

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BALLARD RURAL TELEPHONE)	
COOPERATIVE CORPORATION, INC.)	CASE NO.
)	2004-00036
COMPLAINANT)	
)	
V.)	
)	
JACKSON PURCHASE ENERGY CORPORATION)	
)	
DEFENDANT)	

O R D E R

Ballard Rural Telephone Cooperative Corporation, Inc. (“Ballard”) has filed a complaint against Jackson Purchase Rural Electric Cooperative Corporation (“Jackson Purchase”), alleging that Jackson Purchase refuses to charge Ballard pole attachment rates that are fair, just, reasonable, and non-discriminatory. By this Order, the Commission establishes the methodology that Ballard and Jackson Purchase shall use to calculate the rates each will charge the other for pole attachments.

PARTIES

Ballard is a membership cooperative corporation that provides local exchange carrier telephone service as well as Internet and digital video services¹ in Ballard and McCracken counties in Kentucky.² Jackson Purchase is an electric distribution

¹ Transcript of Evidence (“T.E.”) at 36.

² Testimony of Harlon E. Parker (“Parker Testimony”) at 3.

cooperative corporation formed pursuant to KRS Chapter 279 that provides electricity to approximately 27,000 customers in Ballard, Carlisle, Graves, Marshall, McCracken, and Livingston counties in Kentucky.³

BACKGROUND

In 1981, in a case focused on the emerging cable television industry and its subsequent lack of poles in the ground, the Commission issued a decision that the provision of space on a utility pole for cable television pole attachments is a “service” as that term is defined in KRS 278.010(13) and that the rates, terms, and conditions for providing such pole attachment space are within the jurisdiction of the Commission under KRS 278.010(12) and KRS 278.040.⁴ The Kentucky Court of Appeals affirmed that decision in Kentucky CATV Association v. Volz.⁵ The Commission, thereafter, in Administrative Case No. 251,⁶ established a uniform methodology for utility companies under its jurisdiction to calculate cable television pole attachment rates (“CATV methodology”). That methodology was acceptable to both parties to this proceeding, and each has on file with this Commission approved cable television pole attachment rate tariffs.

³ Testimony of Richard Sherrill (“Sherrill Testimony”) at 3.

⁴ Consolidated Case No. 8040, The Regulation of Rates, Terms and Conditions for the Provision of Pole Attachment Space to Cable Television Systems by Telephone Companies, and Case No. 8090, The Regulation of Rates, Terms, and Conditions for the Provision of Pole Attachment Space to Cable Television Systems by Electric Utilities. (Ky. PSC Aug. 26, 1981).

⁵ Ky. App., 675 S.W.2d 393 (1983).

⁶ Administrative Case No. 251, The Adoption of a Standard Methodology for Establishing Rates for CATV Pole Attachments (Ky. PSC Aug.12, 1982).

The Commission did not extend its decisions regarding CATV pole attachments to those attachments made by local exchange companies or electric utilities, as they had historically negotiated and entered into agreements with other pole-owning utilities for the shared use of space for attachments (“Joint Use Agreements”). Ballard and Jackson Purchase are two such utilities.

Ballard and Jackson Purchase entered into a joint use agreement (“Agreement”) in 1954 that set forth the terms and rates pursuant to which each would make pole attachments available to the other. Their agreement was to remain in effect until terminated at the end of 25 years or thereafter upon written notice by one party to another of not less than 3 years prior to the date of termination. The agreement set initial pole attachment rates to be paid by Ballard within a range of \$.60 to \$1.30.⁷ Pursuant to the rate adjustment mechanisms set forth in the Agreement, Ballard’s rates could rise to a maximum of \$3.00 per pole.⁸

The disagreement which brought this case to this Commission occurred in September 2002, when Jackson Purchase proposed to raise its pole attachment rates for Ballard to a pole-height adjusted range of \$13.79 to \$17.75 per pole.⁹ Jackson Purchase thereafter informed Ballard, on April 23, 2003, that it was terminating their longstanding Agreement effective April 26, 2006. Jackson Purchase instructed Ballard that, upon the termination date, Ballard was to begin the removal of its attachments from Jackson Purchase’s poles. Ballard objected and filed the complaint that is the

⁷ Agreement at Appendix B.

⁸ Application at 3.

⁹ Application at 4.

subject of this proceeding, requesting that the Commission assert jurisdiction over pole attachments provided by joint users, order Jackson Purchase to refund all amounts collected from Ballard for pole attachments, and set the rates that Jackson Purchase can charge Ballard for such service going forward.

