

RECEIVED

AUG 20 2004

PUBLIC SERVICE
COMMISSION

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF DELTA NATURAL GAS)
COMPANY, INC. FOR AN ADJUSTMENT)
OF RATES)

CASE NO. 2004-00067

* * * * *

MOTION FOR DEVIATION
FROM RULE

(Ruled on At
Hearings)

Delta Natural Gas Company, Inc. ("Delta") respectfully moves the Commission pursuant to 807 KAR 5:001, Section 14, for a deviation from the requirements of 807 KAR 5:001, Section 10(5), requiring newspaper publication of the hearing in this proceeding in the areas that will be affected by the outcome of this proceeding. In support of this petition, Delta states as follows:

The procedural order dated May 10, 2004, in this case states that the last day for Delta to publish notice of the hearing is August 10, 2004. To that end, on July 30, 2004, Delta contacted the Kentucky Press Service and requested that it place the Legal Notice of Public Hearing in the 25 newspapers that publish in each county in Delta's service territories. See the Affidavit of Rachel McCarty, attached hereto. The telephonic request was followed, on the same day, with an e-mail confirming the request and attaching the form of Legal Notice of Public Hearing and a list of the newspapers. *Id.* The Kentucky Press Association promptly contacted each newspaper in which the notice should appear and faxed an insertion order to them requesting the placement of the notice. *Id.* The

Kentucky Press Association followed up the fax insertion orders by mailing copies of the notice to each newspaper. *Id.*

The notice was duly published in all of the newspapers on or prior to August 10, 2004, except the *Frenchburg Meniffee County News* and the *McKee Jackson County Sun*. *Id.* The Kentucky Press Service contacted persons at both newspapers and was advised that the newspapers received the notices in sufficient time to publish them on or before August 10, but inadvertently failed to publish the notices. *Id.* Neither the *Frenchburg Meniffee County News* nor the *McKee Jackson County Sun* is published after August 10 and prior to August 18. *Id.*

While the notice was not published in a newspaper located in Meniffee County, it was published in Powell, Montgomery, Bath and Rowan Counties, four of the six counties contiguous to Meniffee County. The notice was published in Madison, Estill, Lee, Clay and Laurel Counties, five of the seven counties contiguous to Jackson County. In addition, the notice was published in the *Lexington Herald-Leader*, a newspaper with significant circulation in eastern Kentucky.

When Delta became aware, on August 11, 2002, of the failure of the Meniffee and Jackson County newspapers to publish the notice of hearing, it examined various approaches to the solution of the problem. Affidavit of Connie King, attached hereto. Delta decide that the best way to assure that its customers in those counties received notice of the hearing in this proceeding was to mail a copy of the notice to each active Delta customer in Meniffee and Jackson Counties. Therefore, on August 12, 2004, Delta mailed a copy of the notice to each of its active customers in those counties. *Id.* The notice was mailed to a total of 542 customers. *Id.* Delta began receiving inquiries about

the mailed notice on August 13, 2004, so its customers began receiving the notice on that date. *Id.*

807 KAR 5:001, Section 10(5) provides that notice of a hearing on a general adjustment of rates “shall be advertised by the utility by newspaper publication in the areas that will be affected in compliance with KRS 424.300.” KRS 424.300 provides as follows:

Notices of hearings by the Public Service Commission upon applications by public utilities for rate increases or reduction or discontinuance of service, except where advertised by mail, shall be advertised by the applicant utility in accordance with such reasonable regulations as the commission may prescribe by newspaper publication in the areas that will be affected.

The procedural order dated May 10, 2004, herein states simply that the last day for Delta to publish notice of the hearing is August 10, 2004.

The purpose of the Commission’s regulation and KRS 424.300 is to ensure that the public has sufficient notice of Delta’s hearing to participate therein, individually or through representative agencies, if desired. While the publication of the notice did not appear in two of the 25 newspapers in which Delta sought to advertise, there was clearly substantial compliance with the regulation and statute. Indeed, the mailing of the notice to each active Delta customer in those counties gave them actual, rather than constructive, notice of the hearing as would have been provided by newspaper advertisement. In addition, while the customers did not receive the eight day notice prescribed by the procedural order, they received five days notice with the mailing.

Delta's substantial compliance with the Commission's regulation has met the purpose of the notice requirement. As stated by the Kentucky Supreme Court in *Conrad v. Lexington-Fayette Urban County Government*, 659 S.W.2d 190, 195 (Ky. 1983):

Substantial compliance in regard to publication requirements has been authorized [citing *Queenan v. City of Louisville*, 233 S.W.2d 1010 (Ky. 1950)]. The purpose of the statute is to allow the public an ample opportunity to become sufficiently informed on the public question involved.

