

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

KENTUCKY UTILITIES COMPANY)
REVISED SPECIAL CONTRACT WITH)
NORTH AMERICAN STAINLESS, L.P.) CASE NO. 2003-00137

O R D E R

On June 2, 2003, the Commission granted a petition filed by North American Stainless, L.P. ("NAS") for rehearing of the April 28, 2003 Order which accepted on a prospective-only basis a revised special contract for electric service by Kentucky Utilities Company ("KU") to NAS.

BACKGROUND

On March 31, 2003, KU filed a revised contract for electric service to NAS for use at its steel mill melt shop in Carrollton, Kentucky. The revised contract was requested to be effective retroactively to June 1, 2002, and was to supersede KU's original contract with NAS, which was dated July 24, 2000. The revised contract differed from the original contract in three limited areas, only one of which is relevant in this rehearing. That relevant difference is that NAS's load, which under the original contract was classified as 100 percent interruptible, was reclassified to reflect a small portion as firm, with the rest remaining interruptible.

By Order dated April 28, 2003, the Commission found that, except for the retroactive effective date, the contract was reasonable and it was accepted and approved for service rendered by KU on and after April 30, 2003. The basis for

rejecting the retroactive effective date was a finding that the reclassification of a small portion of NAS's load as firm would revise its monthly billings, and that such a retroactive change in rates violated one of the basic tenets of rate-making -- that rates are established prospectively only. The Commission's rejection of the retroactive effective date, and the substitution of the April 30, 2003 effective date, was further based on KRS 278.180(1) which provides that:

[N]o change shall be made by any utility in any rate except upon thirty (30) days' notice to the commission, stating plainly the changes proposed to be made and the time when the changed rates will go into effect.

Thus, under this statute, a rate may be changed after giving the Commission 30 days' prior notice. Here, 30 days from the date that KU filed the revised contract was April 30, 2003.

In its request for rehearing, NAS claimed that its original contract for electric service, which designated 100 percent of its load as interruptible, was the result of mutual mistake of fact because it could not actually interrupt 100 percent of its load. NAS stated that, on discovering this factual error, an agreement was reached with KU to revise NAS's power contract to reflect a small portion of its load as firm. In its response to the rehearing request, KU denied that there was any mutual mistake of fact regarding NAS's ability to interrupt its load. KU affirmatively asserted that NAS has always had the proper equipment to interrupt 100 percent of its load. KU further stated that, even though the revised contract designated 1,800 kilowatts ("kW") of NAS's load as firm, with all load above that level being interruptible, KU's actual monthly billings to NAS between June 1, 2002 and April 30, 2003 reflected 2,000 kW as firm load.

Based on this new information provided by KU, the Commission found that KU's actual billings to NAS from June 1, 2002 through April 30, 2003 were based on neither the terms of the original service contract that was on file with the Commission during that time, nor the revised contract which was filed on March 31, 2003. Consequently, the Commission granted rehearing upon finding a need to further develop the evidentiary record.

DISCUSSION

Since granting rehearing, the Commission has issued a number of information requests and held two informal conferences. The parties agreed to file a joint stipulation of facts in lieu of filing testimony. A briefing schedule was established, but only NAS chose to file a brief, which was filed on February 18, 2005. This case now stands submitted for a decision.

The Commission notes that, although KU and NAS have filed a joint stipulation of facts, they have not jointly agreed on a number of significant factual issues. Thus, the joint stipulation includes KU's version of the facts on certain issues, as well as NAS's differing version of the facts on those same issues. Consequently, in making the following findings of fact, the Commission has relied upon the joint stipulation, the responses to data requests, and all other documents of record.

