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 MOTION TO DISMISS

The Kentucky Cable Telecommunications Association ("KCTA") submits this Opposition to Louisville Gas & Electric Company and Kentucky Utilities Company's (collectively "the Companies") Motion to Dismiss KCTA's Complaint.

INTRODUCTION

Pursuant to KRS 278.260, KRS 278.270, KRS 278.040, KRS 278.030, and 807 KAR 5:001 Section 19, 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 17, 2014, the Companies filed an Answer, as well as a Motion to Dismiss KCTA's Formal Complaint. The Companies argue that the Commission should dismiss KCTA's Complaint because Case Numbers 2012-00221 and 2012-00222 (the "2012 rate proceeding") "addressed" the reasonableness of the Companies' pole attachment rates, thus barring KCTA from

challenging the reasonableness of those rates in this case. The Companies also argue that KCTA's Complaint is contrary to the principle of administrative economy and that KCTA failed to support its allegations with evidence. Finally, the Companies argue that KCTA lacks standing to bring its Complaint.

First, the doctrine of collateral estoppel does not apply in this case because the 2012 rate proceeding does not preclude KCTA from challenging the reasonableness of the Companies' pole attachment rates. KCTA was not a party to 2012 rate proceeding, and Kentucky law states that collateral estoppel may not be used against a party that was not a party to the earlier proceeding. Contrary to the Companies' argument, it is not sufficient that the Attorney General intervened in the 2012 rate proceeding, because the Attorney General cannot adequately represent the interests of all consumers. Commission precedent demonstrates furthermore that collateral estoppel will not apply to KCTA simply because it had notice of the earlier proceeding. And because the 2012 rate proceeding resulted in a Settlement Agreement, rather than a full adjudication of the reasonableness of the pole attachment rates, the issue in this case was not "actually litigated" in the prior proceeding. Finally, because KCTA was not a party to the 2012 rate proceeding, it is not clear that the Commission's approval of a cable attachment rate was "necessary" or "essential" to the Commission's Order approving the Settlement Agreement.

Second, "administrative economy" does not require dismissal of KCTA's Complaint. KRS 278.260(1) gives KCTA the right to challenge unreasonable rates, regardless whether those rates were approved by the Commission.

Third, KCTA's Complaint establishes a *prima facie* case. The Complaint states specific and sufficient allegations, supported by evidence in the public record, that entitle KCTA to the relief it seeks.

Fourth, the Commission has repeatedly ruled that KCTA has standing to file complaints on behalf of its members.

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

ARGUMENT

I. Collateral Estoppel Does Not Preclude KCTA's Complaint.

The Companies argue that KCTA's Complaint is barred by the doctrine of collateral estoppel, also known as issue preclusion, because the reasonableness of the pole attachment rate was "addressed" in the 2012 rate proceeding. Memo., at 5-6.

Collateral estoppel bars litigation when (1) the party to be bound in the second case was a party to the first case; (2) the issue in the second case is the same as the issue in the first case; (3) the issue was actually litigated in the first case; (4) the issue was actually decided in the first case;[1] and (5) the decision on the issue in the first case was necessary to the court's judgment and adverse to the party to be bound. *See Ky. Bar Ass'n v. Fernandez*, 397 S.W.3d 383, 389 (Ky. 2013); *Moore v. Ky.*, 954 S.W.2d 317, 319 (Ky. 1997). The Companies carry the burden of establishing that collateral estoppel bars KCTA's Complaint. *Benton v. Crittenden*, 14 S.W.3d 1, 5 (Ky. 1999). The Companies have not met their burden.

A. KCTA Did Not Have a Fair Opportunity to Litigate the Reasonableness of the Pole Attachment Rates in the 2012 Rate Proceeding.

Under Kentucky law, a party to an earlier judgment may not use collateral estoppel against one who was not party to the earlier action because the non-party lacked a full and fair opportunity to litigate the issue. *See Moore*, 954 S.W.2d at 319. KCTA was not a party to the 2012 rate proceeding.

[1] The Commission approved Settlement Agreements in the 2012 rate proceeding that include cable television pole attachment rates. Settlement Agreement, App. B, at 6.

The Companies attempt to circumvent this requirement by arguing that the Attorney General – as a "representative of all customers" – actively participated in the 2012 rate proceeding. Mem., at 7. But the case the Companies cite as support actually aligns with KCTA's position. *See Barboursville v. Delta Natural Gas Co.,* Case No. 8496, Order, at 2 (Ky. PSC May 5, 1982). In that case, the Commission ruled that the Attorney General's office "is necessarily limited by time and resources" and is able to "focus[] only on broad issues affecting a majority of consumers whenever it does intervene and participate in rate proceedings before the Commission." *Id.* The Commission thus rejected the movant's argument that the complainants were estopped from challenging the reasonableness of rates on the theory that the Attorney General had "represented" the complainants through its intervention in an earlier rate case. *Id.* at 3. The Companies' argument that the Attorney General's intervention in the 2012 rate proceeding gave KCTA a "fair opportunity to litigate" is contrary to Commission precedent.

