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September 28, 2017

**VIA HAND DELIVERY**

John S. Lyons  
Acting Executive Director  
Kentucky Public Service Commission  
211 Sower Boulevard  
Frankfort, KY 40601

RECEIVED

SEP 28 2017

PUBLIC SERVICE  
COMMISSION

**RE: Robert David Shouse v. Kentucky Utilities Company**  
**Case No. 2017-00325**

Dear Mr. Lyons:

Please find enclosed and accept for filing the original and ten copies of a *Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted and Answer of Kentucky Utilities Company* 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 our office runner.

Sincerely,

A handwritten signature in blue ink, appearing to read "W. Duncan Crosby III", with a stylized flourish at the end.

W. Duncan Crosby III

WDC:ec  
Enclosures

400001.158291/1520904.1

**COMMONWEALTH OF KENTUCKY**  
**BEFORE THE PUBLIC SERVICE COMMISSION**

**In the Matter of:**

<b>ROBERT DAVID SHOUSE,</b>	)	
	)	
<b>COMPLAINANT</b>	)	
	)	
<b>v.</b>	)	<b>CASE NO. 2017-00325</b>
	)	
<b>KENTUCKY UTILITIES COMPANY,</b>	)	
	)	
<b>DEFENDANT</b>	)	

**MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF  
CAN BE GRANTED AND ANSWER OF KENTUCKY UTILITIES COMPANY**

**1. Motion to Dismiss**

Kentucky Utilities Company (“KU” or the “Company”), by counsel, respectfully asks the Kentucky Public Service Commission (“Commission”) to dismiss with prejudice the Complaint of Robert David Shouse because the requested relief is barred under the doctrine of *res judicata*; therefore, the Complaint fails to state a claim upon which relief can be granted. In effect, Mr. Shouse asks to re-litigate KU’s demand-charge structures, which the Commission approved in KU’s 2016 rate case less than five weeks before Mr. Shouse filed his complaint.<sup>1</sup> Indeed, this appears to be the second time Mr. Shouse has asked to re-litigate KU’s demand charges shortly after the conclusion of a KU rate case: In November 2015, just five months after the Commission issued its final order in KU’s 2014 rate case, complainants David Shouse, Brian Shouse, and Bryan Hendrickson filed a formal customer complaint against KU seeking altered demand charges for KU’s Rate PS (Power Service) and refunds of demand charges they claimed were

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<sup>1</sup> *In the Matter of: Application of Kentucky Utilities Company for an Adjustment of Its Electric Rates*, Case No. 2016-00370, Order (June 22, 2017).

excessive.<sup>2</sup> The Commission correctly disposed of Mr. Shouse's 2015 complaint by dismissing it with prejudice under the doctrine of *res judicata* and the filed-rate doctrine.<sup>3</sup> KU respectfully asks the Commission to follow the same reasoning to dismiss this Complaint with prejudice.

**A. *Res judicata*, and particularly collateral estoppel, precludes making any changes to KU's demand-charge structures or creating a new rate in this proceeding.**

Mr. Shouse's request for relief asks the Commission to "look[] into" KU's demand charges as applied to Mr. Shouse's grain-bin operations, in particular the 50% minimum demand ratchet, and to establish a "seasonal rate or demand be established for ag[riculture] related power."<sup>4</sup> But the doctrine of *res judicata* bars the adjudication of issues that have already been litigated or should have been litigated in a prior case between the same or similar parties.<sup>5</sup> It applies to the quasi-judicial acts of an administrative agency acting within its jurisdiction unless a significant change of conditions or circumstances has occurred between the administrative proceedings.<sup>6</sup> *Res judicata* has two subparts: claim preclusion and issue preclusion.<sup>7</sup> Issue preclusion, which is also known as collateral estoppel, bars further litigation when the issues in the two proceedings are the same, the adjudicator in the previous proceeding reached a final

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<sup>2</sup> *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 v. Kentucky Utilities Company*, Case No. 2015-00417, Complaint (Nov. 19, 2015). KU assumes throughout that the Mr. Shouse who is the complainant in this proceeding is the same Mr. Shouse who filed public comments in KU's 2014 rate case (Case No. 2014-00371) and was a complainant in Case No. 2015-00417. This appears a reasonable assumption based on the nature of the comments and complaints, as well as the text of the comments and complaints and a comparison of the signatures of the complainant in this proceeding and of the complainant in Case No. 2015-00417.

