

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

KENTUCKY ALLIANCE FOR FAIR COMPETITION, INC., ET AL.	)	
	)	
PETITIONERS	)	
	)	
VS.	)	CASE NO. 91-243
	)	
LOUISVILLE GAS & ELECTRIC COMPANY	)	
	)	
RESPONDENT	)	

O R D E R

On July 16, 1991, the Kentucky Alliance for Fair Competition, Inc., et al. ("Kentucky Alliance") filed a formal complaint against the Louisville Gas and Electric Company ("LG&E"). The complaint stated three counts: Count I alleged a violation of Section 210 of the Kentucky Constitution; Count II alleged a violation of Commission Regulation 807 KAR 5:016; and Count III alleged violations of the Kentucky Building Code and Jefferson County Ordinance. Kentucky Alliance requested that the Commission direct LG&E to: undertake a thorough audit to identify all costs and benefits related to LG&E's outdoor lighting program and the costs of its corporate reorganization; cease all activities related to the installation, planning, or advertising of outdoor lighting appliances and systems; and cease engaging in promotional advertising and promotional sales activities in accordance with 807 KAR 5:016. Kentucky Alliance also requested that LG&E's rates

be adjusted to reflect the results of the audit of the outdoor lighting and corporate reorganization costs.

By Order dated July 29, 1991, the Commission dismissed Counts I and III of the complaint for lack of subject matter jurisdiction and Ordered LG&E to satisfy or answer the allegations contained in Count II of the complaint. In its answer, filed on August 8, 1991, LG&E noted that Kentucky Alliance could have challenged the rate-making treatment of LG&E's outdoor lighting program in its most recent rate proceeding, Case No. 90-158,<sup>1</sup> but failed to do so. LG&E stated that public notice of the rate application and the procedure to intervene was published, and that the Commission should not allow Kentucky Alliance to raise a rate-making issue at this late date. In response to the specifics of Count II of the complaint, LG&E stated that it removed the advertising costs of its outdoor lighting program from its cost of service in Case No. 90-158, and thus those costs are not being recovered in the rates LG&E charges its ratepayers. LG&E contends that Kentucky Alliance is in error concerning this complaint, there is no basis for the allegations made, and the complaint should be dismissed.

By Order dated September 26, 1991, the Commission directed Kentucky Alliance to respond to LG&E's request for dismissal and to specifically discuss the evidence to be offered in support of Count II of the Complaint. Kentucky Alliance's response, filed on

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<sup>1</sup> Case No. 90-158, Adjustment of Gas and Electric Rates of Louisville Gas and Electric Company, final Order dated December 21, 1990.

October 9, 1991, states that Count II of its Complaint "is an allegation that LG&E is practicing advertising that constitutes an expenditure which may be includable in the gas or electric utility costs of service for rate-making purposes and that the advertising is promotional advertising. . . ." (emphasis added) The response then cites LG&E's answer as an admission that the advertising in question is promotional in nature, and claims that, "if this advertising directly or indirectly affects cost of service then it is in violation of 807 KAR 5:016, Section 4." (emphasis added)

Kentucky Alliance references the copies of outdoor lighting brochures that were attached to its complaint and argues that since there is no documentation to support LG&E's claim that promotional use of electricity will benefit ratepayers, the Commission should investigate this matter. Kentucky Alliance further states that while LG&E's Answer includes a voucher which purports to show that promotional advertising is charged to Account No. 913, the voucher is not evidence that such expenditures were not charged to ratepayers and only further discovery will resolve this issue. Kentucky Alliance also argues that these issues were not investigated in Case No. 90-158 and that since the Commission's regulation on intervention is permissive, not mandatory, the failure to participate in that case does not bar the instant complaint. In conclusion, Kentucky Alliance states that the outdoor lighting brochures, when coupled with LG&E's admission that they constitute promotional advertising, constitute sufficient evidence to warrant a full investigation by the Commission.

LG&E filed a reply to Kentucky Alliance's response to the motion to dismiss. LG&E notes that the costs of outdoor lighting advertising are recorded in Account No. 913, and that these costs were excluded for rate-making purposes in Case No. 90-158, as shown in that case on Fowler Exhibit 1, Schedule F.

