

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

In the Matter of:

Kentucky Cable Telecommunications Association,)	
)	Case No. 2014-00025
)	
Complainant,)	
)	
v.)	
)	
Louisville Gas and Electric Company and Kentucky Utilities Company,)	
)	
Defendants.)	

**KENTUCKY CABLE TELECOMMUNICATIONS ASSOCIATION’S OPPOSITION TO
LOUISVILLE GAS & ELECTRIC AND KENTUCKY UTILITIES COMPANY’S
SECOND MOTION TO DISMISS AND
MOTION FOR DECLARATION OF LEGAL OBLIGATIONS**

The Kentucky Cable Telecommunications Association (“KCTA”) submits this Opposition to Louisville Gas & Electric Company and Kentucky Utilities Company’s (collectively “the Companies”) Second Motion to Dismiss KCTA’s Complaint and Motion for a Declaration of Legal Obligations.

INTRODUCTION

Pursuant to KRS 278.260, KRS 278.270, KRS 278.040, KRS 278.030, and 807 KAR 5:001 Section 20, on January 24, 2014, KCTA filed a Formal Complaint against the Companies, alleging that their pole attachment rates that became effective January 1, 2013, do not follow the Commission’s pole rate methodology as set forth in PSC decisions, including Administrative Case No. 251, and are unjust and unreasonable in violation of Kentucky law. On March 7, 2014, the Commission ordered the Companies to respond to KCTA’s Complaint, and on March 17, 2014, the Companies filed an Answer, as well as a Motion to Dismiss KCTA’s Formal

Complaint. KCTA filed an Opposition to the Companies' Motion to Dismiss on March 24, 2014, and the Companies filed their Reply to KCTA's Response on March 31, 2014. The Commission has not ruled on the Companies' motion to dismiss and for a declaration of legal obligations.

On October 22, 2014, the Companies each filed a Notice of Intent and Election to File Application for a General Adjustment in Electric Rates (the "current rate proceeding"). *See* Ky. PSC Case Nos. 2014-00371 and 2014-00372. Because several KCTA members attach their facilities to the Companies' utility poles, and they are directly affected by those aspects of the Companies' rate-adjustment application that relate to the Companies' pole attachment rates, KCTA moved to intervene on December 9, 2014.

Now the Companies again move to dismiss KCTA's Complaint, arguing that the reasonableness of the Companies' pole attachment rates will be examined during the current rate proceeding, and that "administrative economy" renders KCTA's Complaint unnecessary. The Companies also ask the Commission for a declaration to "affirm the Companies' legal obligation to collect the pole attachment rental fees." KCTA respectfully requests the Commission to deny the Companies' Motion.

First, dismissal of KCTA's Complaint at this stage would be premature and potentially prejudicial to KCTA because KCTA seeks a determination in this Complaint proceeding of the reasonableness of the Companies' pole attachment rates based on costs that were in effect at the time the pole attachment rates were instituted rather than the Companies' costs as relied on them to support their current general rate case. In lieu of dismissal, KCTA asks that the Commission consolidate its Complaint in case number 2014-00025 with the current rate proceeding.¹

¹ *See* KCTA's Motion to Consolidate, filed December 23, 2014.

Second, the Companies' motion for a "Declaration of Legal Obligations" asks the Commission to take a position regarding arrearages a KCTA member allegedly owes to the Companies for pole attachment fees – an issue that is both premature and not a proper subject of this proceeding. Until the reasonableness of the Companies' pole attachment rates is determined, the Commission has no cause to rule on the Companies' instant motion. And, in any event, such a motion should be brought and decided independently of this Complaint proceeding. As the Companies know, the KCTA member has been making preliminary payments "subject to true-up" to the Companies pending a decision by the Commission on KCTA's Complaint. The Companies are suffering no harm as a result of the KCTA member's preliminary payments.

For these reasons, the Commission should deny the Companies' motion.

