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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

BALLARD RURAL TELEPHONE
COOPERATIVE CORPORATION, INC.

v. PSC CASE NO. 2004-00036

JACKSON PURCHASE ENERGY CORPORATION

JACKSON PURCHASE ENERGY CORPORATION'S
RESPONSE TO BALLARD RURAL TELEPHONE
COOPERATIVE CORPORATION'S MOTION FOR SUMMARY
JUDGMENT

Comes counsel for Jackson Purchase Energy Corporation (Defendant), for its Response to Ballard Rural Telephone's (Plaintiff) Motion for Summary Judgment.

INTRODUCTION:

The Plaintiff has submitted a Motion for Summary Judgment seeking a declaration of a rate for pole attachments from the Defendant, and damages for charging excessive rates. The Defendant hereby argues that the Motion be denied, due to the presence of issues of material fact, and the existence of evidence that the Defendant has developed just, fair and reasonable rates.

ARGUMENT AND ANALYSIS:

The Plaintiff correctly notes in its Motion for Summary Judgment that Civil Rule 56 mandates that summary judgment is appropriate when "there is no genuine issue of material fact." However, in addition to the complex legal issues before the Commission in this case, there are definite factual disputes where the parties are complete disagreement, and evidence of these disputes are before the Commission. For summary judgment to be denied, the non-moving party does not even have to show persuasive factual arguments against the moving party. As noted in

Green v. Bourbon County Joint Planning Com'n, 637 S.W.2d 626 (1982), "it is not necessary that there be many genuine issues of fact in order to deny summary judgment, it is sufficient to deny the granting of a summary judgment even though the genuine issue of material fact may be small." Also any doubts in a review of a motion for summary must be resolved against the moving party *Kirk v. United Fuel Gas Co.*,450 S.W.2d 504 (1970). In *Wilson v. Lowe's Home Center*, 75 S.W.3d 229 (Ky ct. app. 2001), it was noted that the, "Summary Judgment rule should be cautiously applied, and record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Considering the substantial areas of factual issues in this case, Summary Judgment is inappropriate.

Issues of Fact.

On page four of its Motion for Summary Judgement, the Plaintiff states that "Jackson Purchase has failed to present any evidence to justify charging Ballard Rural anything other than the rates established in its CTAT filed with the Commission." Again on page 8 of the Motion, the Plaintiff states that "there is a complete failure of proof in this case. Jackson Purchase has presented no evidence to support the proposed pole attachment rates." These assertions are made to justify the Plaintiff's position that there are no disputes as to material fact. However, these assertions are complete fallacies.

The Defendant has clearly outlined its position as to pole attachment rate justification in the pre-filed testimony of Rich Sherrill, and more specifically in the Exhibit "B " to the Jackson Purchases Energy Corporation's Response to First Data Request of Commission Staff. In the aforementioned exhibit, the Defendant outlined a complex formula outlining how its rates for pole

attachments could be justified via appreciation for various inputs, and avoided costs. For the Plaintiff to assert that the Defendant has presented no proof on the subject is simply preposterous and disingenuous. The only theory offered as to how these sets of proof should be discounted is that they do not comply with the current CTAT tariff on file with the Commission. However, one of the basic issues of this case is whether such tariff rates would even be appropriate for calculation of a rate for a telephone company. The Plaintiff cannot simply decide what issues of material fact should be considered by the Commission. According to the Plaintiff's theory, they have the right to decide what proof should be considered as worthy of consideration, and coincidentally that proof which should not be considered is exactly that proof which they happen to disagree with.

Alternatively, Plaintiff's counsel has failed to establish any proof that the current CTAT rates are the proper measure of what telephone pole attachment rates should consist of. The Plaintiff has not filed any documents of the magnitude of the Exhibit B supplied by Jackson Purchase to justify its rates. It has instead chosen to discount these statistics as irrelevant while failing to submit any similar material of its own.

What makes Plaintiff's counsel's assertion even more ridiculous is that it contradicts the Plaintiff's own previous testimony. In his pre-filed testimony before the Commission, Harlon E. Parker was asked what would be an appropriate rate to pay the Defendant, and he responded that "either the rates established pursuant to the 1954 Agreement (if approved by the Public Service Commission) or the tariffed pole attachment rates of Jackson Purchase applicable to CATV providers" would be appropriate. Therefore according to the Plaintiff's own submitted testimony, the CTAT (CATV) rates are not necessarily the only rate to be considered. This led the

Commission to ask the Plaintiff which rate it considered as the only appropriate rate in its Data Requests of Ballard Rural; question 8 asked:

> "State whether Ballard Telephone believes that the fair, just, and reasonable rate for Ballard Telephone to charge Jackson Purchase for pole attachments is either the rate established by the 1954 agreement or Ballard Telephone's tariffed CATV rate. Explain"
>
> "Response: At this time, yes."

