

September 16, 2016

Via Hand-Delivery

Ms. Talina Matthews, Ph.D.
Executive Director
Kentucky Public Service Commission
P.O. Box 615
211 Sower Boulevard
Frankfort, KY 40602

RECEIVED

SEP 16 2016

PUBLIC SERVICE
COMMISSION

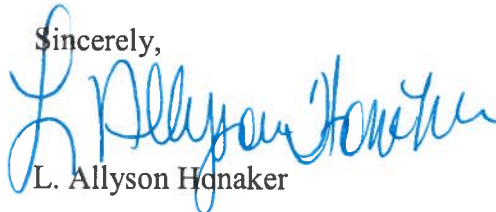
Re: In the Matter of: The Petition of Kentucky Frontier Gas, LLC for a Declaratory Order; Case No. 2016-00287

Dear Ms. Matthews:

Enclosed please find for filing with the Commission in the above-referenced case an original and ten (10) copies of First Baptist Church of Forest Hills' Motion for Leave to File a Sur-reply. An original and ten (10) copies of the proposed Sur-reply are also attached. Please return a file-stamped copy to me.

Please do not hesitate to contact me if you have any questions.

Sincerely,



L. Allyson Honaker

Enclosures

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

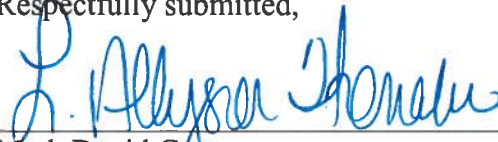
THE PETITION OF KENTUCKY FRONTIER) PSC CASE NO.
GAS, LLC FOR A DECLARATORY ORDER) 2016-00287

**MOTION OF FIRST BAPTIST CHURCH OF FOREST HILLS
FOR LEAVE TO FILE A SUR-REPLY**

Comes now First Baptist Church of Forest Hills (“First Baptist Church”), by counsel, and respectfully requests leave to file a Sur-reply to the Reply of Kentucky Frontier Gas, LLC (“Kentucky Frontier”) in this matter. Kentucky Frontier’s Reply contains several statements which create a false impression. While the Commission is more than capable of sifting through these statements, First Baptist Church believes it is incumbent upon them to correct these statements. Moreover, the Reply cites various legal authorities for the first time without noting that they have been rejected by the Kentucky Court of Appeals and/or are plainly distinguishable from the jurisdictional issue before the Commissions. The Sur-reply which First Baptist Church seeks to file is tendered herewith.

WHEREFORE, on the basis of the foregoing, First Baptist Church respectfully requests the Commission to grant it leave to file the attached Sur-reply.

Respectfully submitted,



Mark David Goss

L. Allyson Homaker

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been served, by delivering same to the custody and care of the U.S. Postal Service, postage pre-paid, this 16th day of September, 2016, addressed to the following:

John N. Hughes

Counsel for Kentucky Frontier Gas, LLC

124 West Todd Street

Frankfort, KY 40601



Counsel for First Baptist Church of Forest Hills

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

THE PETITION OF KENTUCKY FRONTIER GAS, LLC FOR A DECLARATORY ORDER)	PSC CASE NO. 2016-00287
)	

SUR-REPLY OF FIRST BAPTIST CHURCH OF FOREST HILLS

Pursuant to 807 KAR 5:001, Section 19, First Baptist Church of Forest Hills (“First Baptist Church”), by counsel, hereby respectfully submits the following Sur-reply to Kentucky Frontier Gas, LLC’s (“Kentucky Frontier”) Petition for a Declaratory Order:

1. As stated in First Baptist Church’s Response and Motion to Dismiss, on October 4, 1971, First Baptist Church and Belfry Gas Company, Inc., (“Belfry Gas”) entered into an Agreement under which First Baptist Church would sell to Belfry Gas, “a pipe line of two inch and one and one-half inch in diameter” that ran from the First Baptist Church to a connection point on the City Service Company pipeline. The distance of the conveyed pipeline was approximately 3,000 feet. Belfry Gas agreed to: (1) pay First Baptist Church \$1,100 for the pipeline; and (2) furnish First Baptist Church and its parsonage with gas at a price of \$0.35 per thousand cubic feet. The gas was to be provided at this price for as long as “they have service available in this area.” In essence, First Baptist Church accepted a lower upfront payment for the pipeline in exchange for monthly payments from Belfry Gas in the form of gas purchase savings.

