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The Filed Rate Doctrine In Kentucky

The Application of the Filed Rate Doctrine at the Kentucky Public Service Commission

December 2017

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During the last one hundred years, the filed rate doctrine has become a bedrock for utility regulation in the United States. The filed rate doctrine, also known as the "filed tariff doctrine", has a long history in the United States and in Kentucky, particularly with respect to the Kentucky Public Service Commission's ("KYPSC's" or "Commission's") regulation of electric, gas, water and telecommunication tariffs and contracts. The filed rate doctrine is so fundamental to utility rate regulation that anyone deeply involved in developing and filing rates for a regulated utility should have a working knowledge of this important doctrine. The purpose of this paper is to provide information on important aspects of the filed rate doctrine, particularly as it relates to the regulation of rates by the KYPSC.

Under the filed rate doctrine, any "filed rate" – that is, any rate, tariff, set of terms and conditions, or customer contract – that was authorized to be put in place by the governing regulatory agency – is presumptively reasonable and unassailable in proceedings brought by parties in regulatory and judicial proceedings.[2] The filed rate doctrine requires that, in providing service to customers, regulated utilities must provide service in exactly the manner described in their filed tariffs or filed service contracts.[3] The doctrine does not hinge on whether any particular aspect of the filed tariff was actively reviewed by the regulatory commission in a formal proceeding. The fact that a utility has filed its tariff or contracts with the regulatory commission is sufficient to afford protection under the filed rate doctrine. A formal hearing and commission order is not required.[4] To be afforded protection under the filed rate doctrine, the utility's rates, terms and conditions, and service agreements must be filed by the utility with its regulator. The filed rate doctrine precludes special side agreements between utilities and their customers that

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[1] Steve Seelye is the Managing Partner and co-founder of The Prime Group, LLC. Although he is not an attorney and is not offering legal advice in this paper or otherwise, he has been a student of the filed rate doctrine during his entire working career. Also, he was directly involved in a number of cases discussed in the paper.

[2] *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, at 18 (2d Circ. 1988).

[3] See, for example, *Evanns v. AT&T Corp.*, 229 F.3d 837, at 840, (9th Circ. 2000), which states that a regulated utility is "forbidden from charging rates other than as set out in its filed tariff, [and] customers are also charged with notice of the terms and rates set out in that filed tariff."

[4] See *Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, at 374 (1988), wherein the U. S. Supreme Court found that the "Mississippi Supreme Court erred in adopting the view that the preemptive effect of FERC jurisdiction turned on whether a particular matter was actually determined in the FERC proceeding." See also *Square D. Co. v. Niagara Frontier Tariff Bureau, Inc.* 476 U.S., at 417 n.19 (1986), in which the Supreme Court stated as follows:

> In their brief, petitioners argue that, even under Keogh, their treble-damages action should not have been dismissed because *there was no ICC hearing in this case* and because Keogh did not involve allegations of the type of covert legal violations at issue here. Brief for Petitioners 10-11. *The Court of Appeals, however, properly concluded that Keogh was not susceptible to such a narrow reading*. (Emphasis supplied.)

specify different pricing arrangements than those filed with the regulatory agency or that stipulate different service or billing provisions than the ones filed in with the regulator.

Importantly, the filed rate doctrine is not limited merely to the charges billed by a regulated utility but extends to all terms, conditions and special contracts filed with the regulatory commission by the utility. Rates do not exist in isolation from the terms and conditions of providing service. The terms and conditions of service are just as much subject to the filed rate doctrine as the charges themselves.[5]

Fundamentally, the filed rate doctrine established that regulatory bodies and courts should not undermine the regulatory process by second guessing filed tariffs and service contracts that have been allowed to be put in place by the regulatory agency, and that litigation should not become a means for utility customers to obtain preferential treatment.

The filed rate doctrine protects both customers and utility service providers alike. Because of the filed rate doctrine, utilities are forbidden from charging rates or applying terms and conditions other than those on file with the regulatory commission. Therefore, utilities cannot charge rates that are higher or lower than those stated in their tariffs or special contracts. Likewise, utilities cannot capriciously change terms and conditions of service that are set forth in their filed contracts or tariffs. The filed rate doctrine thus ensures both enforceability and predictability in the rates and terms and conditions of service offered by utilities.[6] It also protects against undue discrimination by preventing the utility from changing the rates, terms and conditions from one customer to another *without prior authorization* from the regulatory commission.

The filed rate doctrine also protects utilities against retroactive ratemaking by forestalling claims by customers alleging that the utilities' authorized rates were in some way unreasonable. The proscription against retroactive ratemaking thus implies that modifications to a utility's filed tariffs and service contracts must be prospective, not retroactive. Furthermore, if a regulatory commission determines that a modification of a tariff or service contract is warranted, then the old tariff or contract must remain in force until the utility files and the regulator accepts for filing or affirmatively approves a compliance tariff setting forth the new rates and terms and conditions.

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[5] In *AT&T Corp. v. Central Office Tel., Inc.,* 524 U.S. 214 at 223 (1998), Justice Scalia, delivering the opinion for the U.S. Supreme Court wrote:

> The Ninth Circuit thought that the filed rate doctrine inapplicable "[b]ecause this case does not involve rates or rate setting, but rather involves the provisioning of services and billing." 108 F. 3d, at 990. Rates, however, do not exist in isolation. They have meaning only when one knows the services to which they are attached.

