COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN INVESTIGATION OF ELECTRIC RATES OF LOUISVILLE GAS AND ELECTRIC COMPANY TO IMPLEMENT A 25 PERCENT DISALLOWANCE OF TRIMBLE COUNTY UNIT NO. 1	))))	CASE NO. 10320

O R D E R

This matter having arisen upon the Commission's own motion and upon the Franklin Circuit Court's Order in Civil Action Nos. 89-CI-1783, 89-CI-1784, and 89-CI-1608 entered on September 27, 1991 directing a remand and mandatorily enjoining the Commission to take certain action. A copy of the Court's September 27, 1991 Order is attached as Appendix A and incorporated herein.

The Franklin Circuit Court Order mandatorily enjoins the Commission as follows:

> a. the Commission shall forthwith determine the amount of monies realized by LG&E in the recent sale of the one-half portion of the disallowed capacity of the Trimble County plant to a third party. The Commission shall immediately thereafter order a rebate of these monies with interest to the ratepayers and establish rates to effect this rebate.
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> b. the Commission shall forthwith order the refund of monies collected by LG&E subject to refund under Case No. 10064 with interest less $11 million and establish rates to effect this refund.
>
> c. the Commission shall determine pursuant to statute and Constitutional due process the remaining benefits due the ratepayers of LG&E from the reduced revenue requirements if LG&E sold an additional 12 1/2 percent joint ownership interest in Trimble County less the monies collected subject to refund under Case No. 10064 and now ordered refunded by this Court. The

Commission shall then set rates to effect the additional rebate.

IT IS THEREFORE ORDERED that:

1. LG&E shall file with the Commission by January 7, 1992 all documentation indicating the amount of money realized by LG&E in the recent sale of the one-half portion of the disallowed capacity of the Trimble County plant to a third party including but not limited to the purchase sale agreement and all other related written documents. All other parties shall file comments, if any, or related documentation with the Commission by January 23, 1992.

2. All parties shall file with the Commission by January 7, 1992 responses to the following questions:

a. How should the rates to be established to effect the rebate/refund ordered in paragraph (a) and (b) of the above-mentioned Court's Order be structured?

b. Over what period of time should the rebate/refunds ordered in paragraph (a) and (b) of the above-mentioned Court's Order be made?

c. What rate of interest should apply to the rebate/refunds ordered in paragraph (a) and (b) of the above-mentioned Court's Order?

3. All documents and information required in ordering paragraphs 1 and 2 above shall be filed with the Commission with 12 copies and a copy provided to all parties of record.

4. There shall be a hearing held on February 27, 1992, at 10:00 a.m., Eastern Standard Time, in Hearing Room 1 of the

Commission's Offices at 730 Schenkel Lane, Frankfort, Kentucky, for the purpose of taking all evidence necessary to determine the remaining benefits due the ratepayers of LG&E from the reduced revenue requirements if LG&E sold an additional 12 1/2% joint ownership in Trimble County less the monies collected subject to refund under Case No. 10064[1] and otherwise ordered to be refunded by the Court. All parties shall prefile all testimony to be offered at the above-scheduled hearing no later than February 7, 1992.

Done at Frankfort, Kentucky, this 17th day of December, 1991.

PUBLIC SERVICE COMMISSION

Chairman

Vice Chairman

Commissioner

ATTEST:

Executive Director

1 Case No. 10064, Adjustment of Gas and Electric Rates of Louisville Gas and Electric Company.

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II

FILED

SEP 27 199

FRANKLIN CIRCUIT COURT
[illegible] MARSHALL, CLERK

89-CI-1783
and
89-CI-1784

COMMONWEALTH OF KENTUCKY, ex rel.
FREDERIC J. COWAN, ATTORNEY GENERAL
and
METRO HUMAN NEEDS ALLIANCE, INC., et al — PLAINTIFFS

v.

PUBLIC SERVICE COMMISSION OF KENTUCKY, et al — DEFENDANTS

89-CI-1608

JEFFERSON COUNTY, KENTUCKY, ex rel.
MICHAEL E. CONLIFFE,
JEFFERSON COUNTY ATTORNEY, et al — PLAINTIFFS

v.

