Exhibit 2

Bekaert Corp. v. City of Dyersburg

United States District Court for the Western District of Tennessee, Western Division

May 20, 2009, Decided; May 20, 2009, Filed

No. 07-2316-STA-dkv

Reporter
2009 U.S. Dist. LEXIS 130381; 2009 WL 7196672

BEKAERT CORPORATION, Plaintiff, v. CITY OF DYERSBURG, DYERSBURG ELECTRIC SYSTEM, and J.E. WILLIAMSON, JR., Defendants, CITY OF DYERSBURG, ON BEHALF OF DYERSBURG ELECTRIC SYSTEM, Counter-Plaintiff, v. BEKAERT CORPORATION, Counter-Defendant.

Prior History: *Bekaert Corp. v. City of Dyersburg, 256 F.R.D. 573, 2009 U.S. Dist. LEXIS 17223 (W.D. Tenn., 2009)*

Core Terms

consuming, rates, electric, customer, contracts, distributors, services, resale, billed, energy, cooperatives, parties, judicial review, rate-making, calculated, two year, contractual, industrial, requires, lack of subject matter jurisdiction, subject to judicial review, summary judgment motion, terms and conditions, unjust enrichment, Counterclaim, distribute, terminated, patronage, charges, usage

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Judges: S. THOMAS ANDERSON, UNITED STATES DISTRICT JUDGE.

Opinion by: S. THOMAS ANDERSON

Opinion

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Before the Court are the following motions: Plaintiff Bekaert Corporation's Motion to Dismiss Defendants' Counterclaims (D.E. # 49), Defendants City of Dyersburg and Dyersburg Electric System's Motion to Dismiss for Lack of Subject Matter Jurisdiction (D.E. # 58), Defendants City of Dyersburg and Dyersburg Electric System's Alternative Motion to Dismiss or Motion for Summary Judgment (D.E. # 64), and Plaintiff Bekaert Corporation's Motion for Summary Judgment on Defendants' [*2] Amended Counterclaim (D.E. # 97). The parties have responded, and a hearing on the motions was held on March 19, 2009 (D.E. # 118). For the reasons set forth below, Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction is hereby

GRANTED and Plaintiff's Motion for Summary Judgment on Defendants' Amended Counterclaims is hereby **GRANTED.** Because the Court finds that it lacks Subject Matter Jurisdiction to address the relief requested, the Court does not reach the merits of Defendants' Alterative Motion to Dismiss or Motion for Summary Judgment.

BACKGROUND

The City of Dyersburg operates the Dyersburg Electric System ("DES"), which distributes power that it purchases from the Tennessee Valley Authority ("TVA") pursuant to a contract ("the TVA Contract"). (Compl. ¶¶ 8, 9; D.E. # 1.) The TVA Contract dictates the terms and conditions under which DES may purchase and distribute energy. (*Id.* ¶¶ 10, 13.) In particular, the TVA Contract requires DES apply the Resale Rate Schedule, which provides for different rates depending on the purchaser's classification as either a residential, commercial, or industrial consumer. (*Id.*) Further, the TVA Contract requires that electricity shall [*3] be sold and distributed to the ultimate consumer without discrimination among consumers of the same class, such that no discriminatory rate, rebate, or other special concession may be made or given to any consumer either directly or indirectly. (*Id.* ¶ 11.)

In 1988, Bekaert opened a plant in Dyersburg that produced steel cord for use in the manufacture of tires. (*Id.* ¶ 14.) Pursuant to a series of contracts, Bekaert began purchasing power from DES as an industrial consumer. (*Id.* ¶ 20.) In October 2003, Bekaert's last consumer classification required them to purchase electricity according to the "Manufacturing Service Rate — Schedule MSB," which provides for the rates available to industrial consumers requiring a maximum service capacity between 5,000 and 15,000 kilowatts. (*Id.* ¶ 14.) Schedule MSB requires distributors and consumers to enter into contracts for services. (*Id.* ¶ 19.) Specifically, Schedule MSB states:

> Distributor shall require contracts for all service provided under this rate schedule. The contract shall be for an initial term of at least 5 years and any renewals or extension of the initial contract shall be for a term of at least 1 year; after 10 years of service, any [*4] such contract for the renewal or extension of service may provide for termination upon not less than 4 months' notice. (*Id.*)

