state that under Kentucky law, Respondent was permitted to re-bill commercial accounts "for the portion of the electric usage that did not register . . . immediately prior to the date the defective meter was removed."

6. As a result, Respondent stated that it had recalculated and re-billed Complainant's account for the time period of 4/21/10 through 4/30/10, "based on a review of [Complainant's] usage patterns before and/or after installation of the new meter."

7. Upon information and belief, thousands of Respondent's commercial customers are subject to such meter malfunctions annually.

8. Moreover, the relevant Public Service Commission ("PSC") regulation, 807 K.A.R. 5:006(10), permits Respondent to utilize a meter which is up to 2% fast without replacing the meter and correcting the overbilled customer's account.

9. As a result of malfunctioning meters, and K.A.R. 5:06(10) and similar regulations, Respondent is allowed to overbill customers like Complainant.

10. Complainant closed this location for retail customers on June 1, 2010.

11. Despite the location being closed, and virtually no utilities being used, Respondent billed Complainant over \$3,600.00 for June and over \$3,800.00 for July.

12. Such billings establish either that Respondent's meter at this location is still malfunctioning, or Respondent's policy for estimating bills is fatally and fraudulently flawed, or both.

13. Upon information and belief, Respondent treats all similarly situated commercial accounts in the same manner.

IV. REQUEST FOR CLASS CERTIFICATION

14. Complainant incorporates the foregoing paragraphs as if fully rewritten herein.

15. Respondent has tens of thousands of commercial customers utilizing its meters, of which thousands malfunction annually.

16. Respondent manages estimates of bills resulting from such malfunctions pursuant to 807 K.A.R. 5:006(10), or similar provisions in other jurisdictions, which allows for meter error of up to 2%.

17. Respondent's commercial accounts that close are subsequently overbilled for utilities they did not use.

18. It is clear that the class of Complainants is so numerous that joinder of all members will be impracticable.

19. Because all of the Complainants and class members are similarly situated, there are questions of law or fact common to all the parties.

20. The claims or defenses of all the representative numbers are typical of all parties of the class.

21. The representative parties will fairly and adequately protect the interests of the class.

22. The prosecution of separate actions by each member of the class would create inconsistent or varying adjudications with respect to individual members of the class.

23. The questions of law or fact common among the class members predominate over any questions affecting only individual members.

24. As a result of the foregoing, Complainant requests class status.

V. CAUSES OF ACTION

A. Count One: Fraud

25. Complainant incorporates the foregoing paragraphs as if fully rewritten herein.

26. Respondent's policy of billing closed locations based upon estimates derived from prior months' utility usage, and Respondent's management of malfunctioning meters (which permits it to overbill customers such as Complainant and all those similarly situated) constitutes fraud.

27. As a result of the actions of Respondent, the Complainant individually and as representative of all Respondent's customers similarly situated, has suffered personal injury.

B. Count Two: Breach of Contract

28. Complainant incorporates the foregoing paragraphs as if fully rewritten herein.

29. When entering into an agreement with Respondent to supply utilities to its business, Complainant and all those similarly situated, reasonably expected to be billed accurately for only the utilities they actually consumed.

30. Respondent's management of such customer's accounts in a way that permits it to overbill such customers, constitutes breach of contract.

31. As a result of Respondent's breach of its contract with Complainant and all customers similarly situated, Complainant has suffered personal injury.

C. Count Three: Good Faith and Fair Dealing

32. Complainant incorporates the foregoing paragraphs as if fully rewritten herein.

33. Respondent breached its obligations of good faith and fair dealing in its transactions with Complainant, and all those customers similarly situated.

34. As a result of the actions of Respondent, the Complainant individually and as representative of all Respondent's customers similarly situated, has suffered damages.

D. Count Four: Violation of K.R.S. § 367.170

35. Complainant incorporates the foregoing paragraphs as if fully rewritten herein.

36. Respondent's actions toward Complainant and all those customers similarly situated, constituted unfair, false, misleading, or deceptive acts or practices in the conduct of its business.

37. Respondent's actions were unconscionable.

38. As a result of the actions of Respondent, the Complainant individually and as a representative of all Respondent's customers similarly situated, has suffered damages.

E. Count Five: Unjust Enrichment

39. Complainant incorporates the foregoing paragraphs as if fully rewritten herein.

40. By managing malfunctioning meters in the way that it does, allowing it to bill for utilities that were not actually used, Respondent has been unjustly enriched to the detriment of Complainant and all those customers similarly situated.

41. As a result of the actions of Respondent, the Complainant individually and as a representative of all Respondent's customers similarly situated, has suffered damages.

VI. PRAYER FOR RELIEF

WHEREFORE, Complainant respectfully requests judgment in its favor and against Respondent on all counts for:

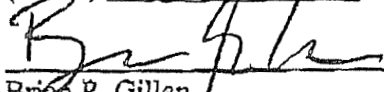
- a. Compensatory damages;
- b. Punitive damages;

- c. Reasonable attorney's fees;
- d. Its costs and expenses;
- e. Trial by jury on all issues so triable; and
- f. Any and all other relief to which Complainant is entitled.

Respectfully submitted,



Eric C. Deters
Eric Deters & Associates
5247 Madison Pike
Independence, KY 41051
(Telephone) (859) 363-1900
(Facsimile) (859) 363-1444
(Email) eric@ericdeters.com



Brian P. Gillan
917 Main Street, Suite 400
Cincinnati, OH 45202
(Telephone) (513) 977-4200
(Facsimile) (859) 977-4238
(Email) bgillan@ericdeters.com

Attorneys for Complainant