

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

MAR 03 2011

PUBLIC SERVICE
COMMISSION

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

Case No. 2010-00404

RESPONDENT'S SUR-REPLY TO COMPLAINANT'S
MOTION TO DISMISS WITHOUT PREJUDICE

Comes now the respondent, Duke Energy Kentucky, Inc. ("Duke Energy Kentucky"), by counsel, in further opposition to the motion to dismiss without prejudice filed by the complainant, Bulldog's Enterprises, Inc. ("Bulldog"), respectfully stating as follows:

Bulldog asserts that its Circuit Court complaint "alleged claims that are distinct from a simple billing dispute...." Reply, p. 2. This is demonstrably incorrect. The "facts" supporting Bulldog's Circuit Court claims are set forth in paragraphs five through sixteen of its complaint, wherein Bulldog alleges, *inter alia*: 1) "it is believed that thousands of the Defendant's commercial customers throughout Kentucky and the United States are unknowingly subjected to meter malfunctions and are billed excessively;" 2) "807 KAR 5:006(1) allows the Defendant electric supplier to utilize a meter, which is up to 20% over on billing;" 3) "the Defendant has a free pass to overbill each and every customer;" 4) "Defendant billed Plaintiff knowing the bill was false;" 5) "[s]uch billing action is clear

[sic] that the Defendant is fraudulently billing the Plaintiff.”¹ Clearly, these averments arise from the same operative facts set forth in Bulldog’s administrative complaint.

Even the specific causes of action raised by Bulldog in its Circuit Court complaint relate back to the underlying billing dispute. The claim of fraud is founded upon “material representations” set forth in Duke Energy Kentucky’s bills.² The claim for breach of contract refers to “an agreement with the Defendant to supply electric power.”³ The only “agreement” is the tariff which applies to all of Duke Energy Kentucky’s customers as it is approved by the Commission. The claims that Duke Energy Kentucky breached a duty of good faith and fair dealing or violated the Kentucky Consumer Protection Act are bald assertions lacking no specific evidentiary support.⁴ Finally, the claim for unjust enrichment again relies upon an allegation that Duke Energy Kentucky allows “bills to be generated by such malfunctioning devices....”⁵ Plainly, both the general averments of fact and the specific claims raised by Bulldog in the Circuit Court action are inextricably associated with the underlying billing dispute.

Bulldog is in the paradoxical position of pursuing ancillary claims in the Kenton Circuit Court while at the same time insisting that the Commission should not determine whether the primary issue – what Bulldog itself characterizes as “the straight forward billing dispute”⁶ – is meritorious. Instead Bulldog admits that it wants to “utilize the broad tools of discovery available to it under the Civil Rules of Procedure” in the Circuit Court action while at the same time requesting the Commission to not ascertain whether

¹ *Bulldog’s Enterprises, Inc. d/b/a Bulldog’s Roadhouse v. Duke Energy a/k/a Duke Energy Kentucky, Inc.*, Kenton Circuit Court, Civil Action No. 11-CI-307, Complaint, ¶¶ 8, 9 and 12. (Feb. 1, 2011). A copy of the complaint is attached as Exhibit 1.

² See *id.*, ¶¶ 28-35.

³ See *id.*, ¶¶ 36-39.

⁴ See *id.*, ¶¶ 40-45.

⁵ See *id.*, ¶¶ 46-48.

⁶ Bulldog Reply, p. 2.

there is any merit to the underlying administrative proceeding. The clear dichotomy of Kentucky law that gives exclusive jurisdiction of billing disputes to the Commission confirms that the present administrative proceeding should be adjudicated based upon the record before the Commission. The resolution of that issue will, of course, bear upon the ultimate disposition of Bulldog's ancillary claims. The notion that Bulldog will somehow lack a judicial remedy in the event that the Commission rules against it in this proceeding is belied by the fact that KRS Chapter 278 prescribes its own precise procedures for seeking judicial review of Commission orders. Duke Energy Kentucky has been consistent in its position that the billing dispute with Bulldog must be resolved by the Commission in accordance with Kentucky law.

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 dismissing Bulldog's complaint on the merits.

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 3rd day of March, 2011, addressed to the following:

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
16th JUDICIAL CIRCUIT
KENTON CIRCUIT COURT
DIVISION 3
CASE NO. 11-01-307

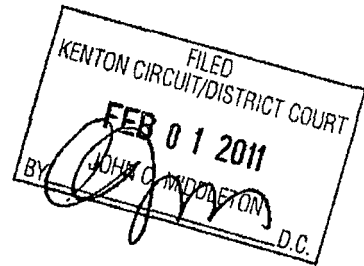
BULLDOG'S ENTERPRISES, INC. d/b/a
BULLDOG'S ROADHOUSE,

Plaintiff

vs.

