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August 29, 2005

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AUG 29 2005

PUBLIC SERVICE
COMMISSION

Hon. Elizabeth O'Donnell
Executive Director
Public Service Commission of Kentucky
211 Sower Boulevard
Frankfort, KY 40601

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

Dear Ms. O'Donnell:

Enclosed please find the original and eleven (11) copies of the Kentucky Cable Telecommunications Association's Brief in the above referenced proceeding. Please file stamp one of the 11 copies and return it to me in the enclosed self-addressed stamped envelope.

Thank you for your attention to this matter and please let me know if there are any questions.

Very truly yours,

WYATT, TARRANT & COMBS, LLP

Frank F. Chuppe

FFC/pw
Enclosures
cc: Gardner Gillespie

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**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

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AUG 29 2005

PUBLIC SERVICE
COMMISSION

In the Matter of:

**APPLICATION OF JACKSON PURCHASE)
ENERGY CORPORATION FOR)
ADJUSTMENTS IN EXISTING CABLE) CASE NO. 2004-00319
TELEVISION ATTACHED TARIFF)**

**BRIEF OF THE KENTUCKY CABLE
TELECOMMUNICATIONS ASSOCIATION**

The Kentucky Cable Telecommunications Association ("KCTA") submits this brief to the Commission, pursuant to its order of July 20, 2005, as amended during the hearing on August 11, 2005.

The application submitted by Jackson Purchase Energy Corporation ("JPEC") for an increase in its pole attachment tariff, as amended on August 2, 2005, now presents only two questions to the Commission. First, whether the Commission will follow its precedents and base pole attachment rates on the accumulated depreciation in the pole investment account (Account 364) in cases where the accuracy of the accumulated depreciation in Account 364 is not questioned. Second, whether the Commission will follow its precedents and base pole attachment rates on the rate of return (or margin) from the utility's last general rate case. In an effort to increase its pole attachment rates, JPEC has departed from the Commission precedents in both respects. KCTA, on the other

hand, believes that the Commission should follow its prior practices. There are good reasons for the past practices followed by the Commission.

Accumulated Depreciation for the Pole Account (364)

The pole attachment methodology adopted by the Commission in Administrative Case 251 in 1982 determines an average annual cost per pole, and then allocates to the cable operator a portion of the cost represented by the cable attachment's use of the "usable space" on the pole. ^{1/} The calculations can be performed on a net or a gross basis – either subtracting out the accumulated depreciation from investment in poles and multiplying by a carrying charge determined on a "net" basis, or multiplying gross pole investment by a carrying charge determined on a similar "gross" basis. ^{2/} The parties here differ on how to adjust for depreciation in these calculations.

KCTA and Ballard Rural Telephone Cooperative Corporation, Inc. ("Ballard") both rely on JPEC's recorded depreciation reserve – the amount that the current investment has already been depreciated – for Account 364. Account 364 contains JPEC's investment in distribution poles and other pole-associated

^{1/} The same basic methodology is used by the Federal Communications Commission and virtually every one of the 18 states that, like Kentucky, regulates pole attachments. See, e.g., *In re. Amendment of Commission's Rules and Policies Governing Pole Attachments*, 16 FCC Rcd 12103 (2001); *Re. Columbus & Southern Ohio Electric Co.*, 50 P.U.R. 4th 37 (Ohio PUC 1982); *In re. Certain Pole Attachment Issues*, 1997 N.Y. PUC Lexis 364 (1997).

^{2/} See *In re. Application of Cumberland Valley Electric, Inc. to Adjust its Rates*, KY PSC Case No. 2000-359 at 4 (Feb. 26, 2001). Where the pole investment is determined on a gross basis, the rate of return – which is intended to be applied to net investment – must be adjusted by the gross-to-net factor. See page 10, *infra*.

facilities, including anchors, guys, crossarms, insulator racks, and a variety of other items. ^{3/} In this case there is no dispute that JPEC accurately keeps records of the accumulated depreciation in that account. JPEC's witness, Richard Sherrill, testified that JPEC keeps those records accurately. Hearing CD at 10:03 a.m. Mr. Sherrill stated that he knows of no reason why the Commission cannot rely on the accuracy of JPEC's records for accumulated depreciation for Account 364. *Id.*