Schedule MSB also sets forth the parameters by which an industrial customer's consumption will be calculated and billed. Specifically, industrial customer's are billed according to a customer charge, an energy charge, a billing demand charge, and, in some cases, an excess demand charge. (*Id.* ¶ 15.) The customer charge is a flat monthly charge designed to recover the electric company's fixed costs for servicing a customer of this type and size. (*Id.* ¶ 16.) The energy charge is the amount charged for the amount of energy actually used by the customer each month. [1] (*Id.*) The billing demand charge is a capacity charge based on the maximum amount of usage by the customer during any half-hour period during the month. Its purpose is to allow the distributor to recover the costs associated with maintaining sufficient facilities and supplies of electricity to meet the customer's highest demand for energy during the month. (*Id.* ¶ 17.) The excess demand charge is an additional charge imposed if the customer's billing demand exceeds the customer's contract demand, which is [*5] the kilowatt amount the customer anticipates it will need, as set by the customer and distributor's energy contract. (*Id.* ¶ 18.) Schedule MSB also requires the distributor to charge its customers a minimum bill calculated according to the customer's base customer charge, base demand charge, and base energy charge.

On November 15, 2006, Bekaert announced that the Dyersburg plant would start curtailing production beginning May 1, 2007 in an effort to

[1] Neither the customer charge nor the energy charge are disputed in this action. (Compl. ¶ 16; D.E. # 1.)

gradually cease operations altogether. (*Id.* ¶ 23.) At this time, Bekaert and DES's power contract was set to expire on December 31, 2006. [2] (*Id.* ¶ 21.) As such, Bekaert approached DES about negotiating a new contract that better suited Bekaert's needs, given the impending plant closure. (*Id.* ¶ 24.) DES offered Bekaert a five year contract with a two year termination provision, which required a contract demand figure based on Bekaert's usage as a fully operational manufacturing facility. (*Id.* ¶¶ 24-25.) As this was substantially higher than Bekaert's needs, Bekaert declined to sign, so DES offered Bekaert an amendment to the proposed contract, **[*6]** which provided that the contract could be terminated upon Bekaert's sale of its Dyersburg facility to a buyer that would use the facility for manufacturing or industrial purposes. (*Id.* ¶ 26.) As Bekaert did not want to curtail their buyer opportunities, Bekaert again declined to accept the proposed contract. (*Id.*)

Eventually negotiations broke down, and on January 1, 2007, Bekaert began purchasing power from DES without a contract. (*Id.* ¶ 28.) Without a contract, DES calculated Bekaert's contract demand figure at zero ("0"), and began charging Bekaert according to a demand charge equal to Bekaert's highest usage during any 30 minute period of that month plus an excess demand charge equal to this amount. (*Id.*) This meant that Bekaert was essentially charged twice for the same peak usage, because a contract demand of zero meant that every kilowatt Bekaert used was in excess of their contract demand. (*Id.*) Although DES was entitled to terminate service to Bekaert, in consideration of the parties twenty year relationship DES asserts that they continued to supply Bekaert electricity under the assumption that eventually a **[*7]** mutually agreeable MSB power contract would be entered into. (*Id.* ¶ 31; D.E. # 1; Def.'s Am. Countercl. ¶ 6; D.E. # 79.) Thus, according to Bekaert, in order to avoid having their service discontinued, they continued to pay DES's bills under protest. (Pl.'s Resp. to Def.'s Mot. for Summ. J. 7; D.E. # 81.) Eventually, Bekaert ceased operations on December 31, 2007 and ceased power consumption on January 14, 2008. (*Id.*) However, DES continued to bill Bekaert for the remainder of 2008, as if Bekaert had signed the two year contract, including billing Bekaert for the entire month of January. [3] (Pl.'s Mot. for Summ. J. on Def.'s Countercl. 5; D.E. # 97.)