In its petition for rehearing, NAS claims that it and KU agreed in June 2002 to re-designate a portion of NAS's load as interruptible because both parties recognized that NAS could not physically interrupt 100 percent of its load, and the original service contract was based upon the mutual mistake of fact that 100 percent interruption was possible. NAS also claimed that the Commission erred by relying on KRS Chapter 278

in denying retroactive application of the KU/NAS revised contract. Arguing that a special contract with one customer has been judicially treated differently than a general rate tariff, NAS asserted that its revised contract should be accepted retroactively under contract law, irrespective of any provision to the contrary in KRS Chapter 278. Finally, NAS argued that its revised contract does not change any rate, only the level of its load that is subject to a non-curtailment penalty.

In response to NAS's petition for rehearing, KU vigorously denied that the revised contract was necessitated by a mistake of fact. KU asserted that NAS has been fully capable of interrupting 100 percent of its load but was reluctant to do so because someone at NAS would have to physically turn off certain high-voltage equipment. According to KU, it was this practical concern, not a mistake of fact, that lead NAS to seek a revision in its original service contract. KU acknowledged that it began billing NAS for 2,000 kW of firm load commencing June 2002 while negotiations continued on other contract terms, but KU claims that it informed NAS at that time that such billings were only estimates because, once a revised contract was filed, the Commission would then have to determine if the revised contract could be accepted retroactively.

FINDINGS OF FACT

Based on the evidence of record and being otherwise sufficiently advised, the Commission finds that the KU/NAS original service contract, filed on July 24, 2000, designated 100 percent of NAS's load as interruptible. By agreeing to receive interruptible electric service, NAS qualified for a lower demand rate, in the form of a fixed monthly interruptible credit. This interruptible credit, expressed in terms of dollars per kW, is multiplied by the amount of load that NAS designates as interruptible in its

service contract and reduces NAS's monthly electric bill. NAS qualified for the maximum amount of interruptible credit available by designating 100 percent of its load as interruptible.

In February 2002, NAS began discussions with KU regarding a number of issues, including re-designating a portion of NAS's load as firm. A verbal agreement was reached in June 2002 whereby KU would begin billing NAS as if 2,000 kW of its load was firm, with the remainder continuing to be interruptible. However, nothing was filed with the Commission regarding that agreement. The parties continued to discuss other service-related issues, and NAS subsequently decided that it wanted 1,800 kW of its load to be designated as firm. A revised contract was then drafted to reflect 1,800 kW of NAS's load as firm, plus two other minor changes, and filed by KU with the Commission on March 31, 2003, with a requested effective date of June 1, 2002.

The reason that NAS sought to revise its original service contract to designate a portion of its load as interruptible was to avoid the inconvenience of having to physically disconnect certain high voltage equipment, not because it was incapable of doing so. As NAS acknowledged in the joint stipulation, it "preferred a small amount of firm power," and it "decided that a partially firm supply would be more prudent than simply having all interruptible service."¹

The Commission further finds that by re-designating a portion of the NAS load from interruptible to firm, the revised contract constitutes a change in a rate. The statutory definition of "rate" is very broad, and it includes:

¹ KU/NAS joint stipulation at 3.

[A]ny 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). The contract designation of a portion of the NAS load as firm is a requirement relating to the charges payable by NAS to KU. The revised contract results in changes in KU's billings to NAS by reducing the amount of its load that qualifies for the interruptible demand credit. Thus, there is clearly a change in a rate.

Although the Commission's April 28, 2003 Order cited only KRS 278.180(1) as the basis for denying retroactive application of the KU/NAS revised contract, KRS 278.160(1) and (2) equally support that denial. This latter statute, commonly known as the filed rate doctrine, provides as follows:

(1) 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.

(2) No utility shall charge, demand, collect, or receive from any person a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed schedules, and no person shall receive any service from any utility for a compensation greater or less than that prescribed in such schedules.

