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COMMISSION

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January 15, 2016

Jeff DeRouen
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, KY 40601

RE: David Shouse and Brian Shouse d/b/a Shouse Farms, and Bryan Hendrickson d/b/a Hendrickson Grain and Livestock, LLP v. Kentucky Utilities Company
Case No. 2015-00417

Dear Mr. DeRouen:

Please find enclosed and accept for filing the original and ten (10) copies of Kentucky Utilities Company's Reply to Complainants' Response to Defendant's Motion to Dismiss and Objection to Complainant's Request for Information in the above-referenced matter.

Please confirm your receipt of this filing by placing the stamp of your Office with the date received on the enclosed additional copies and return them to me via the enclosed, self-addressed, postage paid envelope.

Yours very truly,



Kendrick R. Riggs

KRR/ec
Enclosures as mentioned

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JAN 19 2016

PUBLIC SERVICE
COMMISSION

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

DAVID SHOUSE AND BRIAN SHOUSE
D/B/A SHOUSE FARMS, AND BRYAN
HENDRICKSON D/B/A HENDRICKSON
GRAIN AND LIVESTOCK, LLP

COMPLAINANTS

v.

KENTUCKY UTILITIES COMPANY

DEFENDANT

CASE NO. 2015-00417

**KENTUCKY UTILITIES COMPANY'S REPLY TO COMPLAINANTS' RESPONSE TO
DEFENDANT'S MOTION TO DISMISS AND OBJECTION TO COMPLAINANTS'
REQUEST FOR INFORMATION**

Kentucky Utilities Company ("KU" or the "Company"), by counsel, submits this Reply to David Shouse and Brian Shouse d/b/a Shouse Farms, and Bryan Hendrickson d/b/a Hendrickson Grain and Livestock, LLP's ("Complainants") Response to Defendant's Motion to Dismiss, and Objection to Complainants' Request for Information.

I. The Commission should strike Complainants' Response as untimely.

Kentucky Public Service Commission ("Commission") administrative regulation 807 KAR 5:001 Section 5(2) requires a party file a response to a motion no later than seven days after the motion's filing date.¹ Yet Complainants filed their Response on January 11, 2015, a full 14 days after KU filed its Motion to Dismiss on December 28, 2015. Complainants provided neither a reason for the late response nor a motion to deviate from the Commission's prescribed deadline by a full week. Complainants are commercial parties represented by counsel with over

¹ 807 KAR 5:001 Sec. 5(2) ("Unless the commission orders otherwise, a party to a case shall file a response to a motion no later than seven (7) days from the date of filing of a motion.").

30 years of experience in numerous areas of law,² so there is no reason Complainants should fail to comply with the Commission's readily accessible rules concerning motion practice.³ Therefore, there is no good cause for Complainants' failure to comply with, or to request a deviation from, the Commission's prescribed deadline for responses to motions, and the Commission should strike Complainants' Response from the record of this proceeding and grant the Company's motion to dismiss.

II. Complainants' Response misstates and misapplies the legal standard applicable to motions to dismiss before the Commission.

Kentucky's highest court and the Commission have long held that the Commission is not bound by the Kentucky Rules of Civil Procedure,⁴ making Complainants' arguments based on the civil rules inapt.⁵ Instead, the Commission has its own standard for reviewing formal complaints and determining when to dismiss them. 807 KAR 5:001 Section 20(4) requires the Commission to review each formal complaint to determine whether the complaint established a *prima facie* case. A complaint establishes a *prima facie* case when it states sufficient allegations that, if uncontradicted by other evidence, would entitle the complainant to proceed with the prosecution of the tendered complaint subject to the Commission's practice and rules of procedure; if a complaint fails to establish a *prima facie* case, it may be dismissed.⁶

It is therefore important to be clear about which factual claims—as opposed to interpretations of fact or law—the Complaint actually makes:

² See <http://womacklawofficellc.com/zack-womack/>

³ The Commission's regulations are available online, and have been for more than a decade. Available at: <http://www.lrc.state.ky.us/kar/807/005/001.htm> and <http://www.psc.state.ky.us/Home/About#Statutes>.

⁴ *Inter-County Rural Electric Cooperative Corp., et al. v. Public Service Commission, et al.*, 407 S.W.2d 127, 130 (Ky. 1966); See also, *In the Matter of: An Investigation of the Energy and Regulatory Issues in Section 50 of Kentucky's 2007 Energy Act*, Administrative Case No. 2007-00477, Order at 2-3 (April 18, 2008), and *In the Matter of: Carol D Caycroft v. Black Mountain Utility District*, Case No. 2015-00038, Order at 8 (July 2, 2015).

