

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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In the Matter of:

MAY 6 2005

THE APPLICATION OF KENTUCKY UTILITIES)
COMPANY FOR A CERTIFICATE OF PUBLIC)
CONVENIENCE AND NECESSITY TO CONSTRUCT)
FLUE GAS DESULPHURIZATION SYSTEMS AND)
APPROVAL OF ITS 2004 COMPLIANCE PLAN FOR)
RECOVERY BY ENVIRONMENTAL SURCHARGE)

PUBLIC SERVICE
COMMISSION

Case No. 2004-00426

and

THE APPLICATION OF LOUISVILLE GAS)
AND ELECTRIC COMPANY FOR APPROVAL)
OF ITS 2004 COMPLIANCE PLAN FOR)
RECOVERY BY ENVIRONMENTAL SURCHARGE)

Case No. 2004-00421

MOTION TO STRIKE TESTIMONY OF STEPHEN J. BARON

Comes the Attorney General of the Commonwealth of Kentucky, by and through the Office of Rate Intervention, and moves the Commission to Strike the Testimony of Stephen J. Baron filed in these cases on March 23, 2005, because the entire topic of cost allocation to remedy class cost of service contribution inequities is beyond the subject matter to be considered in connection with an application for cost recovery under KRS 278.183. Therefore, consideration of this issue is both beyond the jurisdiction of the Commission and irrelevant to those determinations the Commission is to make under KRS 278.183. In like token, the Attorney General moves the Commission to strike all rebuttal testimony addressing the issue and to preclude any evidence on cost of service issues or alternative allocations of costs.

KRS 278.183 is a single issue ratemaking statute designed to allow a utility the current recovery of its costs by environmental surcharge to existing rates of complying with the Federal Clean Air Act as amended and those federal, state, or local environmental requirements which

apply to coal combustion wastes and by-products from facilities utilized for production of energy from coal in accordance with the utility's compliance plan. The Statute allows for between general rate case recovery of environmental costs and sets up a limited procedure under KRS 278.183(2) in which the Commission is to:

- (a) Consider and approve the plan and rate surcharge if the commission finds the plan and rate surcharge reasonable and cost-effective for compliance with the applicable environmental requirements set forth in subsection (1) of this section;
- (b) Establish a reasonable return on compliance-related capital expenditures; and
- (c) Approve the application of the surcharge.

In *Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Company*, 983 S.W.2d 493, 501 (Ky.1998), the Supreme Court of Kentucky declared that with KRS 278.183, “the traditional rules about rate making have been completely changed” and that “the General Assembly intended to consider the surcharge separately without regard to any other rate-making statutes.” Cost of service issues are relevant in general rate cases conducted under KRS 278.180 and KRS 278.190, as acknowledged and made mandatory in 807 KAR 5:001 Section 10 for general rate applications. In a general rate case, the overall financial condition of the utility is also relevant. But, like overall the overall financial condition of the utility,¹ class contributions to cost of service is not relevant to the streamlined single issue ratemaking required by KRS 278.183.

KRS 278.183 is a single issue ratemaking statute whose purpose, as declared in the preamble to enacting legislation, is to garner between general rate case cost recovery for the utility in order to incent the utility to use Kentucky coal in attaining environmental compliance.² Its purpose is not to equalize class contribution to cost of service between rate cases. Mr. Baron’s

¹ Id., 2 498.

² See, Preamble to Senate Bill 342, now codified as KRS 278.183, 1992 Acts of the General Assembly, Chapter 102, pp. 521-522.

effort to use this KRS 278.183 application to address class contribution to cost of service issues must fail because the surcharge statute neither allows or permits consideration of the “the substantial subsidies paid and received by various rate schedules pursuant to the rates most recently approved by the Commission in Case No. 2003-434” or “any attempt to mitigate the substantial subsidies being paid by all the large customers on the KU system to support the “below cost” rate paid by residential customers.”³ Therefore, the testimony should be stricken.

