

RECEIVED

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

MAY 24 2017

PUBLIC SERVICE
COMMISSION

IN THE MATTER OF:

AN INVESTIGATION OF THE GAS COSTS OF B&H)
GAS COMPANY PURSUANT TO KRS 278.2207 AND)
THE WHOLESALE GAS PRICE IT IS CHARGED BY)
ITS AFFILIATE, B&S OIL AND GAS COMPANY,)
PURSUANT TO KRS 278.274)

CASE NO.
2015-00367

MOTION FOR REHEARING

Comes now B&H Gas Company (“B&H”) and B&S Oil and Gas Company, (“B&S”), by counsel, pursuant to KRS 278.400 and other applicable law, and for its Motion requesting that the Commission grant rehearing of its Order entered herein on May 4, 2017 (the “Order”), respectfully states as follows:

Introduction

Pursuant to KRS 278.2207, the Commission established this case on November 24, 2015, to review and evaluate the gas costs of B&H and the wholesale gas price B&H is charged by its affiliate B&S.¹ Multiple rounds of discovery were conducted and an evidentiary hearing was held in this matter prior to the Order being entered in this case. In the Order, the Commission developed a formula for B&H to use for its Gas Cost Adjustment (“GCA”) filings and also ordered B&H to file GCAs quarterly beginning September 1, 2017. Pursuant to the ultimate formula developed by the Commission, it ordered an amount of \$101,876 to be refunded to B&H customers from B&H and also for B&S to refund this sum to B&H.

¹ In the Order establishing this case, at page 6, paragraph 3, the Commission directed B&H to “collect the GCA component of its rates subject to refund effective for bills rendered after the date of this Order until further Commission Order.” The Commission’s Order cited nothing to support its authority to require B&H to collect sums “subject to refund.”

Discussion

Pursuant to KRS 278.274, the Commission has the authority to review the wholesale gas price charged to B&H from its affiliate B&S to determine if the price is reasonable. Pursuant to KRS 278.270, if the Commission determines that a rate is not reasonable, it can prescribe a reasonable rate to be followed **in the future**. However, there is no statutory authority for the Commission to retroactively set a reasonable rate and require B&H to refund to its customers the difference between the tariffed rate and the new rate set by the Commission, nor for B&S to refund that same amount to B&H. This action by the Commission constitutes unlawful retroactive rate-making.

In Cincinnati Bell Telephone Company vs. Kentucky Public Service Commission, 223 S.W. 3d, 829 (Ky. Ct. App., 2007), the Court of Appeals held that the Commission could not retroactively require telephone carriers to refund sums that exceeded the proper rate prescribed by the Federal Communications Commission (“FCC”) in a 2002 Order. In the FCC Order, the telephone carriers were not required to seek adjustment of their filed rates on their own, but instead they were to await action by the state commissions. The telephone carriers had been charging the rate that had been approved by the Commission in 1999 and which was the “filed rate” and, under KRS 278.270, that rate could not be altered retroactively by the PSC. The Court went on to state that the filed rate doctrine “in essence stands for the proposition that when the legislature has established a comprehensive ratemaking scheme, the filed rate defines the legal relationship between the regulated utility and its customer with respect to the rate that the customer is obligated to pay and the utility is authorized to collect.”²

² *Id.* at 837.

The Court of Appeals cited several statutes in support of its decision in the *Cincinnati Bell* case, including KRS 278.160, KRS 278.390, KRS 278.270 (discussed above) and KRS 278.190. KRS 278.160 governs the rates that can be charged by a utility and states in part that no utility shall charge... any person a greater or less compensation for any service rendered... than that prescribed in its filed schedules. KRS 278.390 provides in part that every order entered by the Commission remains in force until the expiration of the time, if any, named by the Commission in the order, or until revoked or modified by the Commission. KRS 278.190 governs rate changes **initiated by a public utility** and is the only statute that allows the Commission to suspend the proposed tariffs and, if an order has not been entered during the suspension period, the proposed rates can be placed into effect by the utility, subject to refund if the Commission approves a different rate than the one proposed.