PUBLIC SERVICE COMMISSION OF KENTUCKY
and
LOUISVILLE GAS AND ELECTRIC COMPANY — DEFENDANTS

ORDER

On February 1, 1991, this Court entered a judgment which held that the Public Service Commission's order adopting and approving the "Stipulation and Settlement Agreement" dated October 2, 1989, was contrary to the provisions of Chapter 278

and violated plaintiffs' due process rights. This Court directed the parties, in an order dated February 25, 1991, to brief the issue of a specific remedy. A hearing was held on March 12, 1991 on this issue. Plaintiffs contend that the ratepayers are entitled to have the monies which were collected by Louisville Gas & Electric pursuant to the Commission's prior order refunded by the Court, under the doctrine of equitable restitution. Defendants contend that the matter should be remanded to the PSC.

Plaintiffs rely on three cases to support the remedy of equitable restitution. In the case of Atlantic Coast Line Railroad Co. v. Florida, 295 U.S. 301 (1935), the Supreme Court recognized the doctrine of restitution but declined to apply it. In that case, a railroad carrier had collected freight charges in accordance with an Interstate Commerce Commission order which was subsequently set aside for want of necessary findings. Id. at 305. The issue before the Court was whether restitution should be given by the carrier for the whole or part of rates which were collected while the order was in place. Id. In order to merit restitution, the aggrieved party "must show that the money was received in such circumstances that the possessor will give offense to equity and conscience if permitted to retain it." Id. at 309. The doctrine of restitution rests "in the exercise of a sound discretion, and the Court will not order it where the justice of the case does not call for it, nor where

the process is set aside for a mere slip." Id. at 310. The Court declined to apply equitable restitution in this case, where the matter had gone back before the Commission and it had "file[d] its report in the proper form." Id. at 306. Since "full protection could be accorded to seller and consumer if the regulatory commission were permitted to discharge its proper function of prescribing a just schedule after the unlawful one had fallen," the Court declined to use its equitable power to order restitution. Id. at 316.

A North Carolina case relied upon by plaintiffs, State v. Conservation Council of North Carolina, 320 S.E.2d 679 (N.C. 1984), held that where a rate has not been "lawfully established", the Court may direct the Utilities Commission to order a refund. Id. at 685. The statute providing for review of the Commission's decisions gives the court the power to "affirm, reverse, remand, or modify the order of the Commission." Id. at 686. North Carolina G.S. Section 62-94 (b). The Supreme Court of North Carolina held that allowing the restitution of funds collected as a result of unlawful rates could be the only remedy, as "[t]o hold otherwise would deny ratepayers who appeal from erroneous orders of the Commission adequate relief while allowing utilities to retain the proceeds of rates that were illegally charged." State v. Conservation Council of North Carolina, 320 S.E. at 686.

In the case of Mountain States v. Arizona Corporation

Commission, Ariz. App., 604 P.2d 1144 (1980), the Court of Appeals of Arizona relied upon Atlantic Coast Line, supra, in holding that rates unlawfully collected by the Mountain States Telephone and Telegraph Company should be refunded. The Court followed "the general principle laid down by Justice Cardozo in Atlantic Coast Line, supra, that amounts collected under an invalid order should be refunded unless to do so would be unjust in the particular circumstances of the case." Id. at 1147. The court found that "unless the possibility of a refund exists, there is no effective remedy whatsoever for alleviating the effects of an invalid rate increase." Id. at 1146. The Arizona statute providing for judicial review of Commission orders, like the North Carolina statute, provides that "judgment shall be given affirming, modifying, or setting aside the original or amended order." Arizona Revised Statutes Section 40-254 (c).

Defendants contend that these three cases are inapposite and that restitution would constitute "judicial rate-making." Defendants argue that the Mountain States, supra, and Conservation Council of North Carolina, supra, cases do not apply, as the Arizona and North Carolina statutes provide for "modification" of Commission orders and this Court "lacks jurisdiction to 'modify' orders of the PSC" because of Kentucky law. However, KRS 278.450 provides that "[u]pon final submission of any action brought under KRS 278.410, the circuit court shall enter a judgment either sustaining the order of the Commission

or setting it aside or vacating it in whole or in part, or modifying it, or remanding it to the Commission with instructions." [emphasis supplied].