Bekaert filed the underlying action premised on theories of breach of contractual obligations to third party beneficiaries, breach **[*8]** of common law and statutory requirements of just, reasonable, and nondiscriminatory rates, violations of the Tennessee Consumer Protection Act, violations of *Tennessee Code Annotated § 7-34-115*, and unjust enrichment. (Compl. ¶¶ 37-61, 77-82; D.E. # 1.) Bekaert seeks (1) reimbursement for any amounts it has paid for electricity over and above an amount that is just and reasonable; (2) a declaratory judgment declaring that DES's imposition of an "excess demand" based on a contract demand of zero is unlawful, and that DES's refusal to offer Bekaert a contract that could be terminated in less than twenty-four months was unlawful; (3) triple the amount of damages Bekaert has sustained as a consequence of DES's violation of the Tennessee Consumer Protection Act; and (4) attorneys' fees and costs as provided by the Tennessee Consumer Protection Act. (*Id.* ¶¶ a-d, f.)

In answer, DES asserts that the Court is without subject matter jurisdiction to hear Bekaert's

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[2] This contract had been for a period of thirteen months. (*Id.* ¶ 21.)

[3] Bekaert does not dispute any charges for power consumed between January 1 and January 14, but claims they are unable to determine what they owe. (Pl.'s Mot. for Summ. J. on Def.'s Countercl. 4 n.2; D.E. # 97.) This is because after January 14 another company began consuming power at Bekaert's previous location, leaving Bekaert unable to ascertain what portion of the January bill is attributable to them. (*Id.*)

complaints, because the issues in controversy involve the rates and fees for electricity as promulgated by the Board of the Tennessee Valley Authority (the "TVA Board"), and Congress vested the TVA Board with exclusive discretionary [*9] authority to set and make rates, which is not subject to judicial review. (Answer Affirmative Defenses ¶ 2; D.E. # 10.) Subsequently, DES has filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction. (D.E. #58.) DES additionally has submitted a counterclaim for the total amount of unpaid bills for 2008, which DES claims Bekaert had incurred as a result of taking power pursuant to Schedule MSB. (Def.'s Am. Countercl. ¶¶ 13-15; D.E. # 79.)

I. Judicial Review

Because the issue regarding whether the Court has subject matter jurisdiction over the underlying action may be dispositive of the other issues, this is where the Court's analysis necessarily must begin. Essentially, the key question before the Court is whether TVA's unreviewable authority to set and maintain the rates at which TVA distributors may resale TVA electricity pursuant to a TVA contract extends to the method by which a TVA distributor calculates those rates. To fully understand this question, it may be helpful to begin with some background regarding TVA in general and the relationship between TVA and distributors of TVA power more specifically.

The Tennessee Valley Authority Act (the "TVA Act") authorizes the TVA [*10] Board to fix the rates at which the electric energy generated by TVA may be sold. [4] Under the TVA Act, the TVA Board must supply all of its power at "rates as low as feasible," while at the same time fixing rates that secure the system's financial soundness. [5] To ensure these competing objectives are accomplished, Congress entrusted and committed the act of fixing rates that achieve this balance to the judgment and discretion of the TVA Board. [6] This discretion includes the authority to set resale rates in power sale and distribution contracts. [7] Specifically, section 10 of the TVA Act expressly states that "the Board is authorized to include in any contract for the sale of power such terms and conditions, including resale rate schedules, ... as in its judgment may be necessary or desirable for carrying out the purposes of this chapter...." [8] TVA's statutorily sanctioned authority to set resale rates is limited only by the provision that they not violate the purposes of the TVA Act, and thus, in the absence of a clear violation, rates set by TVA are not subject to judicial review. [9] This principle of nonreviewability seems at least in part based

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[4] *Mobil Oil Corp. v. Tenn. Valley Auth.*, 387 F. Supp. 498, 508 (N.D. Ala. 1974) (citing *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 21 F. Supp. 947 (E.D. Tenn. 1938) (holding that this grant of authority was a valid exercise of the power vested to Congress to dispose of the property of the United States)).

[5] *See Mobil Oil Corp.*, 387 F. Supp. at 506; *Consol. Aluminum Corp. v. Tenn. Valley Auth.*, 462 F. Supp. 464, 468-69 (M.D. Tenn. 1978).

[6] *Consol. Aluminum Corp.*, 462 F. Supp. at 468-69; *Mobil Oil Corp.*, 387 F. Supp. at 506-507 (citing various portions of the TVA Act authorizing the TVA Board to set rates, including provisions relating to the TVA Board's authority to set rates in contracts that relate to the sale of TVA power).

[7] *Consol. Aluminum Corp.*, 462 F. Supp. at 469.

[8] 16 U.S.C. § 831i.