See also Order dated March 31, 2004, PSC Case No. 2003-00434, *In the Matter of: An Adjustment of the Electric Rates, Terms and Conditions of Kentucky Utilities Company* (deviation from three consecutive week publishing requirement when some newspapers were not published for three consecutive weeks at the time the application was filed); Order dated July 24, 1989, PSC Case No. 89-142, *In the Matter of: The Application of Simpson County Water District for a Rate Adjustment for Non-Recurring Charges* (deviation from three consecutive week publication requirement granted); Order dated December 11, 1989, PSC Case No. 89-159, *In the Matter of: An Adjustment of Rates of the Martin County Water District No. 1* (deviation granted where notice of rate increase was published for two weeks and then omitted for the third week at the fault of the newspaper).

The Commission's regulation, 807 KAR 5:001, Section 14, provides that in special cases, for good cause shown, the Commission may permit deviation from its regulations. It is significant that KRS 424.300 does not require newspaper advertisement of notices of hearings if they are "advertised by mail." Here, Delta did what it was expected to do to cause notice of the hearing to be advertised. It was, in fact, advertised in 23 of the 25 newspapers to which the advertisement was sent. Through no fault of

Delta or the Kentucky Press Service, it was not published in two of those 25 newspapers. To make sure that the customers received notice of the hearing, Delta mailed the notice to each active Delta customer in those counties. Therefore, Delta caused the notice of hearing to “advertised by mail” per KRS 424.300 in Menifee and Jackson Counties. Good cause exists for a deviation from the requirements of 807 KAR 5:001, Section 10(5).

WHEREFORE, Delta respectfully requests the Commission to permit deviation from its regulation 807 KAR 5:001, Section 10(5) for the reason that there has been substantial compliance therewith.

Respectfully submitted,

Robert M. Watt, III
Roger M. Cowden
Stoll, Keenon & Park, LLP
300 West Vine Street, Suite 2100
Lexington, Kentucky 40507
(859) 231-3000

By Robert Watt
Counsel for Applicant

CERTIFICATE OF SERVICE

This is to certify that the foregoing pleading has been served by hand delivering a copy of same to the following person on this 18th day of August 2004:

Dennis Howard, II, Esq.
Elizabeth E. Blackford, Esq.
Assistant Attorney General
Office of Rate Intervention
1024 Capital Center Drive
Frankfort, KY 40601

Leslye M. Bowman, Esq.
David J. Barberie, Esq.
Lexington-Fayette Urban
County Government
Department of Law
200 East Main Street
Lexington, Kentucky 40507



Counsel for Delta Natural Gas
Company, Inc.

AFFIDAVIT

The Affiant, Rachel McCarty, after having been duly sworn, states as follows:

1. That she is over the age of eighteen years and has the capacity to make this affidavit.
2. That she is employed by Kentucky Press Service as an advertising assistant.
3. Among the services provided by Kentucky Press Association is the placement of legal advertisements on behalf of persons and entities throughout the Commonwealth of Kentucky.
4. Included among this Affiant's duties with Kentucky Press Service is the placement of such legal advertisements.
5. That on July 30, 2004, she received from Robert C. Hazelrigg, an employee of Delta Natural Gas Company, Inc. ("Delta"), a legal notice of public hearing in Public Service Commission Case No. 2004-00067, *In the Matter of: Application of Delta Natural Gas Company, Inc. for an Adjustment of Rates* (the "Delta Rate Case").
6. Mr. Hazelrigg requested that this Affiant place the legal notice of public hearing before the Public Service Commission, scheduled for August 18, 2004, in the Delta Rate Case in newspapers in all counties that comprise Delta's service area such that the last such advertisement would appear no later than August 10, 2004. A copy of Mr. Hazelrigg's e-mail requesting such publication is attached hereto.
7. This Affiant contacted each newspaper in which the legal notice of public hearing should appear and faxed an insertion order requesting the placement of the legal notice of public hearing.

8. This Affiant followed up the fax insertion order by mailing the insertion order to each newspaper.

9. The legal notice of public hearing appeared in all of the newspapers except the *Frenchburg Meniffee County News* and the *McKee Jackson County Sun*.

10. This Affiant spoke with Brad Toy, an employee of the *Frenchburg Meniffee County News*, who stated that the newspaper received the legal notice of public hearing in sufficient time to place the legal notice of public hearing in the newspaper for publication prior to August 10, 2004, but inadvertently failed to publish the legal notice of public hearing.

11. This Affiant spoke with Tammy Spurlock, an employee of the *McKee Jackson County Sun*, who stated that the newspaper received the legal notice of public hearing in sufficient time to place the legal notice of public hearing in the newspaper for publication prior to August 10, 2004, but inadvertently failed to publish the legal notice of public hearing.

12. Neither the *Frenchburg Meniffee County News* nor the *McKee Jackson County Sun* are published after August 10, 2004, and prior to August 18, 2004.

Further the Affiant sayeth naught.


