

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE
COMMISSION

IN THE MATTER OF:

KENTUCKY POWER COMPANY'S SECOND)
AMENDED ENVIRONMENTAL COMPLIANCE) CASE NO. 2005-00068
PLAN AND SECOND REVISED TARIFF)

JOINT PETITION FOR REHEARING OF
THE ATTORNEY GENERAL AND
KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC.

Pursuant to KRS 278.400 the Attorney General (“AG”) and Kentucky Industrial Utility Customers, Inc. (“KIUC”) (collectively “the Intervenors”) seek Rehearing of the 7 September 2005 Order of the Public Service Commission. In that Order the Commission approved surcharge recovery of a portion of the FERC-approved Interconnection Agreement rate under which Kentucky Power Company (“KPC” or “the Company”), as a deficit company in a pool comprised of AEP subsidiaries, pays the surplus Companies in the pool for a portion of the power produced by those surplus companies. The portion of the Interconnection Agreement rate approved for surcharge recovery by this Order covers Indiana & Michigan and Ohio Power Company’s costs of environmental compliance incurred after 1993 at their plants located in Indiana, Ohio, and West Virginia.

In its Order the Commission held that FERC-approved costs cannot be disallowed as unreasonable in a base-rate case, but that the costs must satisfy the requirements of KRS 278.183 as a prerequisite to surcharge recovery.¹ It also held that with the exception of certain SO3 costs, all costs proposed for surcharge recovery by KPC do satisfy the requirements of KRS 278.183 and are subject to

¹ Order at 10-11.

surcharge recovery.² In so holding, the Commission found that as the AG and KIUC had not specifically alleged that KRS 278.183 is ambiguous, the Commission could not look at legislative intent to determine the scope of the statute.³

The Intervenors agree with the Commission that costs that would be subject to base rate recovery must fully satisfy the requirements of KRS 278.183 as a prerequisite to qualifying for surcharge recovery, but disagree that the costs proposed for recovery in this Application do qualify for surcharge recovery. KRS 278.183 does not allow KPC to recover environmental costs incurred at facilities located outside of Kentucky by utilities over which the Commission has no jurisdiction. With reference to costs for which surcharge recovery is allowed, KRS 278.183's scope is narrower than that interpreted and applied by the Commission.

ARGUMENT

1. **The Purpose Of KRS 278.183 Is To Incentivize The Use Of High-Sulfur, Western Kentucky Coal, Not To Provide After-The-Fact Recovery Of Environmental Cost Incurred Outside Of Kentucky.**

The Commission's approval of KPC's proposal for surcharge recovery of the cost of environmental compliance facilities incurred by other utilities outside of Kentucky several years after these facilities were put into service is counter to the purpose of KRS 278.183. Kentucky case law holds that the Commission should be guided by legislative intent and should look at the evil a statute is designed to address when determining the scope of a statute.

At page 16 of the Order the Commission states:

"The environmental surcharge statute expressly authorizes a utility to recover by surcharge its costs of complying with specified environmental requirements. The statute does not restrict surcharge recovery to costs incurred at facilities owned by the utility or at facilities located in Kentucky. The language of the statute is unambiguous, and neither

² Order at 11-12.

³ Order at 15-16.

KIUC nor the AG have raised a claim to the contrary. Under these circumstances, it is not the Commission's role to determine legislative intent for purposes of interpreting an unambiguous statute."

With this, the Commission has read and applied KRS 278.183 much more broadly than it was intended to be read and applied. In *Kentucky Utility Customers Inc. v. Kentucky Utilities Company*, 983 S.W.2d 493 at 500 (Ky. 1998), the Supreme Court reigned-in the Commission's overly broad interpretation of those costs for which surcharge recovery is appropriate and belied the Commission's belief that it should not look at the purpose of or policy behind KRS 278.183 to determine its scope and application. In determining that certain challenged costs were not subject to surcharge recovery, the Court said:

"The surcharge permits a utility to submit its compliance plan for meeting environmental requirements to the Commission for approval. The plain and unambiguous language of the statute indicates that no surcharge is to be allowed until after Commission approval of a compliance plan. Clearly, this is necessarily a prospective exercise. There is no reason to believe that the legislature intended that the PSC approve, after the fact, actions by the Utility which have occurred more than ten years previous. It is of no consequence that the 1983-1992 environmental capital costs included in the surcharge in 1994 have been reduced by depreciation. KRS 446.080(3) prohibits applying statutes retroactively to any costs which occurred prior to January 1, 1993, the stated effective date of the surcharge statute."

The fundamental rule in statutory interpretation is to give effect to the legislative intent. *Wesley v. Bd. of Education of Nicholas County, Ky.*, 403 S.W.2d 28 (1966). A statute should not be interpreted so as to bring about an absurd or unreasonable result. The policy and purpose of the statute must be considered in determining the meaning of the words used. Cf. *Wade v. Comm., Dept. of Treasury, Ky.App.*, 840 S.W.2d 215 (1992).

The primary intent as expressed by the legislative preamble is to promote the use of high sulfur Kentucky coal by permitting a surcharge for scrubbing equipment. [Emphasis added.]"

Also see, *Sisters of Charity Health Systems, Inc. v. Raikes*, 984 S.W.2d 464 at 468-496 (Ky.1998), where the Court discussed how to determine the scope of a statute, saying:

"KRS 311.377(2) clearly creates a privilege for peer review material. The issue at bar

only concerns the scope of the statute's privilege.

....
Balanced against a necessarily narrow construction of statutory privilege is "[t]he principal rule of statutory construction ... that the applicability and scope of a statute may be determined by ascertaining the intent and purpose of the legislature and by considering the evil which the law is intended to remedy...." *Mitchell v. Kentucky Farm Bureau Company*, Ky., 927 S.W.2d 343, 346 (1996), overruled on other grounds, *Nantz v. Lexington Lincoln Mercury Subaru*, Ky., 947 S.W.2d 36 (1997)." [Emphasis added.]

