

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE APPLICATION OF GREEN RIVER ELECTRIC)	
CORPORATION AND HENDERSON UNION)	
ELECTRIC COOPERATIVE CORPORATION FOR)	CASE NO. 99-162
APPROVAL OF RATE DECREASE FOR KENERGY)	
CORP., CONSOLIDATION SUCCESSOR)	

ORDER

Green River Electric Corporation (GREC) and Henderson Union Electric Cooperative Corporation (HUECC) (collectively the Cooperatives) have jointly applied, pursuant to KRS 278.455, for approval of a 4 percent reduction in the rates for their non-direct serve member-customers. The reduction is proposed to become effective upon the Cooperatives consolidation as Kenergy Corp. Kentucky Industrial Utility Customers (KIUC) has moved, in the alternative, for suspension of the proposed adjustment; or implementation of the proposed rates on an interim basis subject to refund; or Commission approval of a permanent rate reduction for all rate classes. Finding that KRS 278.455 does not govern the application, the Commission rejects the application and directs that the Cooperatives bring their application into compliance with either KRS 278.455 or Administrative Regulation 807 KAR 5:001, Section 10.

GREC and HUECC are electric Cooperatives that collectively serve 48,477 customers in a 15 county area. They have agreed to consolidate on July 1, 1999 and to provide electric service as Kenergy Corp.¹ Pursuant to their consolidation agreement,

¹ See Case No. 99-136, The Application of Green River Electric Corporation and Henderson Union Electric Cooperative Corporation for Approval of Consolidation (Ky. P.S.C. June 18, 1999).

the Cooperatives have applied for approval of a consolidation credit rider equal to 4 percent of the monthly billing amount that will appear on all non-direct serve customer bills. The Cooperatives propose that the credit rider become effective on July 1, 1999 and remain in effect through June 30, 2004.

The Cooperatives make their application pursuant to KRS 278.455, which significantly reduces the level of Commission review of certain electric cooperative rate adjustments. This statute provides:

Notwithstanding any other statute to the contrary, a G&T or distribution cooperative may at any time decrease regulated operating revenues by an amount to be determined solely by the cooperative utility. **If the revenue reduction is allocated among and within the consumer classes on a proportional basis that will result in no change in the rate design currently in effect, the revised rates and tariffs shall be authorized and made permanent on the proposed effective date.**

KRS 278.455(1) (emphasis added). It further provides that such rate changes shall not apply to special contracts under which the rates are **subject to change or adjustment only as stipulated in the contract.** KRS 278.455(3) (emphasis added).

KIUC argues that the Cooperatives have failed to comply with KRS 278.455 in that they have not allocated the proposed revenue reduction among and within their consumer classes on a proportional basis. KIUC states that the Cooperatives have improperly excluded two entire customer classes, large industrial customers served at dedicated delivery points and its large smelter class customers, from the rate reduction. It argues that these 22 customers are served under four separate standard tariffs and are entitled to share in the proposed rate reduction.

Anticipating the Cooperatives arguments, KIUC contends that KRS 278.455(3) does not support the exclusion of these 22 customers. It contends that the 20 large

industrial customers are not special contract customers. All of the industrial customers that HUECC serves are charged rates that are set forth in a filed rate schedule. Of the six large industrial customers that GREC serves, all are served under the cooperative's Rate Schedule Large Industrial Customers Served Under Special Contracts.² None of these contracts, KIUC further asserts, has rates that are self-contained and not subject to change from outside forces. Therefore, these contracts cannot, KIUC concludes, be considered as containing rates that are subject to change or adjustment only as stipulated in the contract.

GREC and HUEC advance two arguments in opposition to KIUC's motion. First, they contend all excluded industrial customers are served under special contracts. They note that, while these contracts adopt or incorporate by reference a filed rate schedule, they contain provisions that are not included in the rate schedule or general tariff and hence are special contracts. Second, they argue that as long as the contract specifies the manner in which rates can be changed or adjusted, even if it is an occurrence extraneous to the contract itself, it meets the qualifications of KRS 278.455(3). The Cooperatives note that, in the case of virtually every industrial customer, their contract with the customer provides under what circumstances the rates may be changed or adjusted. These changes include modification by Commission Order, modification by operation of law, or modification required by the Rural Utilities Service.

² KIUC notes that one of these customers, Commonwealth Aluminum, has terminated its contract with GREC and has no explicit written electric contract in place with its distribution cooperative (GREC) or with the G&T cooperative (Big Rivers). KIUC Motion at 6.

KRS Chapter 278 does not define special contract. Administrative Regulation 807 KAR 5:011, Section 13, however, suggests that a special contract is any contract governing utility service which sets out rates, charges or conditions of service not included in a utility's general tariff. These provisions include specific load requirements, construction obligations, security deposits, and notice requirements. Such provisions fall within the broad statutory definition of rate³ and must be filed with the Commission.⁴ Most contracts involving the Cooperatives large industrial customers have such provisions.

