

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF LOUISVILLE GAS AND)	
ELECTRIC COMPANY AND KENTUCKY)	CASE NO.
UTILITIES COMPANY FOR APPROVAL OF)	2009-00353
PURCHASED POWER AGREEMENTS AND)	
RECOVERY OF ASSOCIATED COSTS)	

O R D E R

On August 28, 2009, Louisville Gas and Electric Company ("LG&E") and Kentucky Utilities Company ("KU") collectively filed a notice that they intended to jointly file an application for approval of long-term contracts for the purchase of energy generated by wind, and for approval of surcharges to their existing rates for the automatic recovery of the costs incurred in connection with the wind power contracts. Attached to the LG&E/KU notice of intent were: (1) an incomplete draft copy of an application for approval of wind power contracts and to establish a surcharge to recover the costs related to those contracts; and (2) a motion requesting that the Commission issue an Order declaring that an application to establish a surcharge to recover the costs of wind power contracts does not need to be supported by the exhibits and documents that are required by 807 KAR 5:001, Section 10, to be filed with an application for a general adjustment in rates or, in the alternative, granting a waiver of the filing requirements for a general adjustment in rates. On September 28, 2009, LG&E and KU jointly tendered for filing their application requesting both approval of wind contracts and approval of rate surcharges.

The motion for a declaratory Order notes that almost five years ago the Commission rejected the efforts of LG&E and KU to establish a surcharge, outside of a general rate case, to recover certain costs associated with their membership in a regional transmission organization known as the Midwest Independent System Operator (“MISO”).¹ The basis for the Commission’s rejection of the MISO surcharge was that the surcharge would be a mandatory rate charged to every customer; and, thus, it constituted a general adjustment in rates, which can only be filed in compliance with the filing requirements set forth in Commission regulation 807 KAR 5:001, Section 10.

Here, LG&E and KU argue that the holding in that MISO surcharge case is now inapplicable based on a 2008 unpublished decision of the Kentucky Court of Appeals in the case of Kentucky Public Service Comm’n et al. v. Commonwealth of Kentucky ex rel. Stumbo, Case No. 2007-CA-001635-MR (Nov. 7, 2008). That unpublished decision, which is now on discretionary review at the Kentucky Supreme Court, addressed a Commission-approved surcharge allowing Duke Energy Kentucky, Inc. (“Duke Kentucky”) to recover the costs of replacing aging gas mains. That Court of Appeals decision is cited by LG&E and KU for the proposition that the Commission has the authority to approve surcharges when costs are fluctuating, volatile, or otherwise not amenable to review in a general rate case. LG&E and KU characterize the costs under

¹ Case No. 2004-00459, Application of Louisville Gas and Electric Company for Approval of New Rate Tariffs Containing a Mechanism for the Pass-Through of MISO-Related Revenues and Costs Not Already Included in Existing Base Rates (Ky. PSC Dec. 22, 2004).

the wind contracts as “a single, extraordinary, and volatile expense that is, and should be, separate from the Companies’ general rates.”²

Further, LG&E and KU claim that good cause exists to grant a waiver from the filing requirements which are applicable to a general rate case and are set forth in 807 KAR 5:001, Section 10. They assert that the information to be provided with their applications will be sufficient for the Commission to properly review the proposed surcharges for the recovery of the costs under the wind contracts plus the costs of transmission service and any adjustments related to the transmission service. They also state that no costs of the wind contracts are currently in their rates, that having to file the exhibits and documents required for a general rate case would cause them unnecessary expense, and that there is insufficient time to comply with the rate case filing requirements because the wind contracts specify that the Commission must approve the contracts and rate surcharges by March 23, 2010.

The Attorney General’s Office, Rate Intervention Division (“AG”), and Kentucky Industrial Utility Customers, Inc. (“KIUC”) jointly filed a motion requesting that the LG&E and KU application be dismissed or, in the alternative, be held in abeyance until the Kentucky Supreme Court rules on the Duke Kentucky surcharge issue. Combined with their motion was a response in opposition to the LG&E and KU motion for a declaratory Order. The AG/KIUC motion argues that, under the unpublished Court of Appeals decision in the Duke Kentucky surcharge case, the Commission lacks the authority to authorize a surcharge for the recovery of wind power costs because there is no specific statutory authority for such a surcharge. Thus, the AG and KIUC request that the

² LG&E/KU Motion at 3.

