COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

O R D E R

This matter comes before the Commission on Ballard Rural Telephone Cooperative Corporation, Inc.'s ("Ballard Telephone") complaint, motion for summary judgment and motion for hearing. By this Order, we assert jurisdiction over pole attachments provided by joint users, deny the motion for summary judgment, and grant the motion for hearing.

BACKGROUND

Ballard Telephone and Jackson Purchase Rural Electric Cooperative Corporation ("Jackson Purchase") entered into a contract in 1954 entitled General Agreement for Joint Use of Wood Poles ("Agreement"), setting forth the terms and rates by which each party would make pole attachments available to the other. The parties have continuously operated pursuant to the terms of that Agreement.

In September 2002, Jackson Purchase informed Ballard Telephone that it was revising its pole attachment rates and that it would be sending Ballard Telephone a new contract. Jackson Purchase proposed an increase of more than 400 percent, which

Ballard Telephone found unacceptable. On April 23, 2003, Jackson Purchase informed Ballard Telephone that it was terminating the Agreement and that Ballard Telephone should begin removing its attachments from Jackson Purchase's poles.

On February 2, 2004, Ballard Telephone filed a complaint, pursuant to KRS 278.260, against Jackson Purchase alleging that Jackson Purchase refuses to allow Ballard Telephone to attach certain facilities on Jackson Purchase's utility poles at fair, just, reasonable, and non-discriminatory rates. The Commission accepted the complaint for filing and established a procedural schedule for the proceeding that required each party to file direct testimony, permitted data requests to be propounded to each party, allowed for rebuttal testimony, and established an informal conference.

Prior to the informal conference, Ballard Telephone filed a motion for summary judgment alleging that there is no genuine issue of material fact for the Commission's consideration and that the case should be summarily dismissed in its favor. It has also filed a motion for a hearing date so that, in the event the Commission does not grant its motion for summary judgment, the case may proceed to hearing. In addition to the documents it filed in accordance with the procedural schedule, Jackson Purchase has filed responses to the complaint, the motion for summary judgment, and the motion for hearing.

POSITION OF THE PARTIES

Jurisdiction

Ballard Telephone asserts that the Commission has jurisdiction over pole attachments and cites the Kentucky Court of Appeals' decision in *Kentucky CATV Association v. Volz*, 675 S.W.2d 393 (Ky.App. 1983) and several statutes in

KRS Chapter 278 to support its assertion. It argues that, pursuant to KRS 278.040, this Commission has exclusive jurisdiction over the "rates" and "services" of a regulated utility and that, according to *Volz*, a pole attachment is a "service" and the money charged therefor is a "rate."

Jackson Purchase disagrees. It contends that the Commission lacks jurisdiction over pole attachments of joint users. It argues that *Volz* simply granted the Commission the latitude to regulate pole attachment rates with regard to cable television operators. In addition, it states that the Commission, in Administrative Case No. 251,[1] clearly distinguished cable television operators from joint users on the basis that cable television operators did not own their own poles and, as a result, were customers of the utility. Jackson Purchase states that Ballard Telephone is a utility with the power of condemnation and the authority to construct its own poles and, therefore, does not share the same utility/customer relationship with Jackson Purchase as cable television operators.

Jackson Purchase argues in the alternative that, if the Commission finds it has jurisdiction, it should rule either that it will continue to allow joint users to negotiate agreements for pole attachments or that it is not restricted to applying the cable television rate calculation to joint users and establish a fair rate.

