

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

LESLIE COUNTY TELEPHONE COMPANY,
INC.

INVESTIGATION INTO THE ALLEGED
VIOLATIONS OF KRS 278.160

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CASE NO. 95-517

O R D E R

Background

During July and August 1995, Telephone and Data Systems ("TDS") performed a billing audit of Leslie County Telephone Company, Inc. ("Leslie"), and found that its wholly owned subsidiary had underbilled customers in its Dwarf exchange \$.10 per month for an undetermined period. In addition, investigations by TDS revealed that Leslie was charging some rates that were not contained in Leslie's tariff. These rates included \$1.50 per month for touchtone, \$0.50 per month for directory listings, and \$3.50 for the first quarter mile and \$1.20 for each additional quarter mile for extension and tie line mileage.

TDS informed the Commission of the tariff discrepancies and an informal conference was held August 23, 1995. On September 15, 1995, Leslie filed a letter detailing the untariffed charges. On September 18, 1995, Leslie filed tariffs for these services, which were approved and effective on October 18, 1995. On November 17, 1995, the Commission found a prima facie showing had been made that Leslie failed to file a schedule for certain rates prior to collecting compensation for those services in

violation of KRS 278.160. A hearing date was set and subsequently cancelled on the motion of Leslie for an informal conference with Commission Staff. The informal conference was held at the Commission's offices on December 15, 1995. At the informal conference Leslie asked that its case be submitted for Commission decision and waived its right to a formal hearing.

Decision

The Commission finds that Leslie improperly charged its customers for touchtone service, directory listings, and extension and tie line mileage. On October 18, 1995, Leslie's tariff was updated to include charges for these services. Leslie has also been underbilling its customers in the Dwarf exchange \$.10 per month for an indeterminate time frame.

All revenue collected from these customers is in violation of KRS 278.160. Leslie shall identify the customers who paid touchtone, extension and tie line mileage, and directory listing charges for the two-year period proceeding the date of the new tariff. These customers shall be entitled to a refund of any rate paid that was not in Leslie's tariff for the period of two years prior to the application of its updated filed tariff on October 18, 1995. For current customers of Leslie the refund due may be accomplished through bill credits over a period not to exceed five (5) years. Should a customer disconnect service prior to receiving the entire refund due, Leslie shall issue a credit for the remaining portion on the customer's final bill. Customers owed refunds that are not currently receiving service shall be paid by a lump sum refund. Leslie shall notify these customers at the last known address by certified mail that they are due a refund. Customers will be responsible for notifying Leslie to arrange payment, in writing or in

person at Leslie's office. Leslie will establish an escheats account for customers it cannot locate and prescribed procedures for handling escheatable funds shall be followed subsequent to the initial notification. The estates of deceased customers shall be entitled to refunds upon showing proper proof of entitlement.

Pursuant to KRS 278.225, Leslie must backbill its Dwarf customers for the \$.10 per month it undercollected. Leslie only needs to backbill for a two-year period. It may collect the monies over two years.

This proceeding concerns alleged violations of KRS 278.160. Leslie admits violating this statute but opposes refunding any amounts collected unlawfully. At issue is whether Leslie must refund or credit unlawfully collected rates which were not set forth in any filed tariff and whether Leslie must backbill the customers who were charged \$.10 per month less than the tariffed rate. Finding in the affirmative, the Commission orders Leslie to refund or credit all amounts illegally collected and backbill amounts uncollected, and assesses a penalty of \$25 against it.

Discussion

KRS 278.160 codifies the "filed rate doctrine." It requires a utility to file with the Commission "schedules showing all rates and conditions for service established by it and collected or enforced." KRS 278.160(1). It further states:

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. KRS 278.160(2).

Interpreting similarly worded statutes from other jurisdictions, courts have held that utilities must strictly adhere to their published rate schedules and may not, either by agreement or conduct, depart from them. Corporation De Gestion Ste-Foy v. Florida Power and Light Co., 385 So.2d 124 (Fla. Dist. Ct. App. 1980).¹ A similar rule applies to the published rate schedules of common carriers. See, e.g., Sallee Horse Vans, Inc. v. Pessin, Ky.App., 763 S.W.2d 149 (1988).

Failure to file with the Commission a rate schedule for its regulated services deprives a utility of the right to charge or collect those rates. A utility "can claim no rate as a legal right that is other than the filed rate." Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 251 (1951). See also GTE North Inc. v. Pub. Serv. Comm'n, 500 N.W.2d 284, 289 (Wis. 1993) ("[I]f the service provided for in this case was not tariffed, GTE had no authority to charge any money, and violated the filed rate doctrine by receiving monies for services other than those properly filed with the appropriate regulatory authority."); Popowsky v. Pennsylvania Public Utility Comm'n, 647 A.2d 302 (Pa. Comwlth. 1994).