Nevertheless, JPEC argues that it should be permitted to apply the percentage that accumulated depreciation represents of total plant. Mr. Sherrill recognized on cross examination at the hearing that JPEC depreciates its different investment accounts in its distribution system at different depreciation rates. Hearing CD at 10:18 a.m. In deed, the truth of that admission is obvious; the percentage of the overall gross plant represented by the accumulated depreciation reserve is quite different – at 71.82% -- than the percentage the accumulated depreciation reserve for Account 364 represents of the investment in that account – 66.5%. *Compare* JPEC August 2, 2005 Amended Application at Exhibit 2 *with* Prefiled Direct Testimony of Randy Grogan on behalf of Ballard Rural Telephone Cooperative, Inc., Aug. 9, 2005, at Tab A.

One would certainly expect that the accumulated depreciation reserve recorded for the specific investment account that includes the poles themselves should be a more accurate reflection of the actual depreciation that has been

^{3/} See 7 C.F.R. § 1767.20 (Account 364).

experienced for poles than would application of the overall percentage of depreciation reserve experienced by all of JPEC's investment accounts. And, indeed, that was the testimony of KCTA's expert, James Freeman. See Freeman Prefiled Direct Testimony at 5. That was also the method used by Ballard's expert, Randy Grogan. See Grogan Prefiled Testimony, Aug. 9, 2005, at TAB A.

JPEC presented three weak arguments in support of its paradoxical position that looking to the whole of its accounts is more accurate than looking to the single account that is directly at issue. First, JPEC's CEO, Kelly Nuckols, suggested that because poles have "negative salvage value" the Commission should not rely on the actual recorded depreciation in Account 364. Yet, if negative salvage value – or any other characteristic of poles – might affect the accumulated depreciation reserve while not similarly affecting other accounts, that argues for, not against, use of the actual account's depreciation reserve. So too, that poles do not make up the entirety of the investment in Account 364 argues for, not against, using the depreciation reserve of that account rather than relying on the company-wide depreciation reserve as an effective representation of the depreciation reserve in Account 364.

Second, JPEC referred to statements made by Staff in a settlement conference. Leaving aside the appropriateness of JPEC's reference to any

statements made by Staff in its effort to help the parties reach a settlement, 4/ KCTA believes that JPEC misunderstood the Staff's position. The Staff indicated that, where a utility's numbers for accumulated depreciation are disputed or questioned by the parties, the overall proportion of plant depreciation may be an effective and necessary proxy. The Staff also referenced, properly, the Commission's decisions in the *Blue Grass* case. 5/ In that case, as pointed out at the hearing, the Commission relied on the cooperative's recorded depreciation in Account 364. In its April 4, 2001, Order in the *Blue Grass* case, the Commission "recognize[d] that accurately determining the balance of accumulated depreciation in Account 364 is essential to a proper calculation of CATV charges." 6/ Then, in its May 30, 2001, Order in the case, the Commission "accepted" the accumulated depreciation balance in Account 364 as recorded by the cooperative. 7/

Finally, JPEC's witness Richard Sherrill asserted that the *Blue Grass* case actually supported JPEC's approach. On cross examination, however, he admitted otherwise. Hearing CD at 10:21 a.m. As noted above, the

4/ JPEC's references to statements of the Staff in such a context, even over the Staff's objections at the hearing, was dumbfounding and improper. If the Staff's ability to work with parties to help them reach a settlement is to be effective, any statements made by the Staff in such circumstances should be protected.

5/ *In re. Application of Blue Grass Energy Cooperative Corp. to Adjust its Rates*, KY PSC Case No. 2000-414, April 4, 2001 Order at 6 & May 30, 2001 Order at 2..

6/ *Id.*, April 4, 2001 Order at 6

7/ *Id.*, May 3, 2001 Order at 2.

Commission's position in the *Blue Grass* case actually supports KCTA's and Ballard's position on this point.

In conclusion, the Commission's practice of accepting the utility's recorded depreciation reserve for Account 364 – at least when questions have not been raised or have been resolved regarding its accuracy – is supported by precedent and logic. The Commission relied on recorded depreciation for Account 364 in the *Blue Grass* case. And that decision rests on the basic principle that the actual number is more accurate than a proxy for that number. As stated by KCTA expert James Freeman: “. . . Pole Depreciation and Pole Investment should be used to determine Net Pole Values, absent a known problem with the accuracy of the Pole Accounts. As no issues of Pole Account accuracy have been raised, it seems logical to use actual data rather than a proxy for the actual numbers.” Freeman Prefiled Direct Testimony at 5.