[6] In Arizona Grocery Co. v. Atchison, T. & S. F. R. Co., 284 U.S. 370, at 384 (1932), the U.S. Supreme court held as follows:

> In order to render rates definite and certain, and to prevent discrimination and other abuses, the statute require[s] the filing and publishing of tariffs specifying the rates adopted by the carrier, and ma[kes] these the legal rates, that is, those which must be charged to all shippers alike.

Cited in *Maislin Industries, Inc. v. Primary Steel, Inc.*, 497 U.S. 116, at 126 (1990).

Additionally, the filed rate doctrine prevents customers from filing complaints with commissions and pursuing litigation in courts to obtain preferential treatment for themselves. The filed rate doctrine provides solidity to the regulatory process by preventing incessant challenges to a utility's published tariffs and filed contracts. As much as anything, the filed rate doctrine creates a level of certainty in the ratemaking process and the regulatory oversight of a utility's service agreements.

Ultimately, the requirement of the transparent filing of rates, tariffs, terms and conditions, and service contracts ensures fairness, stability and predictability in the provision of service by regulated utilities.[7] Without the fair rate doctrine, the rates and terms and conditions for service would be a moving target, forever subject to being second guessed by the courts, regulators and customers seeking a better deal.

A Brief History of the Filed Rate Doctrine

In a sense, the filed rate doctrine has its roots in Kentucky. It is often claimed that the doctrine was first introduced by the renowned Supreme Court Justice Louis Brandeis who was born and raised in Louisville, Kentucky. Brandeis, one of the most influential figures ever to serve on the high court, set forth the filed rate doctrine in *Keogh v. Chicago & Northwestern Railway Co.*[8] As laid down by Justice Brandeis, the Supreme Court held that although regulated entities were not exempt from anti-trust laws, a plaintiff could not recover damages based on a tariff filed with a regulator. Justice Brandeis wrote:

> The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the [filed] tariff cannot be varied or enlarged by either contract or tort of the carrier.[9]

Keogh elevated the authority of the tariffs filed by regulated entities with their regulators, making filed tariffs essentially immune from collateral attacks in the court.

But the filed rate doctrine had antecedents predating *Keogh* by a decade. *Keogh* simply added new contours or new strands to the nascent filed rate doctrine. The doctrine originated from the enforcement of the Interstate Commerce Act (ICA) of 1887. The ICA, which was designed to regulate the railroad industry, particularly its monopolistic practices, required that railroad rates be "reasonable and just". The Act created the Interstate Commerce Commission (ICC), which was charged with monitoring railroads to ensure that they complied with the ICA. The formation of the ICC predated the creation of the Federal Power Commission (FPC) by more than twenty years. The FPC was created in 1920 but is now called the Federal Energy Regulatory Commission (FERC). Originally, the FPC was responsible for the licensing of hydroelectric projects on land or navigable water owned by the federal government, but its regulatory

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[7] In *West Deptford Energy, LLC v. FERC*, 766 F. 3d 10 (DC Circ. 2014), the Court of Appeals for the D.C. Circuit asserted that the "requirement of transparent, public filing of rates ensures evenhandedness, fairness, stability, and predictability in the prices charged for electric energy."

[8] *Keogh v. Chicago & Northwestern Railway Co.,* 260 U.S. 156 (1922). Clearly, earlier Supreme Court decisions laid the foundations for the filed rate doctrine. Perhaps Keogh is cited as the Supreme Court decision that originated the filed rate doctrine because Brandeis is not usually considered a "Lochner era" justice. The U.S. Supreme Court decision in *Keogh* is included in the Appendix.

[9] *Supra,* at 163.

authority was augmented by the Natural Gas Act of 1938 to regulate interstate natural gas sales and by amendments to the Federal Power Water Power Act (now called the "Federal Power Act") to regulate the interstate electric power sales.

Although Keogh dealt with the enforcement of the ICA, there were earlier cases that established the filed rate doctrine. For example, in a 1913 decision, the U.S. Supreme Court ruled in *Pennsylvania Railroad Company v. International Coal Mining Co.* that a published tariff while it is in effect "has the effect of a statute and is binding alike on carrier and shipper."[10]

In the same year, the Supreme Court ruled in *Kansas City Southern R Co. v Carl* that the service provider "must take notice of the rate applicable, and actual want of knowledge is no excuse. The rate, when made out and filed, is notice, and its effect is not lost, although it is not actually posted."[11] Two years later, in *Louisville & Nashville R. Co. v. Maxwell*, the filed rate doctrine was further clarified, as follows:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.[12]

These early ICA cases began to shape the filed rate doctrine by establishing the importance, and, indeed the primacy, of filed tariffs and setting forth the principle that a published tariff by a regulated entity prevails over any other representation or side agreement that the shipper may have made.

Over the years, new strands were added to the filed rate doctrine and the doctrine was applied to other regulated industries, including regulated electric utilities, natural gas utilities, and telecommunication service providers. Since its beginning in the early ICA cases, the following strands were added to the filed rate doctrine: (i) limiting collateral attacks against filed tariffs in the judicial system, as in the case of *Keogh,* (ii) banning retroactive ratemaking, (iii) extending the doctrine not only to apply to rail shippers subject to the ICA but also to cover the tariffs of other regulated industries, (iv) extending the doctrine to apply not only to rates and charges for service but also to the terms and conditions of service, (v) restricting the actions of regulators regarding filed contracts and tariffs, and (vi) establishing a rule for enforcing federal preemption under the Supremacy Clause of the U.S. Constitution, holding that state regulators could not disregard or circumvent filed rates authorized by the Federal Energy Regulatory Commission. As it

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[10] *Pennsylvania Railroad Company v. International Coal Mining Co.* 230 U.S. 184 at 197 (1913). The U.S. Supreme Court decision in *Pennsylvania Railroad Company v. International Coal Mining Co.* is included in the Appendix.

