

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

JOHNNY D. PENNINGTON)	
COMPLAINANT)	
)	
V.)	CASE NO.
)	2015-00260
KENTUCKY POWER COMPANY)	
DEFENDANT)	

ORDER

On July 16, 2015, Johnny D. Pennington (“Complainant”) filed a formal Complaint against Kentucky Power Company (“Kentucky Power”) pursuant to 807 KAR 5:001, Section 20. On July 22, 2015, the Commission ordered Kentucky Power to satisfy or answer the Complaint. On July 29, 2015, Kentucky Power filed its answer in which it denied that Complainant is entitled to the relief sought in his Complaint.

Pursuant to Staff’s Notice of Informal Conference issued September 11, 2015, an informal conference was held on September 17, 2015, to discuss the status of and issues in this case. Complainant did not attend the conference in person or participate telephonically. A memorandum summarizing the informal conference prepared by Staff was filed in the record of this case on September 25, 2015. No comments on the contents of the memorandum were submitted by the parties.

Finding there were material issues of fact in dispute, the Commission established a procedural schedule to afford the parties an opportunity to conduct discovery and to enable the Commission to investigate the claims set forth in the Complaint. The procedural schedule established by the Commission ordered that all requests for

information be filed no later than October 14, 2015, and that all responses to requests for information be filed no later than October 28, 2015.

On September 29, 2015, Kentucky Power filed its Motion to Stay Procedural Schedule and Motion to Dismiss Complaint, or In the Alternative Motion for Summary Judgment, along with an affidavit in support of its request for summary judgment. Pursuant to 807 KAR 5:001, Section 5(2), Complainant had until October 6, 2015, to file a response to the motion. Complainant did not file a response. By Order entered October 12, 2015, the Commission granted Kentucky Power's request to stay the procedural schedule pending its consideration of Kentucky Power's dispositive motions.

Background

Kentucky Power is a privately owned electric utility that generates, transmits, distributes, and sells electricity to approximately 171,000 customers in all or parts of 20 counties in eastern Kentucky.¹ In his Complaint, Complainant alleges that Kentucky Power refused to establish electric service in his name to 736 Hager Branch Road, East Point, Kentucky ("736 Hager Branch"), unless and until he agreed to pay the balance due on a prior resident's account, and that Kentucky Power in fact added the balance from the prior resident's account to his bill. Kentucky Power denies that it required Complainant to assume responsibility for the prior account, and instead contends that Complainant voluntarily agreed to pay for unauthorized electrical usage at 736 Hager Branch that occurred prior to Complainant's request to establish service in his name.

¹ *Annual Report of Kentucky Power Company for the Year Ending December 31, 2014* at 4 and 5 of 164.

In its dispositive motion, Kentucky Power requests the Commission to dismiss the Complaint for failure to prosecute. In the alternative, Kentucky Power argues that it is entitled to summary judgment because it is undisputed that Complainant voluntarily agreed to pay for unauthorized usage that occurred prior to the establishment of electrical service in Complainant's name. For the reasons set forth below, the Commission denies Kentucky Power's motion.

1. Motion to Dismiss

In its motion, Kentucky Power asks the Commission to dismiss the Complaint for failure to prosecute. In support, Kentucky Power notes that Complainant has not taken any action in this case beyond filing his Complaint; that he has yet to challenge the facts set forth by Kentucky Power in its Answer; and that he did not appear at the informal conference convened by Commission staff in this matter.² Kentucky Power states that Complainant "has evidenced no desire, much less intent, to prosecute his claims," and that at a minimum, the Commission should order Complainant to show cause why his Complaint should not be dismissed for failure to prosecute.³

While the Commission may dismiss a Complaint with prejudice due to a failure by a complainant to prosecute the matter or to comply with an Order of the Commission,⁴ the Commission finds that dismissal at this stage of the proceedings is not warranted. In Case No. 2010-00404, the Commission determined that a complainant's failure to

² Motion at 3.