⁵ Complainants' Response at 1-2.

⁶ See, e.g., *In the Matter of: Brenda Joyce Clayton v. Louisville Gas and Electric Company*, Case No. 2011-00211, Order at 1 (July 15, 2011).

1. Factual claim: Complainants are farmers engaged in grain-drying operations who take electrical service from KU.⁷
2. Factual claim: Complainants paid KU to run electrical services to their respective grain drying operations.⁸
3. Factual claim: Complainants' grain drying is seasonal, and uses electricity two to three months each year.⁹
4. Factual claim: KU charged Complainants "a demand rate that includes a 50 percent minimum."¹⁰
5. Interpretation of facts: KU billed Complainants "what would appear to be a charge for recovering of installation costs."¹¹
6. Interpretation of facts: Complainants "believe []" KU's demand charge is "premised" on KU's installation of electrical facilities to serve the Complainants.¹²
7. Interpretation of facts: Complainants believe "the 50 percent minimum demand rate equates to a sum substantially greater over the course of the year than the utilities that are actually used if paid for directly...."¹³
8. Interpretation of facts: Complainants believe KU's demand charges "result[] in a windfall" for KU.¹⁴
9. Legal assertions: Complainants believe KU's demand charges are "unjustly enriching" KU and are "contrary to the intent and spirit of the statutes and regulations."¹⁵

So the actual facts the Complaint alleges, if taken to be true, show that Complainants are KU customers who take service under a rate schedule with a demand charge, and that the installation of service to their grain-drying operations required installing facilities for which KU required Complainants to pay. Nowhere does the Complaint allege that KU charged Complainants anything other than KU's Commission-approved tariffed rates for either the

⁷ Complaint at 2.

⁸ *Id.* at 3.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 4.

¹⁴ *Id.*

¹⁵ *Id.*

installation of facilities to serve Complainants or their ongoing electrical service. Therefore, as KU stated in its Motion to Dismiss, as a matter of well-established law, the filed-rate doctrine prohibits KU from providing, and precludes the Commission from ordering KU to provide, any refund to either Complainant.¹⁶ There is, therefore, no retrospective relief the Commission could grant either Complainant on the facts as alleged, even if all are taken to be true.

Similarly, there is no prospective rate relief the Commission could grant Complainants, even when taking all their asserted facts to be true, due to the doctrine of *res judicata* (particularly collateral estoppel) and the Commission's longstanding prohibition against single-issue ratemaking. As KU argued in its Motion to Dismiss, Complainant David Shouse, both *pro se* and by counsel, twice raised the same facts and arguments in comments filed with the Commission in KU's most recent base-rate case as those raised in the Complaint.¹⁷ The Commission stated in a June 25, 2015 letter to Mr. Shouse's counsel that the Commission understood Mr. Shouse's concern was about KU's demand rates, and that it would take into account Mr. Shouse's concerns when rendering a final order in that proceeding.¹⁸ Mr. Shouse's claim was heard. The Commission then approved as fair, just, and reasonable the very rates addressed in Mr. Shouse's multiple comments in that proceeding, which rates the Complaint now attacks on the same facts and legal assertions made in Mr. Shouse's rate-case comments.¹⁹ This is textbook example of *res judicata*: one of the same parties using the same counsel to make the same arguments, based on the same facts, to the same decision-maker on the same issue the decision-maker decided with finality less than seven months ago.

¹⁶ KU's Motion to Dismiss at 2-3.

¹⁷ *In the Matter of: Application of Kentucky Utilities Company for an Adjustment of Its Electric Rates*, Case No. 2014-00371, Comments of David Shouse (filed May 1, 2015 and June 16, 2015).

¹⁸ Case No. 2014-000371, Correspondence from Commission Staff to David Shouse (June 25, 2015).

¹⁹ Complaint at 3-4.

Moreover, the Commission's prohibition against single-issue ratemaking would preclude changing a single rate—namely KU's Rate PS demand rate—in this complaint proceeding, particularly when the Commission approved the same rate less than seven months ago in a base-rate case that included full intervention and participation by numerous customer advocates, including the Attorney General, and ended in a Commission-approved unanimous settlement.²⁰

Therefore, there is no prospective relief the Commission could grant Complainants, even accepting as true all of their factual allegations. With neither retrospective nor prospective relief available to Complainants on the facts they have alleged, the Commission should dismiss the Complaint with prejudice as failing to state a *prima facie* claim upon which the Commission could grant relief.