[11] *Kansas City Southern R Co. v Carl, 227 U.S. 639 at 653 (1913).*

[12] *Louisville & Nashville R. Co. v. Maxwell,* 237 U.S. 94 at 97 (1915); cited in *Maislin Industries, Inc. v. Primary Steel, Inc.*, *supra* at 127. The U.S. Supreme Court decision in *Louisville & Nashville R. Co. v. Maxwell* is included in the Appendix.

evolved, the filed rate doctrine has been significantly enlarged and refined since its early beginnings in the ICA cases.

Of course, *Keough* was one of the early extensions to the filed rate doctrine. As mentioned earlier, it not only reinforced the idea that filed tariffs must be strictly followed but also limited the actions that parties could pursue in judicial arenas to modify filed tariffs. Other cases reinforced the limitation of collateral attacks of filed tariffs in the court system.

Prohibitions against retroactive ratemaking were addressed in the number of Supreme Court cases and were supported by the filed rate doctrine. The concept here is that rates could not be retroactively modified by either courts or by regulatory commissions themselves. Modifications to rates approved by regulators could only be applied prospectively. Under the filed rate doctrine, regulators may modify filed tariffs, rate schedules, terms and conditions of service, and contracts if they determine that they are not fair, just and reasonable, but they may only do so ***prospectively***. Based on the filed rate doctrine, the tariffs must remain in force until the regulator orders a modification in a tariff and then the modifications will only take place from that point onward. For example, in *Arkansas Louisiana Gas Co. v Hall*, the Supreme Court linked its prohibition against retroactive ratemaking to the filed rate doctrine, stating that "[n]ot only do the courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself has no power to alter a rate retroactively."[13]

As already mentioned, the early filed rate doctrine cases dealt with regulation under the ICA and applied to railway transportation. However, the Hepburn Act of 1906 extended the ICC's authority to cover bridges, terminals, ferries, sleeping cars, express companies and oil pipelines. The Mann-Elkins Act of 1910 then expanded the ICC's jurisdiction to include the regulation of telephone, telegraph and wireless companies. In 1934, Congress transferred the regulation of telecommunications to the newly established Federal Communication Commission (FCC). Therefore, it was not a long before the filed rate doctrine not only applied to the regulation of railways but also to the trucking industry, water transportation, telecommunications, electric power, natural gas and other industries. For example, in 1951, the filed rate doctrine was applied to an electric utility in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*

It was evident even in the early Supreme Court cases dealing with the regulation of railways under the ICA that the filed rate doctrine not only applied to charges for service but also to the terms and conditions of service. For example, in *Chicago & Alton R. Co. v Kirby*, a ruling which was made in 1912, the Supreme Court invalidated a verbal agreement to ship race horses by a specific fast train because the carrier's tariff "did not provide for an expedited service, nor for transportation by a particular train."[14] In *Nantahala Power & Light Co. v Thornburg*, the Supreme Court specifically held that:

> [T]he filed rate doctrine is not limited to "rates" per se: "our inquiry is not at an end, because the orders do not deal in terms of prices or volumes of purchases." Northern Natural Gas Co. v. Kansas Corporation Comm'n, 372 U. S. 84, 372 U. S. 90-91 (1963). Here, FERC's decision directly affects Nantahala's wholesale rates by determining the amount of low-cost power that it may obtain, and FERC required Nantahala's wholesale rate to be filed in accordance with that allocation. FERC's allocation of

[13] *Arkansas Louisiana Gas Co. v Hall, 453 U.S. 571 at 578 (1981).*
[14] *Chicago & Alton R. Co. v Kirby,* 225 U.S. 155 at 165 (1912).

> entitlement power is therefore presumptively entitled to more than the negligible weight given it by NCUC.[15]

Also, in *AT&T Corp. v. Central Office Tel., Inc*., the Supreme Court asserted the following:

> Rates, however, do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa. "If 'discrimination in charges' does not include non-price features, then the carrier could defeat the broad purpose of the statute by the simple expedient of providing an additional benefit at no additional charge . . . . An unreasonable 'discrimination in charges,' that is, can come in the form of a lower price for an equivalent service or in the form of an enhanced service for an equivalent price." *Competitive Telecommunications Assn.* v. *FCC,* 998 F. 2d 1058, 1062 (CADC 1993). The Communications Act recognizes this when it requires the filed tariff to show not only "charges," but also "the classifications, practices, and regulations affecting such charges," 47 U. S. C. § 203(a); and when it makes it unlawful to "extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges" except those set forth in the tariff, § 203(c).[16]

The decision goes on to state that "even provisioning and billing are, in the relevant sense, 'covered' by the tariff."[17]

Furthermore, the filed rate doctrine is compulsory for regulatory commissions, just as it is for courts. While a commission can re-evaluate the reasonableness of a filed tariff, rate, set of terms and conditions, or contract, modifications to any of these filed documents can only apply prospectively. Until they are overturned by the commission, the provisions must remain in full force and effect. For example, in *Electrical District No. 1 v. FERC*, the D.C. Circuit Court held that if the commission determines that the utility's rates are no long reasonable then the old rates must remain in force until the utility files and the regulator accepts a compliance tariff establishing new rates.[18]