Nor is it enough that KCTA had notice of the rate proceeding. The Commission has held that notice alone is not sufficient to create a "fair opportunity to litigate" such that further action is barred by collateral estoppel. In *Barboursville v. Delta Natural Gas Co.*, the ratepayers had notice of the rate case but mistakenly believed that the new rates would have little impact on them. *Id.* Accordingly, the ratepayers had no reason to believe intervention was necessary in the rate proceeding, and only after the rates took effect did they "feel aggrieved" by the Commission's action. *Id.* Because the ratepayers filed a complaint that complied with the requirements of KRS 278.260, the Commission held that the ratepayers' action was proper, regardless of their notice of and failure to participate in the earlier rate proceeding. *Id.* This is analogous to KCTA's situation. KCTA had notice of the Companies' 2012 rate proceeding, but mistakenly believed it would not affect the Companies' pole attachment rates and thus did not

intervene. Only after KCTA's members began receiving bills reflecting increases up to 84 percent in their pole attachment fees did KCTA realize that its members had been negatively affected by the Commission's approval of the Settlement Agreement.

The Companies rely on *Dovie Sears v. Salt River Water District*, Case No. 91-277, Order (Ky. PSC June 30, 1992), to argue that notice and "the opportunity to participate" are enough to invoke collateral estoppel. But *Dovie Sears* is distinguishable for two reasons. First, one of the ratepayers who brought the complaint challenging the approved rates *intervened and participated* in the earlier rate proceeding. *Id.* at 2. Second, the reasonableness of the rates at issue in the complaint were actually litigated before the Commission in the earlier rate proceeding, rather than settled through an agreement among the parties as in the Companies' 2012 rate proceeding. *See In re Application of Salt River Water Dist. for Rate Adjustment,* Case No. 90-143, Order (Ky. PSC March 21, 1991). As discussed in more detail in Section I.B, *infra*, collateral estoppel only applies when the issue was actually litigated in the earlier case. *Dovie Sears* does not control this case.

And the Companies' reliance on *Utah-Idaho Sugar Co. v. Intermountain Gas Co.*, 597 P.2d 1058 (Idaho 1979), for the proposition that notice is sufficient is similarly misplaced. In that case, the Idaho Supreme Court's decision to bar the ratepayer's challenge to recently approved rates was not based on principles of *res judicata*, but was based on an Idaho statute. That statute states: "All orders and decision of the [public service] commission which have become final and conclusive shall not be attacked collaterally." *Id.* at 1063 (citing Idaho Code Ann. § 61-625). Kentucky has no such statute. For the Companies to assert that this stands for the proposition that notice is equivalent to a "fair opportunity to litigate" for the purposes of collateral estoppel in Kentucky is disingenuous at best.

Because KCTA neither participated in the 2012 rate proceeding, nor had a fair opportunity to litigate, collateral estoppel does not bar its Complaint.

B. The Reasonableness of the Cable Television Pole Attachment Rates in the 2012 Rate Proceeding Was Not Actually Litigated.

The Companies must also establish that the issue presented in KCTA's Complaint was "actually litigated" in the 2012 rate proceeding. *See Fernandez*, 397 S.W.3d at 389. This requirement is conspicuously missing from the Companies' recitation of the requirements for the application of collateral estoppel. *See* Mem., at 5-9.

Although the Kentucky Supreme Court has not clearly defined "actually litigated," it has "favorably cited the Restatement (Second) of Judgments when discussing issue preclusion." *KeyBank, N.A. v. Hartman*, 2013 WL 1312013, at *2 (E.D. Ky. March 27, 2013) (citing *Yeoman v. Ky.*, 983 S.W.2d 459, 465 (Ky. 1998)). "Section 27, comment d, states that issues addressed in an agreed order are generally considered *unlitigated*, and therefore *nonpreclusive*." *Id.* (emphasis added); *see also Trover v. Kluger*, 2007 WL 528419, at *5 (W.D. Ky. Feb. 14, 2007) ("The requirements of collateral estoppel are precise. One is that an issue be litigated, not settled."). This is consistent with the definition of "actually litigated" in other jurisdictions. *See, e.g., Tallon v. Lloyd & McDaniel*, 497 F. Supp. 2d 847, 853 (W.D. Ky. 2007) (citing 91 A.L.R. 1170, § 2[a] (1979)) ("[S]tate courts across the country have held that judgments entered according to consent judgments generally do not have collateral estoppel effect."). As the Federal District Court for the Eastern District of Kentucky observed in considering the issue in *Annaco, Inc. v. Hodel*, 675 F. Supp. 1052, 1058 (E.D. Ky. 1987): "[T]he settlement agreement was not achieved through a decision by an impartial judge after hearing arguments by [the parties]. Rather, the settlement was achieved through discussion between [the parties]. Such a procedure, while not impairing the validity of the settlement agreement, does necessitate

negotiation, so that neither side would have pursued its position as vigorously as in an adversarial proceeding. Therefore, the issues did not receive a full and fair litigation[, which] precludes the application of the doctrines of res judicata and collateral estoppel."

