

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN INVESTIGATION OF THE TARIFF )	
FILING BY LOUISVILLE GAS AND )	CASE NO. 2002-00345
ELECTRIC COMPANY TO )	
IMPLEMENT KRS 278.214 )	

AN INVESTIGATION OF THE TARIFF )	
FILING BY KENTUCKY UTILITIES )	CASE NO. 2002-00346
COMPANY TO IMPLEMENT )	
KRS 278.214 )	

AN INVESTIGATION OF THE TARIFF )	
FILING BY THE UNION LIGHT, )	CASE NO. 2002-00348
HEAT AND POWER COMPANY TO )	
IMPLEMENT KRS 278.214 )	

AN INVESTIGATION OF THE TARIFF )	
FILING BY KENTUCKY POWER )	
COMPANY D/B/A AMERICAN )	CASE NO. 2002-00349
ELECTRIC POWER TO )	
IMPLEMENT KRS 278.214 )	

O R D E R

These cases arise from the Commission's enforcement of KRS 278.214, a statute that establishes transmission curtailment priorities for retail electric customers served by jurisdictional electric utilities. That statute, enacted by the 2002 General Assembly, provides as follows:

When a utility or generation and transmission cooperative engaged in the transmission of electricity experiences on its transmission facilities an emergency or other event that necessitates a curtailment or interruption of service, the utility or generation and transmission cooperative *shall not curtail or interrupt retail electric service within its certified territory*, or curtail or interrupt wholesale electric energy furnished to a member

distribution cooperative for retail electric service within the cooperative's certified territory, except for customers who have agreed to receive interruptible service, *until after service has been interrupted to all other customers whose interruption may relieve the emergency or other event.*<sup>1</sup>

The Commission directed Kentucky's jurisdictional electric utilities to file tariffs to implement the service reliability requirements set forth in KRS 278.214. Two of the utilities, Big Rivers Electric Corporation and East Kentucky Power Cooperative, Inc., are generating and transmission cooperatives. Both of them subsequently filed tariffs that explicitly adopt the provisions of KRS 278.214. The remaining four utilities, Louisville Gas and Electric Company (LG&E), Kentucky Utilities Company (KU), The Union Light, Heat and Power Company (ULH&P), and Kentucky Power Company d/b/a American Electric Power (Kentucky Power), each filed tariffs that do not adopt, without qualification, the transmission priorities now mandated by statute.

Each of the four tariffs contains a caveat to the protections required to be given to Kentucky customers by KRS 278.214. To a greater or lesser degree, each utility subjects the statutory strictures to rules to the contrary that may be made by agencies operating under federal auspices. The tariffs have been suspended for review, and the cases were consolidated for briefing purposes. The four affected utilities, along with the Attorney General's Office (AG) and the Kentucky Industrial Utility Customers, Inc., have briefed the issues.<sup>2</sup> Based on a review of the tariffs and the briefs, the Commission finds the issues in these cases to be essentially the same. Therefore, although these cases were consolidated for briefing purposes only, the Commission

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<sup>1</sup> KRS 278.214 (emphasis added).

<sup>2</sup> Although the AG did not request to intervene in these cases, he filed a brief and will therefore be deemed a party.

finds it reasonable to issue a single Order, to be entered in each of these unconsolidated cases.

Each of the utilities asserts federal preemption of KRS 278.214. Kentucky Power also asserts that the statute, on its face, violates the Commerce Clause of the United States Constitution, and urges the Commission to interpret the statute in such a way that the protections it provides Kentucky ratepayers are made subject to any transmission priority rule that may be adopted by the Federal Energy Regulatory Commission (FERC) or other such agencies. By this Order, we find that the tariffs as filed are not in compliance with KRS 278.214. Further, we reject the utilities legal arguments and order them to file tariffs in compliance with KRS 278.214.

The statute is unambiguous. Retail electric customers in a utility's certified territory who have not chosen to receive interruptible service must be the last to be subject to curtailment or interruption of service. There is no exception. The four utilities that are parties to these cases provide retail electric service in Kentucky. None of the four are generating and transmission cooperatives.