Rate of Return

In its November 12, 2004, application in this case, JPEC proposed a rate of return of 5.81%. JPEC's witness Richard Sherrill recognized in that filing that 5.81% is “the rate of return resulting from the cumulative effect of the orders in these [JPEC's last rate] cases” JPEC's Nov. 12, 2004 Application, Prepared Testimony of Richard Sherrill; see *also* Hearing CD at 9:49 a.m. (testimony of Kelly Nuckols). KCTA agrees. This is the effective rate of return

that is applied to the rates for JPEC's other services. ^{8/} When the Commission issued its decision in Administrative Case No. 251, it emphasized that cable operators should be treated as utility customers in obtaining pole attachments , and were entitled to all the rights of a customer. ^{9/} The Commission implemented this concept by requiring utility pole owners to use a rate of return from the utility's last rate case. The "cost of money" factor, the Commission determined, should be "equal to the return on investment (or margin) allowed in the utility's last rate case." ^{10/} That rate of return, of course, is the basis for all other customers' rates.

Ballard argues that JPEC should be required to charge no more than a rate of return of 4.61%, the rate of return offered by JPEC in its last rate case, Case No. 97-422. KCTA believes, however, that the rate from that case should be adjusted to reflect the adjustments to depreciation that were made in the more recent cases, 2000-527 and 2001-485.

JPEC, in its final adjusted application here on the other hand, now argues that the Commission should step 22 years back in time and rely on a rate of return established by the Commission in 1983 for JPEC's services. KCTA's

^{8/} At the hearing, JPEC witness Mr. Nuckols was asked whether there was any rate for services, other than JPEC's proposed rate for pole attachments, which was based on the effective rate of return of 8.88% that JPEC proposes here. He did not know of any. Although he speculated that the unregulated, contractually-derived pole rate charged to joint pole users might be based on a similar rate of return, he admitted he had no basis for his speculation. Hearing CD at 9:39 a.m.

^{9/} *In re. The Adoption of a Standard Methodology for Establishing Rates for CATV Pole Attachments*, KY PSC Administrative Case 251, at 7 (Sept. 17, 1982).

^{10/} *Id.* at 12.

witness, Mr. Freeman, noted in his testimony that 1983 was a period of high interest rates and inflation. Freeman Prefiled Direct Testimony, Aug. 10, 2005, at 4. JPEC's attempt to argue that it was able to obtain low-interest loans from the Rural Utilities Service ("RUS") during that period is beside point. Presumably, had JPEC not had those low interest rates on which to rely, its rate of return would have been higher. In any case, whatever JPEC's RUS interest rates were in 1983, the fact remains that JPEC would base its pole rates now on a rate of return that is badly out of date, and that has been superseded by three much more recent cases.

In struggling to convince the Commission to apply an outdated and superseded rate of return, JPEC departs from the Commission's Order in Administrative Case 251. Whereas the Commission in Administrative Case 251 simply referred to the "return on investment (or margin) allowed in the utility's last rate case," ^{11/} JPEC requests the Commission here to apply "the rate of return in its last general rate case *that had a rate of return stipulated in its order.*" (Emphasis supplied.) ^{12/} Nothing in Administrative Case 251 contains that modifier. The import of JPEC's request is several-fold.

^{11/} *In re The Adoption of a Standard Methodology for Establishing Rates for CATV Pole Attachments*, KY PSC Administrative Case No. 251, at 12 (Sept. 17, 1982). See also *In re. Application of Blue Grass Energy Cooperative to Adjust its Rates*, KY PSC Case no. 2000-414, at 3 (Apr. 4, 2001) ("consistent with the Admin. 251 Order, we find that 10.73 percent, the overall rate of return from Blue Grass RECC's most recent general rate case should be used for the purpose of calculating its CATV charge").

^{12/} JPEC's Amended Application, filed August 2, 2005, at 2; see also Hearing CD at 9:59 a.m.

