

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC.)	
)	
)	
COMPLAINANT)	
)	
v.)	CASE NO. 99-082
)	
LOUISVILLE GAS AND ELECTRIC COMPANY)	
)	
DEFENDANT)	

and

KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC.)	
)	
)	
COMPLAINANT)	
)	
v.)	CASE NO. 99-083
)	
KENTUCKY UTILITIES COMPANY)	
)	
DEFENDANT)	

ORDER

Louisville Gas and Electric Company (LG&E) and Kentucky Utilities Company (KU) (collectively, the Defendants) have filed a joint motion to dismiss the complaints of Kentucky Industrial Utility Customers, Inc. (KIUC). Their motion presents two issues: (1) whether KIUC, a nonprofit corporation, lacks standing to bring a complaint challenging the reasonableness of utility rates that its members are charged; and (2)

whether, in light of the Commission's September 12, 1997 Order in Case No. 97-300,¹ KIUC is precluded from bringing any complaint to challenge the utilities' rates until the Commission has completed its review of the utilities' pending applications² for alternative rate-making regulation. Finding in the negative on both issues, we deny the motion and direct LG&E and KU to either satisfy or answer the complaints.

LG&E is a privately owned corporation which generates, transmits, distributes, and sells electric service to approximately 354,842 customers in Jefferson County and in portions of Bullitt, Hardin, Henry, Meade, Oldham, Shelby, Spencer, and Trimble counties. KU is a privately owned corporation which generates, transmits, distributes, and sells electric service to approximately 464,165 customers in 77 counties within Kentucky. Both are utilities subject to Commission jurisdiction. KRS 278.010(3)(a); KRS 278.040(2).

KIUC is a non-profit corporation organized under the laws of Kentucky. Its corporate purpose is

to represent the industrial viewpoint on energy and utility issues before all appropriate governmental bodies and other pertinent organizations which affect those issues in the Commonwealth of Kentucky and to pursue such other matters and engage in such other activities which may be beneficial in connection with or in furtherance of such primary purpose or in advancing the interest generally of industrial energy consumers operating manufacturing facilities served under industrial tariffs within the Commonwealth of Kentucky.

¹ Case No. 97-300, Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company For Approval of Merger.

² Case No. 98-426, Application of Louisville Gas and Electric Company For Approval of An Alternative Method of Regulation of its Rates and Services; Case No. 98-474, Application of Kentucky Utilities Company For Approval of An Alternative Method of Regulation of its Rates and Services.

KIUC Response to Motion to Dismiss, Exhibit I at 1. KIUC's membership consists of large industrial consumers of electricity, including corporations that receive their electric service exclusive from LG&E³ or KU.⁴ These members have joined KIUC for the sole purpose of controlling their energy costs by pooling their resources to effectively litigate at the Commission. KIUC's Response at 5.

On March 8, 1999, KIUC filed with the Commission formal complaints against the Defendants alleging that they are earning in excess of a fair rate-of-return and that their rates are not fair, just and reasonable under Kentucky law.⁵ KIUC requests, inter alia, significant rate reductions for each utility.

Contending that KIUC lacks standing to file the rate complaints, Defendants argue that a person may file such complaints only if it is directly interested in those rates. Therefore, they assert that KIUC must demonstrate a specific and legally cognizable interest in the rates of LG&E and KU and show that the Commission's decisions will have a direct and substantial impact on KIUC, Inc.'s personal or property rights or interest. Motion to Dismiss at 5. As KIUC is not a customer of either utility,

³ These members are: American Synthetic Rubber Corporation; Arch Chemicals, Inc.; Carbide/Graphite Group, Inc.; DuPont Company, Ford Motor Company, General Electric-Appliance Park; Geon Company; Golden Foods; Kosmos Cement; Philip Morris; and Rohm & Haas. Case No. 99-082, Complaint at ¶6.

⁴ These members are: American Greetings Corporation; ATR Wire & Cable Company, Inc.; Bundy; Clopay Plastic Products Co., Inc.; Corning Incorporated; Dow Corning Corporation; Fruit of the Loom; Lexmark International, Inc.; Square D Company; Texas Instruments; Toyota Motor Manufacturing, North America, Inc.; and Westvaco. Case No. 99-083, Complaint at ¶6.

⁵ Complaints at ¶16.

but merely a non-profit corporation whose members are customers, Defendants assert that KIUC lacks a direct interest in either utility's rates. [I]ndividual memberships in a nonprofit corporation do not give the nonprofit corporation a recognizable interest in the rates of LG&E and KU. Id. at 4.

KRS 278.260 provides:

The commission shall have original jurisdiction over complaints as to rates or service of any utility, and upon a complaint in writing made against any utility **by any person that any rate in which the complainant is directly interested is unreasonable or unjustly discriminatory**, or that any regulation, measurement, practice or act affecting or relating to the service of the utility or any service in connection therewith is unreasonable, unsafe, insufficient or unjustly discriminatory, or that any service is inadequate or cannot be obtained, the commission shall proceed, with or without notice, to make such investigation as it deems necessary or convenient. The commission may also make such an investigation on its own motion. No order affecting the rates or service complained of shall be entered by the commission without a formal public hearing.