Refund

Ballard Telephone maintains that KRS 278.160 requires all regulated utilities to file with the Commission schedules showing all rates and conditions of services and that

[1] Administrative Case No. 251, The Adoption of a Standard Methodology for Establishing Rates for CATV Pole Attachments.

no utility shall charge or collect any greater or less consideration for service than that prescribed in its filed schedules. It claims that since the Commission has jurisdiction over the rates and services of pole attachments, the rates charged for said service must be on file with the Commission. It states that the Agreement was never filed with the Commission; thus, Jackson Purchase should be required to refund, with interest, all monies collected from Ballard Telephone for pole attachments. Jackson Purchase states that it is without sufficient knowledge to form a belief as to whether the Agreement was filed with the Commission. However, it states that the Commission specifically distinguished joint use arrangements from pole attachments by cable television operators in Administrative Case No. 251 and, therefore, KRS 278.160 does not apply. Jackson Purchase also argues that it would be unreasonable for Ballard Telephone to benefit from an agreement for 49 years and then ask for a refund.

Appropriate Rates

Ballard Telephone asserts that KRS 278.170 prohibits Jackson Purchase from giving any unreasonable preference or advantage as to rates or services. Ballard Telephone states that Jackson Purchase has failed to establish that its proposed rates are fair, just, and reasonable and has failed to justify its proposal to charge Ballard Telephone pole attachment rates different from those it charges its cable television customers. Jackson Purchase states that it has clearly outlined and justified the reasonableness of its proposed pole attachment rates.

Summary Judgment

Ballard Telephone states that, like a court, the Commission has the authority to summarily resolve cases when circumstances so warrant and that such action is

warranted in this case. It asserts that summary judgment is appropriate when there is no genuine issue of material fact and that pursuant to the holding in *Hoke v. Cullinan,* Ky. 914 S.W.2d 335 (1995) and *Welch v. American Publishing Co. of Kentucky d/b/a The Daily News, et al.,* Ky. 3 S.W.3d 724 (1999), the non-moving party must present evidence of record to preclude the entry of summary judgment. It states that since Jackson Purchase failed to establish that its proposed rates are fair, just, and reasonable, and failed to justify its proposal to charge Ballard Telephone anything other than the rates it charges its cable television customers, there is no genuine issue of material fact for the Commission to resolve.

Jackson Purchase states that Ballard Telephone is correct that summary judgment is appropriate when there is no genuine issue of material fact, but denies that it is appropriate in this case. Citing *Wilson v. Lowe's Home Center*, 75 S.W.3d 229 (Ky.App. 2001), Jackson Purchase asserts that summary judgment must be cautiously applied and that the record must be viewed in the light most favorable to the non-moving party. While it still maintains that the Commission lacks jurisdiction over this case, it argues that sufficient evidence has been presented to show that a genuine issue of material fact exists and that, according to *Kirk v. United Fuel Gas Co.,* Ky. 450 S.W.2d 504 (1970), any doubts must be resolved against the movant for summary judgment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Both parties to this complaint are utilities subject to this Commission's jurisdiction. The complainant, Ballard Telephone, is an incumbent local exchange carrier that provides telephone services to the public for compensation in Ballard and

McCracken counties in Kentucky and as such is subject to the Commission's jurisdiction pursuant to KRS 278.010(3)(e). The defendant, Jackson Purchase, is a Kentucky corporation engaged in the generation, transmission, and distribution of electricity to the public for compensation in Ballard, Carlisle, Graves, Marshall, McCracken, and Livingston counties in Kentucky and is a utility subject to the Commission's jurisdiction pursuant to KRS 278.010(3)(a).

We find that we must first determine whether the Commission has jurisdiction over joint use pole attachments and, if so, the extent to which we should assert that jurisdiction.

The parties are correct that to date the Commission has distinguished pole attachments made by joint users from those made by cable television operators. The Commission allowed each utility that owned its own utility poles to negotiate its pole attachment arrangements. However, the fact that we have never before assumed jurisdiction in no way prohibits us from doing so at this time if it is appropriate. *See Volz*, *supra*, at 397.

