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

On August 8, 1995, Louisville Gas and Electric Company ("LG&E") filed an application for rehearing and motion for clarification. LG&E alleges that the Commission's July 19, 1995 Order erroneously (1) ordered a refund of $23,921,716 based upon excluding 25 percent of the test-year-end level of Trimble County Unit No. 1 construction work in progress ("Trimble County CWIP") included in rate base in Case No. 10064;[1] (2) ordered refunds in excess of the $11.4 million in revenues collected by LG&E subject to refund on an annual basis pursuant to the Commission's Orders in Case No. 10064; (3) engaged in unlawful retroactive rate-making at a time when the Commission had lost all jurisdiction in Case No. 10064; (4) awarded interest on the refund amount; and (5) compounded interest on a monthly basis. LG&E also seeks clarification that the July 19, 1995 Order is interlocutory and subject to revision until the end of Phase II of the proceeding and a formal identification of all current parties to this proceeding.

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

On August 17, 1995, Jefferson County Government ("Jefferson County") filed its response stating that every issue in this case has been decided on the merits and urging the Commission to declare the July 19, 1995 Order "final and appealable." Similar responses were filed by Metro Human Needs Alliance on August 22, 1995, the Attorney General ("AG") on August 24, 1995, and Kentucky Industrial Utility Consumers on August 25, 1995.

The Commission, after consideration of the evidence of record and being otherwise sufficiently advised, finds that LG&E's application for rehearing and motion for clarification should be denied except as it concerns the issue of compound interest. Jefferson County's request to declare the July 19, 1995 Order final and appealable should also be denied.

ARGUMENTS AND COMMENTARY

The basic issue decided in this case is the method by which the disallowance of 25 percent of Trimble County is to be treated for rate-making purposes. In reaching its conclusion that 25 percent of Case No. 10064 Trimble County CWIP should be removed, the Commission noted that this approach mirrored the ultimate treatment of Trimble County investment in Case No. 90-158.[2] LG&E argues that this conclusion "grossly distorts" its position in the latter case and therefore does not support the Commission's decision in this case.

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[2] Case No. 90-158, Adjustment of Gas and Electric Rates of Louisville Gas and Electric Company.

LG&E's argument on this point is without merit. Regardless of the basis for its action, in Case No. 90-158 LG&E proposed to remove 25 percent of test-year-end Trimble County CWIP from rate base and capitalization, as well as 25 percent of estimated post-test-year investment for Trimble County. The fact that the Commission concluded that its action in this case was consistent with that action makes no comment on anyone's motives. It merely notes that the current decision will produce a consistent regulatory treatment of Trimble County.

LG&E next argues that the Commission "completely ignored" its evidence that ratepayers paid less than 75 percent of Trimble County CWIP. To the contrary, the Commission fully considered the evidence but found that this evidence did "not absolve LG&E from making additional refunds."[3] After arguing that the evidence was completely ignored, LG&E then asserts that the Commission "mischaracterized" LG&E's proposal as retroactive rate-making.

To a certain extent LG&E is correct. While denying that it seeks to recover additional monies for lost carrying costs, LG&E at the same time argued that it should not be required to make any refunds of monies collected, subject to refund, because it did not recover all carrying costs. Had the Commission accepted this argument, it would have allowed LG&E to recover carrying costs lost to regulatory lag and might well have been subject to the accusation of retroactive rate-making.

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[3] Order at pp. 8 and 9.

The Commission did not accept this invitation from LG&E nor did it indulge in retroactive rate-making. An order requiring the refund of rates collected subject to refund cannot be construed as retroactively changing rates. Nor did the Commission in any way deny LG&E all the process to which it was due.

LG&E next latches onto a phrase in the Order and makes the unfounded claim that the Commission has neglected its duty to balance the interests of investors and customers. The disallowance announced in Case No. 9934[4] required a revision to the balance between investors and customers which had been previously in effect. Where investors had seen cash returns on 100 percent of CWIP, they would now see returns on 75 percent. To effectuate this revision, the focus had to shift to the customers. The "maximum amount of benefits" to customers refers to the Commission's objective to ensure customers received the full benefits of the 25 percent disallowance. In its alternative proposals,[5] LG&E repeatedly ignores the effects of regulatory lag on the recovery of carrying costs and insists on making point-in-time comparisons which do not reflect established rate-making procedures. Further, the reduction in revenue requirements in place since January 1, 1991 results from LG&E's compliance with the decision in Case No. 9934 and does not affect the time period under consideration in this case. More to the point, the Commission indeed sought to

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[4] Case No. 9934, A Formal Review of the Current Status of Trimble County No. 1.