KRS 278.455 fails to support KIUC's argument that the definition of special contracts excludes any contract that contains or incorporates charges that are contained in a filed rate schedule. Nothing within KRS 278.455 suggests that a contract

³ Rate means any individual or joint fare, toll, charge, rental, or other compensation for service, rendered or to be rendered by any utility, and any rule, regulation, practice, act, requirement, or privilege in any way relating to such fare, toll, charge, rental or other compensation, and any schedule or tariff or part of a schedule or tariff thereof;

KRS 278.010(12).

⁴ Under rules prescribed by the commission, **each utility shall file with the commission**, within such time and in such form as the commission designates, schedules showing **all rates and conditions for service** established by it and collected or enforced. The utility shall keep copies of its schedules open to public inspection under such rules as the commission prescribes.

KRS 278.160(1) (emphasis added).

containing or incorporating a filed rate schedule cannot be a special contract. The statute does not refer to rates that are not contained in a filed rate schedule. As previously noted, the statutory definition of rate is sufficiently broad to cover other provisions besides charges.

Nevertheless, while the industrial customer contracts may qualify as special contracts, their rates are not limited to changes only as stipulated in the contract. KRS 278.455(3). None of the contracts specifically limit how the Cooperatives rates may be changed. They merely recognize that the rates are subject to Commission regulation. See Board of Education of Jefferson County v. William Dohrman, Ky.App., 620 S.W.2d 328 (1981). None of the industrial customer contracts contain any express limitation upon either party's right to apply to the Commission for changes in the filed rate.

The legislative history fails to support the Cooperatives claim that a contracts recognition of the Commission's statutory authority to change rates is a limitation or stipulation on rate changes. When first introduced, House Bill 517 provided:

Any rate increase or decrease as provided for in subsections of [sic] (1) and (2) of this section shall not apply to special contracts under which the rates are subject to change or adjustment only as stipulated in the contract or as ordered by the commission.

HB 517, codified as amended at KRS 278.455.

The bill was subsequently amended to delete the phrase or as ordered by the commission. This amendment is clear indication the General Assembly did not intend to exempt special contracts subject to change by Commission Order from any rate reduction or increase implemented pursuant to this statute.

Based upon our view of the legislative history, we are of the opinion that the General Assembly enacted KRS 278.455(3) to protect a cooperative's ability to guarantee a contract rate for a specified period and to enable a cooperative to compete with other electric utilities for long-term contracts with industrial customers who wanted guarantees on their power costs. Where the customer and the utility have agreed only that the filed rate will be charged and have recognized that the filed rate is subject to change pursuant to statutory procedures, there is no guarantee of rate stability to be protected. Each party accepts that the filed rate may change.

While the contracts between the Cooperatives and the large industrial customers do not fall within KRS 278.455(3), the Commission finds that the Cooperatives contracts with the aluminum smelters are within the exemption. Each aluminum smelter contract places specific limitations on the parties' right to obtain rate adjustments and establishes with great specificity when the contract rates may be changed. Accordingly, the Cooperatives' decision to exclude their smelter customers from the proposed rate reduction is not contrary to KRS 278.455 and is not grounds for rejecting their application.

Having considered the motion and response thereto and being otherwise sufficiently advised, the Commission finds that:

1. The Cooperatives have not allocated the proposed revenue reduction among and within their consumer classes on a proportional basis. Their proposed rate reduction does not allocate any of the reduction to their large industrial or smelter class customers.
2. The contracts between the Cooperatives and their large industrial customers are not special contracts whose rates are subject to change or adjustment

only as stipulated in the contracts. KRS 278.455(3) therefore does not exempt the Cooperatives from allocating a proportionate share of the proposed revenue reduction among and within the large industrial customer class.

3. As the Cooperatives application does not conform to the requirements of KRS 278.455, it is not subject to Commission review under that statute.

4. If the Cooperatives application is considered as an application for general rate adjustment, it fails to meet the filing requirements set forth in Administrative Regulation 807 KAR 5:001, Section 10.

5. As the Cooperatives application fails to meet the filing requirements set forth in Administrative Regulation 807 KAR 5:001, Section 10, it cannot be accepted for filing; nor can KIUC s requested relief be granted.

IT IS THEREFORE ORDERED that:

1. KIUC s motion is denied.

2. The Cooperative s application is not accepted for filing.

3. The Cooperatives shall have 30 days from the date of this Order to amend their application to conform to KRS 278.455 or, in the alternative, to conform to Administrative Regulation 807 KAR 5:001, Section 10.

4. Should the Cooperatives choose to submit their application as an application for general rate adjustment pursuant to Administrative Regulation 807 KAR 5:001, Section 10, they may request a deviation from those provisions of Administrative Regulation 807 KAR 5:001, Section 10, that they deem unduly burdensome or inapplicable under the existing circumstances. Deviations will be granted where good cause is shown.

5. If, within 30 days of the date of this Order, the Cooperatives have failed to amend their application to conform to KRS 278.455 or Administrative Regulation 807 KAR 5:001, Section 10, this docket shall be closed without further Order of the Commission.

Done at Frankfort, Kentucky, this 1st day of July, 1999.

By the Commission

ATTEST:

Executive Director