DUKE ENERGY aka DUKE ENERGY OF KENTUCKY, INC.
139 East 4th Street
Cincinnati, Ohio 45202
Attn: Terri O'Neil EA025

Serve: C T CORPORATION SYSTEM
306 W. MAIN STREET, SUITE 512
FRANKFORT, KY 40601



and

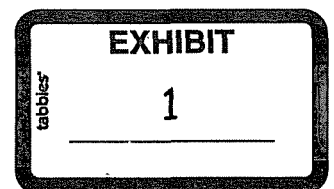
DUKE ENERGY aka DUKE ENERGY CORPORATION, INC. nka
DUKE ENERGY CAROLINAS, LLC
526 South Church Street
Charlotte, NC 28202-1802,

Serve: C T CORPORATION SYSTEM
150 FAYETTEVILLE STREET., BOX 1011
RALEIGH NC 27601

Defendants

COMPLAINT WITH JURY DEMAND AND REQUEST
FOR CLASS ACTION STATUS

Comes now the Plaintiff in the above styled action, by and through counsel, and for the
action herein states as follows:



PARTIES

1. Bulldog's Enterprises is a corporation within the State of Kentucky and duly registered as such with a location at 2015 Declaration Drive, Independence, Kentucky 41051.

2. At all times relevant, Duke Energy, also known as Duke Energy of Kentucky, Inc. is a wholly owned subsidiary of Duke Energy Ohio, Inc. Wherefore, Duke Energy Ohio, Inc. is a wholly owned subsidiary of The Cinergy Corporation, which is a wholly owned subsidiary of Duke Energy Corporation, Inc. which operates as an energy supply company throughout the United States. Duke Energy of Kentucky, Inc. supplies residential and commercial power to the Plaintiff and other users throughout the State of Kentucky and Duke Energy Corporation, Inc. does throughout the United States and North America.

JURISDICTION AND VENUE

3. This Court has proper subject matter jurisdiction based upon the fact that the controversy exceeds the minimum jurisdictional amount of this Court.

4. The Venue of this action is proper due to a substantial portion of the business conducted by the Defendant Duke Energy of Kentucky and Duke Energy Corporation, Inc., as well as acts and omissions within this matter occurred within this judicial district.

FACTS

5. The Plaintiff received a notice on May 24, 2010, from the Defendant's agent that the electric meter owned by the Defendant and installed at the Plaintiff's business was not working properly from 4-21-2010 to 4-30-2010 and as such the meter was replaced on 4-30-2010.

6. The notice from the Defendant to the Plaintiff stated that the Defendant was permitted to *rebill* a commercial account for the portion of electric usage that was not metered prior to the

date of the replacement of the defective meter.

7. The rebilling was based on a usage pattern of the Plaintiff.

8. It is believed that thousands of the Defendant's commercial customers throughout Kentucky and the United States are unknowingly subjected to meter malfunctions and are billed excessively through fraudulent estimates.

9. Public Service Commission regulation, 807 K.A.R. 5:006(10) allows the Defendant electric supplier to utilize a meter, which is up to 20% over on billage without replacing, correcting or reimbursing the commercial customer. Therefore, the Defendant has a free pass to overbill each and every customer.

10. The Plaintiff closed Bulldogs in Independence for the summer after Memorial Day, 2010. It was not open at all for June, three days in July and not until August 20. The hearing and air was off. The grills were off.

11. During the following three billing periods with the Plaintiff, the Defendant billed the Plaintiff \$3,600.00 for the June billing cycle and \$3,800.00 for the July billing cycle. The bills for June, July and August compared to the May bill when Plaintiff was opened the entire month. Defendant billed Plaintiff knowing the bill was false.

12. Such billing action is clear that the Defendant is fraudulently billing the Plaintiff and it is reasonably believed that the Defendant is utilizing the same billing practice on thousands of other commercial customers.

13. Plaintiff filed an action in Kenton Circuit court on 8-3-2010 Case number 10-CI-2490.

14. Said action was voluntarily dismissed without prejudice pursuant to CR 41.01(1).

15. The action was then removed to The Commonwealth of Kentucky before the Public

Service Commission Case no. 2010-00404.

16. The Public Service Commission dismissed based upon the Commission not having jurisdiction any claims of fraud, breach of contract, breach of good faith and fair dealing and unjust enrichment per KRS 367.170 as well as the request for class certification, unliquidated damages and attorneys' fees but ordered that Duke Energy respond to the claim of improper billing. (See attached.) Pursuant to KRS 278.040, the commission has jurisdiction only of rates and service of utilities defined per KRS 278.010 and as such cannot grant the proper relief sought by the Plaintiff. Carr v. Cincinnati Bell, Inc. 651 S.W.2d 126, (Ky. App.1983).

17. The Plaintiff now seeks relief on those additional and jurisdictional issues not under the jurisdiction of the Public Service Commission through this honorable court.