[9] *Ferguson v. Elec. Bd. of Chattanooga*, 378 F. Supp. 787, 789 (E.D. Tenn. 1974); *see also McCarthy v. Middle Tenn. Elec. Membership Coop.*, 466 F.3d 399, 405 (6th Cir. 2006) (stating that "[a] long line of precedent exists establishing that TVA rates are [*12] not judicially reviewable"); *Matthews v. Town of Greenville*, 932 F.2d 968 [published in full-text format at 1991 U.S. App. LEXIS 9453], 1991 WL 71414, *2 (6th Cir. 1991) (stating that "[a] long line of precedent exists establishing that TVA rates are not judicially reviewable"); *Carborundum Co. v. Tenn. Valley Auth.*, 521 F. Supp. 590, 593 (E.D. Tenn. 1981); *Consol. Aluminum Corp.*, 462 F. Supp. at 474 ("The TVA Act commits the fixing of TVA's rates to the discretion of the TVA Board and precludes judicial review thereof."); *Mobil Oil Corp.*, 387 F. Supp. at 506, 511.

upon the theory that allowing judicial [*11] review of TVA's rate-making and contracting process would "create uncertainties that would make the declared statutory policy impossible to carry out." [10]

The issues currently before the Court involve whether the TVA Act's broad grant of rate-making authority extends to the methods by which a TVA energy distributor calculates a resale rate schedule as set by the TVA Board pursuant to a power distribution contract. Although it appears that this question has never been decided directly, several courts have issued opinions that may provide some guidance.

In *Allen v. Electric Power Board of the Metropolitan Government of Nashville and Davidson County*, a residential customer of Nashville's municipal electric utility, "NES", filed a complaint which contended that the utility's implementation of a [*13] rate adjustment schedule through the use of a staggered cycle of meter reading resulted in invidious and arbitrary discrimination in violation of the *Fifth* and *Fourteenth Amendments*. [11] Before reaching the constitutional question, the court initially commented on the reviewability of such an action. Here the court stated:

> TVA has been vested with express statutory authority to prescribe resale rate schedule for the sale of power by its distributors, and ... the discretion delegated to it by Congress ... is not subject to judicial review.... By parity of reasoning, the imposition of the rate adjustment schedule by TVA's distributors pursuant to their contracts with TVA are likewise not reviewable. [12]

In *Matthews v. Town of Greenville*, the plaintiff brought suit against Greenville Light and Power System to recover alleged overcharges, which the plaintiff claimed had resulted from TVA's failure to force Greenville to maintain its accounts in compliance with the methods outlined in TVA and Greenville's electric power distribution contract. [13] More specifically, the plaintiff alleged that

> [D]ue to TVA's failure to enforce [*14] the [distribution] contract, he and the members of the proposed class [had] been paying excessive power rates in violation of the contract between Greenville and TVA and the intent of Congress as expressed in *16 U.S.C. § 831j*...[, which] both provide[d] that TVA-supplied energy [was] to be furnished to consumers at the lowest possible rate. [14]

The plaintiff, sought to have TVA's actions reviewed under *§ 702* of the Administrative Procedure Act, which stated that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review." [15] However, the Court found that there was no language in the TVA Act requiring TVA to enforce its contracts, and that furthermore, as the TVA Act accorded TVA a great amount of discretion in its contractual relations with municipalities, the TVA Act did not even require action by TVA if there was evidence electricity was not being provided at the lowest

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[10] *Mobil Oil Corp.*, 387 F. Supp. at 509 n.29.

[11] 422 F. Supp. 4, 5 (M.D. Tenn. 1976).

[12] *Id.* at 6 (citation omitted).

[13] 1991 U.S. App. LEXIS 9453, 1991 WL 71414 at *2.

