

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE APPLICATION OF KENTUCKY UTILITIES)
COMPANY TO ASSESS A SURCHARGE UNDER KRS)
278.183 TO RECOVER COSTS OF COMPLIANCE) CASE NO. 93-465
WITH ENVIRONMENTAL REQUIREMENTS FOR COAL)
COMBUSTION WASTES AND BY-PRODUCTS)

O R D E R

On August 5, 1994, the Attorney General's office, Utility and Rate Intervention Division ("AG"), filed an application for rehearing of the Commission's July 19, 1994 Order approving an environmental compliance plan and rate surcharge for Kentucky Utilities Company ("KU"). The AG argues two issues in support of rehearing: 1) the July 19, 1994 Order is unconstitutional because it takes ratepayers' property without due process of law; and 2) the Commission erred by not off-setting the increase in revenues experienced by KU since its last rate case against the amount of its requested environmental surcharge.

In support of its constitutional argument, the AG states that since a utility is deprived of its property without due process of law when rates are set too low, ratepayers are correspondingly deprived of their property when rates are too high. From this premise, the AG claims that fair, just and reasonable rates were established for KU in 1983 and now the Commission has authorized KU to charge a supplemental rate in the form of a surcharge, causing the total rate to exceed that which is fair, just, and reasonable.

In addition, the AG argues that since KU has experienced a growth in sales of approximately 50 percent since its existing rates were established in 1983, there has been a corresponding increase in KU's revenues which should be offset against the environmental surcharge. The crux of the AG's argument is that even though the environmental costs sought to be included in the surcharge are not included in existing rates, those rates are producing sufficient revenues for KU to recover such environmental costs.

Based on the petition for rehearing and being advised, the Commission hereby finds that the petition should be denied. The AG has failed to cite any case to support his claim that the ratepayers can be deprived of their property without due process of law if utility rates are set at an excessive level. To the contrary, the courts have held that ratepayers have no such property right. As stated in Hartford Consumer Activists Association v. Hausman, 381 F.Supp. 1275, 1281 (D.Conn. 1974), "Courts have yet to hold that a state agency's approval of a utility rate increase involves a deprivation of a customer's property interest, which is actionable under the Fourteenth Amendment."

While a utility is under a statutory obligation to invest capital to serve the public, ratepayers are under no obligation to invest capital or purchase utility service. This distinction was analyzed in United States Light & Heat Corp. v. Niagara Falls Gas

& Electric Light Company, 47 F.2d 567, 570 (2nd Cir. 1931), where the court held that:

Thus the gas company's business becomes subject to the Public Service Law by reason of the interest which the public has. It must submit to the control by the Public Service Commission for the common good to the extent which it has clothed its property with public interest. But a citizen has no vested rights in statutory privileges or exemption. Cooley, Constitutional Limitations (8th Ed.) 792. This gas company became bound to furnish gas within the city of Niagara Falls by reason of the Public Service Law. The consumer was not obliged to purchase gas; he was privileged to do so. A private right may be interfered with so long as it is not vested (Cooley, Constitutional Limitations [8th Ed.] 749), and a right is not vested unless it is something more than a mere expectation as may be based upon an anticipated continuation of the present general laws. [citation omitted]

See also City of Birmingham v. Southern Bell Tel. and Tel. Co., 176 So. 301 (Ala. 1937).

The AG's request to recognize the growth in sales and resultant increase in revenues since KU's existing rates were established violates KRS 278.183. As the AG acknowledges, both expenses and revenues must be examined to determine a utility's revenue requirements. However, the AG fails to acknowledge that KRS 278.183 precludes an analysis of revenue requirements. The General Assembly has authorized utilities to impose a surcharge to recover specified environmental costs not already included in existing rates, notwithstanding other provisions of KRS Chapter 278. As stated in our July 19, 1994 Order, should the AG or anyone else believe that KU's revenues now exceed its requirements, a full


and complete remedy is available by the filing of a complaint under KRS 278.260.


IT IS THEREFORE ORDERED that the AG's application for rehearing be and it hereby is denied.

Done at Frankfort, Kentucky, this 22nd day of August, 1994.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director