<sup>3</sup> Case No. 2015-00417, Order at 13 (June 29, 2016).

<sup>4</sup> Complaint at paragraph (c).

<sup>5</sup> 47 Am. Jur.2d *Judgments* § 464.

<sup>6</sup> *Bank of Shelbyville v. Peoples Bank of Bagdad*, 551 S.W.2d 234, 236 (Ky.1977); *Williamson v. Public Service Commission*, 174 S.W.2d 526, 529 (Ky.1943); *Cardinal Bus Lines v. Consolidated Coach Corp.*, 72 S.W.2d 7 (Ky. 1934). The Commission has applied this doctrine to dismiss complaints, most notably Mr. Shouse's complaint in Case No. 2015-00417. Case No. 2015-00417, Order at 13 (June 29, 2016). See also *Orbin and Margie Brock v. Western Rockcastle Water Association*, Case No. 97-311, Order (Feb. 25, 1998); *Dovie Sears v. Salt River Water District and Kentucky Turnpike Water District*, Case No. 91-277, Order (June 30, 1992); Case No. 2002-00317, Order at 10.

<sup>7</sup> *Yeoman v. Commonwealth*, 983 S.W.2d 459, 464 (Ky.1998).

decision or judgment on the merits of the case, the issue in the prior action was necessary to the adjudicator's final decision, and the estopped party had a fair opportunity to litigate the issue.<sup>8</sup>

All of the elements of collateral estoppel are present here. First, the Commission has repeatedly considered and approved KU's current demand-charge structures, including KU's minimum demand charge structures (also called demand ratchets).<sup>9</sup> One case in which the Commission considered and approved KU's demand ratchets was KU's 2014 rate case, Case No. 2014-00371. In that case, Mr. Shouse—or someone also named David Shouse who operates grain bins in Morganfield, Kentucky, and is therefore very similarly situated to the complainant here—twice filed public comments, once *pro se* and once by counsel, opposing demand ratchets and asking for “some kind of seasonal or agricultural rate.”<sup>10</sup> The Commission's June 25, 2015 letter to Mr. Shouse's counsel stated clearly 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:

The Commission acknowledges receipt on June 16, 2015 of your letter, a copy of which is attached hereto, addressed to one of our rate analysts, regarding the above referenced case and your client's objection to the amount of demand charges he pays to Kentucky Utilities Company for the seasonal operation of his farming activities. Your letter is being treated as an official protest and will be placed in the case file of this proceeding. The Commission will take your concerns into consideration in its review and decision in this matter.<sup>11</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> *E.g.*, in Case Nos. 2014-00371 and 2016-00370.

<sup>10</sup> *In the Matter of: Application of Kentucky Utilities Company for an Adjustment of Its Electric Rates*, Case No. 2014-00371, Comments of David Shouse at 1 (May 1, 2015); *see also* Case No. 2014-00371, Comments of David Shouse at 1 (June 16, 2015) (“In the circumstances of David Shouse Farms, that demand or the demand charges is not realistic with the nature of the business in which Shouse Farms is involved, which is seasonal.”). As noted above, KU assumes throughout this pleading that the current complainant, Robert David Shouse, is the same David Shouse who participated in Case Nos. 2014-00371 and 2015-00417, though KU's analysis does not depend upon the identity of Mr. Shouse.

<sup>11</sup> Case No. 2014-000371, Correspondence from Commission Staff to David Shouse (June 25, 2015).

Having thus expressed its cognizance of Mr. Shouse's concerns, the Commission issued a final order in that case on June 30, 2015, approving KU's demand charges, including the demand ratchets of which Mr. Shouse had complained.<sup>12</sup>

Less than five months after the Commission's final order in that proceeding, Mr. Shouse and two other individuals filed a formal complaint regarding the exact same issue Mr. Shouse raised in Case No. 2014-00371 and in this proceeding:

The respective grain drying operations are seasonal in nature and each of the Plaintiffs operate[s] the grain bin drying equipment on a two to three month basis.

