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September 11, 2006

VIA HAND DELIVERY

RECEIVED

SEP 11 2006

PUBLIC SERVICE
COMMISSION

Elizabeth O'Donnell
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, KY 40601

Re: In the Matter of 271 West Main Street, LLC v. Kentucky Utilities Company
Case No. 2005-00389
Our File No.: 400001/124348

Dear Ms. O'Donnell:

Enclosed please find and accept for filing the original and ten (10) copies of Kentucky Utilities Company's Reply Memorandum 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 two additional copies provided and return them to me in the enclosed self-addressed stamped envelope.

Should you have any questions or need any additional information, please contact me at your convenience.

Very truly yours,


J. Gregory Cornett

JGC/cja
Enclosures
cc: Parties of Record

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

SEP 11 2006

PUBLIC SERVICE
COMMISSION

In the Matter of:

271 WEST MAIN STREET, LLC)	
)	
COMPLAINANT)	
v.)	CASE NO. 2005-00389
)	
KENTUCKY UTILITIES COMPANY)	
)	
DEFENDANT)	

REPLY MEMORANDUM OF KENTUCKY UTILITIES COMPANY

** ** *

This is an action by 271 West Main Street, LLC (“West Main LLC”) challenging Kentucky Utilities Company (“KU”)’s application of its LP Electric Rate Schedule for Large Power Service (“LP Tariff”). The service at issue is provided to the Court Yard Square building at 269 West Main Street, Lexington, Kentucky (the “Court Yard Square building”). On March 28, 2005, West Main LLC applied with KU for electric service to that building, and KU established a new account in the name of West Main LLC. Prior to that time, service to the Court Yard Square building was provided in the name of a different customer, under a different account number.¹

At issue here is whether the following language in KU’s LP Tariff applies to “grandfather” West Main LLC to take service under that tariff:

Customers with average single phase loads less than 200 KW receiving service under this rate schedule as of July 1, 2004, will continue to be served under this rate schedule.²

¹ See billing records attached as exhibits to the West Main LLC Complaint.

² That language was approved by the Commission for inclusion in KU’s LP Tariff in the June 30, 2004 final order in KU’s last base rate proceeding, Case No. 2003-00434.

Specifically, the issue presented is whether or not West Main LLC is covered by the term “customer” for purposes of this tariff provision.

KU contends that West Main LLC is not covered by the “grandfather clause” in the LP Tariff because it was not the account holder or entity receiving service at the Court Yard Square building, and thus was not the customer, on July 1, 2004, the trigger date under the clause. West Main LLC, however, contends that it is the property, and not the account holder or entity receiving service, which should be considered the customer. Accordingly, West Main LLC argues that it should be permitted to take service under the LP Tariff because the Court Yard Square building itself was served under the LP Tariff on July 1, 2004, albeit under a different account and customer name.

On July 21, 2006, the Commission entered an order in this matter directing the parties to file initial memoranda addressing the issues raised herein by August 7, 2006. KU filed a memorandum in compliance with that order, but no filing was made by West Main LLC. On August 22, 2006, the Commission entered another order permitting West Main LLC to file its memorandum on September 1, 2006, and allowing KU an opportunity to file a reply memorandum on September 11, 2006.

KU hereby submits its reply memorandum in compliance with the Commission’s August 22, 2006 Order. For all of the reasons set forth herein, West Main LLC’s Complaint should be dismissed without further proceedings.³

³ In the cover letter which accompanied the filing of its memorandum, West Main LLC requested an evidentiary hearing. However, the issues now before the Commission are legal issues which depend only on facts that are undisputed. No evidentiary hearing is necessary. This matter can and should be dismissed as a matter of law.

ARGUMENT

I. This Matter is Controlled by the Clear and Unambiguous Terms of KU's LP Tariff.

In its memorandum, West Main LLC contends that the term “customer” is intended to encompass “the Property and not the Property Owner.”⁴ In support of that argument, West Main LLC points to the provisions of 807 KAR 5:001, Section 10 which governs the requirements for filings seeking changes to existing rates.⁵ That regulation, however, does not define the term “customer.” Moreover, the references to “customer class” or “customer classification” in the regulation are simply made to notify a utility in a rate case that it must, as part of its filing, provide calculations for the extent of the proposed change by rate **class**. Of course, rate classes are those groups of customers – residential, commercial, industrial and the like – for which utility service is rendered. The reference to rate classes in 807 KAR 5:001, Section 10 is in no way instructive on whether a customer is the property served, as West Main LLC contends, or the person or entity applying for or receiving service, as KU contends. Accordingly, that regulation simply has no application here whatsoever.