III. Failing to dismiss the Complaint would be an invitation to never-ending rate complaints.

Complainants' Response erroneously asserts that applying collateral estoppel in dismissing the Complaint would effectively mean rates could never be challenged or changed, and that the Commission would be prevented from discharging its statutory duties.²¹ To the contrary, dismissal in this case would acknowledge that the Complaint raises the exact issue one of the Complainants raised twice in KU's very recent base-rate case—the same facts, same arguments, same counsel—and that the Commission decided the issue in an all-encompassing rate proceeding less than seven months ago.²² The Complainants have not alleged a single fact indicating that circumstances have changed materially since the Commission issued its order in that case such that the rates the Commission approved so recently as fair, just, and reasonable have now become unjust, unfair, or unreasonable.

²⁰ Case No. 2014-00371, Order (June 30, 2015).

²¹ Complainants' Response at 6.

²² Case No. 2014-00371, Order (June 30, 2015).

Importantly, failing to dismiss this Complaint would effectively be an open invitation to all customers displeased with recently approved rates to file rate complaints, regardless of whether any changed circumstances justified filing complaints. This potential deluge would unnecessarily and unjustifiably increase administrative burden and costs to the Commission and the other parties who participated in KU's rate case. Absent material changes in circumstances that might justify rate complaints between base-rate cases—changes that presumably would require a considerable length of time to develop—the time for customers to be heard concerning a utility's rate structures is during those base-rate cases. To permit a utility's Commission-approved rates to be constantly challenged would create unnecessary administrative burdens and perpetual uncertainty regarding rates, creating the very problems the filed-rate doctrine and prohibition on single-issue ratemaking are intended to prevent. Therefore, the Commission should apply these principles to dismiss the Complaint.

IV. KU's demand rates are based on sound ratemaking principles and have been repeatedly approved by the Commission.

KU respectfully submits that the Complaint shows a misunderstanding of the demand rates, and that misunderstanding appears to be at the root of the Complainants' repeated erroneous assertions that KU's demand charges as applied to their seasonal grain drying operation are not fair, just, and reasonable.²³ Complainants repeatedly object to paying demand charges when their operations are not actively consuming electricity.”²⁴ Yet the Complainants state they paid significant sums for grain-drying equipment they use only two to three months per year, presumably because Complainants believe the value of their grain-drying capacity when used only a few months per year exceeds its cost, even though the equipment sits idle most

²³ Complainants' Response at 2-5.

²⁴ Complainants' Response at 3. (emphasis in original).

of the year.²⁵ In other words, they paid for grain-drying capacity so it will be available when they want it, even though the grain markets apparently justify actually using that capacity only two to three months each year (and, as Mr. Shouse stated in his rate-case comments, they are never quite sure when they might want to use their grain-drying capacity due to market fluctuations, which explains why they prefer to have that capacity available for use year-round).²⁶ Certainly the Complainants pay some operating costs when their grain dryers are actually running that they can avoid by not running the dryers, but they cannot avoid the capital cost (and likely some fixed operating costs) of their grain dryers even if they cease using them entirely. Presumably they are pricing their grain to recover their capital and fixed operating costs over time, not just their variable operating costs.

This same cost structure—and payment structure—is used for countless goods and services, including cell phone plans, internet plans, cable and other entertainment subscriptions, cars and rental cars, clothes, shoes, houses, apartments, and hotels. Consumers routinely pay what is effectively a demand charge—the capacity cost—to ensure that a desired good or service will be available when they want to use it, even when they actually use it on occasion. For example, it is common for cell-phone plans to have a single monthly charge for unlimited calls and text messages and a certain amount of data usage. Customers pay these monthly charges regardless of how much they actually use their phones; indeed, these charges apply even if customers turn off their phones for entire months. Cell-phone-service providers structure their rates this way because their costs, just like the Complainants' grain-drying costs, are largely capacity-based costs: towers, routers, wires, and the like. The quantity, sizing, and cost of this equipment vary primarily by instantaneous demand for data transfer, not by the total quantity of

²⁵ *Id.*

²⁶ Case No. 2014-00371, Comments of David Shouse (filed May 1, 2015).

data used over time. Recovering these capital and fixed operating costs through a monthly fixed charge that does not vary based on customers' usage from month to month is rational and follows cost-causation principles. And cell-service customers often do not object to this type of payment approach because they are paying for the ability to use the phone when they want to use it, not because they want to use it all the time.

These simple examples are comparable to KU's cost and rate structures, especially its demand rates. KU is required to build facilities capable of serving its customers' needs at all times. Customers might not always need electricity, just like Complainants might only require electricity for their grain drying operations at certain times, but the facilities used to serve them must always be available.