Federal preemption of a state statute is not lightly found to have occurred, particularly where the field of regulation is one that traditionally has been occupied by the states.<sup>3</sup> Certainly service adequacy and reliability issues have traditionally been state-regulated. The controlling federal case on the issue of transmission priority for retail customers, Northern States Power Co. v. Federal Energy Regulatory Commission, 176 F.3d 1090 (8<sup>th</sup> Cir. 1999), cert. denied, sub nom Enron Power Marketing, Inc. v. Northern States Power Co., 528 U.S. 1182 (2000), holds that, in fact, states continue to

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<sup>3</sup> Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

possess the authority to regulate in this area, FERC opinions to the contrary notwithstanding.

Moreover, one looks in vain for any indication in the Federal Power Act that Congress intended that FERC's regulations should occupy the field so as to preclude state authority over adequacy or reliability of electricity service. The Second Circuit Court of Appeals in Katherine Gibbs School v. Federal Trade Commission,<sup>4</sup> found that, in enacting the Magnuson-Moss Act, Congress did not intend for the Federal Trade Commission's regulations to occupy the field: the Act contained no preemption provisions, and nothing in the statute's legislative history indicated intent to preempt. Accordingly, there was no preemption. Precisely the same analysis applies here to the transmission component of bundled retail electric service.

Kentucky Power nevertheless asserts that the Commission must interpret KRS 278.214 to permit utilities to defer to federal jurisdiction if federal requirements differ from those of the statute. It claims that the statute is preempted by FERC's exclusive jurisdiction over the transmission of electricity in interstate commerce, and that it violates the Commerce Clause of the United States Constitution because it unlawfully discriminates in favor of Kentucky citizens.

We reject these arguments for a number of reasons. First, as stated above, we are not convinced that FERC's jurisdiction preempts ours when intrastate service adequacy and reliability issues are at stake. Second, we are not free to interpret a statute in such a way as to read it out of existence. The statute is clear on its face, and provides for no exceptions to the protections to be provided to Kentucky customers.

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<sup>4</sup> 612 F.2d 658 (2d Cir. 1979).

Third, Kentucky Power's preemption argument is not legally cognizable because it is not ripe for review: there is at present no federal statute or regulation that conflicts with KRS 278.214. Certainly Congress has not entered into the arena of intrastate service reliability; and the Eighth Circuit Court of Appeals' ruling in Northern States Power Co. invalidated a FERC attempt to regulate in this very area. In that case, the court ruled that FERC exceeded its jurisdiction in attempting to require a utility to curtail electrical transmission to intrastate customers on a comparable basis with its interstate customers when experiencing transmission constraints. Service reliability, the court ruled, is a matter of state, not federal, jurisdiction.

Fourth, KRS 278.214 simply protects Kentucky ratepayers' interest in transmission facilities which were built to serve their needs and for which they have paid pursuant to the state's regulatory compact with its utilities. If KRS 278.214 is unconstitutional, state utility regulation has been unconstitutional for many, many decades. Fifth, regarding the alleged commerce clause violation, the statute does not discriminate on the basis of in-state versus out-of-state electric service. Rather, the statute protects only in-state retail service within a utility's certified territorial boundary. Thus, any in-state wholesale service by the four utilities to these cases falls outside the ambit of KRS 278.214, as does any out-of-state service, whether retail or wholesale.

Finally, and perhaps of the greatest immediate importance here, even if there were a constitutional problem with KRS 278.214, this agency is not empowered by law to declare a statute void on constitutional grounds.<sup>5</sup> The Public Service Commission

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<sup>5</sup> Commonwealth v. DLX, Inc., Ky., 42 S.W.3d 624, 626 (2001) ( an administrative agency cannot decide constitutional issues ).

operates under a legal mandate to regulate utilities and enforce the provisions of this chapter [KRS Chapter 278].<sup>6</sup> KRS 278.214 is a provision of Chapter 278. We are obligated to enforce it. By this Order, we do so.

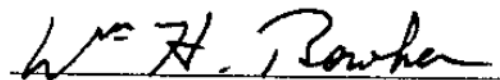
IT IS THEREFORE ORDERED that:

1. The AG is deemed to be a party to each of these four unconsolidated cases.
2. Kentucky Power, KU, LG&E, and ULH&P shall file within their respective cases, within 20 days of the date of this Order, new tariffs setting forth without qualification the expressed transmission priorities required by KRS 278.214.

Done at Frankfort, Kentucky, this 28<sup>th</sup> day of May, 2003.

By the Commission

ATTEST:

  
Deputy Executive Director

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<sup>6</sup> KRS 278.040(1).