The Commission accepted Ballard's complaint for filing and established a procedural schedule that permitted each party to file direct and rebuttal testimony, allowed each party to propound data requests, and established an informal conference. Prior to the informal conference, Ballard filed a motion for summary judgment.

In its denial of Ballard's motion, the Commission asserted jurisdiction over joint use pole attachments, finding the provision of space on a utility pole to be a "service" as defined under KRS 278.010(13), irrespective of the customer receiving the service. The Commission clearly stated, however, that it would continue to allow joint users the opportunity to negotiate and enter into agreements for joint use pole attachments. A hearing having been held, and the parties having filed briefs, the matter stands submitted for decision.

DISCUSSION

The sole remaining issue for consideration in this proceeding is the methodology that should be used by the parties to calculate fair, just, and reasonable rates each may charge the other for pole attachments.

Ballard asserts that Jackson Purchase's proposed pole attachment rate is inappropriate and that Jackson Purchase refuses to provide Ballard with pole attachments at fair, just, reasonable, and non-discriminatory rates in violation of

KRS 278.030(1) and (2). It also asserts that, pursuant to KRS 278.170(1)¹⁰ and Section 2 of the Kentucky Constitution, Jackson Purchase is prohibited from charging Ballard pole attachment rates that differ from the pole attachment rates it charges its CATV customers. Ballard contends that it provides the same or similar services as a cable provider and that the attachments it makes to Jackson Purchase's poles are basically the same as those made by Jackson Purchase's CATV customers. As such, it asserts that Jackson Purchase is required to charge Ballard its approved CATV tariffed rate.

Jackson Purchase asserts that the methodology it is proposing to use to calculate its proposed pole attachment rate for Ballard is fair, just, and reasonable. It argues that, since Ballard is a utility with the power of eminent domain, it is not similarly situated with a CATV customer and should not be charged the CATV tariffed rate. It states that if Ballard does not like the rates Jackson Purchase assesses for pole attachments, Ballard can, unlike CATV customers, erect its own poles or install underground facilities.

Jackson Purchase also argues that the purpose of a joint use agreement is to avoid duplication of facilities and reduce costs. It states that its agreement with Ballard contemplated that each party would own a fair and reasonably equivalent percentage of

¹⁰ KRS 278.170(1) provides:

No utility shall, as to rates or service, give any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage, or establish or maintain any unreasonable difference between localities or between classes of service for doing a like and contemporaneous service under the same or substantially the same conditions.

shared poles and that, as a result, a minimum amount of money would be exchanged. Jackson Purchase states, however, that equivalent ownership was not achieved,¹¹ as Ballard has facilities on 4,610 Jackson Purchase poles, while Jackson Purchase has facilities on only 170 Ballard poles.¹² It maintains that Ballard has saved money by not adhering to the ownership percentage contemplated in the joint use agreement and that, as a result, Ballard's rate should include an avoided cost component. It claims that if an avoided cost component is not included, Ballard will reap a windfall at Jackson Purchase's expense.

Interestingly, while Jackson Purchase has asserted that Ballard is not similarly situated to its CATV customers, its witness testified at the hearing that the same methodology should be used to calculate pole attachment rates, regardless of who makes the attachment.¹³ He contended, however, that the CATV methodology is outdated, does not include all appropriate costs, and should not be used to calculate Ballard's pole attachment rate. Specifically, he testified that the CATV methodology inappropriately allocates only one-eighth of the first 25 feet of a utility pole to the attaching entity. He stated that the allocation is inappropriate because it does not take into consideration that the lines must be raised off the ground approximately 20 feet and that all costs associated with getting the line into the air are unfairly charged to the pole-owning utility. To remedy this situation, Jackson Purchase argues that a joint user

¹¹ Both parties acknowledged that they had not attempted to comply with the terms of the agreement regarding pole parity. See T.E. at 81-82, T.E. at 131.

¹² Sherrill Testimony at 4 and T.E. at 128.

¹³ T.E. at 137.

should have to pay one-half of the weighted installed cost of the first 25 feet of a typical Jackson Purchase pole.

