

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE
COMMISSION

In the Matter of:

The Petition of Kentucky Frontier Gas, LLC) Case No. 2016-00
For A Declaratory Order)

REPLY

Kentucky Frontier Gas, LLC, by counsel, files this reply to the Motion to Intervene and Response of First Baptist Church of Forest Hills. Frontier has no objection to the intervention or the fifteen day extension of time for the filing of a Response. However, Frontier believes that with the Response of the Church being filed, the matter should be submitted for final decision.

There are several key issues expressed in the pleading of the First Baptist Church of Forest Hills (Church) filed on September 8th that need clarification. First, this is not an issue of contract interpretation. The facts are not in dispute, the terms of the contract are explicit and unambiguous. Frontier has not claimed continued right to use the pipeline and has not demanded any compensation for its relinquishment of its prior easement rights. The Church has cited no facts or legal authority to support its position that this is a matter outside the Commission's jurisdiction or to justify the dismissal of the petition for declaratory order.

The only issue related to the contract is whether the rate for gas provided to the Church is \$0.35 per Mcf or the currently approved \$8.55 per Mcf tariff rate, which all other similar customers pay. Based on the Church's annual usage, if service continues at \$0.35 per Mcf, Frontier will lose \$3,280 per year. Regardless of any

other provisions contained in the contract, only the rate is being challenged – a matter exclusively within the Commission's jurisdiction.

Secondly, the allegation that the extremely favorable gas rate is merely part of the purchase price for a short segment of gathering pipeline, which was sold to Belfry at a discount is irrelevant for at least two reasons. Frontier is not claiming ownership of the pipeline, an old bare steel gathering line mostly laid on top of the ground, with numerous corrosion leaks. Frontier has bypassed the old line with a new PE gas main off Church property and has disclaimed any right to the pipeline and the easement it occupied. But, more importantly, the purchase price and the cost of gas are two separate provisions in the contract and the continuation of the gas cost is contingent upon availability of gas – a factor unrelated to the acquisition of the pipeline or its purchase price. If the Church's allegation is correct, just since the acquisition of the Belfry Gas system by Frontier in 2008, assuming similar annual gas usage by the Church, the cost to Frontier for that pipeline has been over \$20,000.00. The cost to the former Belfry Gas over the previous 37 years could be assumed to be far higher.

Finally, gas service has not been terminated to the Church. As the attached affidavit of Steve Shute confirms, except for a brief interruption of service due to a pressure check on the meter, gas service has been continuously provided.

The primary source of Commission authority over this matter is KRS 278.040(2), which provides: "The jurisdiction of the commission shall extend to all utilities in this state. The commission shall have exclusive jurisdiction over the regulation of rates and service of utilities, but with that exception nothing in this chapter is intended to limit or restrict the police jurisdiction, contract rights or powers of cities or political

subdivisions." In *Smith v. Southern Bell Tel. Co.*, 268 Ky. 421, 104 S.W. 2d 961, 963 (Ky.1937), the Kentucky Court of Appeals addressed a suit that a public official brought in circuit court to require a utility to furnish a certain type of service. Finding that the circuit court lacked jurisdiction over the matter, the Court declared that "the primary jurisdiction and authority to fix rates, establish reasonable regulation of service, and to alter and make changes to said regulations and to make investigation as to any change in service . . . is exclusively and primarily in the Commission" In *Bees Old Reliable Shows, Inc. v. Kentucky Power Co*, 334 S W.2d 765 (Ky. 1960), the Court said: "...the Public Service Commission has jurisdiction over questions concerning rates and services generally". By requiring the Commission to consider and decide such questions, the General Assembly sought to ensure that interpretations affecting utility rates and service are uniformly and consistently applied to all public utilities and their customers. The Court in *Smith v. Southern Bell Tel. Co.*, *supra*, noted as much:

The Public Service Commission is an administrative agency set up and appointed by law for the purpose of hearing the facts and establishing reasonable rules, rates, and services to the public in order to secure conformity of services and rates affecting all classes of customers, because for this burden to fall exclusively on the courts and to give the courts the primary and exclusive jurisdiction to pass upon the reasonableness of the rules, services, rates, schedules, practices, etc., of the telephone and telegraph companies, would lead to confusion and uncertainty, because the result might be that one court would say that certain rules and regulations are unreasonable, and another court might regard the same rules reasonable; consequently, a subscriber of the same class in one locality might obtain one' kind of service and the same service be denied a subscriber at another place.