The Companies and the Intervenors in the 2012 rate proceeding filed a "Settlement Agreement, Stipulation, and Recommendation" with the Commission, which the Commission approved on December 20, 2012. *Application of Ky. Util. Co. for an Adjustment of Its Elec. Rates,* Case No. 2012-00221, Order (Ky. PSC Dec. 20, 2012); *Application of Louisville Gas & Elec. for an Adjustment of Its Elec. Rates*, Case No. 2012-00222, Order (Ky. PSC Dec. 20, 2012) ("Settlement Agreement"). The Settlement Agreement states that, "[a]bsent the Settlement, the evidentiary record would have been further developed, and the results of the Commission's traditional ratemaking analysis might have been different." KU Settlement Agreement, at 6 n.6; LG&E Settlement Agreement, at 8 n.7. The Settlement Agreement further states that it is the product of negotiation among the Companies and the Intervenors, and that the parties agreed to forego cross-examination of each other's witnesses at the formal evidentiary hearing. KU Settlement Agreement at 3, 7; LG&E Settlement Agreement at 3, 9. In other words, the parties to the Settlement Agreement negotiated its terms, and neither the Companies nor the Intervenors "vigorously pursued" their respective positions. The Companies have not met their burden of establishing that the Companies and the Intervenors "actually litigated" the reasonableness of the cable television attachments rates in the 2012 rate proceeding.

C. It Is Not Clear that the Reasonableness of the Cable Television Attachment Rates Was Necessary to the Commission's Approval of the Settlement Agreement.

A decision in a former action operates as estoppel only as to issues in the first case that were necessary to the court's judgment. *See Fernandez*, 397 S.W.3d at 389. Kentucky courts

have held that, even where issues were presented and actually decided in a former action, future litigation of those issues is not precluded if those issues were not essential or necessary to the earlier judgment. *See Sedley v. W. Buechel*, 461 S.W.2d 556, 558 (Ky. App. Ct. 1970).

Serious doubt exists here as to whether the issue of the reasonableness of the Companies' cable television pole attachment rates was essential to the Commission's approval of the Settlement Agreements in the prior rate proceeding. As the Kentucky Court of Appeals explained in *Sedley v. West Buechel*, whether a decision was "essential" or "necessary" to a prior judgment is inextricably tied to another requirement for the application of collateral estoppel – whether the party to be bound by the prior judgment had a fair opportunity to litigate. *Id.* at 559 ("It would seem that the rule [requiring a fair opportunity to litigate an issue] would embody the qualification . . . that the adjudication of the issue was essential to the determination for the former case."). In other words, without an interested party litigating and advocating for the determination of a specific issue, the fact that the issue was decided in the prior action does not mean that it was "essential" to that judgment – especially where, as here, the Commission approved dozens of rates by approving the Settlement Agreement, while noting that its "traditional ratemaking analysis" may have resulted in different rates had there been a fully developed evidentiary record." KU Settlement Agreement, at 6 n.6; LG&E Settlement Agreement, at 8 n.7. Although the Commission approved a pole attachment rate, it is not clear that the approval was "necessary" to the Commission's Order approving the Settlement Agreement, especially since neither KCTA – nor any of its members – participated in the proceeding to ensure that the reasonableness of those rates was fully and properly litigated.

II. KCTA Has a Statutory Right to Challenge the Companies' Unreasonable Pole Attachment Rates.

The Companies next argue that KCTA's Complaint will result in a "waste of public resources" that is contrary to the principles of administrative economy because the reasonableness of its pole attachment fees cannot be "examined in isolation." Mem., at 10. But the Commission has held that pole attachment issues may, indeed, be considered without consideration of other utility revenues or issues.[2] KCTA does not challenge either the rate of return agreed to in the 2012 rate proceeding settlement, or any other rates agreed to in that settlement, except for the pole attachment rates. *See* Compl., ¶ 22. The issues raised in KCTA's Complaint thus would have no effect on the other parties that signed the Settlement Agreement. Nor are the amounts involved in KCTA's complaint of sufficient magnitude to suggest that the Companies would be entitled to increases in other rates if the Commission brings their pole attachment rates down to the level required by application of the Commission's standard pole attachment rate formula. While the increase in the pole attachment rates between the 2010 and the 2012 rate proceedings is significant to KCTA and its members – especially in more rural areas where multiple poles are needed to serve each customer – the amount of money at issue constitutes a very, very small percentage of the Companies' overall revenue. And the Companies themselves suggest that they are likely to file another overall rate case in the near future.