These cases show it is not necessary to plead ambiguity as a prerequisite to looking at the purpose for the statute to determine its legislatively intended scope. *KIUC v. Kentucky Utilities* further shows that the Commission is not to afford after the fact approval to utility decisions already made nor surcharge recovery for the compliance costs that follow those decisions. Neither may it afford after the fact approval to decisions made by utilities over which it has no jurisdiction or surcharge recovery for the compliance costs that follow those decisions.

KRS 278.183 is incentive legislation designed to influence the action of the Applicant by giving advantageous rate treatment to actions that will favor the use of Kentucky coal. This finding has already been made by the Kentucky Supreme Court. It is not one the Commission is free to ignore.

Both the preamble to KRS 278.183 and the requirements within KRS 278.183 itself assume that the Commission has jurisdiction over the party making compliance decisions pertaining to the facility at which compliance costs are being incurred as a prerequisite to surcharge recovery. The provisions of KRS 278.183 (1) and (2) that require the submission and approval of a compliance plan and the establishment of a rate of return for the capital expenditures to be incurred in connection with that compliance plan clearly assumes the Commission has jurisdiction over the party making the decisions.

Only by allowing the more narrowly defined costs surcharge recovery can the statute perform its function to operate as an incentive. Allowing windfall recovery of that part of a rate that covers environmental compliance costs incurred by other utilities at plants located outside Kentucky over

which: (1) KPC has no control; and (2) this Commission has no jurisdiction, extends KRS 278.183 well beyond its intended scope. Because the costs contained in the application do not qualify for surcharge recovery under KRS 278.183, KPC's request for surcharge recovery should be denied.

2. **Kentucky Power Failed To Meet The Requirements Of KRS 278.183, Because The Company Has Not Filed A Compliance Plan For The Recovery Of "Its" Environmental Compliance Costs And The Commission Does Not Have The Authority To Approve And Determine A Fair Rate Of Return For The Out-Of-State Costs The Company Proposes To Pass Through The Statute.**

For the reasons articulated below, the Company's costs incurred pursuant to the Interconnection Agreement must be recovered in a base rate case, not the Kentucky environmental surcharge because KRS 278.183 does not allow for the recovery of these costs.

A. KRS 278.183(1)-(2) requires that a utility seeking recovery of costs through an environmental surcharge must file a compliance plan and that the Commission must approve this compliance plan as reasonable in order to receive surcharge recovery. The environmental surcharge statute states that the Commission "*consider*" and "*approve*" a compliance plan "*if the Commission finds the plan... reasonable and cost-effective for compliance with the applicable environmental requirements...*"

Kentucky Power has not filed a compliance plan and therefore fails this requirement of the statute. Even if the Company had filed a compliance plan its Application would have failed to meet the requirements of the statute because the Commission does not have jurisdiction over the facilities owned by AEP affiliates outside of Kentucky. The Commission has no authority to take the next step required by the statute of approving or disapproving the plan or the costs associated with the plan because the Commission has no jurisdiction over facilities located outside the Commonwealth.

B. KRS 278.183(1) states that "*a utility shall be entitled to the current recovery of its cost of*

complying with the Federal Clean Air Act... and those federal, state, or local environmental requirements which apply to coal combustion wastes...” (emphasis added). It is clear that KRS 278.183(1) allows surcharge recover for the applicant’s environmental compliance costs and not the environmental compliance costs of another utility. Kentucky Power’s Application does not seek to recover “*its*” environmental compliance costs, but requests that the Commission adopt a surcharge which is comprised of the portion of the Company’s capacity equalization payments that are attributable to the environmental compliance costs of out-of-state utilities. KRS 278.183 requires that costs to be recovered through an environmental surcharge be the utility’s own costs. Kentucky Power does not meet this standard.

C. KRS 278.183(2) states that the Company’s compliance plan:

“shall include the utility’s testimony concerning a reasonable rate of return on compliance related capital expenditures...”

Further, KRS 278.183(2)(b) requires the KPSC to “[e]stablish a reasonable rate of return on compliance-related capital expenditures...” The Company did not submit a compliance plan and did not submit testimony concerning a reasonable rate of return on compliance related capital expenditures as required by the statute. The Company did not propose that the KPSC set a rate of return for the compliance costs of its out-of-state affiliates because the rate of return has already been set by the FERC.⁴ The statute requires that the Kentucky Commission not FERC set the rate of return on compliance related costs recovered through the surcharge. If the Commission is not able to engage in the necessary step of determining the reasonable rate of return on compliance related expenditures, then Kentucky Power’s proposed costs cannot be the subject of an environmental surcharge according to

⁴ Direct Testimony Errol K. Wagner p. 12 lines 6-10.

KRS 278.183.

CONCLUSION

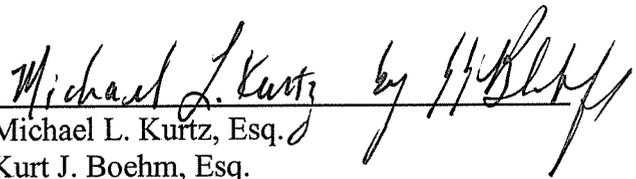
The Commission erred in holding that Kentucky Power's March 8, 2005 Application and subsequent testimony met the requirements of KRS 278.183. That statute does not allow Kentucky Power to recover by surcharge environmental costs incurred by utilities located outside of Kentucky at facilities over which the Commission has no jurisdiction.

Respectfully submitted,

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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 28th day of September, 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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A handwritten signature in black ink, appearing to read "Kevin F. Duffy", is written over a horizontal line.