

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 July 16, 1999, Kentucky Industrial Utility Customers (KIUC) filed a motion and supporting memorandum to strike from the record the following:

1. An agreement dated April 5, 1999, signed by Louisville Gas and Electric Company (LG&E), Kentucky Utilities Company (KU), and the Attorney General, Office of Rate Intervention (AG), and titled Joint Agreement For Regulation Through June 30, 2004 Resulting in Amendment to Application (Joint Agreement);
2. All record references to the Joint Agreement; and
3. All record references to gas rates or gas revenues, including proposals to freeze LG&E s gas rates or forego gas rate increases in the event that the Commission approves the Joint Agreement.

In support of its motion to strike the Joint Agreement, KIUC argues that the document is a non-unanimous settlement which cannot be considered as evidence under the decision in Kentucky-American Water Company v. Commonwealth ex rel.

Cowan, Ky., 847 S.W.2d 737 (1993). In the Kentucky-American case, our Supreme Court held that the Commission had erred by having a hearing to consider the reasonableness of a contested settlement, rather than having a full hearing on all issues in the case. The court answered in the negative the question of whether a contested settlement should afford an evidentiary basis for, or be entitled to consideration by, the Commission in its final decision. Id. at 738.

KIUC also moves to strike all references to LG&E's commitment to forego seeking any increase in its gas rates for five years. KIUC argues that this commitment is an effort to redistribute the wealth of LG&E's and KU's electric customers to LG&E's gas customers, in violation of KRS 278.170(1) which prohibits rate discrimination.

A response in support of the motion was filed by the Community Action Council for Lexington-Fayette, Bourbon, Harrison, and Nicholas Counties (CAC). CAC asserts that while it would be proper for the AG or any other party to support an amendment to an application by filing testimony or other evidence, it is not proper for that support to be in the form of a non-unanimous settlement, as is the case here. Further, CAC states that all references to LG&E's gas rates should be stricken since gas rates and revenues are not relevant to the electric rate issues under investigation here.

Responses in opposition to the motion to strike were filed jointly by LG&E and KU (collectively Applicants), as well as by the AG. The Applicants' response claims the motion is untimely, particularly here since KIUC engaged in discovery on the Joint Agreement, and that the Joint Agreement is not a contested settlement since the Applicants have amended their respective applications to incorporate all the provisions

of the Joint Agreement. On the commitment to freeze LG&E's gas rates, the Applicants assert that their proposed electric rates are, on a stand-alone basis, reasonable, that electric rates are not subsidizing gas rates, and that the gas rate freeze is merely an additional customer benefit.

The AG argues that the rule of law announced in Kentucky-American is not controlling here because no party will be deprived of a hearing on the Applicants' applications. The AG also claims that, in the interests of judicial economy, the Joint Agreement should be considered because it resolves the controversies among the signatories.

KIUC and CAC filed replies, asserting that the motion to strike is not untimely but early since it was filed well before the hearing, which is the time when objections to testimony and other evidence are typically made. KIUC and CAC express agreement with the Applicants' and AG's characterization of the Joint Agreement as not being a settlement, and assert that its status as a non-settlement is the very reason it must be stricken under the holding in Kentucky-American. KIUC also states that none of the parties that support the Joint Agreement, except for the Applicants, have taken the opportunity to file testimony. This lack of testimony, KIUC argues, leaves the record void of any indication of position by such parties because any letters they may have written in support of the Joint Agreement do not constitute evidence.

Based on the motion, response and replies thereto, and being sufficiently advised, the Commission finds that KIUC's motion to strike, having been filed over six weeks before the hearing, was not untimely. Evidentiary objections are typically made at the hearing when the evidence is presented. Considering the nature of KIUC's

objections, it was reasonable and proper to raise them after conducting discovery to ascertain the exact nature and purpose of the Joint Agreement.

On April 5, 1999, the Applicants moved to amend their respective applications to reflect all provisions of the Joint Agreement. By Order dated April 13, 1999, the Commission granted those motions. Thus, the issue that the Applicants now have pending before the Commission is the reasonableness of their respective amended applications. Neither the Joint Agreement, nor the names of those who support or oppose the Joint Agreement, are relevant to determining the reasonableness of the amended applications.

The Applicants and the AG have gone to great lengths to characterize the Joint Agreement as anything but a non-unanimous settlement. However, while some of the facts here are distinguishable from those in Kentucky-American, the Joint Agreement was signed by fewer than all of the parties and is intended to resolve the differences among the signing parties. Since the Applicants have amended their respective applications, the Joint Agreement is merely cumulative and, standing alone, affords no evidentiary basis to support a decision by the Commission. Under these circumstances, the Joint Agreement should be stricken.

With respect to KIUC's motion to strike all record references to LG&E's commitment to a five year gas rate freeze, the Commission finds that LG&E's proposal and the supporting financial discussion of gas operations does not constitute discrimination per se. Whether the Applicants' electric rates are excessive, and whether such rates are being used to subsidize LG&E's gas rates, are issues of fact that cannot be determined at this stage of the proceedings. Only after the evidentiary hearing is

concluded will the Commission be in a position to determine whether a gas rate freeze rises to the level of impermissible discrimination under KRS 278.170(1).

The Commission will, therefore, grant KIUC's motion to the extent that we will strike the Joint Agreement. In taking this action, however, the Commission does not accept KIUC's argument that a party must file testimony and be subject to cross-examination to express support for or opposition to issues under investigation by the Commission. To the contrary, the Commission has historically allowed parties, as well as interested non-parties, to express their positions on pending issues through such means as letters, written statements, oral statements at hearings, pleadings, and briefs. These position statements are admissible not as evidence on the merits of the positions taken, but merely as evidence of the positions taken.

IT IS THEREFORE ORDERED that:

1. KIUC's motion to strike the Joint Agreement and all record references to the Joint Agreement is granted.
2. KIUC's motion to strike all references to LG&E's gas rates and gas revenues is denied.

Done at Frankfort, Kentucky, this August 19, 1999.

By the Commission

ATTEST:

Executive Director