[14] *Id.*

[15] *Id.* (citing ***5 U.S.C. § 702***).

possible rates to customers. [16] In so holding the court stated:

> We realize that our decision effectively leaves Matthews with no alternative but to pursue a legislative remedy. The federal court [*15] system, however, cannot assume the role of a (quasi) public service commission for TVA ratepayers. The broad grant of authority Congress has afforded the TVA in the TVA Act precludes judicial review in this instance. We find that TVA's failure to force GLPS to utilize FERC standards is unreviewable.... [17]

In *McCarthy v. Middle Tenn. Elec. Membership Coop.*, the defendants were 22 electric cooperatives who purchased their electric power from TVA pursuant to TVA power distribution contracts. [18] According to a state statute, if the cooperatives accrued excess revenue beyond what was necessary to cover specified expenses, the cooperatives could distribute patronage funds; however, the contract between the cooperatives and TVA expressly prohibited this. [19] The plaintiffs brought suit against the members of the electric cooperatives and TVA alleging *Fifth Amendment* Takings and Due Process Clause violations, violations of the Sherman Act, violations of the Tennessee Consumer Protection Act, breach of fiduciary duty, and failure to refund patronage capital or to reduce rates as required by state law. [20] The defendants [*16] argued that plaintiffs' claims were not subject to judicial review, because in essence, they were seeking to challenge the level of rates set by the TVA Board for the sale of power and the terms and conditions for the sale of that power. [21] Although the plaintiffs expressly stated that their lawsuit was not about TVA's rate-making authority but merely sought an accounting of the patronage accounts, the Sixth Circuit found that because they also argued they were improperly denied patronage capital, the relief requested implicated TVA's rate-making authority. [22] The Court reasoned that the TVA Act accorded TVA a great amount of discretion in its contractual relations with municipalities, and the contractual provisions that prevented the cooperatives from distributing patronage funds were within TVA's statutory authority to set resale rates. [23] Thus, because the contractual provisions challenged by the plaintiffs involved

> [D]eterminations about the level of rates necessary to recover the various costs of operating TVA's power system, as well as the terms and conditions of TVA's power contracts, ... [they were] part of TVA's unreviewable rate-making responsibilities....To the extent that [*17] Tennessee law imposes additional constraints on the TVA's Authority, it is preempted by the TVA Act's express grant of discretion.... [24]

The Sixth Circuit went on to state that

> If we were to review the Cooperatives' actions in enforcing the contract, we would

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[16] 1991 U.S. App. LEXIS 9453, [WL] at *3.

[17] 1991 U.S. App. LEXIS 9453, [WL] at *4.

[18] *McCarthy*, 466 F. 3d at 404.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 405.

[22] *Id.* at 406.

[23] *Id.* at 407.

[24] *Id.* (quoting *4-County Elec. Power Ass'n v. Tenn. Valley Auth.*, 930 F. Supp. 1132, 1138 (S.D. Miss. 1996)).

> still be reviewing TVA's actions and thus ignoring the...prohibition on judicial review....The plaintiffs' claims under the Tennessee Consumer Protection Act, ..., and for breach of fiduciary duty are based in part on the Cooperatives' failure to issue patronage refunds; the Cooperatives failed to issue the refunds as a result of their contracts with the TVA, which are not subject to judicial review. [25]

Bekaert has alleged that by charging Bekaert twice for the same peak usage, discriminating against Bekaert, charging an unjust and unreasonable rate, offering a contract that could not be terminated in less than twenty-four months, and threatening to impose a $5 million charge for replacement of a substantially depreciated electric substation, [*18] DES has violated its contractual obligations to Bekaert as a third party beneficiary to the TVA Contract, has violated state common law and statutory requirements, has violated the Tennessee Consumer Protection Act, and has become unjustly enriched at Bekaert's expense. As a result of DES's action, Bekaert seeks reimbursement of amounts paid over and above an amount that is just and reasonable, as well as a declaratory judgment finding that Defendants' imposition of an "excess demand" charge equal to Bekaert's peak usage is unlawful, that Defendants' cannot charge Bekaert for the replacement cost of the electric substation, and that Defendants' refusal to offer Bekaert a contract term for less than twenty-four months was unlawful. In light of the above case law, however, the Court finds that it is precluded from reviewing Bekaert's allegations pursuant to the TVA Act's express grant of authority to set the rates at which distributors may resale TVA power pursuant to a TVA distribution contract. [26]

Although Bekaert adamantly contends that the TVA rate making cases are inapplicable since their complaint does not involve TVA's authority to set rates, the Court finds that the manner in which DES calculates a TVA resale rate is inextricably intertwined with TVA's rate-making authority, and thus, is not the proper subject of judicial review. The TVA Board is vested with the responsibility of setting rates at which TVA sells power. [27] "[T]he TVA Act accords the TVA a great amount of discretion in its contractual relations with municipalities." [28] Municipal electric utilities that contract to distribute TVA power are subject to the terms and conditions, including resale rate schedules, which in TVA's judgment it deems necessary. [29] "Determinations about the level of rates necessary to recover the various costs of operating TVA's power system, as well as the terms and conditions of TVA's power contracts, including specifically the length of contracts, are part of TVA's unreviewable rate-making responsibilities." [30] As many previous courts have