The Supreme Court has also ruled that state regulators cannot disregard rates approved by the Federal Energy Regulatory Commission. For example, if a gas utility purchases pipeline transportation service from an interstate pipeline pursuant to a rate schedule filed with the Federal Energy Regulatory Commission, then the state regulator cannot make a determination that the rate charged by the pipeline should be, or should have been, anything other than the rate filed with the FERC. The state regulator cannot second guess the FERC's acceptance of an interstate pipeline's filed rates. For example, in *Arkansas Louisiana Gas Co. v. Hall*, the Supreme Court ruled:

> Congress here has granted exclusive authority over rate regulation to the Commission. In so doing, Congress withheld the authority to grant retroactive rate increases or to permit collection of a rate other than the one on file. It would surely be inconsistent with this

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[15] *Nantahala Power & Light Co. v Thornburg*, 476 U.S. 953 at 966-967 (1986)
[16] *AT&T Corp. v. Central Office Tel., Inc., supra*. The U.S. Supreme Court decision in *AT&T Corp. v. Central Office Tel., Inc*. is included in the Appendix.
[17] *Id.* at 225.
[18] *Electrical District No. 1 v. FERC,* 774 F.2d 490 at 494 (1985).

> congressional purpose to permit a state court to do, through a breach of contract action, what the Commission itself may not do.[19]

In *Nantahala Power & Light v. Thornburg*, the U.S. Supreme Court also dealt with issue of federal preemption and the "trapping" of utility's costs by a state regulator to undo the FERC-approved tariffs or cost allocation approved by the FERC for the utility:

> The filed rate doctrine ensures that sellers of wholesale power governed by FERC can recover the costs incurred by their payment of just and reasonable FERC-set rates. When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate. *See supra,* at 476 U. S. 964-966 (discussing *Narragansett* line of cases). Such a "trapping" of costs is prohibited. Here, Nantahala cannot fully recover its costs of purchasing at the FERC-approved rate if NCUC's order is allowed to stand.

Since its early beginnings in the regulation of railroad tariffs by the ICC, the filed rate doctrine has taken on new shapes and meanings. We can therefore expect that it will continue to evolve to address changes in the utility industry.

The Application of the Filed Rate Doctrine in Kentucky

Regulators in Kentucky are not exempt from the filed rate doctrine. The filed rate doctrine originates directly from KYPSC's statutory authority. KRS 278.160 requires that "each utility shall file with the [KYPSC] 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."[20] KRS 278.160 goes on to state:

> 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.[21]

Under KRS 278.010, the term "rate" is defined broadly, as follows:

> "Rate" means any 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.[22]

Therefore, a rate not only refers to a charge but also to "any rule, regulation, practice, act, requirement, or privilege."[23] The term "tariff" is defined in equally broad terms under the KYPSC's regulations. 807 KAR 5:011 states that:

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[19] *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 at 453 (1986).
[20] KRS 278.160(1),
[21] KRS 278.160(2).
[22] KRS 278.010(12)
[23] *Id.*

> “Tariff” means the schedules of a utility’s rates, charges, regulations, rules, tolls, terms, and conditions of service over which the commission has jurisdiction.

807 KAR 5:011 specifies that utilities are required to file their tariffs and any additions, revisions or withdrawals of their tariffs or tariff sheets with the KYPSC. Furthermore, 807 KAR 5:011 also states that utilities must also file any special contracts that establish “rates, charges, or conditions of service not contained in its tariff.”[24] Consequently, a utility’s charges, tariffs, terms and conditions, and special contracts must be filed with the Commission and are subject to the filed rate doctrine.

Because the KYPSC is a “creature of statute,” the Commission is bound narrowly to its statutory authority.[25] The filed rate doctrine thus emerges directly from the statutes under which utility rates, tariffs, terms and conditions, and special contracts must be filed with the Commission in accordance with the Kentucky Revised Statutes.

The filed rate doctrine was adopted in principle, but not by name, in *Boone County Sand and Grave v. Owen County RECC*.[26] In its decision, the Kentucky Court of Appeals found that Owen County RECC was entitled to collect amounts underbilled under Owen County RECC’s “filed schedules” that were the result of using a incorrect multiplier to the meter readings. The Court of Appeals relied on KRS 278.160(2), which requires that the utility shall not “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”.

The filed rate doctrine was also addressed in *City of Russellville v Public Service Commission of Kentucky.* There the Kentucky Court of Appeals stated:

> We agree with the appellees that the filed rate doctrine although nor heretofore applied in Kentucky by name [in the Court of Appeals], has nevertheless been recognized in Kentucky in principle . . . We believe the real issue herein is whether or not Russellville’s proposed rate increase became the filed rate. If it did, then the districts are bound by it even though it was improperly granted by the PSC.[27]

However, the Court of Appeals ruled that that the filed rate doctrine did not apply because Russellville failed to attach tariff pages in its filing letter submitted to the KYPSC; therefore, the tariff pages were, in fact, never filed with the KYPSC and thus could not be a “filed rate”.[28] This ruling underscores the

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[24] 807 KAR 5:011, Section 13.

[25] *Kentucky Public Service Commission, Appellant v. Commonwealth of Kentucky, ex rel. Jack CONWAY,* 324 S.W.3d 373 at 377 (Ky. 2010), which stated: “And, as further noted by the Court of Appeals, the PSC is a “creature of statute”; and, thus, the lawfulness of its action depends on whether the PSC's action exceeded its statutory authority.

[26] *Boone County Sand and Grave v. Owen County Rural Electric Cooperative Corporation, 779 S.W.2d 224 (Ky. App. 1989).* While the Court of Appeals’ decision does not refer to the filed rate doctrine by name, most of the subsequent citations to the decision by the KYPSC do mention the filed rate doctrine specifically by name. The Kentucky Court of Appeals decision in *Boone County Sand and Grave v. Owen County RECC* is included in the Appendix.