The Commission has cited the *Cincinnati Bell* case in other cases. In Case No. 2014-00025, the Commission quoted the *Cincinnati Bell* case stating:

In light of the General Assembly's comprehensive ratemaking scheme, including only a narrowly defined circumstance under which refunds can be ordered, the filed rate can only be lawfully altered prospectively. Under the requirements of the statute the rate the PSC authorized BellSouth to charge payphone service providers remained in full force and effect until the Commission modified it by its order of May 2003. Consequently, as a matter of law, BellSouth was never overpaid; no credits accrued; and no refunds were owed.³

The Commission went on to say in Case No. 2014-00025 that “[t]he Court of Appeals was clear that changes in rates could only be made prospectively and that no refunds were due prior to entry of the Commission’s Order changing the rates charged to payphone service providers. The

³ *In the Matter of Kentucky Cable Telecommunications Association vs. Louisville Gas & Electric Company and Kentucky Utilities Company*, Order, Case No. 2014-00025, p. 8 (Ky. P.S.C., March 27, 2015).

same limitation applies to this case, and assuming the Commission were to find the current pole attachment rates charged by LG&E and KU to be unreasonable, KCTA would be entitled only to relief on a prospective basis.”⁴ Furthermore, The Kentucky Court of Appeals and the United States Supreme Court have recognized and affirmed the filed rate doctrine.⁵

The rate charged by B&H to its retail customers was the tariffed rate on file with the Commission. Furthermore, B&H’s tariff did not require it to file quarterly GCAs, but instead only required B&H to file a GCA when the cost of gas from its wholesale providers changed. That rate had not been changed since 2008 and therefore no GCA was required to be filed by B&H. B&H’s tariff was not suspended by the Commission and based on the filed rate doctrine and the prohibition against retroactive ratemaking, the Commission did not have the authority to require B&H or B&S to go back sixteen months to issue refunds to customers.

In addition to the arguments set forth above, B&S argues that there was also sufficient evidence in the record of this proceeding to support a finding of a greater gas cost to be charged to B&H, based on the costs incurred by B&S in producing and providing the gas to B&H. Attached to this petition is a list of invoices included in the record of this proceeding for operation, maintenance and repair work performed by Bud Rife Construction for B&S. Also listed are invoices for the lease of the truck used by B&S paid to Bud Rife Construction. Based on just these invoices, the allowable gas cost would be higher than the amount ordered by the Commission in this case. In addition to these invoices, there are other items in the record of this proceeding, such

⁴ *Id.* at. p. 9.

⁵ *See, Boone County Sand and Gravel Company, Inc. v. Owen County Rural Electric Cooperative Corporation*, 779 S.W. 2d 224 (Ky. App., 1989) (holding that the appellant was not liable for undercharges to a customer based upon the filed rate despite the appellee’s apparent negligence in failing to charge the correct amount); *Keogh v. Chicago & Northwestern Railroad*, 260 U.S. 156 (1922) (finding that even if an alleged conspiracy occurred, the shipper had no cause of action for damages since the allegedly excessive rates had been approved by the Interstate Commerce Commission which had determined them to be reasonable and non-discriminatory).

as electric service provided on B&S accounts, fuel purchases, insurance costs for the wells, etc., that would support an even higher gas cost price. Therefore, B&S argues that the rate entered by the Commission in its May 4, 2017 Order is not a reasonable rate based on the costs associated with B&S producing, transporting and providing gas to B&H for ultimate consumption by B&H's retail customers.

Conclusion

There is no statutory authority for the Commission to be able to require B&H or B&S to issue retroactive refunds to customers of rates on file and approved by the Commission. The Commission cannot retroactively apply a rate change when the rate that had been charged was the filed rate with the Commission. Multiple courts have recognized and upheld the filed rate doctrine. Pursuant to Kentucky statutes, the Commission should be guided by the rule of law and can only change the existing filed rate on a prospective basis.

WHEREFORE, on the basis of the foregoing, B&H and B&S respectfully request that this Motion for Rehearing be granted and the Commission reconsider and amend its Order.

This 24th day of May, 2017.

Respectfully submitted,



Mark David Goss
L. Allyson Honaker
GOSS SAMFORD, PLLC
2365 Harrodsburg Road, Suite B325
Lexington, KY 40504
(859) 368-7740
mdgoss@gosssamfordlaw.com
allyson@gosssamfordlaw.com

Counsel for B&H Gas Company and B&S Oil and Gas Company

CERTIFICATE OF SERVICE

This is the certify that a true and correct copy of the foregoing Petition for Rehearing was placed in the U.S. Mail, postage prepaid, on the 24th day of May, 2017, addressed to the following:

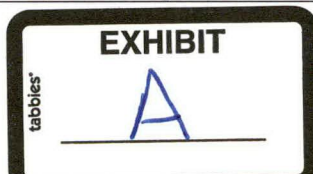
Hon. Rebecca W. Goodman
Hon. Larry Cook
Kentucky Attorney General's Office
700 Capitol Avenue
Suite 20
Frankfort, Kentucky 40601

A handwritten signature in blue ink, appearing to read "David D. Lou", written over a horizontal line.