2. In Kentucky Frontier’s Petition for a Declaratory Ruling and its Reply to First Baptist Church’s Response and Motion to Dismiss, Kentucky Frontier states the 1971 Agreement was

merely an easement. Kentucky Frontier even cites cases pertaining to easements and the jurisdiction of the Kentucky Public Service Commission (“Commission”) over the terms of those easements. That would be all well and good if the 1971 Agreement was merely an easement. It is not. It is an agreement for the sale of an asset. Kentucky Frontier’s insistence that the 1971 Agreement is merely an easement is contradicted by the contract’s plain terms. The word “easement” does not even appear in the 1971 Agreement.

3. The 1971 Agreement was a contract to sell a natural gas pipeline from First Baptist Church to Belfry Gas, Kentucky Frontier’s predecessor in interest. Ownership of this natural gas pipeline changed hands, in exchange for bargained for consideration. The terms of the contract are not ambiguous – they simply need to be enforced in a Court of law. This was clearly a sale of a natural gas pipeline. The bargained for consideration for the sale of this natural gas pipeline was as follows: (1) Belfry Gas agreed to pay an upfront fee of \$1,100; and (2) Belfry Gas agreed to pay monthly payments in the form of savings on the natural gas used by First Baptist Church and its parsonage, for as long as gas service was available in the area.

4. Kentucky Frontier argues that it is not claiming any ownership of the pipeline and is no longer using the pipeline or “easement” and, therefore, no longer has to make these monthly “payments” to First Baptist Church. Kentucky Frontier purchased the assets of Belfry Gas, which included the pipeline in question and, therefore, ownership of the pipeline transferred to Kentucky Frontier. Kentucky Frontier cannot simply deny ownership of the pipeline as a means to avoid its contractual obligations. Nowhere in the 1971 Agreement does it state that this pipeline has to be used to transport natural gas in order to continue the monthly payments in the form of natural gas purchases. Gas simply has to be “available in the area.” Kentucky Frontier does not dispute that natural gas service is still available in the area.

5. Kentucky Frontier asks the Commission to assert jurisdiction by calling this bargained for consideration a “rate”. The 1971 Agreement does not give rise to a rate. The Kentucky Court of Appeals has held that this type of asset purchase payment is not a “rate” and is not within the Commission’s jurisdiction to change. In *Fern Lake Company v. Public Service Commission of Kentucky*, 357 S.W.2d 701, (Ky. App. 1962), Kentucky Utilities Company (“KU”) and Water Service Company (“Water Service”) entered into a contract for the purchase of water and ice plants owned and operated by KU. The agreed upon consideration was \$1,150,000 in cash and certain contracts, including one with the City of Middlesboro. Under that contract, Water Service was: (1) obligated to pay KU the additional sum of \$17,700 annually; (2) Water Service would obtain water from Fern Lake which was owned by KU; and, (3) if Water Service took more than 250,000,000 gallons per year, Water Service would pay KU five (5) cents for each additional 1,000 gallons of water taken per year. Fern Lake Company (“Fern Lake”) later became the owner of the Fern Lake reservoir and facilities and KU assigned the Middlesboro contract to Fern Lake. Water Service subsequently filed an application with the Commission to reduce the \$17,700 annual payment under the contract, which the Commission did. After an appeal to the Circuit Court, the Court of Appeals held that:

As appellees have pointed out, the Commission’s jurisdiction extends to rates and services. However, the arguments of appellees are based on the assumption that the Commission has ordered a change in a ‘rate.’ We cannot accept this assumption when we scrutinize the terms of the Middlesboro contract. Water Service has an absolute obligation to pay Fern Lake Company \$17,700 annually whether or not it takes a drop of water from Fern Lake. Furthermore, it is apparent in the sales agreement that this contract to pay \$17,700 annually was executed as an integral part of the consideration for the sale of the water and ice properties of K.U. Since this contract provides for installment payments of \$17,700 annually..., and in view of the fact that the original sales agreement between K.U. and Water Service makes this payment an essential item of the consideration for the sale of the ice and water plants, we have

concluded that the annual payment (\$17,700) for the term of 20 years is not a *rate* and therefore is not subject to change by the Commission during that term.

