

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

GREEN RIVER ELECTRIC CORPORATION)
APPLICATION FOR AN ORDER APPROVING) CASE NO.
PROPOSED RESOLUTION OF UNDERBILLING TO) 10205
TOWN AND COUNTRY MOBILE HOME PARK)

O R D E R

On June 6, 1989, the Commission denied the application of Green River Electric Corporation ("Green River") for approval of an agreement between Green River and Charles R. Whitaker, owner of Town & Country Mobile Home Park ("Town & Country"). Under the terms of that agreement, Green River would accept a lump sum payment of \$52,344 in satisfaction of all unbilled electricity received by Town & Country prior to September 1, 1988. Finding that Town & Country had received unbilled electricity from Green River worth well in excess of \$52,343, the Commission held that the agreement was contrary to KRS 278.160(2)¹ and 278.170(1)² and rejected it.

¹ No utility shall charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed schedules, and no person shall receive any service from any utility for a compensation greater or less than that prescribed in such schedules.

² No utility shall, as to rates or service, give any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage, or establish or maintain any unreasonable difference between localities or between classes of service for doing a like and contemporaneous service under the same or substantially the same conditions.

Mr. Whitaker and Green River have moved for reconsideration of that Order. Contending that the Commission erred in finding the agreement contrary to law, Mr. Whitaker asks that the Order of June 6 be vacated and the agreement approved. While not contesting the Commission's findings concerning the agreement, Green River requests that the Commission consider whether Commission review of such agreements is necessary. It asks the Commission to find that Commission approval of such agreements is not required and to dismiss this case. Both parties have submitted memorandum in support of their motions.

In his memorandum, Mr. Whitaker argues that neither KRS 278.160(2) nor KRS 278.170(1) pose an obstacle to Commission approval of the settlement agreement. He contends that KRS 278.160(2), which prohibits utilities from charging rates which differ from those contained in their filed rate schedules, "precludes bilateral agreement between a utility and customer."³ It does not, however, proscribe the Commission from authorizing a utility to charge a different rate than contained in its filed schedules by approving such agreements. The Commission may take such action, Mr. Whitaker asserts, because it has the inherent authority in "rate cases" to approve settlement agreements if they are reasonable and in the public interest.

The agreement before the Commission is, in Mr. Whitaker's opinion, reasonable and in the public interest. He lacks the

³ Memorandum of Whitaker, 1.

financial resources to pay the full amount of the underbilling. His financial resources were severely strained in his effort to obtain the settlement sum. If required to pay additional amounts, Mr. Whitaker states that he will seek relief under federal bankruptcy laws. In such an event, Green River as a general creditor would receive little, if any, compensation for the unbilled service. Mr. Whitaker submits that the agreement, therefore, is reasonable because it will permit recovery of the unbilled amount.

As to KRS 278.170(1), Mr. Whitaker maintains that this statute prohibits utilities from granting only unreasonable preferences or advantages in utility rates. In support of this contention, he cites Consolidated Edison of N.Y. v. Arroll,⁴ and Jacksonville Electric Authority v. Draper's Egg and Poultry Co.,⁵ which hold that settlements over disputed utility bills in which the utility receives less compensation than required by its filed rate schedules are not contrary to statutes prohibiting a utility from granting an undue preference or advantage in rates.

The Commission is not persuaded by Mr. Whitaker's arguments. "The Public Service Commission's powers are purely statutory; like other administrative boards and agencies, it has only such

⁴ 522 N.Y.S. 420 (Misc.2d 1971).

⁵ 531 So.2d 371 (Fla. Dis. Ct. App. 1988).

powers as are conferred expressly or by necessary or fair implication."⁶ The statutes do not expressly confer upon the Commission any authority to authorize a utility to accept less compensation for service than prescribed in its filed rate schedules. Furthermore, the Commission has the statutory duty to enforce the provisions of KRS Chapter 278.⁷ To sanction and approve an act which is expressly prohibited by KRS Chapter 278 is inconsistent with and contrary to that duty. It cannot, therefore, be considered a power conferred upon the Commission by implication.

Mr. Whitaker has also failed to show that the preference granted by the agreement is reasonable and, therefore, is not in conflict with KRS 278.170(1). This Commission is aware of no instance where a utility regulatory commission has granted a preference to an individual member of a large customer class solely because that customer is unable to pay his debts. A majority of jurisdictions, including Kentucky, have held that settlement agreements such as the agreement at bar violate anti-discrimination statutes.⁸ In contrast, the holdings in

⁶ Croke v. Pub. Serv. Comm'n, 573 S.W.2d 927, 929 (Ky. Ct. App. 1978).

