

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF LOUISVILLE GAS AND)
ELECTRIC COMPANY FOR APPROVAL OF) CASE NO. 98-426
AN ALTERNATIVE METHOD OF REGULATION)
OF ITS RATES AND SERVICES)

In the Matter of:

APPLICATION OF KENTUCKY UTILITIES COMPANY)
FOR APPROVAL OF AN ALTERNATIVE METHOD) CASE NO. 98-474
OF REGULATION OF ITS RATES AND SERVICES)

O R D E R

On August 13, 1999, Kentucky Industrial Utility customers filed a motion to strike from the record a letter, dated July 28, 1999, from Louisville Gas and Electric Company and Kentucky Utilities Company (collectively Applicants) to the Kentucky Natural Resources and Environmental Protection Cabinet, Division of Energy (KYDOE). (The letter is hereinafter referred to as (Letter Agreement).) KYDOE is an intervenor and it has filed prepared direct testimony in opposition to the Applicants respective amended applications.

The Letter Agreement provides that KYDOE will withdraw its prepared direct testimony and file a pleading to indicate that it now has no objection to the amended applications, in return for which the Applicants will perform future studies of certain demand side and supply side options, evaluate such options under agreed-to criteria, and make certain future filings for approval by the Commission. The Letter Agreement

was filed on August 2, 1999 as an attachment to a KYDOE pleading titled Notice of Withdrawal of Objections and Filing of Joint Agreement.

KIUC's motion characterizes the Letter Agreement as a non-unanimous settlement which, KIUC argues, cannot be considered by the Commission under the decision in Kentucky-American Water Company v. Commonwealth ex rel. Cowan, Ky., 847 S.W.2d 737 (1993). KIUC incorporates its previously filed memorandum of law which addressed the same legal issue in reference to an earlier filed agreement among the Applicants and the Attorney General, Office of Rate Intervention. KIUC claims that the Letter Agreement has no probative or evidentiary value to the merits of this case and the only purpose served by its filing is to persuade the Commission to consider a non-unanimous settlement.

Two responses in support of KIUC's motion to strike were filed: one by Metro Human Needs Alliance, Inc. and People Organized and Working for Energy Reform; and the other by the Community Action Council for Lexington-Fayette, Bourbon, Harrison, and Nicholas Counties. The Applicants and KYDOE filed responses in opposition to KIUC's motion to strike. The Applicants claim that parties have the right to advise the Commission of their positions on issues in a case and it is immaterial whether such advice is in the form of an agreement, a letter, or some other type of notice.

KYDOE acknowledges that the Letter Agreement forms the basis for withdrawing its testimony and objections to the amended applications but states that it is neither being offered as evidence nor filed for consideration and approval. Rather, the Letter Agreement was filed to give the Commission, the parties, and the public notice of its

contents so they can determine if it adequately addresses KYDOE's concerns. KYDOE reasons that if anyone does not believe that the Letter Agreement achieves its intended purpose, that person will have the opportunity to address the issues.

Based on the motion and the response, and being sufficiently advised, the Commission finds that parties, as well as interested non-parties, have the right to advise the Commission of their positions on pending issues. The form of such notice is immaterial. However, the Letter Agreement being challenged here goes far beyond merely informing the Commission of the positions taken by the Applicants and the KYDOE.

The Letter Agreement contains obligations and commitments on behalf of the Applicants to perform future studies and make future filings with the Commission, which are intended to address the issues raised by KYDOE. These obligations and commitments are not contained in the Applicants' amended applications or testimonies, and no motions to further amend the applications have been filed. In addition, since KYDOE requests to withdraw its testimony and objections, none of the issues raised by KYDOE will be in the record either. Thus, no one will have an opportunity to question the Applicants or KYDOE on any of these issues. The Letter Agreement is the only record evidence that KYDOE raised issues and that there is a compromise and settlement among fewer than all the parties on those issues.

While the Letter Agreement is not conditioned upon Commission approval, the settling parties did insist that their agreement be part of the record in this case. However, the Supreme Court's decision in the Kentucky-American case prohibits the Commission from considering the Letter Agreement in determining the reasonableness

of the Applicants amended applications. The most effective way for the Commission to demonstrate that this inadmissible evidence will not influence its ultimate decision is to grant KIUC s motion to strike.

While the Letter Agreement will be stricken from the record, the Commission will accept the August 2, 1999 pleading of the KYDOE giving notice of its withdrawal of both its filed direct testimony and its objections to the Applicants respective amended applications. Should the KYDOE desire to modify either of these withdrawals as a result of the Commission s decision herein, a notice of modification should be filed no later than August 27, 1999.

IT IS THEREFORE ORDERED that:

1. KIUC s motion to strike the Letter Agreement is granted.
2. In the event that KYDOE desires to modify its August 1, 1999 notice of withdrawal of testimony and objections, KYDOE shall file a notice of modification no later than August 27, 1999.

Done at Frankfort, Kentucky, this 24th day of August, 1999.

By the Commission

ATTEST:

Executive Director