With respect to utility rates, KRS 278.030(1) requires that they be "fair, just and reasonable," while utility service under KRS 278.030(2) must be "adequate, efficient and reasonable." In addition, KRS 278.160(1) requires the Commission to prescribe rules for each utility to file "schedules showing all rates and conditions of service established by it and collected or enforced." Pursuant to this statute, the Commission has promulgated 807 KAR 5:011, which requires regulated utilities to submit a complete tariff with the Commission setting forth, among other things, the utility's rates, charges, regulations and conditions of service over which the Commission has jurisdiction. Furthermore, special contracts are expressly provided for in 807 KAR 5:011, Section 13, which states:

Each utility shall file a copy of each special contract that establishes rates, charges, or conditions of service not contained in its tariff.

Additionally, KRS 278.170(1) provides that:

No utility shall, as to rates or service, give any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage, or establish or maintain any unreasonable difference between localities or between classes of service for doing a like and contemporaneous service under the same or substantially the same conditions.

These statutes clearly establish the Commission's jurisdiction to determine the reasonableness of any rate, whether part of a tariff or a contract.

The case before the Commission involves the reasonableness of the rate charged to the Church and whether the rate established in the now relinquished easement for a pipeline across the Church's property conforms to these statutory

requirements. In a case discussing the validity of an easement with conditions, the Commission said in *Goodlett and Goodlett v. Salt River RECC*, Case 9279, dated December 6, 1985 at p. 5:

Further, the Commission finds that if said easement did purport to grant electric service on some condition in conflict with the Commission's rules and regulations, said easement would be unenforceable. The legislature has delegated to the Commission the authority to modify utility contracts except those entered into with municipalities or political subdivisions (KRS 278.040). In accord: Smith v. Southern Bell Tel. and T. Co., Ky., 104 S.W.2d 961 (1937).

In similar cases involving contracts, the Commission has asserted authority to review the terms and conditions of the agreement as they affect rates and service. For example, in *Forest Creek, LLC v. Jessamine South Elkhorn Water District*, Case No. 2011-00297, Order dated March 16, 2012 at pages 10-11:

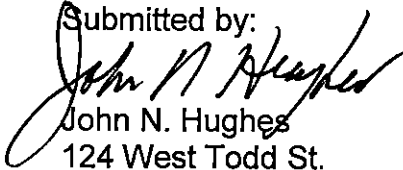
Assuming *arguendo* that the sole question that the Complaint presents is one of contract interpretation, we find no merit in Jessamine District's contention that the Commission lacks the authority to make such interpretation. Kentucky courts have held that the Commission's authority to consider a complaint regarding utility rates and service "**includes the authority to adjudicate private contractual rights involving utility rates and service**" and that "[t]he only limitation on this authority is that it cannot litigate claims for unliquidated damages." (Emphasis added)

Another issue the Church has failed to address is the inability of the parties to bind the Commission to a rate that is unreasonable or which otherwise limits the Commission's ability to review or modify it. Citing KRS 278.040, it said:

No party, however, by contract or other agreement, may obviate Commission jurisdiction over rates and services, and the Commission, therefore, retains the authority and jurisdiction to approve, deny, or otherwise modify any application for a rate change, regardless of the parties previous promises. *Rattlesnake Ridge Water District V. City of Grayson And Grayson Utilities Commission* Case No. 2002-00247, Sept. 13, 2002