KRS 278.260(1) (emphasis added). While mandating that the Commission hear complaints regarding a utility's rates by persons directly interested in those rates, the statute does not define directly interested.

The Commission has previously addressed and rejected Defendants' contention that only a utility customer can be a directly interested person. See Power Development Systems, Inc. v. Kentucky Utilities Co., Case No. 9456 (Ky. P.S.C. Feb. 27, 1986) at 2 (KRS 278.260(1) does not require that complaints be made only by customers). See also Hogan v. Spanish Cove Sanitation, Case No. 94-346 (Ky. P.S.C. Feb. 10, 1994) at 2 (holding that KRS 278.260(1) does not require a complainant to have a direct financial interest in the subject matter of a complaint).

Defendants' contention that the interests of KIUC's individual members will not confer standing upon KIUC, moreover, is at odds with the holding of Rose v. Council for Better Education, Inc., Ky., 790 S.W.2d 186 (1989). In Rose, a non-profit corporation whose membership consisted of 66 local school districts joined in an action against several state officials over the state's system of school financing. The state officials contended, inter alia, that the corporation lacked standing to bring its action and should be dismissed as a party. Specifically referring to the statutory obligation of the corporation's individual members to promote public education, which included the filing of a lawsuit to remedy any defects in the public education system, the Supreme Court rejected this argument and found that the corporation had a judicially recognizable interest in the subject matter of a suit based solely upon its members' interest. Id. at 202.

Here, specific, named members of KIUC have authorized KIUC to file on their behalf the rate complaints, and the named members will bear the costs of prosecuting those complaints. These KIUC members purchase large quantities of electric power from the Defendants and their industrial operations are significantly affected by the Defendants' rates. Thus, these members acting individually have standing to file a rate complaint under KRS 278.260. This standing is not extinguished merely because the KIUC members have elected to act in concert by authorizing KIUC to file the complaints on their behalf. The filing by KIUC is consistent with its principal corporate purpose, which is to represent its members on utility issues before administrative agencies, and is consistent with the interests of those members who authorized the filing on their

behalf. Accordingly, the Commission finds that KIUC has standing to file rate complaints on behalf of its members when authorized to do so by those members.

Defendants next argue that KIUC's complaints represent a collateral attack on the Commission's Order of September 12, 1997 in Case No. 97-300. In that Order, the Commission approved the Defendants' proposed merger and directed them to file detail plans to address any future earnings situations and any proposed incentives to achieve the highest possible levels of performance. Order at 39. Defendants contend that KIUC's complaints represent an attempt to relitigate Case No. 97-300 and make a mockery of the Commission's determination to consider future changes to regulation. Defendants' Motion at 7.

These arguments are wide of their mark. Nothing contained in the Order of September 12, 1997 precludes any party from filing a formal complaint questioning the reasonableness of the Defendants' rates. To the contrary, when approving the Defendants' merger, this Commission expressly noted that the parties as well as the Commission retain the ability under KRS 278.260 to review the utilities' earnings. Order at 14-15. We placed no reservations or conditions upon this right. Similarly, Kentucky courts have advised KIUC and others of this right as one means to resolve their concerns regarding the Defendants' rates. See, e.g., Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Co., Ky., 983 S.W.2d 493, 498 (1998) (If the protestants believe the overall rates are not fair, just and reasonable, they may seek remedy pursuant to KRS 278.260). KIUC's exercise of its statutory right poses no affront to the Commission or its Orders in Case No. 97-300.

Defendants have requested in the alternative that the Commission hold these complaint cases in abeyance pending completion of the Commission's review of Defendants' applications for alternative rate regulation in Case Nos. 98-426 and 98-474. KIUC, on the other hand, has requested that Case Nos. 98-426 and 98-474 be held in abeyance pending resolution of these complaint cases. Based on a review of the complaint cases, which include extensive expert testimony on the issues of earnings and return on equity, and the Defendants' recently filed amended applications in Case Nos. 98-426 and 98-474, which include rate reductions based on current earnings and a reasonable return on equity, the Commission finds that KIUC's rate complaints should be considered in the Defendants' pending alternative rate regulation cases.

Having reviewed the Complaints and considered Defendants' Motion to Dismiss, the Commission finds that the Complaints establish a prima facie case and conform to Administrative Regulation 807 KAR 5:001, Section 12. Further, Defendants' Motion to Dismiss should be denied, as should Defendants' request to hold these complaint cases in abeyance.

IT IS THEREFORE ORDERED that:

1. Defendants' Motion to Dismiss and to hold in abeyance is denied.
2. Within 10 days from the date of this Order, Defendants shall either satisfy the matters complained of in the complaints or shall file written answers to the Complaints, with copies to all parties of record.
3. The KIUC complaint in Case No. 99-082, which relates to LG&E's rates, is transferred to, and its merits shall be considered in, Case No. 98-426.

4. The KIUC complaint in Case No. 99-083, which relates to KU's rates, is transferred to, and its merits shall be considered in, Case No. 98-474.

5. All pleadings in Case Nos. 99-082 and 99-083 are transferred to Case Nos. 98-426 and 98-474, respectively, and Case Nos. 99-082 and 99-083 are closed.

Done at Frankfort, Kentucky, this 13th day of April, 1999.

By the Commission

ATTEST:

Executive Director