This Court is clearly not limited to either vacating or setting aside the PSC's order. Defendants cite Kentucky Power Co. v. Energy Regulatory Commission of Kentucky, Ky., 623 S.W.2d 904 (1981) and Commonwealth ex rel Stephens v. South Central Bell Telephone Co., Ky., 545 S.W.2d 927 (1976) for the proposition that such a modification encompassing equitable restitution would be contrary to Kentucky law, as it would constitute "judicial rate-making." That conclusion is untenable. In Kentucky Power, supra, the Supreme Court held that the circuit court's "refusing to permit a reopening of the administrative proceeding, thus 'prematurely terminating the Commission's inquiry'" did not interfere with the rate-making process. Id. at 907. While it is the duty of the regulatory agency to fix rates, it is "the right and duty of the court to protect parties who are subject to the authority of such an agency from arbitrary and capricious treatment." Id. Although the circuit court had remanded the case, the Supreme Court recognized that the court was not obliged to remand it for all purposes and leave the Commission free to start the inquiry all over again." Id. at 908.

In South Central Bell Telephone, supra, the issue was whether or not a temporary injunction could issue restraining the Commission from enforcing the terms of a rate order. In

that case, the court held that the language of KRS 278.410 with regard to preliminary injunctions mandates that the court grant such relief upon the terms "provided by law." Id. at 931. The court's holding that equitable principles could not be used applied to the facts of that particular case, where rate-making was involved. Id. South Central Bell was not a case in which improper ex parte contacts led to a settlement agreement, nor did the case involve the final disposition of a remedy.

Defendants further contend that Stephens v. Kentucky Utilities Co., Ky., 569 S.W.2d 155 (1978), stands as a bar to equitable restitution. The issue in that case was whether the trial court could receive new evidence. Id. at 158. The court held that the statutes creating judicial review of the rate fixed by the Public Service Commission limit the court's power of review. Id. at 157. This case, too, did not involve a situation where a summary proceeding before the Commission resulted in complete disregard of rate-making procedures and principles.

The case at bar involves three separate proceedings before the Commission, all of which have been incorporated into the record in this case. In Case Number 9934, the Commission ordered the disallowance of 25% of the Trimble County project and ordered that this disallowance be accomplished through a rate-making alternative "which will assure the ratepayers of LG & E that they will receive the benefits of the reduced

Revenue requirements which would result if LG & E sold a 25% joint ownership interest in Trimble County as described in its capacity expansion study -- 1987."

In Case Number 10064, a rate case, the Commission stated:

> In the Order in Case No. 9934 entered on July 1, 1988, the Commission found that 25 percent of Trimble County should be disallowed. In this proceeding, the Commission has heard evidence with regard to the rate-making treatment of Trimble County CWIP; however, there has been no specific testimony offered regarding the various options for rate-making treatment of a disallowance of 25 percent of the cost of Trimble County. Furthermore, in Case No. 9934, since the Commission's decision is being issued concurrently with this Order, there has been no specific investigation of the revenue requirement effects of a 25 percent disallowance of Trimble County. Therefore, the Commission has determined that another proceeding will be established to allow a full investigation of this issue. An Order establishing this case will be rendered in immediate future.
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> In order to protect the interests of the consumers and assure that the disallowance will be recognized from the date of this Order, the Commission is of the opinion that all revenues associated with additions to CWIP since LG&E's last rate case should be collected subject to refund. The Trimble County CWIP included in rate base in LG&E's last rate case was $268 million and Trimble County CWIP has achieved a level of $82 million at the end of the test period in this case. Applying the overall

> rate of return allowed in this case to the increase in Trimble County CWIP of $114 million results in an annual provision of $11.4 million to be collected subject to refund. The final amount of disallowance will be determined in the forthcoming Trimble County CWIP case soon to be established and the current ratepayers will realize the benefits of the disallowance when an Order is issued in that case.

Thus the Commission ordered that all revenues associated with the annual provision of 11.4 million dollars should be collected subject to refund pending a consideration of the effects of the 25% disallowance on the revenue requirements of the Trimble County project CWIP. Case Number 10320 was an investigation into the effects of that disallowance on those revenue requirements in order to implement the 25% disallowance. Case Number 10320 resulted in the "agreed settlement order" which has been set aside by prior order of this Court in the above-styled action. Case Number 10320 was established by the Commission for two stated reasons: (a) to determine the refund to ratepayers from the amounts collected by LG&E pursuant to the Commission order in Case Number 10064 at an annual rate of 11.4 million dollars from May 20, 1988, to January 1, 1991, (the in-service date of Trimble) and (b) to assure the LG&E ratepayers that they would receive the benefits of the reduced revenue requirements which would result if LG&E sold a 25% joint ownership interest in the Trimble County plant.