Any school child knows that the answer to an either/or question is never "yes." Only in its most recent Motion for Summary Judgment, has the Plaintiff indicated a firm preference for the CATV rate as the only reasonable option. This presents the Commission with intense circular reasoning, whereby the Plaintiff argues that the PSC has jurisdiction over pole attachment rates between telephone companies, such rates should be the same as the CTAT (CATV) rate, and any evidence presented against this argument should be discounted because it does not argue that the CTAT rate should be the only option.

The author of the aforementioned cost justification attachment, has supplied an affidavit concerning his report which is attached as Exhibit "A" to this response.

The Plaintiff is not entitled to damages.

Plaintiff's counsel has presented an argument for damages equal to the difference between the amount paid to Jackson Purchase in the past for attachment rates, and their proposed CTAT based rate. As noted above, Plaintiff's counsel has only recently decided that the CTAT rate is the only viable rate, and therefore cannot consistently argue now that it is obviously entitled to such damages. Also as noted in the Jackson Purchase's original Answer to the Complaint of

Ballard Rural, the Plaintiff is not entitled to damages arising from payments freely made under a valid contract that had laid undisturbed for so many years without complaint.

The PSC does not have jurisdiction over this matter.

As noted in the Defendant's Answer to the original complaint in this case, the PSC has never previously been awarded jurisdiction over joint use agreements of the type in this case, and has clearly indicated in its Order 251, that the tariff system for Cable Television providers was meant specifically for the facts at hand, and not for other attachment scenarios. In a section of Administrative Case 251 titled "CATV Operators Are Not Joint Users," the Commission stated that:

> CATV operators do not argue that they should be allowed to construct pole line systems of their own to share with the regulated utilities under typical joint use arrangements, and we see no reason why they should. Since they have no poles to "share," they need not be offered terms equivalent to those in prevailing joint use agreements between utilities both of which own and share poles. Under this doctrine pole attachments from joint use utilities, like electric and telephone services, should not be lumped together with cable television attachments for establishment of rates.

Jurisdiction over the matter was predicated on the fact that cable television providers constituted "customers" of those utilities that own poles made available to the cable tv providers. Ballard Rural Telephone has the same ability to enact condemnation proceedings to secure space for its utility lines as other similar organizations. However, Ballard Rural Telephone has instead chosen not to fully develop its ability to build poles or structures and attempt to shift the burdens of those costs onto Jackson Purchase Energy for a ridiculously low cost. It is these costs which have been noted, (and ignored by Plaintiff) by Jackson Purchase in its exhibits and pre-filed testimony before the commission. If Ballard Rural makes the business decision to retract from more traditional

low-tech work, such as the building of poles, that is their prerogative, but they should not be able to insulate themselves from the natural business consequences of such behavior.

As noted in Jackson Purchase Energy Corporations's Answer, the current matter does not involve a utility/customer relationship, but a joint use agreement, whereby both parties are presumed to have attachments on each others poles for the purposes of mutual convenience and efficiency. Therefore the rationale for the Plaintiff presenting itself as a customer of JPEC falters, and jurisdiction is not appropriate.

The Plaintiff cites *Kentucky CATV Association v. Volz*, 675 S.W.2d 393 for its position, however, as noted previously that case simply allowed the PSC the latitude to regulate pole attachment rates in regards to cable television operators. Our current set of facts are far different, and involve a true joint use agreement where both parties own poles and allow attachments from other utilities with considerable bargaining power.

The Plaintiff has attempted to blur the distinction between CATV regulation and the current joint use agreement scenario, but has failed in this approach. The Plaintiff notes that under 47 U.S.C. sec. 224 that pole attachments include telecommunications attachments of various types. However, the Defendant has never argued that the Plaintiff's attachments are not attachments, but only that the two parties do not share a utility/customer relationship as envisioned by the regulatory authority of KRS 278. Unlike the description portrayed in the Motion for Summary Judgment, the Defendant cannot occupy a monopoly position in regards to the Plaintiff, (as probably existed in the CATV cases), because both parties own poles, and both parties charge each other rates for attaching equipment to those poles as a means of efficiency rather than necessity.