After reviewing the record, the applicable statutes and case law, we find it unquestionable that we have jurisdiction over pole attachments. The *Volz* Court unambiguously stated that the Commission "has jurisdiction over the utility companies, and that jurisdiction extends to their poles and the 'services' and 'rates' generated by pole attachment agreements." *Volz, supra*, at 396. Any argument that the Court's decision in that case was limited to pole attachments of cable television operators fails in light of the Court's own interpretation of that decision in *Elec. & Water Plant Board v. South Central Bell Telephone Co.*, 805 S.W. 2d 141 (Ky. App. 1990). The case before

the Court in *Elec. & Water Plant Board* involved two utility companies, one regulated by the Commission and one municipal utility exempt from Commission regulation, that had entered into a joint use agreement to share utility poles owned by each. The Court in interpreting its decision in Volz, *supra*, stated:

> We do note that this Court in *Kentucky CATV Association v. Volz*, . . . considered the PSC's findings in Order 251 and held that the PSC has jurisdiction over **joint pole use** agreements and has a duty to determine whether rates are just and reasonable. . . .Thus, the PSC had jurisdiction over the appellant as it was a **joint user of utility poles***.* [Emphasis added.]

Elec. & Water Plant Board, *supra*, at 144.

While we find our jurisdiction unquestionable on this point, we still believe that the joint users should be permitted the opportunity to continue negotiating the rates and terms of service to which each will make their poles available to the other. In this case, and in all cases where the parties cannot reach agreement, the Commission will resolve the dispute and establish rates and terms for their pole attachments that are fair, just, and reasonable.

As to the refund request made by Ballard Telephone, we find that the request should be denied. As stated herein, prior to this Order the Commission has never asserted jurisdiction over joint pole attachments. Therefore, we find that the Agreement was not required to be filed pursuant to KRS 278.160 and, consequently, a refund is not required.

Having determined that we have jurisdiction over joint pole attachments, we must determine whether summary judgment is appropriate. The Commission has not established a rule that explicitly governs summary judgment; therefore, in determining

whether to summarily dispose of this proceeding, we are guided by Civil Rule 56 and the principles established by the courts resolving motions for summary judgment.

Civil Rule 56 provides that a party seeking to recover upon a claim may move for summary judgment and that the judgment sought shall be entered if:

> [T]he pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The Kentucky courts have consistently held that this rule should be cautiously applied and that the record should be reviewed in a light most favorable to the party opposing the motion with all doubts resolved in the non-moving party's favor. *See*, *Steelvest, Inc. v. Scansteel Service*, Ky., 807 S.W.2d 476 (1991). Applying the rule and the substantive law to the record in this proceeding, we find that summary judgment should be denied. We find that Jackson Purchase has produced sufficient evidence to show that there is a genuine issue of material fact as to the appropriate rate for its provision of pole attachments to Ballard Telephone.

As we previously stated and as Jackson Purchase argued, we believe it is appropriate for the Commission to assert jurisdiction over joint use pole attachments and continue to allow joint users to negotiate the rates and terms for this service. Ballard Telephone correctly asserts that KRS 278.040 grants the Commission exclusive jurisdiction as to rates and services, and that KRS 278.260 grants the Commission jurisdiction over complaints as to rates or services of any utility. Therefore, in the event joint users cannot reach agreement, as in this case, the Commission will conduct an investigation and establish rates that are fair, just, and reasonable.

IT IS THEREFORE ORDERED that:

1. Ballard Telephone's motion for summary judgment is denied.

2. Ballard Telephone's motion for a hearing is granted and a hearing will be established by separate Order of this Commission.

3. The rates, terms, and conditions for providing joint use pole attachments are within the jurisdiction of the Commission and shall be established on a case-by-case basis.

4. All joint users of pole attachments may continue to negotiate the rates and terms under which they will make poles available to others. In the event the parties cannot reach an agreement, the matter shall be submitted to the Commission for resolution.

Done at Frankfort, Kentucky, this 23rd day of March, 2005.

By the Commission

Commissioner W. Gregory Coker did not participate in the deliberations or decision concerning this case.

ATTEST:

Executive Director