REQUEST FOR CLASS CERTIFICATION

18. Plaintiff incorporates the foregoing paragraphs as if fully rewritten herein.

19. The Defendant has many thousand customers utilizing its metering devices and it is clear that many of the devices malfunction resulting in excessive billing as well as inaccurate and deceptive billing practices. In addition, the estimates made by Defendant are not accurate.

20. The billing practices are estimates per PSC 807 K.A.R. 5:006(10) which provides a free pass to bill at least 2% over the actual amounts due the Defendant.

21. The Defendant has a regular practice of overbilling a customer.

22. It is clear that with the number of metering devices utilized from the Defendant by the Plaintiffs on a national basis that the class of potential Plaintiffs is so numerous that joinder of the members will be impractical.

23. Because all of the Plaintiffs and class members are similarly situated, there are questions

of law and fact common to all of the parties.

24. The claims and defenses of all the representative numbers are typical of all the parties of the class.

25. The representative parties will fairly and accurately protect the interests of the class.

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

27. Based upon the above, the Plaintiff hereby requests this honorable court for an order granting class status in the above action.

CAUSES OF ACTION

A. Count One : Fraud

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

29. The defendants made material representations by issuing bills to the plaintiff and others similarly situated that were based upon and contained readings that were false.

30. The defendants knew or should have known those readings, and therefore the bills they were based upon, were false.

31. The defendants issued the bills with the intention of inducing customers to pay the bill.

32. Customers did in fact pay bills in reliance upon the issuance by the defendants.

33. The plaintiff and other customers suffered injury as a result.

34. The Defendant's actions of billing a commercial customer that is no longer operating a business based upon estimates from prior months electrical usage coupled with the ongoing usage of defective meters to favor the Defendant is fraudulent.

35. As a result of such action by the defendant, the Plaintiff individually and as the

representative of all Defendant's customers similarly situated has suffered substantial financial injury.

B. Count Two: Breach of Contract

36. Plaintiff incorporates the foregoing paragraphs as if fully rewritten herein.

37. Upon entering into an agreement with the Defendant to supply electrical power to its place of business, the Plaintiff as well as those of the class similarly situated, reasonably expected to be billed accurately, honestly and without breach of duty for the amount only of power usage.

38. The Defendant operates and manages its service in such a manner that allows it to covertly overbill customers without the knowledge or consent of the customer and as such clearly breaches all contractual duties.

39. As a result of the Defendants actions, a breach of contract has occurred with the Plaintiff and all customers similarly situated and said Plaintiff has suffered personally and financially.

C. Count Three: Good Faith and Fair Dealing

40. Plaintiff incorporates the foregoing paragraphs as if fully rewritten herein.

41. The Defendant, by and through its action, has breached its obligations of good faith and fair dealing in its transactions with the Plaintiff as well as those customers similarly situated.

42. As a result of the Defendants actions, the Plaintiff individually and as a representative of all Defendants customers similarly situated have suffered financial and personal damage.

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

43. Plaintiff incorporates the foregoing paragraphs as if fully rewritten herein.

44. Defendants action toward the Plaintiff and those customers similarly situated constituted unfair, false, deceptive, and misleading acts and practices in the conduct of business all in violation of KRS 367.170.

45. As a result of the Defendants action, the Plaintiff and all of those customers similarly situated has suffered personal and financial damage.

E. Count Five: Unjust Enrichment

46. Plaintiff incorporates the foregoing paragraphs as if fully rewritten herein.

47. By maintaining and managing the metering devices in the manner in which it does and allowing bills to be generated by such malfunctioning devices to the favor of the Defendant, the Defendant has been unjustly enriched to the detriment of the Plaintiff and those customers similarly situated.

48. As a result of the actions of the Defendant, The Plaintiff individually and as a representative of all Defendants customers similarly situated has suffered financial and personal damage.

PRAYER FOR RELIEF

WHEREFORE, the plaintiff individually and as a representative of those similarly situated in this action, prays this honorable court for judgment in its favor and against the Defendant on all counts and for:

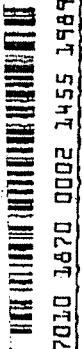
- a. Compensatory damages
- b. Punitive damages
- c. Reasonable attorneys fees
- d. Its costs and expenses
- e. Trial by jury on all issues so trialbe
- f. For any and all other relief to which the Plaintiff and those customers similarly situated may be entitled. .



Eric C. Deters (81812)
Attorney for Plaintiff
ERIC C. DETERS & ASSOCIATES, P.S.C.
5247 Madison Pike
Independence, KY 41051-7941
859-363-1900 Fax: 859-363-1444
Email: eric@ericdeters.com

CERTIFIED MAIL

KENTON CIRCUIT
230 MADISON AVE.
3RD. FLOOR
COVINGTON, KY 41011
PHONE # 859-292-6521



Duke Energy aka Duke Energy of Ky
Sinc IT Corporation Syst.
300 W Main St Ste 512
Shrewport Ky 40401