Alternatively, even if the PSC had jurisdiction over the facts in this case, there is no reason why the PSC should be forced to assert such jurisdiction. The PSC has the latitude to leave this matter to the parties, and allow the them to settle this matter in alternative settings, especially the negotiation table.

There are also practical arguments to consider when viewing jurisdiction in this case. If the PSC asserts jurisdiction over the matter of joint use agreements (at least in the way proposed by Ballard Rural) then all current joint use agreements that have been operating smoothly for decades would need to be revised immediately. The PSC would need to develop strategies for revamping a vast set of agreements and understandings between parties that have previously shown little need for such interference. The PSC would be forced to use its personnel and budget to regulate an entirely new area of commerce. The Plaintiff does not believe that such regulation would be in the interest of most utilities, their customers, or dare we say even in the long run, the Plaintiff. A new statewide bureaucracy would need to be created by the PSC to regulate matters which for five decades were safely outside its hands, and never needed such waste of precious resources better devoted to the concerns of genuine utility customers and not successful business entities.

Further such regulation would inevitably lead to the widespread rewriting of long standing contracts like the 1954 agreement that is the subject of this case. Such changes would violate the longstanding principle of Kentucky law, that contracts between competent parties should not be set aside casually, *Spratt v. Carroll*, 399 S.W.2d 291 (1966), nor rewritten without cause, *O. P. Link Handle Co. v. Wright*, 429 S.W.2d 842 (1968). Jackson Purchase feels that, (opinion of Plaintiff counsel aside), that Ballard Rural Telephone is a completely competent business entity that is more than capable of settling this matter through constructive negotiation, and is more than

a match for the Defendant in any such proceeding, and is in no need of special protection from the PSC.

Alternatively, even if the Commission asserted jurisdiction in this matter, it is not compelled to assert it through a "tariffed rate" or to use the CTAT rate as its model.

In its Motion for Summary Judgement, the Plaintiff outlines its argument for PSC jurisdiction based upon a broad deference by Kentucky's courts to the PSC in matters involving the regulation of utilities and rates. However, while the Plaintiff believes that these court decisions should give the PSC broad authority over utilities, it feels that *how* the PSC regulates those matters should be strictly confined. It declares that the only option for regulating the relationship between these utilities in this case is the same methods it used in the early eighties when regulating CATV rates between cable utilities and utility pole owners. This assertion denies the PSC its natural ability to carefully craft solutions to complex regulatory problems, which the very reason why courts have traditionally awarded great deference to government agencies.

Additionally even if the PSC chose to use a tariffed rate for pole attachments between utilities, there is no reason it should be restricted to its previous methodology used for calculation of CTAT rates. That methodology was used considering the specific set of facts for the parties at hand (involving cable TV providers). In our present situation, the rate actually could be made largely irrelevant if the Plaintiff would attempt to achieve parity with Jackson Purchase in regards to pole construction and ownership. The rate for attachments would be almost a nullity, since the rates would simply cancel each other out and leave the parties sharing each others poles. However, the Plaintiff has chosen to construct and own fewer poles than Jackson Purchase. As mentioned previously, Jackson Purchase feels that it should not have to subsidize and bear all the

risks of the business decisions of the Plaintiff. This economic situation is inherently different from that found in previous matters dealing with cable television providers. It is simply nonsensical that a competent business organization like Ballard Rural Telephone should need to shift the costs of pole construction and maintenance onto another utility, while simultaneously paying a hopelessly inappropriate and outdated rate for the privilege of doing so. The Plaintiff does not need such charity in order to function properly and conduct its work effectively.

Additionally there is no authority for restricting the PSC to a single methodology or system of rates, provided that any methodology it does approve is within its legal guidelines as outlined in KRS 278. Plaintiff's counsel has also failed to present any alternative proof supporting the relative usefulness of the CTAT rate as the correct rate in this case. Instead, Plaintiff's counsel has merely supplied allegations.

Therefore the Plaintiff is attempting to force jurisdiction of this matter upon the PSC, and then to dictate to the PSC how exactly it must resolve the matter. The Plaintiff cannot argue for PSC jurisdiction of this matter, and then artificially restrict its powers to develop solutions to the issues brought before it.

