

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

KENTUCKY INDUSTRIAL UTILITY CUSTOMERS,)	
INC., COMPLAINANT)	
v.)	CASE NO.
KENTUCKY UTILITIES COMPANY & LOUISVILLE)	2018-00034
GAS & ELECTRIC COMPANY, DEFENDANTS)	

ATTORNEY GENERAL'S INTERIM RESPONSE TO
KENTUCKY UTILITIES COMPANY'S AND
LOUISVILLE GAS AND ELECTRIC COMPANY'S
PETITION FOR RECONSIDERATION AND REQUEST
FOR HEARING

Comes now the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention, and hereby responds to Kentucky Utilities Company's ("KU") and Louisville Gas and Electric Company's ("LG&E") (collectively "LG&E/KU" or "Companies") March 26, 2018, Petition for Reconsideration and Request for Hearing ("Petition") in the above-styled matter. This Interim Response should not be considered a waiver of any further response afforded to the Attorney General ("AG") pursuant to 807 KAR 5:001 Section 5. Given LG&E/KU's extraordinary request for an Order within two (2) days, and a notation that, "[i]f necessary, the Companies are prepared to file a civil action with the Franklin Circuit Court seeking emergency injunctive relief," the Attorney General believes it necessary to immediately address portions of the Petition while reserving his right to respond in full to the entirety of the Companies' arguments within the time

afforded to him pursuant to administrative regulation.¹ Further, although the Commission entered an Order in this matter on March 28, 2018, two (2) days after the Petition was filed, adjudication on the Petition without consideration of this response prejudices the Attorney General and the consumers he is obligated to represent.

Provided as Exhibit 1 to its Petition, the Companies provided notice of their withdrawal from the Offer and Acceptance of Satisfaction. As LG&E/KU correctly noted, Section 5.6 of the Offer and Acceptance of Satisfaction provides that if the Commission does not approve the document in its entirety, “any adversely affected Party may withdraw from the Offer and Acceptance of Satisfaction within the statutory period provided for rehearing and appeal of the Commission’s order by (1) giving notice of withdrawal to all other Parties and (2) timely filing for rehearing or appeal.” Section 5.6 further states that, “[i]f any Party timely seeks rehearing . . . all Parties will continue to have the right to withdraw until the conclusion of all rehearings and appeals.” Pursuant to Section 5.6 of the Offer and Acceptance of Satisfaction, and pursuant to LG&E/KU’s notice of withdrawal and rehearing, the AG provided the other Parties official notice that it has withdrawn. Attached as AG’s Exhibit 1 is the letter sent to the other parties evidencing such withdrawal.

Although the Attorney General does not feel a hearing is necessary, should the Commission grant rehearing, it should not be for a limited issue or purpose. The Companies argue that they were not made aware of the issues in this case, specifically increases to

¹ Petition for Reconsideration and Request for Hearing, Case No. 2018-00034, (Ky. PSC March 27, 2018) at (“Petition”). Although the Companies threaten to flee to Franklin Circuit Court, they provide no basis for emergency injunctive relief, including an absence of any showing of irreparable injury. If the Companies are aware of any irreparable injury, they should provide the Commission notice of such harm to allow the agency to consider the implications of its Orders and allow an opportunity to rectify such harm. The Companies’ failure to identify any irreparable harm, and request relief from the Commission, is a likely indication none exists. *See generally Maupin v. Stansbury*, 575 S.W.2d 695 (Ky. Ct. App. 1978).

capitalization and changes in cost of debt. Because the Commission did not specifically tell LG&E/KU that it disagreed with the Companies' changes, they argue the Commission deprived them of procedural due process. The Commission's Order does not violate the Companies' due process rights under the U.S. or Kentucky Constitutions. The Companies were fully aware, as were the other Parties, as to the substance of the Offer and Acceptance of Satisfaction, particularly the changes to capitalization. Insofar as the Companies, Kentucky Industrial Utility Customers ("KIUC"), and the Attorney General failed to meet their burden in proving the reasonableness of the rates provided in the Offer and Acceptance of Satisfaction, any such deficiency does not rise to the level necessary to grant rehearing on the basis of a violation of due process. The Companies cannot now argue that they were unaware that capitalization was an issue in this matter. The Commission determined in its Order that the change in capitalization, and the rates stemming from that change, were unreasonable and not supported by evidence, and subsequently denied the rates.² The Parties, not the Commission, must adequately develop the evidence of record and request a hearing, if they deem it necessary, to support the Offer and Acceptance of Satisfaction.

The Companies argue that in addition to not identifying and providing notice of the "issues," the Commission further violated their due process rights by not holding a hearing. This argument fails for a simple reason: had the Commission approved the surcharge amount exactly as prescribed by the Offer and Acceptance of Satisfaction, the Companies would not have raised the issue. Effectively, LG&E/KU's argument is that setting rates without a hearing is fine, as long as the Companies approve. As such, any argument that the Commission's Order violates due process falls flat.