[27] *City of Russellville v Public Service Commission of Kentucky, 2005 WL 385077 at *4 (Ky. App. 2005). The Kentucky Court of Appeals decision in City of Russellville v Public Service Commission of Kentucky is included in the Appendix.*

[28] *Id*.

importance of utilities taking proper measures to ensure that changes in their rate schedules are properly filed with the KYPSC.

The filed rate doctrine has been addressed in numerous KYPSC orders. In its Order in Case No. 95-107[29], the Commission grounded its enforcement of KRS 278.160 explicitly in terms of the filed rate doctrine. In Case No. 95-107, the KYPSC addressed a situation where the utility had entered into a Settlement Agreement that relieved the utility of collecting undercharges under its filed rates from certain customers. The KYPSC found that the Settlement Agreement violated the filed rate doctrine. In its Order, the KYPSC stated:

> While the amount of undercharges is small, the principle at stake is not. *The filed rate doctrine is the bedrock of utility rate regulation. Acceptance of the Settlement Agreement would erode the basic bulwark against rate discrimination and arbitrary utility action. Even the smallest erosion of this rule must be avoided*. (Emphasis added.)[30]

In an order in a subsequent case, Case No. 95-517, the Commission provided a detailed discussion of the file rate doctrine. Case No. 95-517 concerned an investigation into violations of KRS 278.160 by Leslie Country Telephone Company, Inc. Specifically, the utility was being investigated for charging rates that were not in its tariff. In is order in Case No. 95-517, the Commission stated that "KRS 278.160 codifies the 'filed rate doctrine.'"[31] The Commission ruled that a utility must bill charges in accordance with its filed tariff. The order states that filed tariffs "have been reviewed and found reasonable by the Commission. Prior to becoming effective, they are examined and questioned. The scrutiny is the principal reason for the Commission's existence."[32]

In *Cincinnati Bell Telephone Co. et al. v. Kentucky Public Service Commission*, the Kentucky Court of Appeals also reinforced the filed rate doctrine in Kentucky. The case involved a complex set of issues arising from directives issued by the Federal Telecommunications Commission (FTC) under the Telecommunications Act of 1996 and a proceeding undertaken at the Commission in response to the Act. In an order that was appealed by a group of local exchange carriers, the KYPSC had ordered the local exchange carriers to make a refund to reflect rates that the Commission determined *should have been but were not filed* by the carriers when the FTC issued certain guidelines. The carriers argued that the Commission's ruling violated the filed rate doctrine and the Kentucky Court of Appeals agreed. In its decision, the Kentucky Court of Appeals stated:

> BellSouth relies first upon the filed-rate doctrine. That doctrine in essence stands for the proposition that when the legislature has established a comprehensive ratemaking schedule, the filed rate defines the legal relationship between the regulated utility and its customer with response to the rate that the customer is obligated to pay and that the utility is authorized to collect . . . The PSC's statutory rate-making authority is derived from

[29] Order in Case No. 95-107, *In the Matter of North Marshall Water District*, dated October 13, 1995. The Commission's Order in Case No. 95-107 is included in the Appendix.
[30] *Id*. at p. 3.
[31] Order in Case No. 95-517, In the Matter of Leslie County Telephone Company, Inc., dated June 21, 1996, at p.3. The Commission's Order in Case No. 95-517 is included in the Appendix.
[32] *Id.* at p. 5.

> an integral, comprehensive system aimed at providing stability and notice to all entities involved in the rate process.[33]

The Kentucky Court of Appeals ruled that a utility's tariff must remain in effect until the tariff is modified by the Commission in accordance with its statutory authority. Specifically, the Kentucky Court of Appeals cited KRS 278.180(1), which provides as follows:

> Except as provided in subsection (2) of this section, no 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 rate will go into effect. . . . The commission may order a rate change only after giving an identical notice to the utility. . . .

The Kentucky Court of Appeals also cited KRS 278.270, which provides as follows:

> Whenever the commission, upon its own motion or upon complaint as provided in KRS 278.260, and after a hearing had upon reasonable notice, finds that any rate is unjust, unreasonable, insufficient, unjustly discriminatory or otherwise in violation of any of the provisions of this chapter, the commission shall by order prescribe a just and reasonable rate **to be followed in the future**. (Emphasis was included in the decision by the Kentucky Court of Appeals).

Relying on these statutes, which, among other statutory provisions, established the filed rate doctrine in Kentucky, the Kentucky Court of Appeals rejected the Commission's decision requiring the local exchange carriers to make refunds based on rates that the Commission determined should have been filed by the carriers but were not.

In Case No. 2001-139, a customer of Kentucky-American Water Company (KAWC), who was a builder, filed a complaint against KAWC alleging that the utility had represented to the customer that an application for a tap-on to the water system would not be subject to a tapping fee even though the requirement of a tapping fee was set forth in KAWC's tariffs. Once again, grounding its decision on the filed-rate doctrine, the Commission's Order stated:

> *Boone County Sand and Gravel* clearly applies here. Complainants allege that a tariffed rate should not apply to them because KAWC acted either negligently or unreasonably in implementing its tapping fee policy. However, we need not determine whether KAWC's actions were unreasonable. Even if KAWC had acted unreasonably or negligently, Boone County Sand and Gravel would prohibit the Commission from granting the rates Complainants seek. So, in fact, does KRS 278.170, which prohibits discriminatory rates.[34]

Relying on the filed rate doctrine, the Commission reached similar conclusions in Case No. 2005-00062 and Case No. 2008-00199. Case No. 2005-00062 involved a complaint against Kentucky Utilities Company

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[33] *Cincinnati Bell Telephone Co. v. Kentucky Public Service Commission,* 223 S.W.3d 829 at 838 (Ky.App. 2007). The Kentucky Court of Appeals decision in *Cincinnati Bell Telephone Co. et al. v. Kentucky Public Service Commission* is included in the Appendix.