ARGUMENT

I. Dismissal of KCTA's Complaint Would Be Premature and May Prejudice KCTA's Members.

The Companies argue that "administrative economy" requires the dismissal of KCTA's Complaint because the reasonableness of the Companies' pole attachment rates can be more efficiently examined in the current rate proceeding, and that dismissal of KCTA's Complaint would not prejudice KCTA's members.

Although the reasonableness of the Companies' pole attachment rates will be examined during the current rate proceeding, it is unclear whether the Companies will use their prior or current cost data as support for those rates. KCTA's Complaint alleges that the pole attachment rates the Companies have charged since January 1, 2013, are not supported by the Companies' costs that were in effect at the time the rates were instituted. *See* Compl. at ¶ 22. And as explained below, if the Commission determines that the Companies' pole attachment rates are not supported by the Companies' costs at the time those rates were instituted, KCTA members

would be entitled to pay the corrected pole attachment rate dating back to at least January 24, 2014 – the date KCTA filed its Complaint. *See Cincinnati Bell Tel. Co. v. Ky. PSC*, 223 S.W.3d 829, 839 (Ky. Ct. App. Feb. 2, 2007) (explaining that a filed rate holds constant until the rate is challenged by an interested party). Because dismissal of KCTA’s Complaint could prejudice its members by depriving them of an adjudication of whether the Companies’ prior costs support the current pole attachment rates, and by depriving them of the ability to pay the correct rate dating back to the date of the Complaint, the Commission should consolidate KCTA’s Complaint with the current rate proceeding rather than dismissing it.²

II. The Companies’ Request for a “Declaration of Legal Obligations” Is Premature, Prejudicial, Unnecessary and Must Be Raised in a Separate Proceeding.

The Companies allege that a KCTA member owes them hundreds of thousands of dollars and ask the Commission for a “declaration” to “affirm the Companies’ legal obligation to collect the pole attachment rental fees” in the current rate schedule.

The Companies’ request for a “declaration” is procedurally improper. Under the Commission’s rules, a request for a declaratory order must be initiated in a separate proceeding. *See* 807 KAR 5:001 § 19(1) (“The [C]ommission may, upon application by a person substantially affected, issue a declaratory order with respect to the jurisdiction of the commission, the applicability to a person, property, or state of facts of an order or administrative

² As KCTA explains in its Motion to Consolidate, filed December 23, 2014, its Complaint and the current rate proceeding involve common questions of law and fact. Consolidation of the two proceedings will conserve time, energy, and resources of the parties and of the Commission, without risking prejudice to any party. *See, e.g., Big Rivers Elec. Corp.’s Notice of Changes in Its Rates for Electricity Sold to Member Cooperatives*, Case No. 9163, Order, at 1-2 (Ky. PSC Dec. 28, 1984) (granting a motion to consolidate a complaint alleging unreasonable rates with the utility’s application to increase rates because the two proceedings had common questions of fact and law and consolidation promoted an “economical and expeditious disposition of the two proceedings”).

regulation of the commission or provision of KRS Chapter 278, or with respect to the meaning and scope of an order or administrative regulation of the commission or provision of KRS Chapter 278.”); *see also* 807 KAR 5:001 § 20 (explaining the requirements of a formal complaint).

The Commission’s rules governing the application for a declaratory order or the filing of a complaint require the party seeking relief to provide specific information, and they provide the adverse party with notice and an opportunity to respond. In the case of a declaratory order, the party seeking the order must provide a “complete, accurate, and concise statement of the facts upon which the application is based,” and each allegation must be supported by an affidavit or otherwise be verified. 807 KAR 5:001 §§ 19(2)(b), (6). The Commission’s rules also require a response to an application for a declaratory order within 21 days of the filing of the initial application. *Id.* § 19(4). With regard to a formal complaint, a party seeking relief must establish a prima facie case, and once a prima facie case has been established, the Commission requires an answer within ten days. *Id.* §§ 20(4)(a), (4)(b). The Companies’ motion meets none of these criteria.