First, JPEC would have the Commission disregard all rates of return that have been accepted by the utility, intervenors, and the Commission in settlements of rate cases. It is common for these parties to reach settlements of rate cases without having a “rate of return stipulated in its order.” Were the Commission to adopt JPEC’s new effort to limit the meaning of the Commission’s decision in Administrative Case No. 251, it would lead to two unfortunate long-term results. It would mean that pole attachment rates would often be based on very old, out of date, and inaccurate rates of return. And, more important, it would mean that cable operators would refuse to enter into settlements in rate cases unless the rate of return is stipulated in the Commission’s order. This would mean, in turn, that the common practice of parties entering into “black box” settlements, where the parties agree on an overall settlement but not on the specific elements, would be severely curtailed – requiring more frequent, and longer, hearings in rate cases. This point cannot be made strongly enough. JPEC’s approach would make settlements in general rate cases much more difficult to obtain.

Second, it would mean that pole attachment rates would often be based – as would be the case here – on a different rate of return than the rates for other utility services. The Commission’s desire, articulated in Administrative Case 251 that cable operators be treated as other utility customers, would be thwarted. JPEC’s qualification to the Commission’s determination to rely on the “last rate case” has no support.

Finally, perhaps understanding that it has a difficult burden to overcome in arguing for application of an outdated and superseded rate of return, JPEC also attempted to confuse the issue at the hearing. JPEC noted that the rate of return it has actually used in its rate calculations has been “adjusted” to 6.38 percent because it is applied to gross investment. Hearing CD 9:51 a.m. Of course, this Commission recently made plain in the *Cumberland Valley* case that the rate of return to be applied in pole attachment cases is, like all other rates of return authorized by the Commission, “based on net investment rate base.” *In re. Application of Cumberland Valley Electric, Inc. to Adjust its Rates, KY PSC Case No. 2000-359, at 4.* As noted by the Commission in that case, the parties can proceed in one of two ways. Either they can adjust the pole investment amounts to “net” investment and use the full authorized rate of return, or they can use the gross pole investment numbers, and “net” out the rate of return number. *Id.* JPEC has earned no gold star simply for netting out its rate of return as required in the latter method.

In summary, JPEC cannot justify its use of an old and out of date rate of return that was set in the very different economic situation of 22 years ago, that has been superseded by a series of recent rate cases, and that is not used to determine any other customers’ rates. JPEC’s efforts to graft new language (and new meaning) onto the Commission’s reliance on the “last general rate case” must fail. Among other things, it would eliminate reliance on rate settlements,

such as those which determined JPEC's current rates and depreciation mechanisms in this case.

Rates

Mr. Freeman calculated the correct pole attachment rates for JPEC, based on his interpretation of the appropriate accumulated depreciation and rate of return. By use of JPEC's depreciation reserve for the pole account (Account 364) and the rate of return resulting from JPEC's most recent general rate case, Mr. Freeman has determined that the proper rates are \$4.20 for two-party poles, \$3.56 for three-party poles, \$5.10 for anchor attachments, \$.22 for two-party grounds, and \$.13 for three-party grounds. KCTA respectfully submits that the Commission should approve these rates for JPEC.

Conclusion

This case presents two important issues to the Commission. Should the Commission follow its precedents and rely on the utility's recorded depreciation reserve for pole investment, and should the Commission follow its precedents and rely on the last rate of return on which all other regulated rates of the utility

are based? KCTA believes that the Commission should follow those precedents here.

Respectfully submitted,

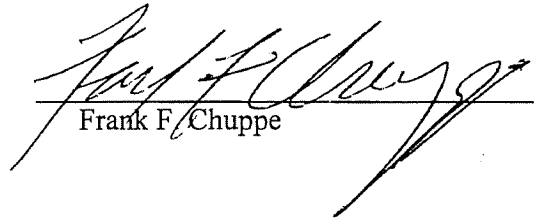
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon Frank N. King, Jr., Dorsey, King, Gray, Norment & Hopgood, 318 Second Street, Henderson, KY 42420, John E. Selent and Holly C. Wallace, Dinsmore & Shohl, LLP, 1400 PNC Plaza, 500 West Jefferson Street, Louisville, KY 40202, and to the Attorney General of Kentucky, Office of Rate Intervention, 1024 Capital Center Drive, Frankfort, KY 40601 by U.S. Mail, first class postage prepaid, this 29th day of August, 2005.



Frank F. Chuppe