[34] Order in Case No. 2001-139, *In the Matter of K. Michael Cravens D/B/A Cravens Builders and Home Builders Association of Lexington v. Kentucky-American Water Company*, dated August 23, 2001, at 8. The Commission's Order in Case No. 2001-139 is included in the Appendix.

(KU) about a back-and-forth dispute concerning a high bill complaint. KU initially had adjusted the customer's bill believing that there was a mechanical problem with the meter. However, after testing the meter, KU determined that the meter was accurate within the tolerances required by the Commission and therefore required that the customer pay the correct billing for service. Once again, the Commission, relying on the filed rate doctrine as set forth in *Boone County Sand and Grave v. Owen County RECC,* ruled that the only avenue available in this instance was for the customer to pay the full amount calculated under the filed rate. As in Case No. 2005-00062, Case No. 2008-00199 involved a customer complaint against KU. Again, a customer filed a complaint against KU alleging that the customer was overcharged for consumption of electric energy. KU had again found that the meter was accurate within the tolerances specified in the KYPSC's regulations. Citing *Boone County Sand and Grave v. Owen County RECC*, the Commission again dismissed the complaint with prejudice.[35]

More recently, the filed rate doctrine was addressed in a complaint filed against Louisville Gas and Electric Company (LG&E) and Kentucky Utilities (KU) Company by the Kentucky Cable Telecommunications Association (KCTA) (Case No. 2014-00025). This is a proceeding in which the author of this paper was involved as a consultant on behalf of LG&E and KU. In this complaint proceeding, the KCTA argued that the utilities' pole attachment rates, which the Commission had approved in general rate cases two years earlier, were not fair, just, and reasonable. The KCTA had not intervened in the earlier rate cases and was asking that the Commission establish new pole attachment charges outside of a general rate case and for the new charges to be implemented retroactively from the date that the KCTA filed its complaint with the Commission. The Commission rejected the KCTA's motions. Citing KRS 278.270 and KRS 278.390, the Commission ruled that:

> It is well established that a Commission's Order remains in full force and effect until amended or revoked by subsequent Commission Order or order by a court of competent jurisdiction. [Footnote: KRS 278.390.] KRS 278.270 provides that:
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> > Whenever the commission, upon its own motion or upon complaint as provided in KRS 278.260, and after a hearing had upon reasonable notice, finds that any rate is unjust, unreasonable, insufficient, unjustly discriminatory or otherwise in violation of any of the provisions of this chapter, the commission shall by order prescribe a just and reasonable rate to be followed in the future.[36]

The Commission rejected KCTA's request for retroactive relief and ordered that the reasonableness of LG&E and KU's pole attachment rates would be considered in general rate cases that had been filed by the utilities.

The filed rate doctrine was also addressed in another recent complaint case filed against Kentucky Utilities Company in *David Shouse and Brian Shouse, D/B/A Shouse Farms, and Bryan Hendrickson, D/B/A Hendrickson Grain and Livestock, LLP v. Kentucky Utilities Company* (Case No. 2015-00417). This is another

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[35] Order in Case No. 2008-00199, In the Matter of Jim Devers v. Kentucky Utilities Company, dated December 30, 2008, at 5. The Commission's Orders in Case Nos. 2005-00062 and 2008-00199 are included in the Appendix.
[36] Order in Case No. 2014-00025, *In the Matter of Kentucky Cable Telecommunications Association v. Louisville Gas and Electric Company and Kentucky Utilities Company*, dated March 27, 2015. The Commission's Order in Case No. 2014-00025 is included in the Appendix.

proceeding in which the author of this paper was involved as an expert witness. In the complaint proceeding, two customers that operated grain drying operations taking service under KU's Power Service rate schedule (Rate PS) filed formal complaints against KU concerning the determination of the customers' billing demand under Rate PS. The complainants argued that because their grain drying operations were seasonal in nature, the determination of the billing demands under Rate PS caused KU to collect revenues from the customers that exceeded the actual cost of power over the course of the year.

Even though the customers did not dispute that KU followed its rules and conditions in calculating the billing demands for the rate, the complainants argued that the rates, specifically the terms for calculating the billing demands in the application of the rates, were "unjust, unfair, unreasonable." The complainants claimed that "unjust, unfair, unreasonable and/or discriminatory rates are always subject to review [pursuant to] KRS 278.260 and KRS 278.270."[37] The KYPSC disagreed.

In its Order in Case No. 2015-00417, the Commission once again emphasized the importance of the filed rate doctrine, stating:

> In the present case, the Complaint does not allege that KU charged Complainants a rate other than one in KU's schedule of rates on file with the Commission for the service Complainants received. Rather, the Complaint simply reflects Complainants' displeasure with KU's rates, in particular the demand-rate structure of Rate PS. Yet, customer's dissatisfaction with a utility's filed rate schedule does not provide grounds for lawfully ordering, or allowing, a utility to collect from that customer a rate different from that collected from other customers who are similarly situated.[38]

The KYPSC granted KU's motion to dismiss the complaint with prejudice, but directed KU to "include in its next application for a general adjustment in rates testimony in support of the monthly billing demand provisions of Rate PS."[39] In KU's and LG&E's next rate case application filed in Case No. 2016-00370 and 2016-00371, respectively, the author of this paper submitted direct testimony in support of the provisions in Rate PS for determining customer billing demands. In its order in that proceeding, the billing demand provisions for Rate PS were permitted by the Commission to remain unchanged.

