

COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION II

CIVIL ACTION No. 11-CI-01238



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KENTUCKY UTILITIES COMPANY

PLAINTIFF

vs.

THE CITY OF BENHAM, KENTUCKY;  
and BENHAM POWER BOARD

DEFENDANTS

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OPINION AND ORDER

This matter is before the Court upon Defendants' *Motion to Dismiss* and Plaintiff's *Motion for Summary Judgment and Leave to File Amended Complaint*. Upon review of the parties' briefs and papers, and after being sufficiently advised, this Court hereby GRANTS Defendants' Motion to Dismiss.

STATEMENT OF FACTS

This matter centers on a contract between Plaintiff ("KU"), a public utility, and its customer, Defendants (collectively "Benham"). Benham purchases wholesale electricity from KU per an agreement that became effective on May 1, 2009. This agreement requires Benham to make monthly payments. Beginning in October 2010, Benham fell behind in its payments to Plaintiff. Benham's unpaid balance rose to a height of \$107,484.28 in July 2011.

In August 2011, KU requested Benham provide it with performance assurance in the amount of \$145,117.88 in accordance with the parties' agreement.<sup>1</sup> KU's request gave Benham twelve (12) days to bring its account current as well as providing full performance assurance. When Benham failed to comply with KU's demand, KU filed this suit on August 16, 2011. Originally, KU filed this suit against the Benham Electric System. However, KU has submitted an amended complaint to the Court to name the real parties in interest, the City of Benham, Kentucky and the Benham Power Board. The Court holds that KU may amend its complaint and finds no reason to dismiss this case for KU's failure to first name the proper parties.

On September 6, 2011, Benham paid its outstanding balance as well as all late fees and interest. Benham has been current on its payments since that time, paying invoices both in advance and in excess. According to Benham's reply brief, it paid an additional \$5,000 in certain months in order to provide performance assurance against any future obligations.

KU now brings this declaratory judgment action moving this Court to declare that Benham's failure to make timely payments or provide performance assurance when demanded is a default as defined by the parties' agreement, and, therefore, allows KU to terminate the contract with Benham. Benham argues that KU's claims for damages are moot, and that this Court is without jurisdiction to determine KU's rights to terminate the agreement. Both parties move the Court to either dismiss this action or grant summary judgment.

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<sup>1</sup> Agreement at Section 1.1 (See attachments to Complaint).

## ANALYSIS

### I. STANDARD OF REVIEW

The Kentucky Court of Appeals discussed a trial court's standard of review when ruling on a motion to dismiss in *D.F.Bailey, Inc. v. GRW Engineers Inc.*, 350 S.W.3d 818 (Ky. App. 2011):

In ruling on a motion to dismiss, the pleadings should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true. Therefore, "the question is purely a matter of law." [...] Further, it is true that in reviewing a motion to dismiss, the trial court is not required to make any factual findings, and it may properly consider matters outside of the pleadings in making its decision. However, reliance on matters outside the pleadings by the court effectively converts a motion to dismiss into a motion for summary judgment. (Internal citations omitted).

*Id.* at 820-21.

Summary judgment may be ordered by a trial court when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. CR 56.03. In making a summary judgment determination, a trial court must "view the evidence in the light most favorable to the non-moving party and all doubts are to be resolved in his favor." *Steelvest v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky 1991).

The moving party bears the initial burden of showing the non-existence of a genuine issue of material fact, and the burden then shifts to the opposing party to affirmatively show that there is a genuine issue of material fact for trial. *Jones v. Abner*, 335 S.W.3d 471, 475 (Ky. App. 2011). "The inquiry should be whether, from the evidence on record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial." *Welch v. Am. Publ'g Co. of Ky.*, 3. S.W.3d 724, 730 (1999).