As KU cited in its initial memorandum, however, there are numerous other Commission regulations which do expressly define the term “customer,” and it is quite telling that West Main has chosen to completely ignore those definitions in its memorandum. In each such instance where “customer” is defined by Commission regulation, the term is used to refer only to the person or entity applying for or receiving service from the utility, and does not include the

⁴ West Main LLC Memorandum, p. 3.

⁵ At page 6 of its Memorandum, West Main LLC also cites two statutes from Washington and South Dakota which it claims support its definition of customer. However, neither of those statutes actually define “customer.” The Washington statute deals with real estate boundaries and plats. While the South Dakota statute does involve utility issues, it does not define or limit the term “customer” to being only “customers at new locations,” as West Main LLC contends. Instead, the statute merely provides that “new customers at new locations” may qualify for a statutory exemption regarding choice of electric service providers. Indeed, if the South Dakota statute meant that “customer” was synonymous with “location,” then it would have been unnecessary to refer to both customer and location in that statute, and it would have sufficed to say only that “new locations” served as of a certain date could

physical property or location at which service is rendered. For example, in 807 KAR 5:006, customer is defined as “any person, firm, corporation or body politic applying for or receiving service from any utility.”⁶ The term is similarly defined in three other Commission regulations.⁷

It is the general rule that tariff provisions should be interpreted based upon the “ordinary meaning” of the language used therein.⁸ As set forth above, the Commission’s own regulations repeatedly define “customer” in terms of the person or entity applying for or receiving service, and not the physical building or location at which service is rendered. Similarly, Merriam-Webster defines “customer” as the “one that purchases a commodity or service.”⁹ Those definitions provide clear guidance on the ordinary meaning of “customer,” and West Main LLC has provided no evidence or authority to the contrary. Accordingly, that definition should be applied to KU’s LP Tariff.

Because West Main LLC was neither the applicant nor the entity receiving service at the Court Yard Square building on July 1, 2004, the “grandfathering clause” of the LP Tariff does not apply here. The fact that the occupants of the Court Yard Square building have purportedly remained unchanged since 2004 is of no consequence. Because it is West Main LLC who applied for and who bears financial responsibility for KU’s electric service, and who, as the owner of the building, receives the service at the meter, it is West Main LLC, and not its tenants, who is KU’s customer.¹⁰

be exempt from the statute. However, those two terms are not synonymous, and both were included in the statute because they have different meanings.

⁶ 807 KAR 5:006, Section 1 (2).

⁷ 807 KAR 5:041, Section 1 (3); 807 KAR 5:066, Section 1 (1); 807 KAR 5:071, Section 2 (3).

⁸ *Almond Tree Hulling Co. v. Pacific Gas and Electric Co.*, 2005 PUC Lexis 494 (Cal. PUC 2005). West Main LLC contends that the LP Tariff should be “construed against” KU as the drafter. However, the legal principle of construing a document against its drafter applies only in instances in which the language at issue is unclear or ambiguous. 64 Am.Jur.2d Public Utilities § 61 (2006). Here, there is no ambiguity in the LP Tariff, so there is no basis to apply that principle of construction. Moreover, that principle of construction does not in any event permit an interpretation that is contrary to the plain meaning of the language used, as is the West Main LLC’s definition.

⁹ Merriam-Webster Online Dictionary, <http://www.m-w.com/dictionary/customer>.

¹⁰ *See, e.g. Re: WST, Inc.*, 2005 WL 2952114 (Mo. PSC Order of October 19, 2005) and *PUC Rulemaking to Revise Customer Protection Rules*, 2004 WL 1123872 (Tex. PUC Order of April 29, 2004) (both recognizing that in the

The language of KU's LP Tariff is clear and unambiguous, and it is being applied by KU as it was intended and in a manner that is fully consistent with the ordinary meaning of the language used therein. That tariff, like any other, must be enforced as written.¹¹ Accordingly, West Main LLC has failed to state a claim upon which relief can be granted, and its Complaint should be dismissed.