² Specifically, the Commission found that the changes in capitalization, "have not been subjected to the Commission's investigation and review." Order, Case No. 2018-00034 (Ky. PSC March 20, 2018) at 7-8.

In further support of their Petition, LG&E/KU state, “factual errors appear to exist in the Order’s calculation.”³ However, LG&E/KU provide no basis to support this argument other than stating, “the Companies believe the calculations of the effective tax rates and tax gross up in the Order have several errors.”⁴ The Companies further state that they have “requested the spreadsheets” used to perform these calculations, although the Commission has declined to provide them, “to the prejudice of the Companies.”⁵ Interestingly, none of the below-noted counsel for the Attorney General were privy to these apparent requests for spreadsheets. As such, these actual communications prejudiced the Attorney General. It is amazing that the Companies have attempted to contact the Commission directly to somehow ascertain evidence they believe is imperative to the reasonableness of the rates without as much as a mention to the other Parties. The Companies’ allegation of error based upon pure conjecture and improper communications cannot support a request for rehearing.

The Companies also disingenuously argue that the Commission does not have the authority to modify the Offer and Acceptance of Satisfaction. First, the Offer and Acceptance of Satisfaction itself, and specifically Section 5.6, recognizes that the Commission may not approve the agreement in its entirety. Second, both counsel identified in the Companies’ Petition were counsel of record for LG&E/KU in filing an *Amici Curiae* brief along with other utilities in *Kentucky Public Service Commission v. Commonwealth of Kentucky, ex rel. Jack Conway, et al.*, 324 S.W.3d 373 (Ky. 2010). Here, the Companies argue the regulation governing complaints “makes no provision for the modification of the defendant’s accepted offer.”⁶ Conversely, the Companies’ as *Amici* in the aforementioned case argued that, “[e]xcept for

³ Petition at 9.

⁴ *Id.*

⁵ *Id.* at 9–10.

⁶ Petition at 10.

such express limitation as those found in KRS 278.183, the Commission retains the broad latitude granted by the General Assembly to enable it to accomplish the complex, very specialized task with which it has been entrusted: to regulate utilities in the public interest and to ensure that their rates and practices are reasonable and their services are adequate.”⁷ The Court generally agreed with the *Amici*, holding that, “since there was no statutory authority forbidding” the provided rate, the Commission’s plenary power allowed the Commission to approve the rate.⁸ The Companies have not provided any “statutory authority forbidding” the Commission from modifying the Offer and Acceptance of Satisfaction. Furthermore, the Companies have wholly ignored the Commission’s statutory obligation to ensure rates are “fair, just, and reasonable”⁹ and in the Companies’ own words, “[t]here is only the vast body of case law supporting an administrative agency’s authority to supply the necessary means to achieve the statutory end.”¹⁰

The Companies’ argument that the Commission’s modification of the Offer and Acceptance of Satisfaction was arbitrary because it was not “supported by substantial evidence” is without merit.¹¹ The Companies now argue that the Commission did not adequately consider, 1) the positive and negative impact of the TCJA, 2) the Companies’ financing for the TCJA because of its net operating loss carryforward (“NOLC”) position,

⁷ Brief of Atmos Energy Corporation, Big Rivers Electric Corporation, Columbia Gas of Kentucky, Inc., Delta Natural Gas Company, Inc., East Kentucky Power Cooperative, Jackson Energy Cooperative Corporation, Kenergy Corp., Kentucky Association of Electric Cooperatives, Inc., Kentucky Power Company, Kentucky Rural Water Association, Inc., Kentucky Utilities Company, Louisville Gas and Electric Company, and Taylor County Rural Electric Cooperative Corporation as *Amici Curiae*, *Kentucky Public Service Comm’n v. Com. ex rel. Stumbo* 2009 WL 6371694, at 2 (Ky. 2009) at 10.

⁸ *Kentucky Public Service Comm’n v. Conway*, at 383.

⁹ KRS 278.030 (In the *Amici Curiae* brief in *Kentucky Public Service Comm’n v. Com. ex rel. Stumbo* 2009 WL 6371694, at 2 (Ky. 2009), the Companies referred to this provision as “a substantive statute, pursuant to which the Commission is to set, without other strictures, ‘fair, just and reasonable rates.’”).

¹⁰ *Amici Curiae* at 14.

¹¹ Petition at 10, citing *American Beauty Homes Corp. v. Louisville & Jefferson Cnty. Planning & Zoning Comm’n*, 379 S.W.2d 450, 456 (Ky. 1964) (citing *Thuman v. Meridian Mut. Ins. Co.*, 345 S.W.2d 635 (Ky. 1961)).

and 3) future financing costs. The Attorney General posits that the Commission made the decision it did, because it did not have the evidence necessary to consider those issues. In fact, in reading the Commission's Order and the Companies' Petition, it is apparent that other than simply taking the Parties' word, there was no evidence in the record to consider the aforementioned issues. As such, any order that allowed for "negative" impacts of the TCJA, NOLC implications and future financing costs would have actually been arbitrary as not supported by substantial evidence.