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[25] *Id.*

[26] Although the questions before the *Allen*, ***Matthews***, and *McCarthy* courts are distinguishable from the case at bar, most notably by the fact that TVA was a party to all of these actions, their [*19] analyses are persuasive nonetheless.

[27] *Mobil Oil Corp.*, 387 F. Supp. at 508 (citing *Tenn. Elec. Power Co.*, 21 F. Supp. 947).

[28] *Matthews*, 1991 U.S. App. LEXIS 9453, 1991 WL 71414 at *3; *see McCarthy*, 466 F.3d at 406.

[29] *See Consol. Aluminum Corp.*, 462 F. Supp. at 469.

[30] *4-County*, 930 F. Supp. at 1138 (holding that TVA could condition participation in a discount incentive program offered to TVA distributors upon the entry of [*21] a ten year contractual relationship to purchase TVA power as part of its unreviewable rate making authority, where a TVA power distributor alleged this condition was not related to any legitimate concern for the need to recover costs incurred in providing services and hence should not be characterized as a "rate making" case).

stated "[a] long line of precedent exists establishing that TVA rates are not judicially reviewable." [31] Schedule [*20] MSB, the rate schedule under which Bekaert was charged, was created by TVA's authority to set resale rate schedules, [32] and as the validity of this rate schedule is neither disputed nor subject to judicial review, by parity of reasoning, the imposition of Schedule MSB by DES, a TVA distributor, pursuant to its contract with TVA is likewise not reviewable. [33] Specifically, in seeking reimbursement of amounts paid over and above an amount that is just and reasonable, and *ipso facto* seeking a determination of what amount would have been just and reasonable, as well as seeking a finding that DES's "excess demand" calculation and contract term negotiations were unlawful, Bekaert essentially has asked the Court to assume the "role of a (quasi) public service commission for TVA rate payers," a role the Court is precluded from filling. [34]

Thus, because the allegations and requested relief outlined in Bekaert's complaint would require the Court to fix a new rate and contract term length, and because this sort of court action would be incompatible with TVA's discretionary responsibility of fixing resale rates and would represent judicial review and modification of a TVA rate, Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction is hereby **GRANTED.** [35]

II. DES's Counterclaim

On January 14, 2008, Bekaert ceased consuming power from DES; however, DES continued to bill them for the remainder of 2008, including the entire month of January. These charges appear to be calculated in accordance with the "minimum bill" provision of Schedule MSB. According to DES, because they required all industrial customers consuming power under Schedule MSB to enter into two year minimum contracts, and because the TVA contract prohibited DES from offering Bekaert anything different from what they had offered other customers under Schedule MSB, by consuming power pursuant to Schedule MSB, Bekaert had obligated itself to a two year commitment, even though no contract had been signed. (Def.'s Am. Countercl. ¶ 5; D.E. # 79.) DES states that in supplying Bekaert with MSB power services, DES conferred upon Bekaert a valuable benefit in the form of Bekaert's use of DES's substations, transformers and infrastructure, and that Bekaert will be unjustly and inequitably enriched at the cost and expense of DES and its [*23] other customers/rate payers if Bekaert is discharged for the total of unpaid charges invoiced for 2008. [36] (*Id.* ¶¶ 13-14.)

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[31] *McCarthy*, 466 F.3d at 405; *Matthews*, 1991 U.S. App. LEXIS 9453, 1991 WL 71414 at *2; *Carborundum Co.*, 521 F. Supp. at 593; *Mobil Oil Corp.*, 387 F. Supp. at 506, 511.

[32] *McCarthy*, 466 F.3d at 407.

[33] *Allen*, 422 F. Supp. at 6.

[34] *Matthews*, 1991 U.S. App. LEXIS 9453, 1991 WL 71414 at *4.