Commission dismiss the LG&E and KU application or, in the alternative, hold it in abeyance, claiming that it would be premature to process an application to establish wind surcharges until such time as the Kentucky Supreme Court has concluded its review of the Duke Kentucky surcharge issue.

In response to the LG&E and KU motion for a declaratory Order, the AG and KIUC reference the existence of a statutory process and Commission regulations for the review of rate adjustments to insure that they are fair, just, and reasonable. The AG and KIUC argue that this review process was created to protect the public interest and that this process should not now be circumvented because a full review is necessary to insure that the proposed wind power contracts are needed and that their costs are reasonable.

LG&E and KU filed a response to the AG/KIUC motion to dismiss or hold in abeyance. LG&E and KU argue that it would be premature to dismiss at this time since they have not yet filed their application for approval of the wind contracts and the rate surcharge.³ Further, they state that, since their application will be for the acquisition of renewable resources, the Commission should conduct a review of the merits of their proposals. LG&E and KU also claim that the AG and KIUC have mischaracterized the Court of Appeals decision in the Duke Kentucky surcharge case as prohibiting all surcharges that lack specific statutory authorization. That decision, according to LG&E and KU, actually approves such surcharges if they recover costs that are fluctuating and volatile such as fuel, including wind power costs.

³ As noted above, their application was filed on September 28, 2009.

Finally, LG&E and KU argue that it is most unlikely that the Kentucky Supreme Court will ban all surcharges that are not specifically authorized by statute because to do so would require the Court to overturn its own long-standing precedent approving surcharges for fuel costs. Thus, according to LG&E and KU, holding their application in abeyance would produce no benefits and would be contrary to the Commission's prior practice of fulfilling its regulatory responsibilities by continuing to process cases under existing laws despite the possibility that the law might change in the future.

Based on the evidence of record and being otherwise sufficiently advised, the Commission finds that LG&E and KU have now tendered for filing a joint application for approval of two wind purchase power contracts and to implement surcharges that, according to provisions in their respective tariffs, will be applicable in all territories served and will be mandatory to all electric rate schedules. For residential customers using 1,000 kWh per month, the additional cost is projected to be \$0.71 for an LG&E customer and \$0.92 for a KU customer.⁴

Considering the expansive definition of "rate" as set forth in KRS 278.010(12), which includes "any individual or joint fare, toll, charge, rental, or other compensation for service rendered or to be rendered by any utility," a surcharge applied to all customers to recover the costs of wind power will be a "rate" since it will obligate every LG&E and KU customer to pay additional compensation for the service rendered by LG&E and KU. By proposing to charge each customer a new rate in addition to the existing rates, LG&E and KU are proposing general adjustments to their existing rates, and such

⁴ The cost differential is due to LG&E's intent to purchase 34 percent of the wind power while KU intends to purchase 66 percent.

adjustments can be made only when there has been compliance with the filing requirements set forth in 807 KAR 5:001, Section 10, or when those filing requirements have been waived upon a showing of good cause.

The regulatory scheme established by the Kentucky General Assembly and codified in KRS Chapter 278 entitles utilities to charge rates that are “fair, just and reasonable.”⁵ When a utility believes that its existing rates are no longer fair, just, or reasonable, it has the right to file with the Commission new rates pursuant to KRS 278.180 and 278.190. When new rates to be charged to all customers are proposed, those new rates constitute a general adjustment in existing rates and the filing of those new rates must be supported by all of the exhibits and documents required by 807 KAR 5:001, Section 10.

While the Kentucky Court of Appeals held, in its unpublished decision in the Duke Kentucky surcharge case, that the Commission had authority to establish a surcharge for fluctuating and volatile costs, the surcharge at issue in that case was established in a general rate case. Consequently, the issue before the Court in that case was limited to the Commission’s authority to establish a surcharge for the recovery of capital costs as part of a general rate case, not in the absence of a rate case.