This finding is consistent with previous Kentucky Court rulings: "Strictly speaking, the Commission had the right and duty to regulate rates and services, no matter what a contract provided." *Bd. of Education v. Dohrman*, 620 S.W.2d 328, 329 (Ky. App. 1981). In *National Southwire v. Big Rivers Elec.*, 785 S.W.2d 503, 517 (Ky. App. 1990), the court favorably quoted Dohrman: "Kentucky law generally holds utility contracts are subject to rate changes ordered by the PSC, no matter what the contracts provide. *Bd. Of Education of Jefferson County v. William Dohrman, Inc.*, 620 S.W.2d 328 (1981). Also, a prior approval of a contract and rate does not estop the PSC from subsequently changing the rate."

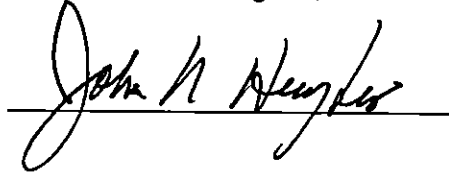
For these reasons, Frontier asserts that the Commission has jurisdiction over the reasonableness of the rate and an order consistent with that authority should be issued.

Submitted by:

John N. Hughes
124 West Todd St.
Frankfort, KY 40601
PH 502 227 7270
inhughes@johnnhughespsc.com

Attorney for Kentucky Frontier
Gas, LLC

Certification:

I certify a copy of this Reply was mailed to Allyson Honaker and Mark David Goss, Goss and Samford, 2365 Harrodsburg Rd, # B325, Lexington, KY 40504 the 13th day of September, 2016.

A handwritten signature in black ink, reading "John N. Hengler", is written over a horizontal line. The signature is cursive and fluid.

DECLARATION OF STEVEN SHUTE

I, Steven Shute, am a Member of Kentucky Frontier Gas, LLC, the Applicant in the referenced matter and am familiar with the facts related to service to the Forest Hills Baptist Church.

On July 13, 2016, Frontier sent a letter to the Church informing it of Frontier's release of its rights to use the natural gas pipeline located on the Church's property, previously executed by the Church and Belfry Gas Company.

Due to the condition of the existing pipeline, Frontier installed a new natural gas pipeline to allow it to maintain adequate service to the area, which became operational by July 11, 2016. The new pipeline is located near, but not on, the Church's property.

At no time during the construction of the new pipeline or subsequent to the delivery of the letter to the Church on July 13th was gas service to the Church terminated, limited or modified.

On August 3, Frontier as part of its Automated Meter Reading or AMR program, installed a new AMR radio transmitter on the Church's meter. As part of the AMR conversion, the technicians are also instructed to take meter pressures to verify the billing pressure. The technician in Forest Hills came back several days later to take pressure, which requires the gas meter to be turned off briefly. When the pressure check was done, the technician prepared to relight any pilot lights on the property, but found no one present at the Church or Parsonage. He left a door tag on the front door of the Parsonage with the date and the instruction to relight any gas appliances, or to call Frontier.

Last week, after the Church filed its pleading with the Commission, the Frontier technician informed a Church member that gas service is available. He was told that the pastor had recently left the church and moved to Tennessee, leaving the parsonage empty. In his absence, no Church member had noticed the Frontier door

tag on the parsonage. The Frontier technician hadn't known the parsonage was vacated and didn't know any details of the terminated contract with the church, but instead was doing a routine pressure check of the Church meter with all other meters in Forest Hills. Nobody at Frontier ordered this or any other technician to terminate gas service to the Church. The meter was never locked out or otherwise blocked. Except for a brief turn off several weeks ago, gas service has been continuously available to the Church.

Pursuant to KRS 523.020-040, I certify under penalty of false swearing that the foregoing is true and correct.

Dated this 12th day of September, 2016.



Steven Shute, Member,
Kentucky Frontier Gas, LLC