This inflexibility is, in part, the result of a strong public policy to ensure rate uniformity, to "have but one rate, open to all alike, and from which there could be no departure." Boston & M.R.R. v. Hooker, 233 U.S. 97, 112 (1914). Equality among customers cannot be maintained if enforcement of filed rate schedules is relaxed. For

¹ See also, Haverhill Gas Co. v. Findlen, 258 N.E.2d 294 (Mass. 1970); Laclede Gas Co. v. Solon Gershman, Inc., 539 S.W.2d 574 (Mo. App. 1976); Capital Properties Co. v. Pub. Serv. Comm'n, 457 N.Y.S.2d 635 (N.Y. App. Div. 1982); West Penn Power Co. v. Nationwide Mut. Ins. Co., 228 A.2d 218 (Pa. Super. Ct. 1967); Wisconsin Power & Light Co. v. Berlin Tanning & Mfg. Co., 83 N.W.2d 147 (Wis. 1957).

this reason, neither equitable considerations nor a utility's negligence may serve as a basis for departing from filed rate schedules. Boone County Sand & Gravel Co. v. Owen County Rural Elec. Co-op. Corp., Ky.App., 779 S.W.2d 224 (1989).

The doctrine is also intended to preserve the Commission's "primary jurisdiction over reasonableness of rates and . . . ensure that regulated companies charge only those rates of which the agency has been made cognizant." City of Cleveland, Ohio v. Fed. Power Comm'n, 525 F.2d 845, 854 (D.C. Cir. 1976). Filed rates have been reviewed and found reasonable by the Commission. Prior to becoming effective, they are examined and questioned. This scrutiny is the principal reason for the Commission's existence.

Neither the voluntary nature of the relationship between Leslie and its customers nor the absence of any monopoly power is relevant to the issue of refunds. KRS 278.160 expressly limits a utility's right to collect compensation for utility services to that prescribed in its filed rates. Courts interpreting the filed rate doctrine have consistently held that a voluntary agreement to deviate from filed rates was unlawful and that the utility or common carrier was entitled to collect only the filed rate. See, e.g., Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246 (1951), Louisville & Nashville R. Co. v. Central Iron & Coal Co., 265 U.S. 59 (1924). These holdings have involved transactions where the exercise of monopolistic power was absent.² See, e.g.,

² The Commission's holding in Harold Telephone Co., Case No. 10170 (Ky. P.S.C. July 29, 1988), should not be followed. To the extent that Harold Telephone Co. holds that the assessment and collection of non-tariffed fees are permissible because "the affected customers, of their own volition, requested and received the service in exchange for payments," it is contrary to KRS 278.160.

Louisville & Nashville R. Co. v. Mead Johnson & Co., 737 F.2d 683, 690 n.5 (7th Cir. 1984).

The Commission finds no evidence that strict enforcement of KRS 278.160 will impede competition within the telecommunications industry. All telecommunications utilities are currently required to file their rates with the Commission. Several have been required to refund unlawfully collected rates which they collected.³ The only means of ensuring a level playing field for all and thus promoting competition is the uniform enforcement of existing statutes. The strict enforcement of the filed rate doctrine and competition, moreover, are not mutually exclusive. In other industries which were once heavily regulated and which are now being deregulated, the filed rate doctrine has continued to be strictly enforced. See Rene Sacasas, The Filed Rate Doctrine: Casualty or Survivor of Deregulation?, 29 Duquesne Law Rev. 1 (1990).

Assuming arguendo that the filed rate doctrine impedes competition, a telecommunications utility may either petition the Legislature to amend KRS 278.160 or to petition the Commission, pursuant to KRS 278.512, for prospective exemption from KRS 278.160. The Commission, however, cannot unilaterally and retroactively dispense with the doctrine.

³ See, e.g., Affinity Network Inc., Case No. 92-025 (Ky. P.S.C. Mar. 24, 1992); Business Choice Network, Inc., Case No. 92-026 (Ky. P.S.C. Mar. 24, 1992); CTG Telecommunications, Inc., Case No. 92-042 (Ky. P.S.C. Apr. 3, 1992); Affinity Fund, Inc., Case No. 92-069 (Ky. P.S.C. Aug. 27, 1992); Phoenix Network Inc., Case No. 92-172 (Ky. P.S.C. July 22, 1992); Telenational Communications Limited Partnership, Case No. 92-173 (Ky. P.S.C. May 27, 1992); Working Assets Long Distance, Case No. 93-172 (Ky. P.S.C. June 10, 1993); U.S. Digital Network Limited Partnership, Case No. 93-479 (Ky. P.S.C. Apr. 22, 1994); Executone Information Systems, Case No. 94-057 (Ky. P.S.C. Mar. 29, 1994); Westinghouse Electric Corp., Case No. 94-312 (Jan. 30, 1995).

