

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BIOFUEL MINING, INC.)	
)	
COMPLAINANT)	
)	CASE NO.
V.)	2022-00133
)	
KENTUCKY POWER COMPANY)	
)	
DEFENDANT)	

ORDER

On April 29, 2022, Biofuel Mining, Inc. (Biofuel), a crypto mining company, tendered a complaint against Kentucky Power Company (Kentucky Power). Biofuel initiated discussions with Kentucky Power in January 2022 to reserve 30 MW of power for a site in Letcher County in the Gateway Industrial Park.¹ In the complaint, Biofuel alleged that it had a verbal contract with Kentucky Power, and that Kentucky Power declined to enter into a written contract to provide service to Biofuel, failed to provide a rate schedule under which Biofuel would take service, required a \$2.5 million deposit with only seven days’ notice, and failed to provide the basis for the deposit amount. Based on these allegations, Biofuel alleged that Kentucky Power violated KRS 278.030, regarding fair, just and reasonable rates; KRS 278.030(2), regarding the provision of adequate service; 807 KAR 5:006, Section 8, regarding deposits; and 807 KAR 5:001, Section 4, regarding tariffs. Biofuel’s requested relief for the alleged violations are for the

¹ Complaint, unnumbered page 3 and Exhibit B, unnumbered page 2.

Commission to require Kentucky Power to contract with Biofuel and to prohibit Kentucky Power from entering into a contract with a second customer to provide 30 MW of power at Gateway Industrial Park. Because of Kentucky Power's limited capacity to provide additional service to Gateway Industrial Park, Kentucky Power could only provide service to one customer at the requested load of 30 MW.²

On May 3, 2022, Kentucky Power filed a non-party motion to schedule an informal conference to expedite resolution of the complaint. Kentucky Power stated that the motion was not an admission that the complaint states a *prima facie* case.

LEGAL STANDARD

Commission regulation 807 KAR 5:001, Section 20, governs the filing of a formal complaint. In accordance with 807 KAR 5:001, Section 20(1)(c), a complaint must state "[f]ully, clearly, and with reasonable certainty, the act or omission" that the complaint alleges the utility failed to comply with, and facts with details of the alleged failure. In accordance with 807 KAR 5:001, Section 20(4)(a), the Commission examines a complaint to determine whether the complaint establishes a *prima facie* case and conforms to the administrative regulation. A complaint establishes a *prima facie* case when, on its face, it states sufficient allegations that, if uncontradicted by other evidence, would entitle the complainant to the requested relief. If a complaint fails to establish a *prima facie* case or conform to the administrative regulation, 807 KAR 5:001, Section 20(4)(a)(1) provides that the complainant be notified and provided an opportunity to amend the complaint within a specified time. Additionally, 807 KAR 5:001, Section 20(4)(a)(2) provides that if

² Complaint (tendered April 29, 2022), Exhibit B, unnumbered page 3.

the complaint is not amended within the time that the Commission grants, then the complaint shall be dismissed.

KRS 278.030(1) states that “[e]very utility may demand, collect and receive fair, just and reasonable rates” for services provided. KRS 278.030(2) states that “[e]very utility shall furnish adequate, efficient and reasonable service, and may establish reasonable rules governing the conduct of its business and the conditions under which it shall be required to render service.”

KRS 278.160 requires a utility to file with the Commission a written schedule of rates and conditions for service (Tariff), and written special contracts that contain rates and conditions of service. Commission regulation 807 KAR 5:011, Section 4 sets forth the contents of Tariffs.

Commission regulation 807 KAR 5:006, Section 8 governs customer deposits. The deposit amount is calculated as set forth in 807 KAR 5:008: (1) actual usage data for the customer at the same premises for the most recent 12 month period; (2) if actual usage is not available, estimated usage based on the average bills of similar customers and premises in the utility’s system; and (3) the deposit amount shall not exceed 2/12 of the average bill if bills are rendered monthly, such as with Kentucky Power. Further, 807 KAR 5:006, Section 8(5) provides that a utility may refuse service to a customer if the customer does not pay the requested deposit.

Kentucky Power’s Tariffs, which are approved by the Commission, establish conditions of service regarding deposits that conform to Commission regulations. Kentucky Power Tariff Sheet 2-2, Section 4, states that, prior to providing service or any time after service begun, Kentucky Power can require a cash deposit or other guaranty

to secure payment of bills. Kentucky Power Tariff Sheet 2-3, Section 4(c)(1)(b) provides that deposits for commercial and industrial customers are calculated using actual usage data or, if not available, data usage for similar customers and premises in that customer class, and that the deposit shall not exceed 2/12, or more simply, two months, of customer's actual or estimated annual bill.

DISCUSSION AND FINDINGS

As an initial matter, the Commission rejects Biofuel's claim that Kentucky Power verbally contracted with Biofuel to provide service.³ KRS 278.160 requires that all Tariffs and special contracts be in writing; there is no provision for a verbal contract under KRS Chapter 278. Because a verbal contract is not legal under KRS Chapter 278, any verbal contract, if one existed, would be void and unenforceable.

In the complaint, Biofuel admitted that it was informed of the deposit amount in February and March 2022, and asserted that Biofuel did not expect the demand for a deposit to be made before service was provided.⁴ Biofuel alleged that, if Kentucky Power provided reasonable advance notice when the deposit would be due, then it could have been prepared to pay the deposit.⁵ Biofuel deemed 30 days to be the appropriate notice period. Biofuel maintained that Kentucky Power simply "guesstimated" the deposit amount without any basis for the determination.⁶

³ Complaint at unnumbered page 3.