## II. COUNTS I, II, AND III ARE MOOT ISSUES

The complaint filed in this case sets forth four counts. The fourth count seeks declaratory judgment on the issue of KU's proposed termination of the agreement ("Count IV"). This issue will be discussed below. The other counts are claims of (1) breach of contract ("Count I"); (2) unjust enrichment ("Count II"); and (3) breach of the duty of good faith and fair dealing ("Count III"). Benham argues to this Court that all three of the enumerated counts became moot once Benham made full payment to KU on September 6, 2011. KU agrees that Count II is mooted by Benham's payments, but contests that Counts I and III remain ripe for decision by this Court because both counts are grounded in Benham's failure make timely payments or to provide performance assurance to KU.

However, it is only Count III in the complaint that specifically mentions Benham's failure to pay the performance assurance. In fact, Count I only alleges breach in Benham's failure to pay monthly invoices timely and requests damages in the amount of \$87,484.28, the exact amount Benham was behind in its monthly payments at the time of this suit. Therefore, the Court finds that with respect to Count I, KU accepted the funds it was owed on September 6, 2011. KU argues that Benham's payments do not cure the event of default; however, the Court need not declare a breach and award KU a damage amount it has already received.

Count III in the complaint includes allegations that Benham failed to provide KU with performance assurance and demands damages "in excess of the jurisdictional minimum limits of this Court." Complaint at 7. As pointed out by Benham, KU is not seeking a demand by this Court that Benham pay the performance assurance in full.

Since September 6, 2011, Benham has not only remained current on its account with KU, but has also paid extra amounts to be set aside by KU as assurance against any further obligations of Benham. It appears from the record that KU has been accepting these additional payments. Because KU only seeks monetary relief, and that relief is being accepted by KU, this Court understands that issue to be moot.

### III. THIS COURT IS WITHOUT SUBJECT MATTER JURISDICTION OVER CHANGES IN RATE SCHEDULES OF UTILITY CONTRACTS

As stated above, Court IV of the complaint seeks this Court to issue a declaratory judgment as to “whether KU is entitled to exercise its right to terminate the Agreement because an Event of Default has occurred.” Complaint at 7. The termination of a transmission service requires approval by the Federal Energy Regulatory Commission (“FERC”) because it constitutes a rate change. *See* 16 U.S.C. § 824d(d); *Sacramento Municipal Utility District v. Fed. Energy Regulatory Commission*, 474 F.3d 797, 800 (D.C. Cir. 2007) (“Because termination of transmission service constitutes a rate change requiring FERC approval under section 205(d) of the Federal Power Act (FPA), 16 U.S.C. § 824d(d), a transmission service provider must file with the FERC before terminating service....”); 18 C.F.R. § 35.15(a). KU even states in its complaint that even if the Court rules that KU may terminate its contract with Benham, it will seek approval, if necessary, by the FERC before taking any action.<sup>2</sup>

The Court finds that the FERC must approve any termination of this contract and would have the ability to render its own determination despite any ruling by this Court. It appears that whatever decision the Court would make in this case would not be

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<sup>2</sup> This is in conformity with the agreement which provides that any termination is “subject to any necessary FERC approval.” Agreement at Section 2.3.1.2.

determinative of the issue, and the Court must refrain from entering what could only be an advisory opinion in this matter. *Foley v. Commonwealth*, 306 S.W.3d 28, 31 (Ky. 2012); KRS 418.040.

The Court notes that KU appears to only truly be seeking this Court to declare that Benham breached the agreement by not making full payment in August 2011. The record clearly demonstrates that such payment was not made, as admitted by Benham. However, even assuming that Benham admits this failure constitutes a default of the contract, it is for the FERC to determine whether such default or similar action allows KU to terminate the agreement.

**WHEREFORE**, the Court **DISMISSES** this action.

This order is final and appealable and there is no just cause for delay.

SO ORDERED, this 26<sup>th</sup> day of March, 2012.



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**THOMAS D. WINGATE**  
Judge, Franklin Circuit Court

**CERTIFICATE OF SERVICE**


I hereby certify that a true and correct copy of the foregoing Order was mailed, this 26 day of March, 2012, to the following:

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