

**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

In the matter of: : CASE NO. 2016-00371

THE ELECTRONIC APPLICATION OF LOUISVILLE :
GAS & ELECTRIC COMPANY FOR AN :
ADJUSTMENT OF ITS ELECTRIC AND GAS RATES :
AND FOR CERTIFICATES OF PUBLIC :
CONVENIENCE AND NECESSITY :

In the matter of: : CASE NO. 2016-00370

APPLICATION OF KENTUCKY UTILITIES :
COMPANY FOR AN ADJUSTMENT OF ITS :
ELECTRIC RATES AND FOR CERTIFICATES :
OF PUBLIC CONVENIENCE AND NECESSITY :

**THE KENTUCKY SCHOOL BOARDS ASSOCIATION’S MEMORANDUM BRIEF
REGARDING KRS § 278.035**

Comes the Kentucky School Boards Association (“KSBA”), by counsel, and submits the following memorandum brief addressing KRS § 278.035:

HISTORY OF KRS § 278.035

KRS § 278.035 directs that, “[a]ny entity receiving public funds from the Commonwealth of Kentucky, or any political subdivision thereof, for the purpose of offsetting at least fifty percent (50%) of its operational expenses shall not be entitled to preferential retail rates for services provided by utilities subject to the provisions of KRS Chapter 278. This section shall not prohibit the provision of free or reduced rate served under KRS 278.170(3).” The legislature enacted the original version of KRS § 278.035 in 1990 from a bill addressing water districts and the amount of interest they could charge customers paying deposits for new accounts. The original version of KRS § 278.035 mirrors the current version with the exclusion of the last

sentence (added by amendment in 1996), “[t]his section shall not prohibit the provision of free or reduced rate service under KRS 278.170(3).”

CURRENT FUNDING FOR PUBLIC (K-12) SCHOOLS

The Council for Better Education website <http://kycbe.com/> contains funding data for public school districts under “2016 SEEK Overviews”. The current statewide funding ratio for K-12 public schools is 53% State Funding versus 47% Local Property Tax funding on an inflation adjusted basis. These numbers are however trending toward the public school districts overall as a class to soon be receiving more than 50% in local property tax funding as a result of revenue and tax increases. Currently, for LG&E served schools as a class they are clearly above the 50% threshold (receiving more in property taxes than state SEEK funding) due to Jefferson’s counties school property taxes however on a school district by school district basis certain other less economically endowed districts which receive less property taxes fall below the 50% threshold.

IMPACT OF PILOT SCHOOL TARIFF ON OVERALL REVENUE REQUEST BY THE COMPANIES & EXPERIENCE OF KSBA WITNESS RONALD WILLHITE

Based on the proposed pilot tariff for K-12 public schools, for KU \$750,000 is 0.05% of the total annual revenue and for LG&E \$750,000 is 0.07% of total annual revenue. A chart and description is attached as Exhibit “1”.

With respect to Mr. Willhite, KSBA witness in this matter, Mr. Willhite has experience with rate design and cost of service analysis beginning on or about 1973 – 2001 having previously been an employee in various capacities addressing these issues with Kentucky Utilities and LG&E. Mr. Willhite has been involved with schools boards since on or about 1985

to the present day. Mr. Willhite also previously taught ratemaking through the Edison Electric Institute. A copy of Mr. Willhite's CV is attached hereto as Exhibit "2".

DOES THE PROPOSED SCHOOL PILOT TARIFF VIOLATE KRS § 278.035?

A. Summary of Argument

Does the pilot tariff violate the statute? In a word, "no." The characterization as K-12 public schools as a separate rate class permitting a tariff for schools is acceptable and the rate is not "preferential". In support thereof, KSBA witness, Ronald Willhite, provided pre-filed testimony which articulated how schools differ as a class from other groups with unique and different energy load use characteristics. Mr. Willhite also discussed the reporting requirements and benefits to the schools associated with the energy manager program coming from KRS § 160.325. As a class, schools are homogenous group, recognizing this difference with a pilot tariff is not an unreasonable classification, and the tariff is not preferential.

B. K-12 Schools are different as a class and the data supports classification of schools as a unique class

Within Mr. Willhite's testimony he articulated that K-12 schools are different because of three reasons: (1) K-12 public schools are subject to KRS § 160.325 and the corresponding energy management requirements; (2) school operating hours differ significantly from commercial and industrial customers; and (3) school load and usage characteristics differ significantly from commercial and industrial customers. See Ronald Willhite's prefiled testimony on behalf of KSBA pgs. 3-6.

