

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BALLARD RURAL TELEPHONE COOPERATIVE)
CORPORATION, INC.)
) CASE NO. 95-518
_____)
)
INVESTIGATION INTO THE ALLEGED)
VIOLATION OF KRS 278.160)

O R D E R

Background

On July 12 and 13, 1995, Commission Staff visited Ballard Rural Telephone Cooperative Corporation, Inc. ("Ballard") to perform field work for a cost allocation examination. In addition to reviewing cost allocations, Staff reviewed billing, customer deposits, and capital credits. While reviewing customer bills, Staff found a charge for touchtone on customer bills that did not appear in Ballard's tariff.

On August 8, 1995, Staff and Ballard representatives informally discussed Ballard's untariffed charges. On August 23, 1995, Ballard filed a tariff to include a charge for touchtone service, which was approved. On August 23, 1995, Ballard responded to issues raised in the informal discussion. On September 7, 1995, by letter, Staff requested additional information and Ballard responded on September 12, 1995. On November 17, 1995, the Commission found a prima facie showing had been made that Ballard failed to file a schedule for certain rates prior to collecting compensation for service in violation of KRS 278.160. A hearing date was set and subsequently cancelled on the motion of Ballard for a second informal conference that was held on December 19, 1995. At the informal

conference Ballard proffered a settlement agreement, asked that its case be submitted for Commission decision, and waived its right to a formal hearing.

The Commission finds that Ballard improperly applied the rate found at section Mc.3.2. Ballard's tariffed touchtone rate found in this section was applicable only to customers who leased a phone from Ballard. Customers who did not lease a touchtone phone from Ballard should not have paid any charge for touchtone service as indicated in the tariff at section M.6.2. Beginning August 24, 1995, Ballard's tariff was updated to include all customers of the utility that requested touchtone service regardless of whether they leased a phone or provided their own equipment.

The Commission finds that the collection of touchtone revenue from customers who did not lease a telephone is in violation of KRS 278.160. Ballard shall identify the customers who paid touchtone charges and did not lease a phone for two years prior to the effective date of the new tariff. These customers shall be entitled to a refund of touchtone charges paid (\$2.50 monthly). For current customers of Ballard, the refund due may be accomplished through bill credits over a period not to exceed five years. Should a customer disconnect service prior to receiving the entire refund due, Ballard shall issue a credit for the remaining portion on the customer's final bill and refund the excess, if any, in a lump sum payment. Customers due refunds who are not currently receiving service shall be paid by a lump sum refund. Ballard shall notify these customers at the last known address by certified mail that they are due a refund. Customers will be responsible for notifying Ballard to arrange payment, in writing or in person at Ballard's office. Ballard will establish an 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.

Ballard refunds capital credits to its subscribers at the discretion of its Board of Directors. Although these capital credits cannot be tied to the provision of any particular service, it is clear a portion is generated by touchtone charges. Since these subscriber refunds and capital credits are funded from the same source, i.e. retained earnings, these returns should be viewed as a part of the general capital credit mechanism, although they are targeted to a specific segment of the subscriber base. This is a fair and equitable approach because the subscribers who paid the untariffed rate are the beneficiaries of this decision and subscribers who did not pay the rate are not harmed.

This proceeding concerns alleged violations of KRS 278.160. Ballard admits violating these statutes but opposes refunding any amounts collected unlawfully. At issue is whether Ballard must refund unlawfully collected rates which were not set forth in any filed tariff. Finding in the affirmative, the Commission orders Ballard to refund or credit amounts illegally collected for the last two years 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

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).

customers cannot be maintained if enforcement of filed rate schedules is relaxed. For 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 Ballard 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. 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., Louisville & Nashville R. Co. v. Mead Johnson & Co., 737 F.2d 683, 690 n.5 (7th Cir. 1984).

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.

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 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.

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

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. 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, 1992); 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).

arguendo that Ballard did not willfully violate KRS 278.160, the lack of any willful intent does not create a legal right to assess the unfiled rates. Ballard may only assess and collect its filed rates. As the rates in question were not on file, Ballard may not assess or collect them.

The Commission, moreover, finds that a willful violation of KRS 278.160 occurred in this case. Ballard should have applied for the appropriate regulatory approval or taken steps to prevent the charge of unauthorized rates. Its failure to take such action constitutes a willful violation of KRS 278.020 and 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 Ballard 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 Ballard'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 Ballard'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 filed 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. Ballard collected fees for untariffed intrastate telecommunications services within Kentucky.
2. For its violation of KRS 278.160, Ballard should be assessed a penalty of \$25.
3. Ballard's proposed settlement is rejected without prejudice to tariff revisions proposing the same changes.

IT IS THEREFORE ORDERED that:

1. Ballard is assessed a penalty of Twenty-Five Dollars (\$25) for its violation of KRS 278.160.
2. Within 30 days of the date of this Order, Ballard 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.

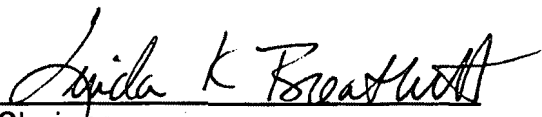
3. Within 60 days of the date of this Order, Ballard shall begin refunding or crediting all fees collected for the last two years for services for which it did not have an approved tariff. The refunding or crediting shall be concluded within five years from the date of this Order.

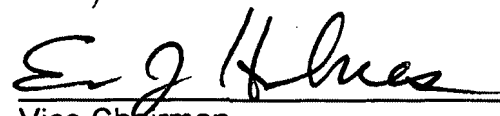
4. Ballard's proposed settlement shall be rejected without prejudice.

5. Within 120 days of the date of this Order, Ballard shall file with the Commission a list of all persons who will receive refunds or credits 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