³ *Id.*

⁴ See Case No. 2010-00404, *Bulldog's Enterprises, Inc. D/B/A Bulldog's Roadhouse v. Duke Energy Kentucky, Inc.* (Ky. PSC Mar. 20, 2012), Final Order at 2.

prosecute its case for a period of over 18 months and failure to comply with numerous Orders of the Commission, including the failure to file timely responses to requests for information, warranted a dismissal with prejudice.⁵ In this proceeding, Complainant was not required to file anything in response to the factual allegations made by Kentucky Power in its Answer and has not failed to comply with any Order of the Commission. Nor was Complainant required to file a response to Kentucky Power's motion, as Kentucky Power, as movant, bears the burden to establish its entitlement to dismissal of the Complaint. Complainant's failure to participate in the informal conference convened by Commission Staff, in and of itself, is insufficient to support a finding that he has abandoned his claims or has no intent to prosecute them.

2. Motion for Summary Judgment

In its motion, Kentucky Power states that Complainant purports to raise three claims: (1) that Kentucky Power wrongfully required him to assume financial responsibility for electrical usage by a prior tenant as a condition to establishing service in his name at 736 Hager Branch, East Point, Kentucky; (2) that Kentucky Power required him to post a deposit before it would establish service; and (3) that Kentucky Power took these actions despite the fact that he has a heart condition.⁶ Kentucky Power correctly notes that Complainant bears the burden of proof in this matter and argues that Complainant has not and cannot meet his burden. Kentucky Power

⁵ *Id.*

⁶ Motion at 4–5.

contends that there are no genuine issues of material fact and that Kentucky Power is entitled to judgment as a matter of law.⁷

At the outset, the Commission notes that although Complainant does allege in his Complaint that Kentucky Power “charged” him a deposit to establish service to 736 Hager Branch, and that he is “a heart patient” who has to have electricity for his “heart machine,” Pennington does not seek relief based on either allegation or, in fact, allege that Kentucky Power acted wrongfully in charging him a deposit. Rather, Complainant’s claim for relief is based solely on his allegation that as a condition to establishing service in his name to the property located at 736 Hager Branch, Kentucky Power improperly required him to assume liability for the delinquent account of a prior tenant, and added charges for the usage of the prior tenant to his account.

In support of its motion for summary judgment, Kentucky Power relies on the sworn affidavit of John A. Rogness III, which it filed with its motion. In his affidavit, Mr. Rogness, who is Kentucky Power’s Director of Regulatory Services, avers that:

- Kentucky Power provided electric service to 736 Hager Branch in the name of John Wayne Fairchild from May 13, 2014 until December 5, 2014.⁸
- Mr. Fairchild requested on December 4, 2014, that his service be terminated effective December 5, 2014.⁹

⁷ *Id.* at 5.

⁸ Affidavit of John A. Rogness III (“Rogness Affidavit”) at 2.

⁹ *Id.*

- A meter reading on January 9, 2015, showed unauthorized usage after service was terminated on December 5, 2015. Kentucky Power physically disconnected service to prevent further unauthorized usage.¹⁰

- On February 9, 2015, Kentucky Power discovered that service had been reconnected to 736 Hager Branch without authorization and that there had been additional unauthorized usage. Kentucky Power again physically disconnected service and locked the meter base to prevent further tampering.¹¹

- On February 9, 2015, the same day that Kentucky Power disconnected service to 736 Hager Branch for the second time, a woman identifying herself as the spouse of Mr. Fairchild called Kentucky Power's customer service center and inquired about re-establishing service. She did not place an order for service.

- Later that same day, Complainant called Kentucky Power's customer service center to request that electrical service to 736 Hager Branch be re-established in his name. He represented to the customer service representative that he was the landlord of the property.¹²

- During the call, the customer representative inquired about the unauthorized usage, and "indicated that the Company needed to resolve the identity of the responsible party prior to establishing service."¹³

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 3-4.

¹³ *Id.* at 3.