Although the Attorney General does not believe that rehearing is warranted, should the Commission decide to grant the Companies' request for rehearing, it should not be limited in any way. The Companies' central complaint to the Commission's Order (other than merely not getting their way) is that it was not supported by enough evidence and that the Companies were not afforded an additional opportunity to make their case other than through direct testimony and Commission Staff data request responses. If the Commission chooses to grant rehearing to consider the level and implementation of savings due to the TCJA, the Attorney General requests it do so in a broad manner. As the Attorney General is no longer a signatory of the Offer and Acceptance of Satisfaction, he is interested in conducting discovery on the level of savings, and the impact on the Companies. Further, as the AG has previously mentioned, he agreed to the fifteen-year amortization of unprotected excess ADITs in the Offer and Acceptance of Satisfaction "as part of a global settlement, which included significant give and take amongst parties," but noted that he will be advocating for a five-year amortization "in the fully litigated Case No. 2017-00321."¹²

¹² Attorney General's Comments, Case No. 2018-00036, (Ky. PSC March 13, 2018) at 7.

Finally, the Commission should deny the Companies' request to implement the level of TCJA Surcredits prescribed in the Offer and Acceptance of Satisfaction, and should instead ensure that the rates provided for in the Commission's March 20, 2018 Order are implemented on or after April 1, 2018 to the benefit of consumers.

Respectfully submitted,

ANDY BESHEAR
ATTORNEY GENERAL



KENT A. CHANDLER
REBECCA W. GOODMAN
JUSTIN M. MCNEIL
LAWRENCE W. COOK
ASSISTANT ATTORNEYS GENERAL
700 CAPITAL AVE., SUITE 20
FRANKFORT KY 40601-8204
(502) 696-5453
Kent.Chandler@ky.gov
Rebecca.Goodman@ky.gov
Justin.McNeil@ky.gov
Larry.Cook@ky.gov

AG Exhibit 1



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

ANDY BESHEAR
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITOL AVENUE
FRANKFORT, KY 40601
(502) 696-5300
FAX: (502) 564-2894

March 28, 2018

Via Electronic and Regular Mail

Michael L. Kurtz
Kurt Boehm
Jody Kyler Cohn
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202

Kendrick R. Riggs
Stoll Keenon Ogden, PLLC
2000 PNC Plaza
500 West Jefferson St.
Louisville, KY 40202

Allyson K. Sturgeon
LG&E and KU Energy LLC
220 W. Main Street
Louisville, KY 40202

In Re: Kentucky Industrial Utility Customers, Inc., Complainant v. Kentucky Utilities Company, & Louisville Gas & Electric Company, Defendants; Case No. 2018-00034;

Counsel:

The Attorney General is in receipt of a letter, received by electronic means, dated March 26, 2018 from Mr. Kendrick R. Riggs of Stoll Keenon Ogden, on behalf of Kentucky Utilities Company (“KU”) and Louisville Gas and Electric Company (“LG&E”) (collectively, “Companies”). The letter states that the Companies are exercising their right to withdraw from the Offer and Acceptance of Satisfaction, and provided notice of such withdrawal. The Companies further stated that such withdrawal is provided for in Section 5.6 of the Offer and Acceptance of Satisfaction as the Commission’s March 20, 2018 Order “made a material modification to the Tax Cuts and Jobs Act Surcredit proposed by the Offer and Acceptance of Satisfaction.” The Attorney General is also in receipt, by electronic means, of a Petition for Reconsideration and Request for Hearing filed by the Companies on March 26, 2018.

As mentioned in Mr. Riggs' letter, Section 5.6 provides for the process in which a party that is adversely affected by an order denying or modifying the Offer and Acceptance of Satisfaction may withdraw. The Companies have seemingly complied with that process by timely (1) giving notice of withdrawal to all other parties and (2) filing for rehearing. Section 5.6 of the Offer and Acceptance of Satisfaction also provides for other Parties to withdraw, in the event a different Party timely seeks rehearing. The Attorney General is hereby exercising his right to withdraw from the Offer and Acceptance of Satisfaction. This letter provides notice of the Attorney General's withdrawal.

Later today, the Attorney General will file a response to the Companies' Petition for Reconsideration and Request for Hearing, effectively objecting to the request for rehearing and to the Companies' proposal to implement surcredit rates lower than that provided for in the Commission's March 20, 2018 Order.

Should you have any questions, please feel free to contact me at your convenience.

Sincerely,



Kent A. Chandler
Assistant Attorney General

cc:

Gwen Pinson
Executive Director
Kentucky Public Service Commission
211 Sower Blvd.
Frankfort, KY 40602