Even if the CTAT rate were used as the model for a proper pole attachment rate, it would not be at the level suggested by the Plaintiff.

While there is no reason that the PSC should be restricted to use of the CTAT methodology for calculation of an appropriate tariff, such a rate calculation would not yield the rate suggested by the Plaintiff when adapted to telephone attachments. There are two reasons for this: First is that the new rate would need to be fully updated in order to be established. The Current CTAT rate is several years out of date, and has yet to be updated to current economic

conditions since its first use in 1984. This single rate will be equal to $5.84 once it has been filed with the Commission. Second, the current CTAT tariff operates on a presumed one foot of pole space utilized by the cable provider. However, telephone companies traditionally ask for two feet of pole space per attachment. Therefore the updated rate calculation would have to be doubled in order to work for telephone companies. The end result would be a figure of $11.68 (or $5.84 X 2). These figures are attested to by the affidavit of Rich Sherrill as Exhibit "A".

Therefore even if the PSC was forced to use the CTAT methodology for telephone attachments, (and we see no reason why they should be), then the resulting rate would be vastly different than the one mistakenly proposed by the Plaintiff.

CONCLUSION:

Jackson Purchase Energy Corporation does not believe that the PSC has jurisdiction over the current matter. However, assuming that jurisdiction does exist, Jackson Purchase believes

that sufficient evidence has been presented to show that genuine issues of material fact exist which preclude the awarding of summary judgment in this case. Therefore, Jackson Purchase Energy Corporation requests that Ballard Rural Telephone's request be denied.

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By Walter R. Luttrull III
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ATTORNEYS FOR JACKSON PURCHASE ENERGY CORPORATION

I hereby certify that 10 copies of the foregoing were filed with the Public Service Commission by mailing via Federal Express to:

MR THOMAS DORMAN EXEC DIR
PUBLIC SERVICE COMMISSION
215 SOWER BLVD
P O BOX 615
FRANKFORT KY 40601

AND via facsimile transmission to:
Mr. Thomas Dorman, Executive Director,
Commission @ 502-564-3460

True and correct copies of the foregoing have been mailed to:

HON ANITA MITCHELL ATTY
PUBLIC SERVICE COMMISSION
215 SOWER BLVD
P O BOX 615
FRANKFORT KY 40602

AND via facsimile transmission to:

HON JOHN E. SELENT
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on 30th day of July, 2004.

Walter R. Luttrull, III

CC: Kelly Nuckols @
Jackson Purchase Energy Corporation

EXHIBIT A

AFFIDAVIT Of RICHARD SHERRILL

Comes the affiant, Richard Sherrill, and after being duly sworn under oath, states and deposes as follows:

1. This affiant is employed as Vice President and a licensed Professional Engineer of Jackson Purchase Energy Corporation, which is currently involved in litigation before the Public Service Commission, in the case styled **Ballard Rural Telephone Cooperative Corporation, Inc. v Jackson Purchase Energy Corporation**., Case No. 2004-00036.

2. This affiant states that he supplied an Exhibit "B" as an attachment to Jackson Purchase Energy Corporation's Response to First Data Request of Commission Staff, which detailed Jackson Purchase Energy Corporation's analysis of cost justifications for the rates for pole attachments proposed to Ballard Rural Telephone prior to commencement of litigation.

3. This affiant further states that the information supplied in the Exhibit was true and correct as to his understanding of the facts and details of the matter at the time.

4. The affiant further states that the rate charged for cable television attachments to utility poles owned by Jackson Purchase Energy Corporation are not directly applicable to attachment rates for Ballard Rural Telephone.

5. This affiant states that the current cable television rates, or CTAT rates, or CATV rates are several years out of date, having been last updated in 1984, and represent rates for only half of the space normally provided to telephone operators, and therefore if cable television methodologies were fully utilized to develop a pole attachment rate for Ballard Rural Telephone's attachments to Jackson Purchase Energy's poles, the rate would be $11.68 ($5.84 X 2).

Further, this affiant sayeth not.

Richard Sherrill, PE
Vice President- Engineer of Operations,
Jackson Purchase Energy Corporation.

STATE OF KENTUCKY)
COUNTY OF MCCRACKEN)

Subscribed, sworn, and acknowledged before me on this 29th day of July, 2004, by Richard Sherrill.

My commission expires 9/23/05.

Vickie L. Hoover
Notary Public, State at Large