Thus, there are two distinct periods in which CWIP

has been paid by the ratepaying public: (1) from May 20, 1988 through January 1, 1991 pursuant to the orders of Case Number 10064; and (2) from 1978 through May 19, 1988 as a result of previous Commission orders in the Trimble County project cases.

From May 20, 1988 through January 1, 1991 LG&E was permitted to charge the ratepaying public subject to refund under Case Number 10064 the sum of $11.4 million annually for CWIP. Pursuant to that order, LG&E has collected in excess of 30 million dollars. Additionally, pursuant to the now-voided order in Case Number 10320, LG&E has refunded to the ratepayers 11 million dollars. The ratepayers are entitled to have this money refunded, and the Commission is so instructed.

Furthermore, counsel for appellant intervenors state in their memorandum that LG&E has sold 12.5 percent of the Trimble County plant capacity to a third party. This assertion has not been denied by defendants and indeed is deemed admitted in light of oral argument before the court on September 27, 1991. LG&E has the benefit of the proceeds of this sale in hand. Equity requires that these proceeds be returned to the ratepayers.

Case 10320 was also established to "assure the ratepayers of LG&E that they will receive the benefits of reduced revenue requirements which would result if LG&E sold a 25% joint ownership interest in Trimble County...." The

Commission must determine in which manner and in what amounts, with appropriate interest, these benefits should flow to the ratepayers. This determination should be made fairly and expeditiously by the Commission. LG&E cannot in good conscience be allowed to retain the proceeds collected from the ratepayers on the disallowed portions of the Trimble County project.

Under KRS 278.450, Kentucky Power Co. v. Energy Regulatory Commission, supra, and the principles of equitable restitution, this Court is authorized to order a refund of the monies obtained as a result of the unlawful settlement agreement. Without question, ratepayers are entitled to the monies collected subject to refund pursuant to the Commission's order in Case No. 10064 and the monies collected from the sale of one-half of the disallowed portion of the Trimble County plant. The question left for the Commission is: how much more are the ratepayers entitled to? As the Supreme Court stated in Kentucky Power Company, supra, the duty of the court is to protect parties that are subject to the authority of the Commission. Given the unique circumstances of this case, and the fact that a refund amount has already been established by the PSC in Case No. 10320 in the amount of 11.4 million dollars, this Court will order a refund in that amount. These amounts collected under the PSC's order were obtained under such circumstances that it would greatly offend equity and good

conscience should the utility be permitted to retain them. Atlantic Coast Line Railroad Co. v. Florida, 295 U.S. 301, 309 (1935). None of the cases cited by defendant establish that a refund, in light of the court's power to modify the PSC's orders, would constitute rate-making. Rate-making is clearly not the court's function. However, where the Commission's actions go outside the bounds of lawful rate-making, then the court is authorized to insure that the unlawful process will not be rewarded. The reasoning in the cases of State v. Conservation Council of North Carolina, supra, and Mountain States Telephone and Telegraph Co. v. Arizona Corporation Commission, supra, is in accord with this Court's view. The utility should not be permitted to profit through charges unlawfully established.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that this action is REMANDED to the defendant Commission which is mandatorily enjoined as follows:

a. the Commission shall forthwith determine the amount of monies realized by LG&E in the recent sale of the one-half portion of the disallowed capacity of the Trimble County plant to a third party. The Commission shall immediately thereafter order a rebate of these monies with interest to the ratepayers and establish rates to effect this rebate.

b. the Commission shall forthwith order the refund of monies collected by LG&E subject to refund under Case No.

10064 with interest less $11 million and establish rates to effect this refund.

c. the Commission shall determine pursuant to statute and Constitutional due process the remaining benefits due the ratepayers of LG&E from the reduced revenue requirements if LG&E sold an additional 12 1/2 percent joint ownership interest in Trimble County less the monies collected subject to refund under Case No. 10064 and now ordered refunded by this Court. The Commission shall then set rates to effect the additional rebate.

SO ORDERED THIS 27 day of SEPTEMBER, 1991.

William L. Graham

JUDGE, FRANKLIN CIRCUIT COURT