RACHEL MCCARTY

STATE OF KENTUCKY)
)
COUNTY OF Franklin)

The foregoing affidavit was subscribed and sworn to before me on this 13 day of August by Rachel McCarty.

My commission expires: 9-18-04.

Bennie J. Howard

NOTARY PUBLIC

Subject: Notice of Hearing

From: "Bob Hazelrigg" <BHAZELRIGG@deltagas.com>

Date: Fri, 30 Jul 2004 10:28:32 -0400

To: <inan@kypress.com>

Rachel, pursuant to our telephone conversation, please arrange for the attached Notice of Public Hearing to be published as a legal classified advertisement in the required newspapers by no later than August 10th. As in the past, after you have prepared the copy for publication please send it to me for proofing.

Also, as I mentioned in our conversation, if we could have two copies of the tearsheets it would be helpful.

Thank you for your kind assistance in this matter.

Bob

NOTICE OF PUBLIC HEARING

NOTICE is hereby given that the Kentucky Public Service Commission has scheduled a hearing on the Application of Delta Natural Gas Company, Inc. ("Delta") for an Adjustment of Rates, Case No. 2004-0067, for Wednesday, August 18, 2004, at 9:00 a.m., Eastern Daylight Time, in Hearing Room 1 at the Commission's offices, 211 Sower Boulevard, Frankfort, Kentucky, for the purpose of cross-examination of witnesses of Delta and the Intervenors and the presentation of additional testimony, if any.

DELTA NATURAL GAS COMPANY, INC.

3617 Lexington Road
Winchester, Kentucky 40391
859-744-6171

Delta Natural Gas Company
Newspaper List for
Notice of Public Hearing

Barbourville Mountain Advocate

Three Forks Tradition (Beattyville)

Bath County News Outlook

Times Tribune (Corbin)

Whitley Republican

Berea Citizen

Winchester Sun

Bourbon County Citizen

Sun Courier (Pineville)

Central Record (Lancaster)

Citizen Voice and Times (Irvine)

Clay City Times

Flemingsburg Gazette

Jackson County Sun

Jessamine Journal

The Ledger Independent (Maysville)

Leslie County News

Lexington Herald Leader

Manchester Enterprise

Menifee County News

Middlesboro Daily News

Morehead News

Mt. Sterling Advocate

Richmond Register

Sentinel Echo (London)

AFFIDAVIT

The Affiant, Connie King, after having been duly sworn, states as follows:

1. That she is over the age of eighteen years and has the capacity to make this affidavit.
2. That she is employed by Delta Natural Gas Company, Inc. ("Delta") as Director-Rates & Treasury.
3. That among her duties at Delta is participation in the presentation of applications for adjustment of rates before the Public Service Commission.
4. That on August 11, 2004, following inquiry by this Affiant, she was advised by Rachel McCarty of the Kentucky Press Service that the legal notice of the public hearing scheduled for August 18, 2004, at the Kentucky Public Service Commission in Case No. 2004-00067, *In the Matter of: Application of Delta Natural Gas Company, Inc. for an Adjustment of Rates* (the "Delta Rate Case") had been published in newspapers in all the counties in Delta's service territories on or before August 10, 2004, except for Menifee and Jackson Counties where the legal notice was inadvertently omitted from publication by the *Frenchburg Menifee County News* and the *McKee Jackson County Sun*, respectively.
5. That on August 12, 2004, this Affiant caused the legal notice of public hearing, a copy of which is attached hereto, to be mailed by first class mail to each customer of Delta in Menifee and Jackson Counties, Kentucky. The legal notice of public hearing was mailed to a total of 542 active Delta customers.
6. That this Affiant believes that Delta customers in Menifee and Jackson Counties began receiving the legal notice of public hearing on August 13, 2004, because she

received telephone calls from such customers inquiring about the legal notice on August 13, 2004.

Further the Affiant sayeth naught.

Connie King
CONNIE KING

STATE OF KENTUCKY)
)
COUNTY OF CLARK)

The foregoing affidavit was subscribed and sworn to before me on this 13th day of August by Connie King.

My commission expires: 2/29/08

[Signature]
NOTARY PUBLIC

NOTICE OF PUBLIC HEARING

NOTICE is hereby given that the Kentucky Public Service Commission has scheduled a hearing on the Application of Delta Natural Gas Company, Inc. ("Delta") for an Adjustment of Rates, Case No. 2004-0067, for Wednesday, August 18, 2004, at 9:00 a.m., Eastern Daylight Time, in Hearing Room 1 at the Commission's offices, 211 Sower Boulevard, Frankfort, Kentucky, for the purpose of cross-examination of witnesses of Delta and the Intervenors and the presentation of additional testimony, if any.

DELTA NATURAL GAS COMPANY, INC.

3617 Lexington Road
Winchester, Kentucky 40391
859-744-6171