[5] LG&E Application for Rehearing, Tables H and J.

ensure that the "maximum amount of benefits" to which customers were entitled under law and its prior decisions were indeed afforded to them. It was obligated by law to do no less.

In its last attack on the basic premise of the Order, LG&E argues that the Commission has ignored various benefits customers have received under various decisions which addressed the general issue of Trimble County. However, this case addressed a specific period of time and the rate-making treatment of the disallowance during that specific period of time. Certain matters relating to Trimble County are over and the Commission addressed the matter before it for decision.

In its second issue, LG&E argues that the Commission's ordered refund exceeds the $11.4 million in revenues collected annually subject to refund pursuant to the Case No. 10064 Orders. However, the $11.4 million amount, grossed up for taxes, results in a revenue requirement of $16.1 million annually.[6] Regardless of the various subsequent arguments made by LG&E, the intervenors, and the Commission, the ordering paragraphs in the Commission's July 14, 1988 Order in Case No. 10064 are controlling on this issue. As stated there, when establishing an amount subject to refund, the Commission ordered,

> All revenues associated with the annual provision of $11.4 million shall be collected subject to refund, pending the final dollar amount of disallowance to be

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[6] Response to Attorney General's Data Request dated January 28, 1994, Question 5(d).

determined in a proceeding dealing with the revenue requirement effect of Trimble County CWIP.[7]

In presenting its third reason for seeking rehearing, LG&E asserts that the Commission indulged in retroactive rate-making because it has lost jurisdiction over Case No. 10064 and that its authority under KRS 278.260(1) is limited to setting rates to be followed in the future. The Commission agrees that it has lost jurisdiction over Case No. 10064. However, by the same token, LG&E has long since lost the opportunity to challenge the fact that certain revenues were collected subject to refund.

The issue of retroactive rate-making was extensively discussed in the Commission's Order granting LG&E's motion in limine. In the July 19, 1995 Order, the Commission did not require any change in rates collected before Case No. 10064 and did not require any change in rates based on CWIP included in rates prior to that decision. To the extent that the Commission removed CWIP in that case and precluded LG&E from recovering it from that point forward, it cannot be accused of retroactive rate-making.

In its fourth issue, LG&E contends that there is no statutory authority applicable to this proceeding which permits the award of interest. LG&E further argues that even if authorized by statute, any award of interest in this case would be an abuse of discretion. The company states that the Commission gave no reason for the award of interest.

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[7] July 19, 1995 Order at 11, emphasis added.

The Commission was within its statutory authority to order interest on the amount determined to be refunded." From May 20, 1988 to December 31, 1990, LG&E's customers paid rates which included a cash return on 100 percent of Trimble County CWIP as of Case No. 10064 test-year end. Under the decision in Case No. 9934, those rates should have reflected a disallowance of 25 percent of the test-year-end balance of Trimble County CWIP. The July 19, 1995 Order rectifies this discrepancy. To accomplish this, the award of interest was necessary and can hardly be deemed an abuse of discretion.

The authority of the Commission under KRS 278.190(4) to determine whether to impose interest and the amount of interest on refunds is "a rate-making matter that has been specifically delegated to the Public Service Commission by the legislature." Com. ex rel. Beshear v. Kentucky Utilities Co., Ky.App., 648 S.W.2d 535, 536 (1982). In light of this discretion extended to it by the Legislature, the Commission has long exercised the authority to order interest on refunds which do not fall specifically within the factual outline of the statute and for which specific provision is not elsewhere made. Although the Kentucky courts do not appear to

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" See Case No. 91-370, Application of The Union Light, Heat and Power Company to Adjust Electric Rates. The Commission authorized electric rates subject to refund which included purchased power expense based on an interim decision by the Federal Energy Regulatory Commission ("FERC"). See May 5, 1992 Order, at 24 and 80. After the final FERC decision, purchased power expense was reduced, and electric rates lowered. The excess in electric rates collected during the interim period was refunded with interest. See November 25, 1992 Order, at 2.

have addressed the specific issue, the courts of Indiana and Iowa have found that statutes similar to Kentucky's support refunds with interest in situations similar to this case. See, Northern Indiana Public Service Co. v. Citizens Action Coalition of Indiana, Inc., Ind., 548 N.E.2d 153 (1989); Equal Access Corporation v. Utilities Board, Utilities Division, Iowa Department of Commerce, Iowa, 510, N.W.2d 147 (1993).