6. When the terms of the 1971 Agreement are scrutinized, they are essentially the same as the Fern Lake case. The terms of the 1971 Agreement include an upfront payment of \$1,100 and monthly payments in the form of savings on the gas purchases of First Baptist Church and its parsonage. As in the Fern Lake case, these monthly payments were an integral part of the consideration for the sale of the natural gas pipeline and the connection it provided to City Service Company. These monthly payments are an essential item of the consideration for the sale of the natural gas pipeline and the connection it provided, and therefore, it is not a rate and is not subject to change by the Commission.

7. In Kentucky Frontier's reply, an Order dated March 16, 2012 and entered by the Commission in Case No. 2011-00297, *Forest Creek, LLC v. Jessamine South Elkhorn Water District*, is cited for the purpose of showing the Commission's jurisdiction over rates and services "includes the authority to adjudicate private contractual rights involving utility rates and services". However, what Kentucky Frontier fails to mention is the Commission entered an order in this same case on June 16, 2014, acknowledging the Court of Appeals' disagreement with the Commission's assertion of jurisdiction over the contract in that case. In the footnote to that Order, the Commission states:

The parties also have a circuit court action regarding the same subject matter, *Jessamine-South Elkhorn Water Dis. V. Forest Creek, LLC*, Civil Action No. 2010-CI-001394 (Jessamine Cir. Ct. Ky filed Dec. 17, 2010). After the Commission intervened in that action, the trial court dismissed the action for lack of subject matter jurisdiction. JSEWD appealed the decision. In an unpublished decision, the Court of Appeals reversed the trial court and found that the subject matter was a contractual issue that does not invoke the

Commission's exclusive jurisdiction over rates and services. 2013
WL 3480344 (Ky. App.)

In that unpublished opinion, the Kentucky Court of Appeals cited *Louisville Gas & Electric Co. v. Dulworth*, 130 S.W.2d 753, 755 (1939), stating “Unless exclusive power is given to the commission, the authority conferred upon it does not deprive the courts of jurisdiction over the same matters, and an application to the commission is not a prerequisite to an action before the court to obtain relief with respect thereto.” It also cited *Carr v. Cincinnati Bell, Inc.*, 651 S.W.2d 126, 128 (Ky. App. 1983), and stated “And, where issues of rates or services are not implicated, matters of contract interpretation and enforceability are more appropriately addressed by the court.” In the JSEWD case at the Court of Appeals, the Commission was attempting to assert jurisdiction over a contract for an extension of service. Forest Creek had originally decided to file for an extension of service with JSEWD under Option II offered by JSEWD. Forest Creek later wanted to change to Option I and JSEWD would not allow Forest Creek to change its option. In an attempt to assert jurisdiction, the Commission relied on the fact that JSEWD stated it could be forced to raise rates in order to absorb the cost if it had to proceed with the Forest Creek extension under Option I. The Court stated “the mere possibility of raising rates in the future does not bring this matter within the exclusive jurisdiction of the Commission. Rather, the question posed is solely one of contract enforceability, i.e., whether Forest Creek can now elect to proceed under Option I after having entered into an agreement to proceed under Option II.” The Court found that the questions presented did not invoke the Commission's exclusive jurisdiction.

8. The matter at hand is clearly a contract enforcement issue. The monthly payments by Kentucky Frontier are part of a bargained for consideration and are not subject to change by the Commission. The 1971 Agreement did not merely grant an easement. According to the 1971

Agreement, as long as gas service is available in the area, the monthly payments in the form of savings, are valid and enforceable. In fact, Kentucky Frontier even admits that First Baptist Church is entitled to receive gas at the specified amount of \$0.35 per Mcf.¹ However, Kentucky Frontier misstates the terms of contract by stating “if gas ceases to be available through the pipeline, further gas service is not required and the pipeline reverts to the Church.”² Where in the 1971 Agreement is that language? The answer to that question is nowhere! Kentucky Frontier is relying upon a contract clause that does not exist as a pretext to seeking regulatory dissolution of a contractual obligation. Nowhere in the 1971 Agreement does it state that the pipeline has to be used to transport gas in order for the monthly payments to continue. The only condition is that gas service be available in the area. Kentucky Frontier admits in its Petition that it still has gas service available in the area and that it **assumed the obligation** to serve the Church at the \$.35 per Mcf price in the contract.³

9. Furthermore, Kentucky Frontier is wrong to claim that there are no facts in dispute. Kentucky Frontier claims in its Reply that gas service has not been terminated to the Church. Kentucky Frontier also states in its Reply at page 2 that an affidavit of Steve Shute is attached. The attachment is not an affidavit. It is titled “Declaration of Steven Shute”, is not a sworn, notarized statement. The Declaration is an attempt to show that First Baptist Church’s gas service has not been interrupted, however, First Baptist Church has been without gas for a lengthy period of time. When Kentucky Frontier sent the email to the Commission this past Friday, First Baptist Church again checked its gas service. The valve on the meter was turned to the off position. After the Response of First Baptist Church was filed, several telephone communications took place

¹ See Petition of Kentucky Frontier, p. 3.