Counsel for B&H Gas Company and B&S Oil & Gas Company

**B&S Gas, Invoices from Bud Rife Construction
January 1, 2015 – September 1, 2016**

Invoice No.	Date	Description	Amount
014	1/1/2015	Truck	775.80
015	2/1/2015	Truck	775.80
016	3/1/2015	Truck	775.80
017	4/1/2015	Truck	775.80
018	5/1/2015	Truck	775.80
019	6/1/2015	Truck	775.80
020	7/1/2015	Truck	775.80
021	8/1/2015	Truck	775.80
022	9/1/2015	Truck	775.80
023	10/1/2015	Truck	775.80
024	11/1/2015	Truck	775.80
025	12/1/2015	Truck	775.80
040	1/1/2016	Truck	775.80
041	2/1/2016	Truck	775.80
042	3/1/2016	Truck	775.80
043	4/1/2016	Truck	775.80
044	5/1/2016	Truck	775.80
045	6/1/2016	Truck	775.80
046	7/1/2016	Truck	775.80
047	8/1/2016	Truck	775.80
048	9/1/2016	Truck	775.80
123	1/1/2015	Forman & 1 man; Blow drips and methanol and keep check on; pressure 4 hrs per day; 01/01/15-01/31/15	8,680.00
129	2/2/2015	Forman & 1 man; Blow drips and methanol and keep check on; pressure 4 hrs per day; 02/01/15-02/28/15	7,840.00
131	3/2/2015	Forman & 1 man; Blow drips and methanol and keep check on; pressure 4 hrs per day; 03/01/15-03/31/15	8,680.00
134	4/1/2015	Forman & 1 man; Blow drips and methanol; 04/01/15	140.00
136	5/1/2015	Forman & 1 man; Blow drips and methanol; 05/01/15	140.00
139	6/1/2015	Forman & 1 man; Blow drips and weed eat; 06/01/15	140.00
140	7/1/2015	Forman & 1 man; Blow drips and weed eat; 07/01/15	140.00
145	8/3/2015	Forman & 1 man; Blow drips and weed eat; 08/03/15	140.00
146	9/1/2015	Forman & 1 man; Blow drips and weed eat; 09/01/15	140.00
149	10/1/2015	Forman & 1 man; Blow drips and methanol and check pressure 4 hrs per day; 10/01/15-10/31/15	8,680.00
150	11/2/2015	Forman & 1 man; Blow drips and methanol and check pressure 4 hrs per day; 11/01/15-11/30/15	8,400.00
152	12/1/2015	Forman & 1 man; Blow drips and methanol and check pressure 4 hrs per day; 12/01/15-12/31/15	8,680.00
155	1/1/2016	Forman & 1 man; Blow drips and methanol and check pressure 4 hrs per day; 01/01/16-01/31/16	8,680.00
156	2/1/2016	Forman & 1 man; Blow drips and methanol and check pressure 4 hrs per day; 02/01/16-02/29/16	8,120.00
159	3/1/2016	Forman & 1 man; Blow drips and methanol and check pressure 4 hrs per day; 03/01/16-03/31/16	8,680.00
162	4/1/2016	Forman & 1 man; Blow drips and weed eat; 04/01/16	140.00
167	5/2/2016	Forman & 1 man; Blow drips and weed eat; 05/01/16	140.00