- Kentucky Power re-established electrical service to 736 Hager Branch on February 19, 2015, in the name of Complainant upon his payment of a deposit.¹⁴

- A written payment plan for the amounts due for electrical service was established at Complainant's request on April 23, 2015. The payment plan was for a total amount of \$1,490.11, and was for charges for service rendered to 736 Hager Branch for the period December 5, 2014, through April 23, 2015. The payment plan required six monthly payments.¹⁵

- The payment plan included charges for the unauthorized usage between December 5, 2014, and February 5, 2015, in the amount of \$761.13. This is the amount Complainant now disputes.¹⁶

- Complainant made the first payment under the payment plan on May 5, 2015. Complainant made no further payments under the payment plan, and the payment plan terminated by its terms on May 22, 2015, for non-payment.¹⁷

- After due notice, Kentucky Power terminated service to 736 Hager Branch on July 27, 2015, and subsequently rendered a final bill.¹⁸

- It is Kentucky Power's practice to apply payments and credits to the oldest outstanding charges. If, however, payments and credits are applied first to undisputed charges, i.e., for the period after Complainant established service in his name, the total

¹⁴ *Id.* at 4.

¹⁵ *Id.* at 4–5.

¹⁶ *Id.* at 5.

¹⁷ *Id.*

¹⁸ *Id.*

amount owed by Complainant for electrical service to 736 Hager Branch is \$1,010.72, including the \$761.13 he disputes.¹⁹

In reliance upon Mr. Rogness's affidavit, Kentucky Power argues it is undisputed that Complainant "voluntarily assumed financial responsibility for the previous unauthorized usage at 736 Hager Branch Road, East Point, Kentucky."²⁰

Kentucky Power argues that it is entitled to judgment as a matter of law because there is no genuine dispute that Complainant "voluntarily assumed financial responsibility for the . . . unauthorized usage at 736 Hager Branch Road" that occurred prior to the establishment of electrical service in his name.²¹ Specifically, Kentucky Power argues that other than his unverified assertion in his Complaint that Kentucky Power required him to assume financial responsibility for the unauthorized usage, Complainant has failed to come forward with affirmative evidence to contravene the averments in Mr. Rogness's affidavit sufficient to create a genuine issue of material fact.²² Kentucky Power further claims that even if the Commission were to accept as true Complainant's claim that he was required to assume financial liability for the prior, unauthorized service as a condition to receiving electrical service, Kentucky Power is entitled to judgment because Complainant ratified the agreement to assume financial responsibility for the unauthorized usage by subsequently accepting the benefits of the agreement.²³

¹⁹ *Id.* at 6–7.

²⁰ Motion at 11.

²¹ *Id.*

²² *Id.* at 10.

²³ *Id.* at 7, n.21, and at 12.

Discussion and Findings

Although the Commission has not established an explicit rule authorizing the summary disposition of complaint cases, 807 KAR 5:001, Section 9(1), does not require the Commission to conduct a hearing if the Commission finds that a hearing is “unnecessary for protection of substantial rights.” Although the Kentucky Rules of Civil Procedure have not been adopted by the Commission, Civil Rule 56 and the principles established by the courts in ruling on motions for summary judgment provide persuasive guidance in our consideration of whether to rule on a complaint case without conducting an evidentiary hearing.

Civil Rule 56 provides that upon motion by a party the court shall enter summary judgment if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. Kentucky courts have consistently held that the rule should be applied cautiously and that the record should be reviewed in a light most favorable to the party opposing summary judgment with all doubts resolved in the non-movant’s favor.²⁴ Applying the rule and the substantive law to the record in this proceeding, we find that Kentucky Power, the movant, has not met its burden to establish that it is entitled to judgment as a matter of law, and we find that, accordingly, its motion should be denied.

This case involves liability for electrical usage at 736 Hager Branch that occurred prior to the establishment of service in Complainant’s name. Complainant alleges in his signed but unverified Complaint that Kentucky Power is trying to make him pay the prior

²⁴ See, e.g., *Steelvest, Inc. v. Scansteel Service*, 807 S.W.2d 476, 480 (Ky. 1991).

resident's bill.²⁵ Kentucky Power states that the disputed charges are for unauthorized usage, but does not identify who is responsible for such usage. The Commission finds that it is unclear who is responsible for the diversion of services that occurred between December 4, 2014, when service in the name of John Wayne Fairchild was terminated at his request, and February 19, 2014, the date service was re-established in Complainant's name. The Commission therefore finds that for the purposes of Kentucky Power's motion, this uncertainty must be resolved in Complainant's favor.