By asking the Commission for a “declaration” in its motion, the Companies are circumventing the procedural safeguards provided by the Commission’s rules. If the Commission permitted the Companies to proceed in this manner, the Companies would avoid the Commission’s threshold requirements for either an application for a declaratory order or a formal complaint. And the rules that would otherwise provide KCTA with an adequate opportunity to respond would similarly be undermined.

In their memorandum, the Companies primarily rely on two cases in support of their motion for a declaration. But the Companies’ reliance on those cases is misplaced. In those

cases, the person or entity seeking relief on the issue of underpayment or overpayment *filed a complaint* with the Commission seeking the relief at issue. *See Americoal Corp. v. Boone County Water & Sewer Dist.*, Case Nos. 90-108, 91-220, Order, at 1-2 (Ky. PSC Apr. 24, 1992) (explaining that ratepayer filed a complaint against the utility seeking a refund of excessive and unreasonable charges); *Green River Elec. Corp. Application for an Order Approving Proposed Resolution of Underbilling to Town & Country Mobile Home Park*, Case No. 10205, Order, at 3 (Ky. PSC June 6, 1989) (noting that when a ratepayer refused to pay a bill for unbilled service, the utility initiated a case to obtain Commission approval to bill the ratepayer the disputed amount).

The Companies have filed neither an application for a declaratory order nor a formal complaint asking the Commission to initiate a case regarding the alleged underpayment of pole attachment rates. Because the issue must be raised in a separate proceeding before the Commission, the Commission should deny the Companies' motion.

Furthermore, the Companies are not being injured, as the KCTA member that has made preliminary payments to the Companies has done so subject to true up – up or down – based on the Commission's determination regarding the reasonableness of the Companies' rates. KCTA's members, on the other hand, would be prejudiced were they unable to determine the reasonableness of the Companies' current rates based on the costs in effect at the time the rates were instituted. The Companies have previously argued that those KCTA members that attach to the Companies' poles would not be prejudiced were the Commission to wait to decide this Complaint case until the Companies filed another general rate case to have the reasonableness of its rates determined. *KU/LG&E Mem. in Support of First Mot. to Dismiss*, at 12. The Companies should be estopped from now arguing, as they do here, that their existing,

unreasonable rates, necessarily apply for all prior periods since they were instituted. The Kentucky Court of Appeals has held that a filed “rate holds constant until a rate change is formally requested or a challenge to the rate is raised by an interested party.” *Cincinnati Bell Tel. Co.*, 223 S.W.3d at 839 (emphasis added); see also *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 128 (1990) (“The filed rate doctrine . . . contains an important caveat: The filed rate is not enforceable if the [regulatory agency] finds the rate to be unreasonable.”). Thus, to the extent the pole attachment rates that have been in effect since January 1, 2013, are found to be unreasonable based on the Companies’ costs at the time the rates were instituted, KCTA members would be entitled to pay the correct pole attachment rate from the date of the Complaint, at a minimum. Nor should the Companies be allowed to charge unjust and unreasonable rates for the period prior to their sending out invoices that alerted the attaching companies to the new rates or for the period in which the parties were discussing whether their dispute could be resolved without the need for Commission involvement. KCTA raised its “complaint” to the Companies shortly after they became aware of the unreasonable rates being charged by the Companies, in excess of the rate that the parties agreed to in 2010.

CONCLUSION

For the reasons stated above, KCTA asks the Commission to deny the Companies’ Second Motion to Dismiss and Motion for Declaration of Legal Obligations.

Respectfully submitted,

/s/ Laurence J. Zielke

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**ATTORNEYS FOR THE KENTUCKY CABLE
TELECOMMUNICATIONS ASSOCIATION**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Kentucky Cable Telecommunications Association's Opposition to the Companies' Second Motion to Dismiss and Motion for Declaration of Legal Obligations has been served on all parties of record via hand delivery, facsimile, or electronically this 23rd day of December, 2014.

/s/ Laurence J. Zielke

Laurence J. Zielke