In its fifth issue, LG&E argues that the Commission was arbitrary and unreasonable when it ordered compound interest. LG&E claims that under Kentucky law, in the absence of a specific agreement to pay compound interest, unpaid interest may not be compounded. After further review of Kentucky law on this issue, the Commission concludes that the Order in this regard is incorrect. The holding in McWilliams v. Northwestern Mutual Life Insurance Co., 258 Ky. 192, 147 S.W.2d 79 (1940), that compound interest can be imposed only under specific agreement, appears to be controlling. The Commission will therefore grant rehearing on this issue. To the extent that the parties wish to brief the issue, this can be done concurrently with the proceedings considering LG&E's refund plan.

In seeking clarifications, LG&E asks the Commission to state that the July 19, 1995 Order is interlocutory. The intervenors in response seek to have it designated as final and appealable. In light of Franklin Circuit Court's November 7, 1994 final order in 94-CI-1391 dismissing the Intervenors' appeal of the Commission's ruling on the AG's recusal motion, it would appear to be futile for

the Commission to express its opinion on this matter. It would also appear that Franklin Circuit Court does not intend to entertain appeals in this case until all issues are adjudicated by the Commission. As there are refund mechanism issues yet to be decided, all parties should proceed accordingly.

LG&E also requests the Commission to list the parties to this proceeding at the present time. Those parties responding to the Commission's January 19, 1995 are listed on Appendix A to this Order. The Commission considers Appendix A to be an accurate list of those parties participating in this proceeding at this time.

IT IS THEREFORE ORDERED that:

1. LG&E's application for rehearing is denied except for the issue of compound interest. To the extent the parties wish to brief this issue, they may file briefs at the times set forth in the procedural schedule for filing the refund plan and responding to it.

2. Ordering paragraphs 3, 4, and 5 of the July 19, 1995 Order shall take affect as if originally entered as of the date of this Order.

3. Jefferson County's request to declare the July 19, 1995 Order final and appealable is denied.

Done at Frankfort, Kentucky, this 28th day of August, 1995.

PUBLIC SERVICE COMMISSION

Chairman

Vice Chairman

Commissioner

ATTEST:

Executive Director

APPENDIX A

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE COMMISSION IN CASE NO. 10320 DATED August 28, 1995

Hon. William E. Doyle Assistant Attorney General Public Service Litigation Branch P. O. Box 2000 Frankfort, Kentucky 40602-2000	Attorney General
Hon. J. Bruce Miller Hon. Evan G. Perkins J. Bruce Miller Law Group 621 West Main Street - Fourth Floor Louisville, Kentucky 40202	Jefferson County
Hon. Anthony G. Martin Office of Kentucky Legal Services, Inc. 201 W. Short Street, #506 Lexington, Kentucky 40508	Residential Intervenors and Metro Human Needs Alliance, Inc.
Hon. Kay Guinane Hon. Casandra Culin Legal Aid Society, Inc. 425 W. Muhammad Ali Blvd. Louisville, Kentucky 40202	Residential Intervenors and Metro Human Needs Alliance, Inc.
Hon. Douglas M. Brooks Louisville Gas and Electric Company 220 West Main Street Louisville, Kentucky 40202	Louisville Gas and Electric Company
Hon. James Park, Jr. Hon. Katherine Randall Brown, Todd & Heyburn 2700 Lexington Financial Center Lexington, Kentucky 40507-1749	Louisville Gas and Electric Company
Hon. David A. McCormick Regulatory Law Office Department of the Army 901 N. Stuart Street Room 713 Arlington, Virginia 22203-1837	U.S. Department of Defense
Hon. Christina Heavrin City of Louisville 601 West Jefferson St. Room 200 Louisville, Kentucky 40202	City of Louisville
Hon. David Boehm Boehm, Kurtz & Lowry 2110 CBLD Center 36 E. Seventh Street Cincinnati, Ohio 45202	Kentucky Industrial Utility Customers