...

[O]n opinion and belief, the 50 percent minimum demand rate ... result[s] in a windfall for Defendant [KU] and/or otherwise unjustly enrich[es] the Defendant, and/or [is] contrary to the intent and spirit of the statutes and regulations."<sup>13</sup>

The Commission ultimately dismissed the complaint with prejudice, stating in relevant part:

[T]he Complainants' concerns with KU's Rate PS and demand charge were raised during KU's prior base rate case proceeding, and the Commission clearly considered the objections during the course of its approval of the settlement agreement and KU's rates. The record does not indicate any changes of fact or circumstances since Case No. 2014-00371 that would require the Commission to further investigate this rate at this time. Accordingly, the doctrine of *res judicata*, particularly collateral estoppel, bars Complainants from re-litigating in their Complaint the identical issues that were raised and fully adjudicated in Case No. 2014-00371.<sup>14</sup>

(The Commission further denied Mr. Shouse's request for demand-charge refunds on filed-rate-doctrine grounds.<sup>15</sup>) But the Commission noted it would review the reasonableness of Rate PS in

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<sup>12</sup> Case No. 2014-00371, Order (June 30, 2015).

<sup>13</sup> Case No. 2015-00417, Complaint at 4-5 (Nov. 19, 2015).

<sup>14</sup> Case No. 2015-00417, Order at 7 (June 29, 2016).

<sup>15</sup> *Id.* at 9-11, 13.

KU's next base rate case, and required KU to "present testimony in support of the minimum billing demand provisions of Rate PS" in its next rate case.<sup>16</sup>

The Commission and KU did just that in KU's 2016 rate case. KU supported its Rate PS and its demand ratchets with the direct testimony of two of its witnesses, Robert M. Conroy and W. Steven Seelye,<sup>17</sup> and provided discovery in response to at least one Commission Staff request concerning Mr. Seelye's testimony on demand ratchets.<sup>18</sup> Yet less than five weeks after the Commission's final order approving KU's demand ratchets, Mr. Shouse has once again filed a formal complaint regarding the exact same issue. Therefore, the first requirement of collateral estoppel, namely that the issues be identical in both proceedings in question, is clearly met here.

Second, the Commission issued final orders on the merits of KU's previous rate case, Case No. 2014-00371, and KU's most recent base rate case, Case No. 2016-00370, both of which addressed this issue. In its orders, the Commission emphasized that it had closely reviewed the schedules of rates in the proffered settlement agreements in those proceeding, declaring that it could not defer to the decision of the parties, but would determine for itself based on the entire record and its expertise to make an independent decision as to the level of rates that should be approved as fair, just, and reasonable.<sup>19</sup> Based upon these reviews, the Commission approved KU's proposed demand-rate structures, including the demand ratchets of Rate PS.<sup>20</sup> In addition, as the quote in the paragraph above from the Commission's June 25, 2015 letter to Mr. Shouse's counsel makes clear, the Commission took into account Mr. Shouse's concerns about KU's demand rates when issuing its final order in Case No. 2014-00371. And as

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<sup>16</sup> *Id.* at 13.

<sup>17</sup> Case No. 2016-00370, Testimony of Robert M. Conroy at 20-21 and Testimony of Steven Seelye at 26-37 (filed Nov. 23, 2016).

<sup>18</sup> Case No. 2016-00370, KU Response to Commission Staff's Second Request for Information No. 84 (Jan. 25, 2017).

<sup>19</sup> *See* Case No. 2014-00371, Order at 11-12 (June 30, 2015); Case No. 2016-00370, Order at 28-29 (June 22, 2017); Case No. 2016-00370, Order at 3 (June 29, 2017).

<sup>20</sup> *See id.*

noted above, KU complied with the Commission's requirement from its final order in Case No. 2015-00417 directing KU to support its Rate PS and its demand ratchets by filing testimony on those subjects (and by providing discovery on them) in Case No. 2016-00370. Thus, the Commission clearly did issue final orders on the merits of Case Nos. 2014-00371 and 2016-00370, and it did so accounting for the same concerns the Complaint expresses in this proceeding with regard to KU's demand rates.