The Mobile-Sierra Rule in Kentucky

The Mobile-Sierra rule is a doctrine closely related to the filed rate doctrine. The Mobile-Sierra rule originated from two U.S. Supreme Court decisions in the 1950s dealing with contracts filed by a natural gas pipeline and an electric power supplier with the FPC (now the FERC). Mobile-Sierra established the presumption that a rate set forth in a freely-negotiated, arms-length contract is "just and reasonable." Mobile-Sierra therefore put in place what has been called a "practically insurmountable"[40] hurdle for the

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[37] Complainants' Response to KU's Motion to Dismiss in Case No. 2015-00417), paragraph 11. The Commission's Order in Case No. 2015-00417 is included in the Appendix.
[38] Order in Case No. 2015-00417, *In the Matter of David Shouse and Brian Shouse, D/B/A Shouse Farms, and Bryan Hendrickson, D/B/A Hendrickson Grain and Livestock, LLP v. Kentucky Utilities Company,* dated June 29, 2016, at pp. 10-11.
[39] Id. at 13.
[40] In his opinion in *Papago Utility Tribal Authority v. FERC*, 723 F. 2d 950 at 954 (D.C. Circ.1983), Antonin Scalia, who was then a D.C. Circuit Court judge, wrote that "[t]he public interest standard [for abrogating a contract under Mobile-Sierra] is practically insurmountable."

regulator to overturn natural gas and electric power contracts that were executed at arm's length between the parties and filed with the FPC/FERC. The doctrine would only allow abrogation of filed contracts in circumstances of unequivocal public necessity.

The basic premise supporting the Mobile-Sierra doctrine is that deference should be given to filed contracts because the parties who enter into them are "sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a 'just and reasonable' rate as between the two of them."[41] Under the Mobile-Sierra rule, there is "a presumption – based on both the need to protect stability of contract and the likelihood that market participants entering into long-term contracts can protect their own interests – that the reasonableness continued throughout the term of the contract."[42]

The Mobile-Sierra doctrine was originally established in decisions issued on the same day in 1956 by the Supreme Court in two different cases. Although there were subtle differences between the two decisions, the issues addressed in both cases were essentially similar, whether a utility subject to FPC regulation could file to increase the charges contained in a bi-lateral contract without consent of the counterparty.

In *United Gas Pipe Line Co. v. Mobile Gas Service Corp* (*Mobile*), the FPC had allowed United Gas Pipe Line to increase the rate charged to Mobile Gas Service Corp despite a contract between the pipeline and the customer specifying a lower rate.[43] The Supreme Court ruled that United Gas Pipe Line could not file a rate increase that violated the requirements of its agreement with Mobile Gas Service Corp. The Supreme Court held that the Natural Gas Act "evinces no purpose to abrogate private rate contracts as such"[44] and "[b]y preserving the integrity of contracts, [the Natural Gas Act] permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry."[45]

In the companion case, *Federal Power Commission v. Sierra Pacific Power Co. (Sierra)*, Pacific Gas & Electric Company (PG&E) had entered into a fifteen-year contract to sell power at a discounted rate to Sierra Pacific Power Company (Sierra) when Sierra had an attractively priced alternative power supply.[46] After Sierra lost its alternative power supply, PG&E filed a rate increase pursuant to Section 205 of the Federal Power Act. The FPC had allowed the rate increase to go into effect, but the Supreme Court again ruled that PG&E could not violate its contract with Sierra by filing a rate increase under Section 205 of the Federal Power Act. In its decisions in both *Mobile* and *Sierra,* the Supreme Court ruled that rates established by filed contracts could be modified only "when necessary in the public interest", but in Mobile the Supreme Court raised the bar higher by addressing considerations of what constituted "public interest." The Supreme Court explained that when the FPC was considering the abrogation of a contractual rate, "the sole concern of the Commission would seem to be whether the rate is so low as to

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[41] *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 at 479 (2002).
[42] *Public Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 471 F.3d 1053 at 1077 (9th Cir. 2006).
[43] *United Gas Pipe Line Co. v. Mobile Gas Service Corp* (Mobile), 350 U.S. 332 (1956). The U.S. Supreme Court's decision in Mobile is included in the Appendix.
[44] *Id*. at 338.
[45] *Id*. at 344.
[46] *Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956). The U.S. Supreme Court's decision in Sierra is included in the Appendix.*

adversely affect the public interest -- as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory."[47]

In the mid-1960s. the U.S. Supreme Court addressed the Mobile-Sierra in its decision in the *Permian Basin Rate Cases*.[48] The Supreme Court found that the FPC had appropriately declined to adjust area gas supply rates in Permian Basin areas because of contract prices. While acknowledging that "the Commission has plenary authority to limit or proscribe contractual arrangements that contravene the relevant public interest,"[49] the Supreme Court stated that:

> The regulatory system created by the Act is premised on contractual agreements voluntarily devised by the regulated companies; *it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity*. See United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373. There was here no evidence of financial or other difficulties that required the Commission to relieve the producers, even obliquely, from the burdens of their contractual obligations.[50] (Emphasis supplied.]