⁴ Complaint at unnumbered page 3.

⁵ Complaint at unnumbered page 4.

⁶ Complaint at unnumbered page 4.

With the complaint, Biofuel also filed two exhibits. Exhibit A contained the rate schedule for the 30 MW of power requested by Biofuel. Exhibit A appears to be a portion of an email sent to Biofuel by a Kentucky Power manager, but is not dated.

Exhibit B is an email dated with attachments regarding the security deposit that Kentucky Power requested Biofuel to pay. Exhibit B includes a letter from Kentucky Power to a Biofuel executive, dated April 25, 2022, that sets forth the history of Biofuel's service request to Kentucky Power. According to Exhibit B, Biofuel contacted Kentucky Power in January 2022 to request service and was informed on February 7, 2022, and March 28, 2022 that a deposit of \$2.8 million would be required and that payment must be made within seven calendar days of the formal request for payment.⁷ Also in Exhibit B, Biofuel was informed that, in accordance with Kentucky Power Tariff Sheets 2-2 and 2-3 and Commission regulations 807 KAR 5:006, Sections 1 and 8, that Kentucky Power may require a deposit equal to two months of the expected bill prior to providing service. The documents provided by Biofuel indicate that Kentucky Power agreed to a two-day extension from April 27, 2022, to April 29, 2022, for payment of the deposit or other security, such as irrevocable letter of credit or a surety bond, or Kentucky Power would have to offer similar terms to another applicant for the same load in the same industrial park.⁸ Biofuel also provided a copy of Kentucky Power's calculations of the two-month deposit, which is based upon Biofuel taking service under the IGS Subtransmission rate schedule.⁹ Finally, Biofuel provided an email from a Kentucky Power representative to a

⁷ Complaint, Exhibit B, unnumbered page 2.

⁸ Complaint, Exhibit B, unnumbered page 3.

⁹ Complaint, Exhibit B, unnumbered pages 5–6.

Biofuel representative dated April 20, 2022, that referenced attachments including a letter of agreement, security schedule, and load ramp up schedule form for Biofuel to complete, and a formal request for payment of the deposit.¹⁰

Based upon a review of the Complaint, motion, statutes, tariffs, and regulations, and being otherwise sufficiently advised, the Commission finds that Biofuel failed to state sufficient allegations to establish a *prima facie* case because the complaint failed to identify any acts or omissions by Kentucky Power that violate any statute, regulation, or tariff enforced by the Commission. This is because, from the documents provided by Biofuel, Kentucky Power calculated the deposit amount as required by Kentucky Power's Tariff and Commission regulations based upon two months of actual or estimated usage. Further, Kentucky Power's Tariff and Commission regulations provide that payment of a deposit may be required as a condition of service, as it was here. Further, the evidence provided by Biofuel refutes the allegations. Biofuel's allegation that Kentucky Power never provided rates is refuted by Biofuel's own evidence that it received a rate schedule from Kentucky Power.¹¹ Biofuel admits that it was aware of the amount of the deposit on February 7, 2022 and March, 28, 2022.¹² That admission is supported by documents filed by Biofuel that it received email notice of the deposit amount in February and March 2022.¹³ Biofuel also filed evidence that, at least on March 28, 2022, it received notice that Biofuel would have seven calendar days to pay the deposit in full.¹⁴ Biofuel provided

¹⁰ Complaint, Exhibit B, unnumbered page 11.

¹¹ Complaint, Exhibit A, unnumbered page 1.

¹² Complaint at unnumbered page 3.

¹³ Complaint, Exhibit B, unnumbered page 9.

¹⁴ Complaint, Exhibit B, unnumbered page 9.

evidence that Kentucky Power provided Biofuel with a written agreement on April 20, 2022, at the same time that Kentucky Power made the formal request for payment of the deposit.¹⁵ Biofuel provided evidence that Kentucky Power provided the calculation of the deposit amount.¹⁶

For the above reasons, the Commission finds that Biofuel's complaint should be rejected for failing to establish *prima facie* case. The Commission further finds that, in accordance with 807 KAR 5:001, Section 20(4)(a)(1), Biofuel should be afforded the opportunity to amend the complaint to state a *prima facie* case. If Biofuel fails to submit an amended complaint within ten days of this Order, the complaint shall be dismissed by separate Order.

Because the Commission rejected Biofuel's complaint for failure to state a *prima facie* case, the Commission finds that Kentucky Power's non-party motion to schedule an informal conference is denied a moot. Should Biofuel file an amended complaint that the Commission determines establishes a *prima facie* case, the Commission would consider a motion to schedule an informal conference at that time.

IT IS THEREFORE ORDERED that:

1. Biofuel's complaint is rejected for failing to state a *prima facie* case.
2. Within ten days of the date of this Order, Biofuel shall file with the Commission an amended complaint that states a *prima facie* case.
3. If Biofuel fails to file with the Commission an amended complaint that states a *prima facie* case, the Commission shall dismiss the complaint by separate Order.

¹⁵ Complaint, Exhibit B, unnumbered page 10.

¹⁶ Complaint, Exhibit B, unnumbered pages 5–6.

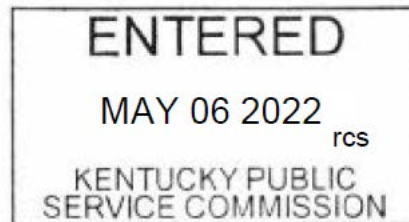
PUBLIC SERVICE COMMISSION



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ATTEST:



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