Third, the reasonableness of KU's Rate PS, including its minimum billing demand rates, was a necessary component of the Commission's decision in Case Nos. 2014-00371 and 2016-00370. KRS 278.030 permits utilities to assess only "fair, just, and reasonable rates" for their services, and prohibits the Commission from authorizing any rate that is not "fair, just, and reasonable." Therefore, to approve the rates and charges set forth in the settlement agreements, the Commission necessarily determined the reasonableness of each rate, including Rate PS and KU's demand ratchets. It could not otherwise have performed its statutory obligations. Moreover, as shown in the paragraph above, the Commission applied its traditional ratemaking analysis to determine if KU's proposed rates were fair, just, and reasonable, and it explicitly informed Mr. Shouse's counsel that it would consider Mr. Shouse's concerns about KU's demand rates in Case No. 2014-00370. And as noted above, KU complied with the Commission's requirement to support its Rate PS and its demand ratchets in Case No. 2016-00370. So the third requirement of collateral estoppel, namely that the issue in question have been necessary to the previous adjudication, is met here.

Concerning the fourth element of collateral estoppel, Mr. Shouse had a fair opportunity to litigate the reasonableness of KU's demand charges in both of KU's most recent rate cases. Although Mr. Shouse did not intervene in Case No. 2014-00371, he submitted two sets of

comments—one *pro se* and one by counsel—on the very issue addressed in the Complaint in this proceeding. And although Mr. Shouse did not intervene or file comments in Case No. 2016-00370, it is evident he was capable of participating in and filing comments in the proceeding, having done so repeatedly in Case No. 2014-00371, and having now apparently filed two formal complaints in less than two years on the same subject. Moreover, Complainant's interests were represented by the Attorney General in those proceedings. "KRS 367.150(8)(a) makes the Attorney General's Consumer Protection Division the representative of all customers of a particular utility whenever that office chooses to intervene in a rate case before the PSC."<sup>21</sup> The Attorney General intervened and actively participated in Case Nos. 2014-00371 and 2016-00370 and was a signatory to the settlement agreements. And in the Commission's order dismissing Complainant's 2015 complaint on this exact issue, the Commission noted the importance of the AG's participation:

Although Complainant David Shouse was not formally a party to that proceeding, the Commission finds that it duly considered his objections and that his interests, as a consumer, were represented by the Office of the Attorney General who did intervene, actively participated, and was a signatory to the settlement agreement.<sup>22</sup>

With regard to the final element of *res judicata* as applied in administrative cases, namely changed circumstances, it is notable that Mr. Shouse does not allege any changed circumstances, material or otherwise, occurring in the five weeks between the Commission's final orders in Case No. 2016-00370 and the filing of his complaint in this proceeding. Indeed, Mr. Shouse has not alleged any changed circumstances from the time of the filing of his complaint in Case No. 2015-00417 addressing the same issues, or from the time Mr. Shouse filed his public comments

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<sup>21</sup> *The Complaint of the City of Barbourville et. al vs. Delta Natural Gas Company, Inc.*, Case No. 8496, Order at 2 (May 5, 1982). See also *State ex rel. Public Service Comm'n v. Boone Circuit Court*, 138 N.E.2d 4, 7 (Ind. 1956) ("Every rate payer, whether or not he actually intervenes or participates in a rate proceeding, is bound by such proceeding when instituted after notice as provided by law. If there is no intervention or active participation, his interest, nevertheless, is represented by the Public Counselor").

<sup>22</sup> Case No. 2014-00417, Order at 6 (June 29, 2016).



in Case No. 2014-00371. In short, as the Commission noted in its order dismissing with prejudice Mr. Shouse's complaint in Case No. 2015-00417, "The record does not indicate any changes of fact or circumstances since Case No. 2014-00371 that would require the Commission to further investigate this rate at this time."<sup>23</sup> The same holds true regarding Mr. Shouse's complaint in this proceeding, and certainly with respect to the rates and rate structures the Commission approved less than five weeks ago.