More recently, the Mobile-Sierra rule was upheld in *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 (Morgan Stanley)*. The case arose from numerous complaints filed at the FERC following the 2000-2001 energy crisis in the Western United States. Nevada Power Company and Sierra Pacific Power Company filed complaints against ten different power suppliers. Public Utility District No. 1 of Snohomish County, Washington filed a complaint against Morgan Stanley Capital Group, Inc., and Southern California Water Company filed a complaint against Mirant Americas Energy Marketing, L. P. The author of this paper was involved in numerous regulatory proceedings related to the complaints filed by Nevada Power Company and Sierra Pacific Power Company.

In its decision, the Supreme Court reaffirmed the role of contracts in the regulatory scheme established by the Federal Power Act and the Natural Gas Act.[51] The Court also held that the Mobile-Sierra presumption applies to market-based rate contracts filed with the FERC. The Supreme Court's decision delivered by Justice Scalia began by stating:

> Under the Mobile-Sierra doctrine, the Federal Energy Regulatory Commission (FERC or Commission) must presume that the rate set out in a freely negotiated wholesale-energy contract meets the "just and reasonable" requirement imposed by law. The presumption may be overcome only if FERC concludes that the contract seriously harms the public interest.[52]

The decision went on to state:

> Sierra was grounded in the commonsense notion that "[i]n wholesale markets, the party charging the rate and the party charge [are] often sophisticated businesses enjoying presumptively equal

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[47] *Id.* at 355.
[48] *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).
[49] *Id*. at 784.
[50] *Id*. at 822.
[51] *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1,* 128 S. Ct. 2733 (2008). The U.S. Supreme Court's decision in *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1* is included in the Appendix.
[52] *Id.* at 2737.

> bargaining power, who could be expected to negotiate a 'just and reasonable' rate between the two of them." Verizon, 533 U.S. at 476. Therefore, only when the mutually agreed-upon contract rate seriously harms the consuming public may the Commission declare it not to be just and reasonable. [Footnote 3: We do not say, as the dissent alleges, post, at 7 (opinion of Stevens, J.), that the public interest is not also relevant in a challenge to unilaterally set rates. But it is the " 'sole concern' " in a contract case. See FPC v. Sierra Pacific Power Co., 350 U.S. 348, 355 (1956).]

The Court also held the FERC was required to apply the Mobile-Sierra presumption in its evaluation of the contracts regardless of whether the FERC had an initial opportunity to review them.

In Kentucky, the Mobile-Sierra doctrine has been raised in at least one case before the KYPSC, and the Commission embraced the underlying principles of the doctrine. The doctrine was considered in Case No. 2012-00226, which related to an application by Kentucky Power Company ("Kentucky Power") to withdraw a real-time pricing tariff that had been implemented as part of a settlement agreement in an earlier proceeding. Kentucky Industrial Utility Customers, Inc. ("KIUC") filed motions to dismiss Kentucky Power's application on the grounds that, among other things, the Mobile-Sierra doctrine limited Kentucky Power's ability to modify the settlement agreement that provided for the implementation of the real-time pricing tariff. Specifically, KIUC argued that, in accordance with the Mobile-Sierra doctrine, the Commission could only modify a settlement if it found "the settlement to seriously harm the public interest."[53] In its Brief filed in the case, Kentucky Power maintained that the "Mobile-Sierra Doctrine is a product of federal – not Kentucky – statutory law."[54] In its Order in Case No. 2012-00226, using language essentially similar to the U.S. Supreme Court decisions dealing with the Mobile-Sierra doctrine, the Commission denied Kentucky Power's request to withdraw the real-time pricing tariff that was approved in settlement agreement, stating as follows:

> Arguably, there could be situations in which the public interest could require the Commission to exercise its jurisdiction under KRS Chapter 278 to allow withdrawal of a tariff prior to its expiration under the terms of that particular tariff. The prevention of extreme financial difficulty or bankruptcy of a utility might be a situation in which the public interest could require the Commission to act pursuant to its authority under KRS Chapter 278 to allow a tariff to be withdrawn prior to its expiration date.[55]

Although the Commission did not mention the Mobile-Sierra doctrine by name, the Commission established the same standard for abrogating a contract, tariff, or settlement agreement as has been established by the U.S. Supreme Court in its application of the Mobile-Sierra presumption.

Conclusion

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[53] Case No. 2012-00226, *In the Matter of an Application of Kentucky Power Company to withdraw its Tariff RTP Pending Submission by the Company and Approval by the Commission of a New Real-Time Pricing Tariff*, Reply of Kentucky Industrial Utility Customers, Inc. to Response of Kentucky Power, June 19. 2012, at p. 2.

[54] Case No. 2012-00226, Brief of Kentucky Power Company, November 21, 2012, at p. 37.

[55] Order in Case No. 2012-00226, dated December 20, 2012, at 15. The Commission's Order in Case No. 2012-00226 is included in the Appendix.

The filed rate doctrine has a long history in Kentucky and is firmly grounded in Kentucky statutes. An understanding of the filed rate doctrine is of critical importance to utilities regulated by the KYPSC. It is important for regulated utilities to understand that they must adhere to the rate schedules, tariffs and contracts filed with the Commission. Utilities in Kentucky cannot offer rates, terms or conditions that are different from what are set forth in the filed tariffs. Furthermore, utilities cannot offer service under terms that are different – better or worse – from what are provided in their tariffs and contracts. Likewise, neither the Commission nor the courts can retroactively modify the rates that were filed by the utilities with the Commission. The Commission can modify tariffs and special contracts, but only prospectively and only in accordance with state statutes.

APPENDIX