Pursuant to KRS 278.030(3), utilities are granted the right to receive fair compensation for its services, and to employ reasonable classifications as to its service and rates. Said another way, utilities have the ability to create rates (and classes of customers) or services provided they are not discriminatory. See, *Marshall County v. South Central Bell Telephone Company*, 519

S.W.2d 616, 618 (Ky.1975) citing KRS 278.030(3)("[e]very utility may employ in the conduct of its business suitable and reasonable classifications of its service, patrons and rates. The classifications may, in a proper case, take into account the nature of the use, the quality used, the time when used, the purpose for which used, and any other reasonable consideration.").

Consistent with KRS § 278.030(3), Mr. Willhite articulated several reasonable reasons for schools being labeled as their own class with their own tariff. For example, the uniformity of K-12 schools load usage, in warmer months loads building from around 7:00 a.m. in the morning and peaking around lunch time and during colder months loads peaking in morning hours and declining after lunch. Additionally, the differences as pointed out in Mr. Willhite's cost of service study reviewing KU's LOLP study. *See* p. 5-6 of Ronald Willhite's prefiled testimony.

Simply put, reasonable reasons exist for the classification of K-12 schools in their own tariff. The companies have previously recognized the uniqueness of certain other classes of ratepayers such as TOD industrial and TOD commercial (both prior LG&E tariffs) and the Mine Power Service Rate (prior KU tariff). Whereas, "[d]iscrimination in rates or services is not permitted by municipalities any more than private utilities. *Pond Public Utilities, Sec. 280. But 'a distinction may be made between different customers or classes of customers on account of location, amount of consumption or such other material conditions which distinguish them from each other or from other classes.'*" (emphasis added) *Louisville & Jefferson County Metropolitan Sewer Dist. v. Seagram v. International Harvester Co.*, 211 S.W.2d 122, 126 (Ky.1948).

C. The pilot rate is not a preferential rate

What is a preferential rate? "Rates ...are...preferential when a...district offering rates, terms, and conditions to an entity...does not offer substantially similar rates, terms, and

conditions to all other entities.” *Gear v. Public Util. Dist. No.2 of Grant County*, 2007 Wash.App.LEXIS 701 *2 (copy attached hereto as Exhibit “3”). As detailed above, reasonable reasons exist for classification of K-12 schools in their own class and tariff. Likely the only difference between K-12 public schools and K-12 private schools would be the adherence of K-12 public schools to KRS § 160.325 and the corresponding energy management and reporting requirements. But with respect to load profile, usage and peak issues, the vast majority of K-12 public schools and K-12 private schools would share similar load usage profiles. As detailed by KSBA’s response to the post-hearing data requests from the Commission Staff, inclusion of K-12 private schools within the proposed pilot tariff is acceptable to KSBA. And, “[i]n determining whether rates are unreasonably discriminatory the administrative agency much be granted an area of discretion. Absolute equality between classes of service is a practical impossibility. Rates for different classes of service need not be uniform or equal or equally profitable to the utility; the prohibition is against unreasonable or undue discrimination in the application of the rates.” *Capital Improv. Board of Managers v. Public Service Com.*, 375 N.E.2d 616, 633-34 (Ind.App.1978) citing (*City of Pittsburgh v. Pennsylvania Public Utility Commission*, 78 A.2d 35, 38 (Pa.1958)). Allowing similarly situated entities within a class (K-12 public and private schools) to enjoy the benefits of the pilot school tariff would not create a preferential rate as all the potential pilot class members are included obviating a preferential rate for any class entity. Said another way, the mere existence and financial benefit of a pilot school tariff rate does not create a preferential¹ rate provided the rate class includes all potential parties or entities to the rate.

¹ It should be noted that, “[i]f a statute is ambiguous, the courts grant deference to any permissible construction of the statute by the administrative agency charged with implementing it. *Public Service Commission of Kentucky v. Commonwealth of Kentucky, et. al.*, 320 S.W.3d

CONCLUSION

Creation of a class of service for K-12 public and private schools has merit based upon their homogenous load usage (e.g. consistency of timing of use and peak times). Moreover, the K-12 private and public schools have unique load usage profiles and creation of a new pilot school tariff (from an existing pool of PS and TODS school accounts) for K-12 private and public schools does not create a preferential retail rate in violation of KRS § 278.035 **provided** both K-12 private and public schools are included in the pilot tariff.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified, this the 1st day of June 2017, that the attached is a true and correct copy of the document being filed in paper medium; that the electronic filing has been transmitted to the Commission on June 1, 2017; that there are currently no parties that have been excused from participation by electronic service; that an original and six copies of this document are being hand-delivered to the Commission for filing on June 1, 2017; and that an electronic notification of the electronic filing will be provided to all counsel listed on the Commission's service list in this proceeding.

/s/Matt Malone

ATTORNEY FOR KSBA

660 (Ky.2010) citing *Bd. Of Trustees of the Judicial Form Retirement Sys. v. Attorney General*, 132 S.W.3d 770, 786-87 (Ky.2003) referencing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844-45 (1984) .