⁷ KRS 278.040(1).

⁸ See Boone County Sand and Gravel Co. v. Owen County RECC, 779 S.W.2d 224 (Ky. Ct. App. 1989); Slegal v. City of Detroit, 362 N.W.2d 886 (Mich. Ct. App. 1985).

Consolidated Edison and Jacksonville Electric Authority have been virtually ignored, even in the states where those decisions were rendered.⁹ Accordingly, we afford them very little weight.

Green River takes a different approach in addressing this issue. It does not contest the Commission's findings that the settlement agreement is contrary to KRS 278.160(2) and 278.170(1). Instead it maintains that Commission approval of the agreement is not required. Debt collection, Green River asserts, is a managerial function. As a general rule, regulatory agencies will not interfere in managerial functions "unless there is a very clear and convincing evidence that the management's policies are inefficient or otherwise substantially detrimental to the interests of the consuming public."¹⁰ Inasmuch as the parties contend that the largest amount which can be obtained from Mr. Whitaker is \$52,343, it necessarily follows that a settlement for \$52,343 is both reasonable and in the public interest and that intrusion by the Commission into this process is not warranted.

Green River proposes the following: It and Mr. Whitaker will stipulate to the amount of the unbilled service. Based on this stipulation, the Commission may issue an Order determining the amount of unbilled service received by Mr. Whitaker and allowing

⁹ See, e.g. Consolidated Edison Co. of New York v. Jet Asphalt Corp., 522 N.Y.S. 124 (N.Y. App. Div. 1987); Corp. De Gestion Ste-Foy, Inc. v. Florida Light & Power Co., 385 So.2d 124 (Fla. Dist. Ct. App. 1980).

¹⁰ Memorandum of Green River, 4 (quoting Re Kentucky Utilities Co., 22 PUR3d 113, 120 (Ky. P.S.C. 1958)).

Green River to collect that amount in accordance with its normal debt collection practices. The Commission need not prescribe the collection method to be used.

The Commission readily concedes that a utility's debt collection practices are primarily managerial concerns. The exact manner or method in which a debt is collected is not within a utility regulatory commission's prerogative. As the United States Supreme Court has declared, "[W]hile the state may regulate, with the power to enforce reasonable rates and services, it is not clothed with the general power of management incident to ownership."¹¹ Accordingly, if the parties stipulate to the amount owed for the unbilled service, if that stipulated amount is adequately supported by the case record, and if Green River wishes to withdraw its application for imposition of a surcharge on Town & Country's bill and employ other means to collect the unbilled amount, the Commission finds that no reason would exist to continue this case and that it should be dismissed.

Such action is neither inconsistent with nor contrary to the findings of the Commission's previous Order. The Commission cannot approve an agreement which requires a utility to accept less compensation for service than that prescribed in its filed rate schedules. Such approval is contrary to the Commission's statutory duty to enforce the provisions of KRS Chapter 278. Any

¹¹ Missouri v. Southwestern Bell Tel. Co., 262 U.S. 276, 289 (1923).

Order accepting or approving such agreement would be contrary to law. The statutes do not, however, specify the method or manner in which a debt for utility service should be collected, only that the debt be collected.

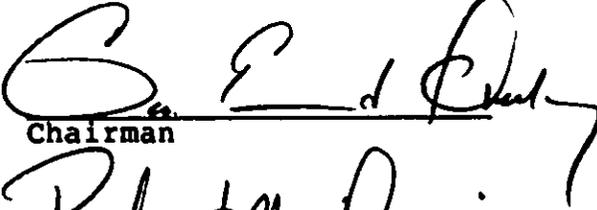
The Commission cautions Green River that, should this case be dismissed, its duty to collect the unbilled amount owed by Mr. Whitaker will remain. KRS 278.160(2) states that: "[n]o utility shall. . .collect. . .from any person a greater or less compensation for any service rendered. . .than that prescribed in its filed schedules. . . . (emphasis added)" The Commission interprets this statute to require a utility to exercise all reasonable efforts to collect the full amounts due for service rendered. Green River's failure to exercise such efforts will subject it to a penalty under KRS 278.990.

IT IS THEREFORE ORDERED that:

1. Mr. Whitaker's motion for reconsideration is denied.
2. Green River's motion for reconsideration is granted.
3. Green River shall have 20 days from the date of this Order in which to submit a joint stipulation on the amount of unbilled electricity received by Town & Country between January 1, 1979 and August 31, 1988 and to submit a motion for dismissal. If these pleadings are not received within that time period, a hearing in this matter shall be scheduled.

Done at Frankfort, Kentucky, this 19th day of January, 1990.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman

Commissioner

ATTEST:



Executive Director