² *Id.*

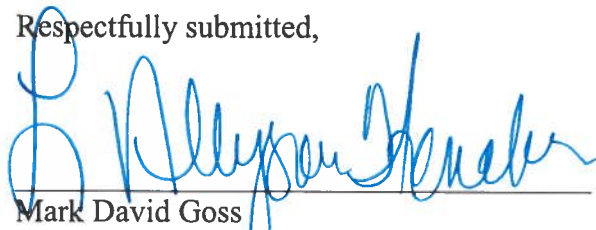
³ *Id.* at 2-3 (emphasis added).

between a First Baptist Church representative and a Kentucky Frontier representative and the gas flow was only restored to the church on September 13, 2016. Please see the attached memorandum that is part of First Baptist Church's file.

10. Pursuant to 807 KAR 5:001 section 19(6), each Reply containing an allegation of fact must be verified or supported by affidavit. The Reply of Kentucky Frontier fails to meet this requirement. The Reply is not verified nor is the attached Declaration of Steve Shute a sworn affidavit. Furthermore, the Declaration does not address every allegation of fact raised in the Reply.

WHEREFORE, First Baptist Church asks that this case be dismissed on the basis that the \$.35 per Mcf is not a rate but is bargained for consideration for the sale of the natural gas pipeline and is outside the Commission's jurisdiction.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been served, by delivering same to the custody and care of the U.S. Postal Service, postage pre-paid, this 16th day of September, 2016, addressed to the following:

John N. Hughes
124 West Todd Street
Frankfort, KY 40601
Counsel for Kentucky Frontier Gas, LLC


Counsel for First Baptist Church of Forest Hills

First Baptist Church of Forest Hills, KY

Memo to File

By: Roger Varney, Treasurer of First Baptist Church of Forest Hills

Date: September 14, 2016

RE: Telephone conversations between Roger Varney, treasurer for First Baptist Church Forest Hills and a representative of KY Frontier Gas, LLC who identified himself as Dallas

Dallas's Telephone # [REDACTED] identified location at Prestonsburg, KY

1. Telephone conversation between myself and Dallas on 9/9/16:

On this date a representative from KY Frontier Gas, LLC identifying himself as Dallas called me at my personal residence in reference to the natural gas being turned off at the meter at the Church. Dallas asked me if the gas at the church had been turned back on. I told him I did not know. He informed me he turned it off to do some maintenance work to the gas meter. He advised me he left a sticker on the meter so we would be aware the gas was off. He said he knocked on the door of the parsonage but no one answered. I informed him that our recent Pastor had resigned and was now living in TN and that no one was living in the parsonage at the present time. He said he was coming to Forest Hills today to turn the gas back on at the meter. Then he asked if I could take a pair of pliers and turn the plug on a pipe under the meter horizontal to allow gas flow and then unscrew a knob on the side of the meter to pull the plunger out therefore saving him from having to make a trip to Forest Hills. I told him I knew what he was talking about. I told him I would, however after speaking to a Church Trustee I was advised if the gas company turned it off then it would have to be turned back on by them. Therefore I did not turn the gas back on.

Conversation on 9/12/16: Dallas called my residence to see if I turned the gas back on. I told him I did not and told him why. I asked if he was coming over to turn it on. He said he had to talk to his boss and he would get back to me. I told him that would be fine.

Conversation on 9/13/16: Dallas called my residence to inform me that he would be over today to turn the gas on and light the pilot lights in the Church. I informed him that the Church building and the Auxiliary building had automatic pilot light starters. I did not know if the parsonage had an automatic pilot starter or not, however I did not have a key to access the parsonage. He said he would be over to turn the gas on sometime on this day. I checked the gas line the next day and the plug on the gas line had been turned on to the horizontal position which indicated to me that the gas was on. I checked the plunger on the side of the meter and it was in the correct position to send gas flow to the various Church buildings. After Dallas came to turn the gas back on (9/13/16) no other conversations took place.

Document to file: 9/15/16.....rv