Finally, the Commission finds no merit in the contention that the lack of a conscious violation of KRS 278.160 precludes the refunding of unlawfully collected rates. Assuming arguendo that Leslie did not willfully violate KRS 278.160, the lack of any willful intent does not create a legal right to assess the unfiled rates. Leslie may only assess and collect its filed rates. As the rates in question were not on file, Leslie may not assess or collect them.

The Commission, moreover, finds that a willful violation of KRS 278.160 occurred in this case. Leslie should have charged rates from its approved tariff and taken steps to prevent the provision of unauthorized services. Its failure to take such action constitutes a willful violation of KRS 278.160.

In addition to the filed rate doctrine, other policy considerations mandate the refund of the unlawfully collected rates. As KRS 278.160(2) prohibits the collection of the fees in question, permitting their retention is contrary to the literal language of that statute and would represent a dereliction of the Commission's statutory duty to enforce KRS Chapter 278. See KRS 278.040(1). Failure to order a refund would permit Leslie to profit from its violation of the law and encourage other utilities to imitate its conduct. Acquiescence by the Commission would undermine the long held and widely accepted public policy supporting the filed rate doctrine.

Permitting Leslie's retention of the unlawfully collected fees would also violate the judicial prohibition against retroactive rate-making. It is a fundamental rule of utility rate-making that rates are exclusively prospective in application because rate-making is a legislative act. As such it is subject to the rules of statutory construction. See Public Service Comm'n v. Diamond State Tele. Co., 468 A.2d 1285 (Del. 1983). As the

Commission had not approved Leslie's fees when assessed, permitting it to retain them now would amount to retroactive Commission approval. See Sunflower Pipeline Co. v. State Corp. Comm'n, 624 P.2d 466 (Kan. App. 1981).

The Commission recognizes that its decision today may be viewed as inflexible and dogmatic. That, however, is the very nature of the filed rate doctrine. When enacting the file rate doctrine, the Legislature "did not create a flexible standard for the courts [or this Commission] to apply in accordance with the facts, equities, and economic realities of the particular case." Western Transportation Co. v. Wilson and Co., Inc., 682 F.2d 1227, 1231 (7th Cir. 1982). It instead fashioned a hard and fast rule which must be applied in all cases.

Summary

Having considered the evidence of record and being otherwise sufficiently advised, the Commission finds that:

1. Leslie collected fees for untariffed intrastate telecommunication services within Kentucky.
2. At the time Leslie billed for these services, it did not have a published tariff for these services on file with the Commission.
3. Leslie underbilled its Dwarf exchange customers and now must backbill them pursuant to KRS 278.225.
4. For its violation of KRS 278.160, Leslie should be assessed a penalty of \$25.

IT IS THEREFORE ORDERED that:

1. Leslie is assessed a penalty of Twenty-Five Dollars (\$25) for its willful violation of KRS 278.020 and 278.160.

2. Within 30 days of the date of this Order, Leslie shall pay the assessed penalty. This payment shall be in the form of a cashier's or certified check made payable to "Treasurer, Commonwealth of Kentucky" and shall be mailed or delivered to: Office of General Counsel, Public Service Commission of Kentucky, 730 Schenkel Lane, Post Office Box 615, Frankfort, Kentucky 40602.


3. Within 60 days of the date of this Order, Leslie shall begin refunding or crediting all fees collected for the last two years for services for which it did not have an approved tariff. The refunding or crediting shall be concluded within five years from the date of this Order.

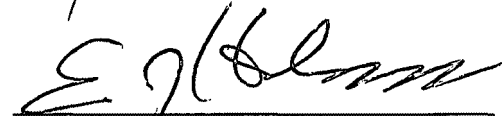
4. Over a two-year period, Leslie shall backbill its Dwarf exchange customers for uncollected rates.

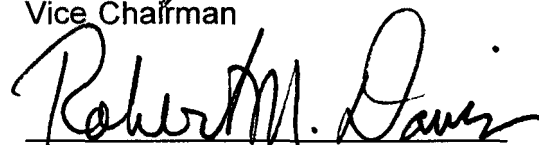
5. Within 120 days of the date of this Order, Leslie shall file with the Commission a list of all persons to receive refunds or credits and backbills, and the amount for each account.

Done at Frankfort, Kentucky, this 21st day of June, 1996.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director