[35] *See Mobil Oil Corp.*, 387 F. Supp. at 509 (ultimately declining to review a minimum bill provision that would require the court fix new rates according to the consumer's actual use, as such action "could not be [*22] squared with the discretionary responsibilities placed on the TVA Board by the TVA Act in fixing rates or the principle of judicial nonreviewability...")

[36] Although the Court has found that review of the amounts charged while Bekaert was consuming power under a TVA mandated rate schedule is precluded pursuant to TVA's rate-making authority, the same does not hold true for the time during which Bekaert was no longer consuming power, and thus, no longer subject to a TVA Rate Schedule. Instead it seems the only way the Court would be precluded from reviewing the amounts charged for the remainder of 2008 would be if the parties had entered into a contract pursuant to TVA's Schedule MSB, or perhaps, if the Court found that Bekaert was liable under some sort of implied contractual obligation per TVA's Schedule MSB. For cases holding consumers liable for a minimum bill pursuant to their contracts *see City of Memphis v. Ford*

A. Standard of Review

Federal Rule of Civil Procedure 56(c) provides that a

> judgment . . . shall be rendered forthwith if the pleadings, depositions, [*24] answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. [37]

In reviewing a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. [38] When the motion is supported by documentary proof such as depositions and affidavits, the nonmoving party may not rest on his pleadings but, rather, must present some "specific facts showing that there is a genuine issue for trial." [39] It is not sufficient "simply [to] show that there is some metaphysical doubt as to the material facts." [40] These facts must be more than a scintilla of evidence and must meet the standard of whether a reasonable juror could find by a preponderance of the evidence that the nonmoving party is entitled to a verdict. [41] When determining if summary judgment is appropriate, the Court should ask "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-side that one party must prevail as a matter of law." [42]

Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." [43] In this Circuit, "this requires the nonmoving party to 'put up or shut up' [on] the critical issues of [her] asserted causes of action." [44] Finally, the "judge may not make credibility determinations or weigh the evidence." [45] Under *Federal Rule of Civil Procedure 56(c)*, summary judgment is proper "if . . . there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." [46]

B. Implied Contracts

"Unjust enrichment is a quasi-contractual theory or an equitable substitute for a contract claim ...."

Motor Co., 304 F.2d 845 (6th Cir. 1962; *Carborundum Co. v. Tenn. Valley Auth.*, 521 F. Supp. 590, 591 (E.D. Tenn. 1981); *Mobil Oil Corp.*, 387 F. Supp. at 502-503.

[37] ***Fed. R. Civ. P. 56(c)***; *see* *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); **[*25]** *Canderm Pharmacal, Ltd. v. Elder Pharms, Inc.*, 862 F.2d 597, 601 (6th Cir. 1988).

[38] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

[39] *Celotex*, 477 U.S. at 324.

[40] *Matsushita*, 475 U.S. at 586.

[41] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

[42] *Id.* at 251-52 (1989).

[43] *Celotex*, 477 U.S. at 322.

[44] *Lord v. Saratoga Capital, Inc.*, 920 F. Supp. 840, 847 (W.D. Tenn. 1995) (citing *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989)).

[45] *Adams v. Metiva*, 31 F.3d 375, 379 (6th Cir. 1994).

[46] ***Fed. R. Civ. P. 56(c)***; **[*26]** *see also* *Celotex*, 477 U.S. at 322 (1986).

[47] Under Tennessee law, "[c]ourts may impose a contractual obligation under an unjust enrichment theory if there is no contract between the parties or the contract has become unenforceable or invalid and the defendant will be unjustly enriched unless the court imposes an obligation." [48] Actions based on unjust enrichment theories for all practical purposes are the same as actions based on quasi-contract, quantum meruit, or contract "implied in law," and courts frequently have employed this terminology interchangeably. [49] Each of these actions is premised on an implied obligation where justice and equity require the imposition of a contractual relationship regardless of the parties' assent. [50] A party may recover under theories of implied-in-law or quasi-contract if the following circumstances are shown:

> (1) There is no existing, enforceable contract between the parties covering the same subject matter;
>
> (2) The party seeking recovery proves that it provided valuable goods or services;
>
> (3) The party to be charged received the [*27] goods or services;
>
> (4) The circumstances indicate that the parties to the transaction should have reasonably understood that the person providing the goods or services expected to be compensated; and
>
> (5) The circumstances demonstrate that it would be unjust for a party to retain the goods or services without payment. [51]