**B&S Gas, Invoices from Bud Rife Construction
January 1, 2015 – September 1, 2016**

169	6/1/2016	Forman & 1 man; Blow drips and weed eat; 06/01/16	140.00
170	7/1/2016	Forman & 1 man; Blow drips and weed eat; 07/01/16	140.00
174	8/10/2015	Forman & 1 man; Blow drips and weed eat	140.00
175	8/11/2015	Forman & 1 man; Blow drips and weed eat	140.00
177	9/1/2016	Forman & 1 man; Blow drips and weed eat; 09/01/2016	140.00
201	6/1/2015	Bobcat Skid Steer Loader; MOVE ROCK DOWNHILL AT BETSY LAYNE WELL	480.00
207	6/6/2015	Bobcat Skid Steer Loader; WORK AT BETSY LAYNE WELL	480.00
208	6/7/2015	Bobcat Skid Steer Loader; WORK AT BETSY LAYNE WELL	480.00
209	6/8/2015	Bobcat Skid Steer Loader; WORK AT BETSY LAYNE WELL	480.00
210	6/8/2015	Mack Crane Truck; WORK ON IVEL WELL PUT SUCKER CUPS IN; FOREMAN & 3 MEN	1,680.00
217	6/9/2015	Mack Crane Truck; WORK ON IVEL WELL PUT INSTALLING NEW PUMP AND SUCKER RODS; FOREMAN & 3 MEN	1,680.00
218	6/9/2015	Bobcat Skid Steer Loader; WORK AT BETSY LAYNE WELL	480.00
227	6/10/2015	Mack Crane Truck; HOOK UP STUFF IVEL WELL; FOREMAN & 3 MEN	1,680.00
228	6/11/2015	Mack Crane Truck; FINISH HOOK UP STUFF IVEL WELL AND OIL TANK; FOREMAN & 3 MEN	1,680.00
231	6/13/2015	Bobcat Skid Steer Loader; HAUL DIRT DOWN HILL BETSY LAYNE WELL	480.00
233	6/15/2015	Bobcat Skid Steer Loader; HAUL DIRT DOWN HILL BETSY LAYNE WELL	480.00
239	6/20/2015	Bobcat Skid Steer Loader; HAUL IN DIRT BETSY LAYNE WELL; International Dump Truck (9 Yard Bed); PC 120 KOMATSU EXCAVATOR	1,720.00
240	6/21/2015	Bobcat Skid Steer Loader; HAUL IN DIRT BETSY LAYNE WELL; International Dump Truck (9 Yard Bed); PC 120 KOMATSU EXCAVATOR	1,720.00
241	6/22/2015	Bobcat Skid Steer Loader; HAUL IN DIRT BETSY LAYNE WELL; International Dump Truck (9 Yard Bed); PC 120 KOMATSU EXCAVATOR	1,720.00
243	6/23/2015	Bobcat Skid Steer Loader; HAUL IN DIRT BETSY LAYNE WELL; International Dump Truck (9 Yard Bed); PC 120 KOMATSU EXCAVATOR	1,720.00
244	6/24/2015	Bobcat Skid Steer Loader; HAUL IN DIRT BETSY LAYNE WELL; International Dump Truck (9 Yard Bed); PC 120 KOMATSU EXCAVATOR	1,720.00
251	7/13/2015	Bobcat Skid Steer Loader; HAUL IN DIRT BETSY LAYNE WELL; International Dump Truck (9 Yard Bed); PC 88 KOMATSU EXCAVATOR	1,680.00
252	7/14/2015	Bobcat Skid Steer Loader; HAUL IN DIRT BETSY LAYNE WELL; International Dump Truck (9 Yard Bed); PC 88 KOMATSU EXCAVATOR	1,680.00
253	7/15/2015	Bobcat Skid Steer Loader; HAUL IN DIRT BETSY LAYNE WELL; International Dump Truck (9 Yard Bed); PC 88 KOMATSU EXCAVATOR	1,680.00
254	7/16/2015	Bobcat Skid Steer Loader; HAUL IN DIRT BETSY LAYNE WELL; International Dump Truck (9 Yard Bed); PC 88 KOMATSU EXCAVATOR	1,680.00
255	7/17/2015	Bobcat Skid Steer Loader; HAUL IN DIRT BETSY LAYNE WELL; International Dump Truck (9 Yard Bed); PC 88 KOMATSU EXCAVATOR	1,680.00
261	8/31/2015	Mack Crane Truck; WORK ON IVEL WELL AND REPLACE ELECTRIC MOTOR; FOREMAN & 3 MEN	1,680.00