II. "Grandfather Clauses" in the Utility Rate Context are Generally Applied Only to the Customer and not the Location of Service.

West Main LLC tries to avoid the application of the plain language of the LP Tariff by claiming that "'grandfather clauses' are traditionally applied to the service location and not the customer in the utility rate context."¹² In support of that argument, West Main LLC relies heavily upon the *Pasco* case.¹³ However, that case had nothing to do with the interpretation or application of a utility tariff, or even with the application of "grandfather clauses" in general, and is entirely distinguishable from the situation at hand.

Pasco involved a federal court action by a gasoline retailer against its supplier for alleged violations of federal laws. The case held, in relevant part, that a successor to a gasoline supply company could not be considered "new customers" for purposes of allocating shares of rationed gasoline supplies. However, that holding was based upon express wording in the controlling federal regulation which provided that a change in ownership of a supplier did not cause that supplier to be deemed a new customer under the regulation.¹⁴ There is no such regulatory

situation where a building has multiple tenants but one meter for utility service, it is the building's owner who is the utility's customer).

¹¹ *In the Matter of: Shawn and Katherine Gillen v. Kentucky Utilities Co.*, Case No. 2005-00062 (PSC Order of April 12, 2006). Indeed, that case recognizes that a filed rate must be enforced even where there might have been negligence by the utility. Thus, even though West Main LLC tries to imply that KU should have done something differently to affirmatively advise it of the rate change at the time the application for service was made, a claim which KU very much disputes, the LP Tariff must still be enforced as written.

¹² West Main LLC's Memorandum, p. 4.

¹³ 373 F.Supp. 1312 (D. Az. 1974)

¹⁴ *Id.* at 1319 (applying 10 C.F.R.

provision here. To the contrary, as set forth above, all definitions of “customer” in the Commission’s regulations, and in common usage, support KU’s position. For those reasons, *Pasco* is not applicable here.

West Main LLC similarly cites to cases in the zoning context, where “grandfather clauses” have in some instances been applied on a property-specific basis. Of course, zoning regulations of all kinds typically apply on a property-specific basis. Utility tariffs, on the other hand, are typically customer-specific. Because the two situations are entirely different, both factually and legally, cases in the zoning context also have no application here.

Although they are ignored by West Main LLC, there are cases in the utility context which involve the application of “grandfather clauses.” Specifically, KU cited three such cases in its initial memorandum. In those cases, other state commissions held, in the utility context, that “grandfather clauses” should be applied in a customer-specific, rather than property-specific, manner.¹⁵

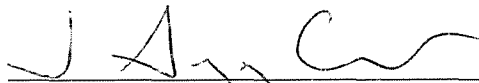
To the extent the Commission chooses to look beyond the language of KU’s LP Tariff to determine the proper construction of “grandfather clauses” in general, the only applicable authority in that regard are the cases cited by KU, in which other state commissions have applied such clauses in utility tariffs in the same way that KU has applied its LP Tariff here. For that additional reason, West Main LLC has failed to set forth a claim upon which relief can be granted, and its Complaint should be dismissed.

¹⁵ *In the Matter of the Application of AT&T Communications of California, Inc.*, 1990 Cal. PUC Lexis (Cal. PUC 1990); *Investigation of Proposed Changes to Electric and Steam Rates, Public Service Company of Colorado*, 1996 Colo. PUC Lexis 348 (Colo. PUC 1996); *In re: Georgia Power Company’s Application for Interruptible Service Options*, 2001 Ga. PUC Lexis 61 (Ga. PUC 2001).

CONCLUSION

For all of the reasons set forth above, KU's LP Tariff has been appropriately interpreted and applied as it relates to West Main LLC, and this matter should be dismissed without further proceedings.

Respectfully submitted,



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CERTIFICATE OF SERVICE

It is certified that a true and correct copy of the foregoing was served via U. S. Mail, postage prepaid, this 11th day of September, 2006 upon:

Preston Cecil
Robert Bullock
BULLOCK & COFFMAN
101 St. Clair Street
Frankfort, KY 40601
Counsel for Complainant


Counsel for Kentucky Utilities Company