KRS 278.160(1) and (2). Here, between July 2000 and March 31, 2003, the only rate schedule that KU had on file with the Commission for service to NAS was the original contract that designated 100 percent of its load as interruptible. Thus, the only rate that could legally be charged to NAS during that time, and the only compensation that NAS

could legally pay to KU during that time, was the rate in the original contract, which designated NAS's load as 100 percent interruptible. By requesting to implement the revised contract retroactively to June 1, 2002, initially KU, and now on rehearing NAS, attempted to charge a rate for a period that predates the filing of that rate. Such a retroactive change in a rate is expressly prohibited by KRS 278.160(1) and (2).

The Commission is not persuaded by NAS's legal arguments that the issue of rate retroactivity should be decided on the basis of contract law, rather than under the provisions of KRS Chapter 278. Neither the statutes nor legal precedent cited by NAS supports a finding that special contracts can be treated differently from generally available rate tariffs. KRS Chapter 278 sets forth a comprehensive scheme for the regulation of utilities. More specifically, KRS 278.040(1) provides that, "The Public Service Commission shall regulate utilities and enforce the provisions of this chapter," and KRS 278.040(2) provides that, "The commission shall have exclusive jurisdiction over the regulation of rates and service of utilities...." In Board of Education of Jefferson County, Kentucky v. Dohrman, 620 S.W.2d 328 (Ky. App. 1981), a utility customer receiving service under a special contract claimed that its rates could only be changed in accordance with the terms of its special contract. The Court, citing the Commission's exclusive jurisdiction to regulate rates under KRS 278.040(2), rejected the customer's claim, declaring that, "Strictly speaking, the Commission had the right and duty to regulate rates and services, no matter what a contract provided."

When a utility and a customer enter into a special contract that touches upon rates (or service), KRS 278.160(1) requires that the contract be filed with the Commission in the same manner as the utility's generally available tariffs. The only

limited statutory exception is under KRS 278.160(3), which provides that a special contract need not be available for public inspection if it otherwise qualifies for one of the Open Records Act exemptions as enumerated in KRS Chapter 61. No other provision of KRS Chapter 278 carves out any exception for special contracts.

NAS's reliance on Bee's Old Reliable Shows, Inc. v. Kentucky Power Co., 334 S.W.2d 765 (Ky. 1960), is misplaced. In that case, the Court held that the Commission did not have exclusive jurisdiction under KRS 278.260 to adjudicate a complaint against a utility. Relying upon the version of KRS 278.260 in effect at that time, the Court stated that a special contract "is of private concern to these parties."² At the time that case was decided, KRS 278.260 authorized the Commission to investigate complaints that were filed "by any ten (10) patrons of the utility complained of..." However, that statute was subsequently amended, in 1982, to delete the requirement that ten patrons were necessary to invoke the jurisdiction of the Commission. The amended version of KRS 278.260 now provides as follows:

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 . . . the Commission shall proceed, with or without notice, to make such investigation as it deems necessary or convenient.

Consequently, since this statutory revision, a special rate contract between a utility and one customer is within the Commission's exclusive jurisdiction and must conform to all applicable provisions of KRS Chapter 278.

² Id. at 767.

Finally, NAS's reliance on Carr v. Cincinnati Bell, Inc., 651 S.W.2d 126 (Ky. App. 1983), is similarly misplaced. In Carr, the customer had filed a court action alleging that the utility breached a special contract to provide a particular type of telephone service. The relief requested included monetary damages and the telephone service as described in the special contract. The Court of Appeals held that the customer could maintain the contract action against the utility for unliquidated damages because the Commission had no jurisdiction to award such relief, but the request for a particular type of phone service was within the exclusive jurisdiction of the Commission under KRS 278.040(2). Thus, the Court in Carr recognized a distinction based on whether the issue related to utility rates or service, which are within the Commission's exclusive jurisdiction, not a distinction based on whether the issue arose under a special contract which was of private concern to the parties.

IT IS THEREFORE ORDERED that the Commission's April 28, 2003 Order is affirmed in all respects and this case is closed and is removed from the Commission's docket.

Done at Frankfort, Kentucky, this 19th day of October, 2005.

By the Commission

ATTEST:



Executive Director

Case No. 2003-00137