The Attorney General is aware that he has previously proposed or supported cost of service allocation of the environmental surcharge.⁴ He is also aware that in denying the cost of service allocation recommendations, the Commission has indicated it was doing so based on its reluctance to depart from the cost allocations reflected in existing rates absent compelling evidence to support such a departure, including the filing of cost-of-service studies to support the proposed departures, rather than on any indication that the statute might not allow varying cost of service determined surcharge rates.⁵ Regardless, given the language of the statute, the Attorney General’s efforts and the Commission’s previous rulings have ignored the statute’s requirement set out in subsection (2) that permits only one surcharge to be applied to existing rates rather than allowing differing surcharges to be applied to existing rates.

Not only does KRS 278.183 repeatedly refer to “the” surcharge, “a” surcharge, and “an environmental” surcharge, all in the singular, it specifically states that the recovery of costs is to be “by environmental surcharge”, singular, “to existing rates,” plural.⁶ Where the statute intends

³ Stephen J. Baron, Direct Testimony, p. 6.

⁴ *In the Matter of: The Application of Kentucky Utilities Company to Assess a Surcharge Under KRS 278.183 to Recover Costs of Compliance with Environmental Requirements for Coal Combustion Wastes and By-Products*, PSC Case No. 93-465, and *In the Matter of: Application of Big Rivers Electric Corporation to Assess a Surcharge Under KRS 278.183 to Recover Costs of Compliance With Environmental Requirements of the Clean Air Act*, Case No. 94-032.

⁵ Order of August 31, 1994, page 23, entered in Case No. 94-032 pertaining to Big Rivers and Order of July 19, 1994, page 21, entered in Case No. 93-465 pertaining to Kentucky Utilities.

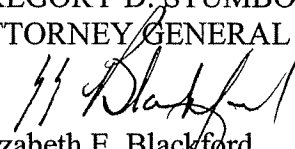
⁶ KSR 278.183, (2).

to use a plural, it clearly does so, referring to taxes, costs, facilities, expenses, expenditures and existing rates. By contrast, with the exception of the reference to past surcharges,⁷ the statute always refers to the surcharge in the singular. Given this, the statute's declaration that environmental costs are to be recovered "by environmental surcharge to existing rates" clearly sets out the legislative intent that a single surcharge is to be applied to the various existing rates. Differing or varied surcharges are not to be applied to the existing rates. The varying or differing surcharges that would result were Mr. Baron's recommendations adopted are not permitted by KRS 278.183.

The legislative disallowance of varying surcharges eliminates frequent and repeated between general rate case cost-of-service contests and is in keeping with the streamlined approach of KRS 278.183, whose sole purpose is to garner cost recovery for the utility. The fundamental rule in statutory interpretation is to give effect to the legislative intent. *Wesley v. Board of Education of Nicholas County*, 403 S.W.2d 28 (Ky. 1966); *Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Company*, supra, at 500. The statute is not designed to address or rectify possible cost allocation problems either apparent in or arising after the last base rate case. Its language prohibits the result Mr. Baron's seeks. Therefore, the testimony should be stricken.

Respectfully submitted,

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⁷ KRS 278.183(3).

NOTICE OF FILING AND CERTIFICATION OF SERVICE

I hereby give notice that I have filed the original and ten true copies of the foregoing with the Executive Director of the Kentucky Public Service Commission at 211 Sower Boulevard, Frankfort, Kentucky, 40601 this the 6th day May, 2005, and certify that this same day I have served the parties by mailing a true copy, postage prepaid, to the following:

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I further certify that I have served the parties and Counsel for the Commission this same day by sending a true electronic copy to the following addresses: AW.Turner@ky.gov; MKurtz@bkllawfirm.com; kriggs@ogdenlaw.com; beth.cocanougher@lgeenergy.com; and Kent.Blake@lgeenergy.com.