Complainants might only use their facilities at certain times of the year, but they need access to electricity at all times. And KU builds the facilities necessary to serve its customers at all times—to meet the instantaneous demand of all customers at all moments—because that is when customers expect to have electricity available to them. KU incurs costs to construct and maintain those facilities regardless of when, or if, the customers consume electricity. Simply put, the same facilities are always in place to serve Complainants, regardless of when or whether the Complainants are consuming electricity. Imposing charges to recover the cost of those facilities is the most basic ratemaking principle; utilities build facilities to serve their customers, and collect rates based on that cost of service.

There appear to be two additional fundamental misunderstandings in the Complaint concerning KU's demand charges. First, the Complainants' one-time payments under KU's Line Extension Plan for the service lines run to their respective grain dryers do not begin to cover all of the capital or fixed operating costs of serving them; rather, those one-time payments covered

the cost of the portion of their respective service lines that exceeded the standard service-line lengths prescribed in KU's tariff. Those payments did not cover KU's capital or fixed operating costs for any portion of KU's generators, transmission lines, other distribution facilities, customer service operations and facilities, personnel, and the other capital and fixed-operating components required to provide Complainants and all other customers' service. So Complainants are not paying twice for the same service lines by paying monthly demand charges after having paid for part of their service lines through their one-time payments under the Line Extension Plan.

The second and related misunderstanding is that KU's demand charges are not, as Complainants appear to believe, pre-payments for energy consumption that Complainants are not using: "[T]he 50 percent minimum demand rate equates to a sum substantially greater over the course of the year than the utilities that are actually used if paid for directly"²⁷ Instead, the Basic Service Charge and demand charges under Rate PS are designed to recover most of the capital and fixed operating costs described in the preceding paragraph; KU does not recover variable operating costs through those charges. The Rate PS energy charge recovers KU's variable operating costs, mostly fuel costs, related to energy consumed. So Complainants are in no way paying for utility service they are not receiving; rather, as explained at length above, part of the service they receive is for KU to provide generating, transmission, and distribution capacity sufficient that whenever Complainants switch on their grain dryers—and create considerable amounts of electrical demand when they do—the power will be there to serve them. That is a valuable service requiring considerable cost to provide, and the Commission has approved fair, just, and reasonable rates for it.

²⁷ Complaint at 4.

Finally, it is important to note the consequences to other customers if Complainants were charged as they appear to desire to be charged, namely only for their monthly energy and monthly peak demand.²⁸ As described above, KU is required to build and maintain generating, transmission, and distribution facilities sufficient to meet Complainants' overall peak demand, and those facilities—and their costs—do not disappear in the months Complainants have lower demands. Using demand charges that charge customers only for their peak demand each month would require increasing demand rates, and would effectively penalize customers who more consistently and efficiently use the facilities KU must build to serve them. The minimum demand charge structure in KU's Rate PS mitigates this penalty on efficient customers by ensuring that customers who occasionally place high demands on KU's system do not offload the costs they create onto other customers. Complainants have provided no justification for so penalizing their fellow customers, and the Commission should refuse to do so.

V. The Commission should strike Complainants' discovery requests for being issued in violation of Commission regulation 807 KAR 5:001 Section 4(12).

The Commission should strike, and KU objects to, Complainants' Request for Information filed on January 11. 807 KAR 5:001 Section 4(12) permits a party to request information from another party only "[i]f permitted by administrative regulation or by order of the commission." There is no administrative regulation permitting Complainants to issue requests for information at this time, and the Commission has not issued an order setting forth a procedural schedule or permitting discovery in this proceeding. Therefore, the Commission should strike Complainants' Request for Information, and KU will not respond to it unless the Commission orders KU to do so.

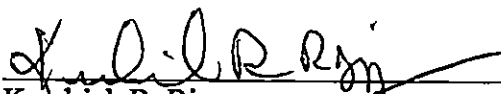
²⁸ *Id.*

Finally, in the interest of economies of time and resources, KU respectfully asks the Commission not to enter a procedural order in this proceeding until it issues an order granting or denying KU's Motion to Dismiss.

WHEREFORE, for all the reasons set forth above, Kentucky Utilities Company respectfully requests that the Commission issue an Order striking the Complainants' Response to Defendant's Motion to Dismiss and granting KU's Motion to Dismiss and dismissing the Verified Complaint with Prejudice.

Dated: January 15, 2016

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the above and foregoing Reply and Objection was served upon the following person by first class, United States Mail, postage prepaid, on the 15th day of January, 2016:

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