Although there is no case law, statute, or regulation that directly addresses the issue, "the Commission has long held that one party cannot be held liable for a third party's consumption of service or a utility's charges."²⁶ In particular, the Commission has held that a "jurisdictional utility cannot unilaterally impose, directly or indirectly, as a condition of service, the debt of a user of its services, including but not limited to tenant/lessee, on another, including, but not limited to, landlord/owner."²⁷

In Case No. 9383,²⁸ the Commission rejected proposed tariff provisions filed by Hardin County Water District No. 1 ("Hardin No. 1") that would have required a landlord/owner, as a condition of service to a tenant, to execute an agreement making landlords and tenants jointly and severally liable for all charges for service to the tenant. The Commission stated:

²⁵ Complaint at 1.

²⁶ Case No. 2005-00099, *Norman L. Dennison vs. Louisville Gas and Electric Company* (Ky. PSC Oct. 18, 2006), Order at 7.

²⁷ Case No. 2003-00168, *The Filing of Jessamine-South Elkhorn Water District to Revise Its Water User Agreement* (Ky. PSC Feb. 18, 2004), Order at 2.

²⁸ Case No. 9383, *An Investigation into the Rates and Charges of Hardin County Water District No. 1* (Ky. PSC Aug. 26, 1985), Order at 4.

Hardin No. 1's proposed tariff revision also contains a provision making landlords and tenants jointly liable for water charges. It is the opinion of the Commission that landlords and tenants cannot be held jointly liable for water charges. Rather, the person who applies for and receives the service is responsible for charges for that service. Likewise, a tenant with good credit cannot be denied service because of a prior delinquency incurred by a former tenant or the landlord at that address; nor can a landlord with good credit be denied service in the name of the landlord at the rental property because of a delinquent bill owed by a former tenant even when the new tenant is a delinquent customer of the utility.²⁹

In Case No. 2005-00099,³⁰ the Commission applied and affirmed its findings in Case No. 9383 in circumstances similar to those presented herein. In that case, Louisville Gas and Electric Company ("LG&E") disconnected gas and electric service to a landlord's rental property at the request of the tenant. Thereafter, LG&E discovered that service to the property had been restored illegally. Pursuant to a provision in its tariff making the property owner responsible for diversion of service in the absence of an active account, LG&E issued a bill to the landlord for the unauthorized usage. The Commission found the tariff provision was unreasonable because it would unilaterally impose liability on the owner/landlord for service to another, and ordered LG&E to remove all charges for diversion of services from the landlord's account.³¹

The Commission, however, has held that it is permissible for a landlord/owner and jurisdictional utility to enter into a written agreement to govern the terms and conditions under which service will be provided, so long as the landlord/owner executes

²⁹ *Id.* (emphasis in original).

³⁰ Case No. 2005-00099, *Norman L. Dennison vs. Louisville Gas and Electric Company* (Ky. PSC Oct. 18, 2006).

³¹ *Id.* at 8-9.

the agreement voluntarily, and the terms of the agreement are not imposed by the utility as a condition of service.³² The terms and conditions of such agreement must be reasonable and be clearly stated in the utility's tariff.³³

In this case, Kentucky Power claims that Complainant, as landlord, voluntarily agreed to pay for unauthorized electrical usage and entered into a payment plan for the amounts due. The Commission finds that Kentucky Power's tariff does not contain an agreement that allows a property owner to agree to assume responsibility for a tenant's unpaid charges as a condition of service to the property.

The Commission also finds that Kentucky Power has failed to establish the absence of a genuine dispute as to whether Complainant agreed to pay the disputed charges voluntarily and not as a condition of service unilaterally imposed by Kentucky Power. Kentucky Power has not produced any payment plan signed by Complainant to support its claim that Complainant voluntarily agreed to pay for the unauthorized electrical usage. Kentucky Power relies exclusively on the affidavit of John Rogness, which states:

At no time did the customer service representative or the Company require Mr. Pennington to assume financial responsibility for the unauthorized service as a condition precedent to his receiving electrical service at 736 Hager Branch, East Point, Kentucky.

As noted previously in this Order, we find that Civil Rule 56 offers persuasive guidance. Civil Rule 56.05 states, with regard to the form of affidavits for a motion for summary judgment:

³² Case No. 2003-00168, *Jessamine-South Elkhorn Water District* (Ky. PSC Feb. 18, 2004), Order at 2-3.

³³ *Id.* at 3.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or further affidavits.