Based on a review of the pleadings and taking administrative notice of Case No. 90-158, the Commission hereby finds that a challenge under 807 KAR 5:016 to the inclusion of advertising costs in a utility's cost of service may properly be raised only in a general rate case. The preamble to the regulation governing rate recovery of advertising costs states as follows:

NECESSITY AND FUNCTION: KRS 278.190(3) provides that at any hearing involving a rate or charge of a utility for which an increase is sought, the burden of proof shall be on the utility to show that the increased charge or rate is just and reasonable. This regulation specifies what advertising expenses of a utility will be allowable as a cost to the utility for ratemaking purposes.

807 KAR 5:016. The regulation further provides that:

No advertising expenditure of a utility shall be taken into consideration by the commission for the purpose of establishing rates unless such advertising will produce a material benefit for the ratepayers.

807 KAR 5:016, Section 2(1). The regulation also imposes upon the utility the burden of proving that, "any advertising cost or expenditures proposed for inclusion in its operating expenses for ratemaking purposes within a given test year fall within the categories" specified in the regulation. 807 KAR 5:016, Section 5.

The intent of 807 KAR 5:016 is to put utilities and interested persons on notice as to the specific types of

advertising costs which must be excluded from test-year operating expenses when rates are to be established. As provided for in 807 KAR 5:016, Section 1, promotional, political, or institutional advertising costs must be excluded by gas or electric utilities. In Case No. 90-158 the Commission conducted an extensive investigation of LG&E's application for increased rates. Notice of the pendency of that rate case and the procedures for intervention were published in local newspapers. LG&E's advertising costs were questioned and reviewed in that proceeding. Kentucky Alliance did not participate in that investigation, despite the opportunity to do so.

However, even assuming that an independent right exists under 807 KAR 5:016 to challenge advertising costs, Kentucky Alliance has failed to present a prima facie case. Pursuant to KRS 278.260(1), the Commission has original jurisdiction over a complaint against a utility "that any rate in which the complainant is directly interested is unreasonable or unjustly discriminatory." The Complaint filed by Kentucky Alliance does not allege that prohibited advertising costs are being recovered through rates by LG&E. Rather, the complainants merely allege that, "Based upon information and belief. . . LG&E's advertising scheme. . . may be includable in gas or electric utility costs of service for rate making purposes." Amended Complaint, pages 6-7.

When presented with an opportunity to disclose the nature of the information and the basis for the belief that LG&E's rates may include prohibited advertising costs, the complainant responded that discovery was necessary and the mere existence of promotional

advertising warrants an investigation by the Commission. Complainant's position is devoid of merit. Promotional advertising by gas or electric utilities is not prohibited per se. Rather, 807 KAR 5:016 only prohibits the recovery of such costs in rates.

Kentucky Alliance has failed to disclose even a scintilla of evidence to indicate that promotional advertising is currently being recovered in rates by LG&E. To the contrary, the record discloses that the promotional advertising complained of was charged to Account No. 913, and these costs were specifically excluded from LG&E's test-year operating expenses for rate-making purposes.<sup>2</sup> In addition, the Commission disallowed LG&E's test-year legal expenses associated with the restructuring and formation of the holding company, LG&E Energy Corporation.<sup>3</sup> Based on the findings herein, no hearing is necessary in the public interest or for the protection of substantial rights.

IT IS THEREFORE ORDERED that Count II of the Complaint filed by Kentucky Alliance be and it hereby is dismissed and the relief requested is denied.

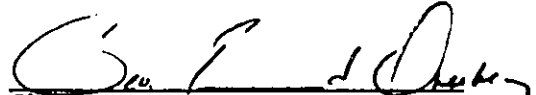
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<sup>2</sup> Fowler Testimony, Exhibit 1, Schedule F.

<sup>3</sup> Commission's December 21, 1990 Order, page 36.

Done at Frankfort, Kentucky, this 25th day of November, 1991.

PUBLIC SERVICE COMMISSION

  
Chairman

  
Vice Chairman

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Commissioner

ATTEST:

  
Executive Director