Applying the *Doe* test to the case at bar demonstrates that while DES has presented proof as to the first factor, they have failed to offer any proof on the remaining four. After January [*28] 14, 2008, DES did not provide power to Bekaert, nor did Bekaert consume power from DES. Although DES claims that Bekaert knowingly benefitted from the use of DES's substations, transformers, and infrastructure, once Bekaert stopped consuming power, Bekaert also stopped receiving any benefit from DES's equipment and services. With the exception of the fourteen (14) days in January, which was not prorated to reflect the period that Bekaert was still consuming DES's power, Bekaert has already paid the full amount for the power it consumed. DES contends that since all consumers of the MSB rate class were obligated to consume DES's power for a minimum two year term, and since DES cannot supply power any differently to Bekaert than it could to the other MSB rate class members, Bekaert's power consumption pursuant to Schedule MSB during 2007 constitutes the benefit for which Bekaert also becomes liable for the 2008 billings. Essentially, DES claims that Bekaert owes DES $ 606,014.18, the amount billed for 2008, as part of the total amount of just and reasonable compensation owing for the MSB power furnished during 2007. This argument is unavailing.

To begin with Bekaert and the other MSB class [*29] members were not the same. The other MSB members had committed themselves to two year minimum agreements, which in turn afforded

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[47] *Metro. Gov't of Nashville & Davidson County v. Cigna Healthcare of Tenn., Inc.*, 195 S.W.3d 28, 32 (Tenn. Ct. App. 2006) (citing *Whitehaven Cmty. Baptist Church v. Holloway*, 973 S.W.2d 592, 596 (Tenn. 1998)); *see also Doe v. HCA Health Servs. of Tenn., Inc.*, 46 S.W.3d 191, 197 (Tenn. 2001) ("Where a contract is invalid or unenforceable, the court may impose a contractual obligation when the defendant will be unjustly enriched absent a quasi-contractual obligation.").

[48] *Cigna Healthcare of Tenn., Inc.*, 195 S.W.3d at 32 (citing *Paschall's Inc. v. Dozier*, 219 Tenn. 45, 407 S.W.2d 150, 154-55 (Tenn. 1966)).

[49] *Id.*

[50] *Id.*

[51] *Doe*, 46 S.W.3d at 197-98 (citing *Swafford v. Harris*, 967 S.W.2d 319, 324 (Tenn. 1998)).

them certain protections and benefits, which Bekaert did not enjoy as an MSB class member. Bekaert did not sign a contract with DES, and DES did not promise to make any particular amount of power available to Bekaert for any specified period of time. DES made no infrastructure expenditures or other commitments to Bekaert, because DES was well aware that Bekeaert was shutting down operations and would cease using power. Additionally, the circumstances surrounding Bekaert and DES's contract negotiations, as well as Bekaert's consumption of power without a contract, in no way suggest that the parties reasonably understood that DES expected to be compensated for minimum bills through the end of 2008. Bekaert did not sign the contracts offered by DES, in large part because Bekaert did not want to make a two year commitment. In other words, DES has completely failed to allege any material facts, which could demonstrate that they provided Bekaert valuable goods or services during 2008; that Bekaert received any valuable goods or services from DES during 2008; that [*30] the circumstances in any way indicate Bekaert should have understood that DES was providing goods and services during 2008 for which DES expected to be compensated; or that DES would be unjustly enriched should Bekaert be allowed to retain the phantom goods and services provided by DES during 2008 without payment. [52] Furthermore, if the Court were to adopt DES's theory of implied-in-law contract, Bekaert's conscious decision to sign or not to sign the contracts offered would have had no legal effect, since Bekaert would have been bound either way.

Because DES has presented no evidence under any theory of implied-in-law contract, which could remotely demonstrate that Bekaert was liable for the amount billed during 2008, with the exception of what is still due for the time in January during which Bekaert was still consuming power, Bekaert's Motion for Summary Judgment on DES's counterclaim is hereby **GRANTED.**

IT IS SO ORDERED.

/s/ S. Thomas Anderson

S. THOMAS ANDERSON

UNITED STATES DISTRICT JUDGE

Date: May 20th, 2009.

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[52] *See* Cigna Healthcare of Tenn., Inc., 195 S.W.3d at 32; Doe, 46 S.W.3d at 197-98.