There is no indication in Mr. Rogness's affidavit that this statement is based on personal knowledge of Complainant's conversations with Kentucky Power's customer service representative. Additionally, while the Commission is not bound by the technical rules of legal evidence,³⁴ we find that Mr. Rogness's statement would be inadmissible hearsay and would not meet the requirements for an affidavit to support a motion for summary judgment made under Civil Rule 56.³⁵ Accordingly, we decline to find Mr. Rogness's statement sufficient to establish the absence of a genuine issue of fact.

Kentucky Power argues that even if there is a genuine issue as to whether Complainant voluntarily agreed to assume financial responsibility for the prior unauthorized usage before electrical service to 736 Hager Branch was established in his name, Complainant "ratified that initial agreement . . . by his subsequent acceptance of the benefits of the allegedly coerced agreement for nearly four months."³⁶ Kentucky Power does not claim that Complainant received any benefit after the account was established in his name other than the provision of electrical service to 736 Hager Branch. The Commission finds that the contractual doctrine of ratification is not

³⁴ KRS 278.310.

³⁵ Kentucky Rule of Evidence 802.

³⁶ Motion at 12 (citing Rogness Affidavit at 19).

controlling on the issue of whether Kentucky Power improperly required Complainant to agree to pay for electrical usage for which he was not responsible as a condition of that service.

Based on the foregoing, the Commission finds that Kentucky Power's motion to dismiss, or in the alternative, for summary judgment, should be denied, and that a procedural schedule should be established.

IT IS THEREFORE ORDERED that:

1. Kentucky Power's motion to dismiss, or in the alternative, for summary judgment, is denied.

2. The procedural schedule set forth in the Appendix to this Order shall be followed.

3. a. Responses to requests for information shall be appropriately bound, tabbed and indexed, and shall include the name of the witness responsible for responding to the questions related to the information provided, with copies to all parties of record and an original and seven copies to the Commission.

b. Each response shall be answered under oath or, for representatives of a public or private corporation or a partnership or association or a governmental agency, be accompanied by a signed certification of the preparer or person supervising the preparation of the response on behalf of the entity that the response is true and accurate to the best of that person's knowledge, information, and belief formed after reasonable inquiry.

c. Any party shall make timely amendment to any prior response if it obtains information that indicates the response was incorrect when made or, though correct when made, is now incorrect in any material respect.

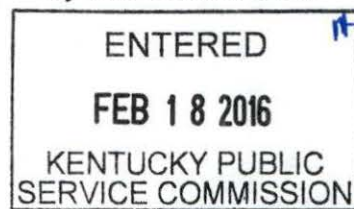
d. For any request to which a party fails or refuses to furnish all or part of the requested information, that party shall provide a written explanation of the specific grounds for its failure to completely and precisely respond.

e. A party filing a paper containing personal information shall, in accordance with 807 KAR 5:001, Section 4(10), encrypt or redact the paper so that personal information cannot be read.

4. The Commission does not look favorably upon motions for continuance. Consequently, motions for extensions of time with respect to the schedule herein shall be made in writing and will be granted only upon a showing of good cause.

5. Nothing contained herein shall prevent the Commission from entering further Orders in this matter.

By the Commission



ATTEST:


Acting Executive Director

APPENDIX

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE
COMMISSION IN CASE NO. 2015-00260 DATED **FEB 18 2016**

Requests for information shall be filed no later than02/25/16

Responses to requests for information
shall be filed no later than03/10/16

The Commission may schedule a Public Hearing
if determined to be necessary to the disposition of this case To be scheduled

Johnny D Pennington
736 Hager Branch
East Point, KENTUCKY 41216

Johnny D Pennington
P.O. Box 152
Meally, KENTUCKY 41234

Johnny D Pennington
876 Buffalo Road
Meally, KENTUCKY 41234

*Kentucky Power Company
101 A Enterprise Drive
P. O. Box 5190
Frankfort, KY 40602

*Kentucky Power Company
Kentucky Power Company
101 A Enterprise Drive
P. O. Box 5190
Frankfort, KY 40602

*Honorable Mark R Overstreet
Attorney at Law
Stites & Harbison
421 West Main Street
P. O. Box 634
Frankfort, KENTUCKY 40602-0634