Dismissing Mr. Shouse's complaint as barred under the doctrine of *res judicata* would also serve the public interest and administrative efficiency by not requiring scarce Commission resources to be spent re-litigating a matter the Commission brought to a close less than five weeks ago. Indeed, to allow this proceeding to continue would set a crippling precedent: Any potential participant could refrain from providing input in a rate case and wait to see the results; if unsatisfactory, the party could simply file a complaint days or weeks later to address any unsatisfactorily resolved issue, even if no material circumstances had changed (and Mr. Shouse has not alleged that any have). The Commission should therefore have no compunction about dismissing the Complaint with prejudice.

In sum, given that Mr. Shouse twice raised the issue of the reasonableness of KU's demand charges under Rate PS in Case No. 2014-00371, and that the Commission approved KU's rates even after taking into account those comments; given that the Commission barred Mr. Shouse's complaint in Case No. 2015-00417 based on *res judicata*, and that the Commission again approved KU's rates in Case No. 2016-00370; it is clear that the doctrine of *res judicata*, and particularly collateral estoppel, bars Mr. Shouse from once again re-litigating that issue through the complaint process for the second time, and further bars the Commission from

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<sup>23</sup> Case No. 2015-00417, Order at 9 (June 29, 2016).

granting Mr. Shouse's requested relief of ordering changes to KU's demand rates or the creation of new rates in this proceeding.

**WHEREFORE**, for all of the reasons set forth above, Kentucky Utilities Company respectfully requests that the Commission dismiss the Complaint with prejudice for failure to state a claim upon which relief can be granted and that this matter be closed on the Commission's docket.

## **II. Answer**

In accordance with the Commission's Order of September 18, 2017, in the above-captioned proceeding, KU respectfully submits this Answer to the Verified Complaint of Mr. Shouse filed on July 31, 2017. In support of its Answer, and in response to the specific averments contained in said Verified Complaint, KU states as follows:

1. In response to the first sentence of paragraph (a) of the Complaint, KU is without sufficient knowledge to admit or deny Mr. Shouse's residency status or principal place of business.

2. With regards to the allegations contained in paragraph (c) of the Complaint, KU states as follows:

- A. In response to the first sentence of paragraph (c) of the Complaint, KU denies any of its demand charges are unjust. (On information and belief, Mr. Shouse complains of the minimum billing demand charges of KU's Rate PS, which is the only such rate for which the entire demand charge can be subject to a 50% demand ratchet.) KU's Commission-approved Rate PS comprises charges designed to recover KU's costs of providing service to its customers. Indeed, the Commission most recently issued an order approving KU's Rate PS, including its demand-rate structure, approximately three months ago in Case No. 2016-00370.
- B. In response to the remaining sentences of paragraph (c) of the Complaint, KU is without sufficient knowledge to admit or deny Mr. Shouse's assertions regarding his grain-bin usage throughout the year and his service from Kenergy Corporation.

### **FIRST AFFIRMATIVE DEFENSE**

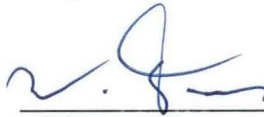
The doctrine of *res judicata*, particularly collateral estoppel, bars any attack against KU's demand rates in this proceeding. KU incorporates by reference the entirety of its Motion to Dismiss as stated above in support of this First Affirmative Defense.

**WHEREFORE**, Kentucky Utilities Company respectfully asks the Commission to issue an Order:

1. Dismissing the Complaint with prejudice;
2. Granting KU any and all other relief to which it may be entitled; and
3. Closing and removing this matter from the Commission's docket.

Dated: September 28, 2017

Respectfully submitted,



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*Counsel for Kentucky Utilities Company*

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the above and foregoing Motion to Dismiss and Answer was served upon the following person by first class, United States Mail, postage prepaid, on the 28<sup>th</sup> day of September 2017:

Robert David Shouse  
5010 U.S. Highway 60  
Morganfield, KY 42437



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*Counsel for Kentucky Utilities Company*