With respect to the alternative request by LG&E and KU that they be granted a waiver from the filing requirements set forth in 807 KAR 5:001, Section 10, for a general rate case, the Commission finds that compliance with those requirements is essential to the investigation to determine whether or not it is reasonable to authorize a surcharge for the recovery of wind power costs. To justify the authorization of a surcharge to

⁵ KRS 278.030(1).

recover a particular category of costs, such as those for wind power, a utility must first demonstrate, among other things, that its existing rates are insufficient to cover all of its reasonable costs, including those proposed to be recovered by the surcharge. Thus, the exhibits and documents required to be filed pursuant to 807 KAR 5:001, Section 10, are essential for an investigation of whether or not the existing rates of LG&E and KU are insufficient since, absent findings of insufficiency, there would be no justification for the authorization of the proposed surcharges.

Consequently, while the LG&E and KU requests for rate surcharges cannot be deemed filed absent compliance with the requirements for a general rate case, those requirements are not applicable to the requests for approval of the wind power contracts. The long-term purchase power contracts proposed here are subject to Commission approval under KRS 278.300 as evidences of indebtedness. The application tendered by LGE and KU does satisfy the minimum filing requirements for evidences of indebtedness, and those wind contracts can be reviewed and processed independently of the proposed rate surcharges.

With respect to the joint motion filed by the AG and KIUC requesting that the LG&E and KU application be dismissed on the basis that there is no statutory authority for the surcharges, the Commission finds that prior Court decisions, including National-Southwire Aluminum v. Big Rivers Electric Corp., 785 S.W.2d 503 (Ky. App. 1990) and the unpublished Court of Appeals decision in the Duke Kentucky surcharge case, have recognized the Commission's authority to establish surcharges in conjunction with general rate cases. Further, the Commission finds that, under its statutory responsibility to enforce the provisions of KRS Chapter 278, it would not be appropriate to hold the

LG&E and KU application in abeyance once it is filed merely because a future judicial decision might change the current law. Thus, the motion to abate filed by the AG and KIUC should be denied. However, as noted above, even though that part of the LG&E and KU application requesting surcharges cannot be deemed filed until such time as LG&E and KU fully comply with the filing requirements set forth in 807 KAR 5:001, Section 10, the other part of their application requesting approval of the wind power contracts can be reviewed independently of the surcharges.

IT IS THEREFORE ORDERED that:

1. The filing of an application by LG&E and KU to establish a surcharge to recover the costs of purchasing wind power constitutes a general rate adjustment and must be in compliance with the requirements of 807 KAR 5:001, Section 10, absent a showing of good cause to justify a waiver.

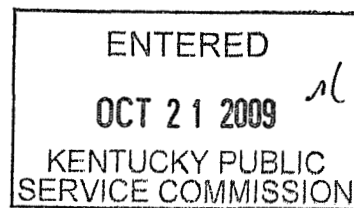
2. The LG&E and KU motion requesting a declaratory Order authorizing the filing of applications for approval of surcharges to recover the costs of purchasing wind power without the necessity of complying with 807 KAR 5:001, Section 10, or, in the alternative, requesting a waiver from that regulation, is denied.

3. That part of the LG&E and KU application requesting approval of long-term wind power contracts will be reviewed and processed independently of the part of the application requesting surcharges to recover the costs to be incurred under those wind contracts.

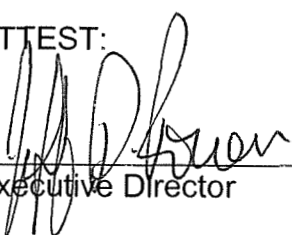
4. The motion to dismiss or abate filed by the AG and KIUC is denied.

5. That part of the application tendered by LGE and KU requesting approval of financing under KRS 278.300 satisfies the filing requirements and will be accepted for filing as of September 28, 2009, and that part of the application requesting approval of surcharges is deficient for failure to comply with 807 KAR 5:001, Section 10, and cannot be accepted for filing.

By the Commission



ATTEST:



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