The Commission finds that KRS 278.170(1) prohibits a utility from giving any “unreasonable preference or advantage” or making any “unreasonable difference” as to rates among customers who received a “like or contemporaneous service under the same or substantially the same conditions.” KRS 278.170(4) provides that “the Commission may determine any questions of fact arising under this section.” Having determined that the provision of space on a utility pole is a “service,” the Commission has reviewed the evidence of record to determine what that service entails for the parties hereto and compared it to the service provided to cable television customers. The Commission finds that the pole attachments made by these parties constitute a like service made under the same or substantially the same conditions and that it would constitute a violation of KRS 278.170(1) for the parties to charge each other attachment rates based on a different methodology than that it uses to calculate the rate they charge their cable customers.

Jackson Purchase’s witness testified that for the CATV customer, the pole attachment would be the “metal gizmo with the bolt through the pole.”¹⁴ The Commission does not believe that an attachment made by Ballard or Jackson Purchase should be viewed any differently. The Commission finds that the pole attachment is the facility that is actually appended to the pole and that over-lashed conductors should not be considered as multiple individual attachments. The Commission further is not persuaded by Jackson Purchase’s argument that the party making the attachment

¹⁴ Id. at 157-158.

should be responsible for the cost to get its line to the required height. The service provided is for the use of space on the pole, and that is the space for which the party making the attachment should be responsible. However, the Commission finds that if space on the pole is insufficient for the attaching party to make its attachments, that party should be responsible for any make-ready work or re-engineering required to make the pole suitable for the attachment, including increasing the pole height.

The Commission disagrees with Jackson Purchase's assertion that the methodology established for CATV attachments is flawed and that an avoided cost component should be included in calculating a pole attachment rate. When questioned about how the avoided cost component would be calculated, Jackson Purchase's witness stated that the cost is subjective and cannot be calculated.¹⁵ He then provided some examples of subjective costs, such as the cost of repairing or replacing damaged poles, filing claims for damaged poles, and maintaining records on the poles, and testified that the avoided costs could be calculated but that he was not sure they would be applicable to the overall situation.¹⁶

The Commission believes that the subjective costs enumerated by Jackson Purchase are already included in the carrying charge component of the CATV methodology. The Commission specifically stated in Administrative Case No. 251 that the carrying charge component includes operation and maintenance expenses, general administrative expenses, depreciation, property or ad valorem taxes, income taxes

¹⁵ Id. at 132.

¹⁶ Id.

where applicable, gross receipts taxes, and a return on investment.¹⁷ The Commission finds, therefore, that it is inappropriate to include the avoided cost component proposed by Jackson Purchase.

Jackson Purchase argues that the bare pole factor component of the CATV methodology is outdated and that utilities have records today that could provide a much better idea of what factor should be used in the calculation. It states that it attempted to change that factor from .85 to .926 in its last CATV rate adjustment case.¹⁸ The Commission acknowledges that when Jackson Purchase filed its last CATV pole adjustment application, it proposed two changes to the CATV methodology – the amount per ground and the percentage adjustment for appurtenances. However, as the case proceeded, Jackson Purchase amended its application and proposed that its rates be adjusted based on the CATV methodology.¹⁹ The Commission affirmed the CATV methodology in that case and set fair, just, and reasonable rates for Jackson Purchase to charge for CATV attachments, which Jackson Purchase did not appeal.

SUMMARY

Having considered the evidence of record and being otherwise sufficiently advised, the Commission finds that the rates proposed by Jackson Purchase for Ballard pole attachments are unreasonable and should be denied. The Commission also finds

¹⁷ Administrative Case No. 251, August 12, 1982 Order at 10.

¹⁸ Case No. 2004-00319, Application of Jackson Purchase Energy Corporation for Adjustments in Existing Cable Television Attachment Tariff.

¹⁹ “JPEC now desires to request CATV rates based on adherence to the Case No. 251 uniform methodology. . . .” See Case No. 2004-00319, Amended Application at 2.

that the attachments made by these parties should be treated the same as those made by the parties' CATV customers and that the approved CATV methodology should be used by these parties to calculate the rate that each will charge the other for pole attachments.

IT IS THEREFORE ORDERED that:

1. Jackson Purchase's proposed pole attachment rate for Ballard is denied.
2. The CATV methodology established in Administrative Case No. 251 shall be used by Jackson Purchase and Ballard to calculate the pole attachment rates charged to the other.
3. Within 30 days from the date of this Order, Jackson Purchase and Ballard shall file a tariff consistent with this Order.

Done at Frankfort, Kentucky, this 2nd day of August, 2007.

By the Commission

ATTEST:



Executive Director