**B&S Gas, Invoices from Bud Rife Construction
January 1, 2015 – September 1, 2016**

287	10/5/2015	FOREMAN & 4 MEN; TRAM WELL OPERATOR; PC 35 KOMATSU EXCAVATOR; LORAIN 20 TON CRANE	3,760.00
288	10/6/2015	FOREMAN & 4 MEN; REMOVE WELL HEADS AND PARTS; LORAIN 20 TON CRANE	3,280.00
289	10/7/2015	FOREMAN & 4 MEN; MEN START PULLING SUCKER RODS; LORAIN 20 TON CRANE	3,280.00
290	10/8/2015	FOREMAN & 4 MEN; MEN START PULLING TUBING; LORAIN 20 TON CRANE	3,280.00
291	10/9/2015	FOREMAN & 4 MEN; CLEAN UP TUBING AND GET PACKER READY; LORAIN 20 TON CRANE; PC 35 KOMATSU EXCAVATOR	3,760.00
295	10/12/2015	FOREMAN & 4 MEN; START SETTING TUBING; LORAIN 20 TON CRANE	3,280.00
296	10/13/2015	FOREMAN & 4 MEN; START SETTING SUCKER RODS; LORAIN 20 TON CRANE	3,280.00
297	10/14/2015	FOREMAN & 4 MEN; HOOK EVERYTHING UP IN WELL; LORAIN 20 TON CRANE; PC 35 KOMATSU EXCAVATOR	3,760.00
297	10/15/2015	FOREMAN & 4 MEN; HOOK GAS TO WELL AND INSTALL FITTINGS; PC 35 KOMATSU EXCAVATOR	1,760.00
299	10/16/2015	FOREMAN & 4 MEN; HAUL EVERYTHING AND CLEAN UP	1,280.00
307	11/3/2015	PC 88 KOMATSU EXCAVATOR; International Dump Truck (9 Yard Bed); Bobcat Skid Steer Loader	1,680.00
308	11/4/2015	PC 88 KOMATSU EXCAVATOR; International Dump Truck (9 Yard Bed); Bobcat Skid Steer Loader	1,680.00
309	11/5/2015	PC 88 KOMATSU EXCAVATOR; International Dump Truck (9 Yard Bed); Bobcat Skid Steer Loader	1,680.00
310	11/6/2015	PC 88 KOMATSU EXCAVATOR; International Dump Truck (9 Yard Bed); Bobcat Skid Steer Loader	1,680.00
317	11/10/2015	PC 88 KOMATSU EXCAVATOR; FILL WHERE WASHED OUT; International Dump Truck (9 Yard Bed); Bobcat Skid Steer Loader	2,100.00
318	11/11/2015	PC 88 KOMATSU EXCAVATOR; FILL WHERE WELL WASHED OUT; International Dump Truck (9 Yard Bed); Bobcat Skid Steer Loader	2,100.00
320	11/12/2015	PC 88 KOMATSU EXCAVATOR; HAUL AND FILL IN AT WELL; International Dump Truck (9 Yard Bed); Bobcat Skid Steer Loader	2,100.00
321	11/13/2015	PC 88 KOMATSU EXCAVATOR; HAUL AND FILL IN AT WELL; International Dump Truck (9 Yard Bed); Bobcat Skid Steer Loader	2,100.00
322	11/14/2015	PC 88 KOMATSU EXCAVATOR; FINISH FILL IN AT WELL; International Dump Truck (9 Yard Bed); Bobcat Skid Steer Loader	1,680.00
329	12/4/2015	PC 88 KOMATSU EXCAVATOR; International Dump Truck (9 Yard Bed); Bobcat Skid Steer Loader	1,680.00
342	1/11/2016	FOREMAN & 1 MAN; WELD ON TANKS AND METHANOL	280.00
343	1/12/2016	FOREMAN & 1 MAN; WELD ON TANKS AND METHANOL	280.00
344	1/13/2016	FOREMAN & 1 MAN; WELD ON TANKS AND METHANOL	280.00
345	1/14/2016	FOREMAN & 1 MAN; WELD ON TANKS AND METHANOL	280.00
349	1/19/2016	FOREMAN & 2 MEN; THAW TRAM WELL	800.00
356	1/26/2016	FOREMAN & 2 MEN; WORK ON TRAM WELL	800.00
361	2/9/2016	PC 88 KOMATSU EXCAVATOR; HAUL DIRT TO WELL; Bobcat Skid Steer Loader; International Dump Truck (9 Yard Bed)	2,100.00
378	4/5/2016	FOREMAN & 1 MAN; COLLECT SAMPLES	560.00
379	4/6/2016	FOREMAN & 1 MAN; COLLECT SAMPLES	560.00
619	2/20/2015	WELLS FROZE OFF; FOREMAN & 4 MEN	1,280.00

B&S Gas, Invoices from Bud Rife Construction
January 1, 2015 – September 1, 2016

647	4/1/2015	LABOR 1 MAN; WEED EAT WELLS AND ROADS; 4/1/15-4/30/15	2,400.00
651	5/1/2015	LABOR 1 MAN; WEED EAT WELLS AND ROADS; 5/1/15-5/31/15	2,400.00
656	6/1/2015	LABOR 1 MAN; WEED EAT WELLS AND ROADS; 6/1/15-6/30/15	2,400.00
663	7/1/2015	LABOR 1 MAN; WEED EAT WELLS AND ROADS; 7/1/15-7/31/15	2,400.00
708	8/1/2015	LABOR 1 MAN; WEED EAT WELLS AND ROADS; 8/1/15-8/31/15	2,400.00
739	9/1/2015	LABOR 1 MAN; WEED EAT WELLS AND ROADS; 9/1/15-9/30/15	2,400.00

TOTAL: \$194,131.80