[2] The Companies primarily rely on an argument KCTA made in an unrelated 2010 case – an argument the Commission rejected. *See Application of Blue Grass Energy Coop. Corp. for an Adjustment of Its Sec. Deposit and Cable Television Attachment Rates*, Case No. 2010-00185, Order (Ky. PSC Aug. 23, 2010). The *Blue Grass Energy Coop.* case states that "detailed accounting and financial information. . . is not necessary for a determination of the reasonableness of proposed CATV rates established by the Commission in Administrative Case No. 251." *Id.* at 4.

If the Commission were to follow the Companies' argument to its logical conclusion, it would foreclose complaints challenging Commission-approved rates because, in the Companies' view, such complaints would "needlessly re-litigate" the reasonableness of the Companies' pole attachment fees. Such a view is inconsistent with state law as well as Commission rules and precedent.

Section 278.260(1) of the Kentucky Revised Statutes explicitly "permits a person to file a written complaint against a utility regarding a rate 'in which the complainant is directly interested.'" *Fidelity Corp. Real Estate, LLC v. Union Light, Heat, & Power Co.*, Case No. 99-393, Order, at 2 (Feb. 25, 2000) (quoting KRS 278.260(1)). The Commission has held that KRS 278.260(1) "does not limit that right to utility rates not previously subject to prior Commission review." Nor could it, "[s]ince the Commission reviews every rate contained in a utility's filed rate schedules before approving it or permitting it to become effective." *Id.* The Companies' argument regarding "administrative economy," if accepted, would strip all ratepayers of any right to file a written complaint about a rate. And that would clearly be "contrary to the statute's language and intent." *See id.*; *see also Danny Ray Adams v. Garrard County Water Assoc.*, Case No. 2005-00008, Order, at 4-5 (Sept. 29, 2005) ("Even if a tariff provision has been filed with the Commission and accepted as part of a utility's tariff, that provision is subject to review when a complaint is filed challenging the reasonableness of the provision."); *In re CATV Pole Attachment Tariff of S. Cent. Bell Tel. Co.*, Admin. Case No. 251-18, Order (Nov. 9, 1983) (denying KCTA's Petition for Rehearing and Request for Suspension of Tariff but directing KCTA to pursue its objections to the reasonableness of the pole attachment rates by complaint pursuant to KRS 278.260 and 807 KAR 5:001 after tariff had taken effect).

The Companies have used this argument unsuccessfully in the past. Following the Commission's approval of the merger of LG&E and Kentucky Utilities, a non-profit representing the interests of several ratepayers filed complaints, arguing that the Companies' rates were unreasonable. *See Ky. Indus. Util. Customers, Inc. v. Louisville Gas & Elec.*, Case No. 99-082, Order (Ky. PSC April 13, 1999). The Companies moved to dismiss the complaints, arguing, among other things, that the complaints represented a collateral attack on the Commission's order approving the merger, and that the complaints were an attempt to "re-litigate" the earlier case. *Id.* at 6. The Commission rejected this argument, explaining that it was "wide of [its] mark" because "nothing contained in the [earlier] Order precludes any party from filing a formal complaint questioning the reasonableness of the [Companies'] rates." *Id.* The Commission further explained that when it approved the merger, it expressly retained the ability under KRS 278.260 to review the Companies' earnings. *Id.* The Commission explained that the complainants' "exercise of its statutory right poses no affront to the Commission or its [earlier] Orders." *Id.*

The Companies have asserted again here that KCTA is attempting to "re-litigate" the issues that were resolved in the 2012 rate proceeding and Settlement Agreement. But as before, that argument is foreclosed not only by KCTA's statutory right to challenge the Companies' unreasonable pole attachment rates, but also by the plain language of the Settlement Agreement, which expressly notes that it "shall in no way be deemed to divest the Commission of jurisdiction under Chapter 278 of the Kentucky Revised Statutes." Settlement Agreement, App. A, at § 5.9.

KCTA has a right to challenge the reasonableness of the Companies' pole attachment rates.[3]

III. KCTA Has Presented A *Prima Facie* Case.

KCTA's Complaint presents a *prima facie* case that requires a hearing. A complaint establishes a *prima facie* case when, on its face, it states sufficient allegations that, if uncontradicted by other evidence, would entitle the complainant to the relief it seeks. *In re Kanawha Hall v. Equitable Prod. Co.*, Case No. 2004-00307, Order, at 2-3 (Ky. PSC Oct. 28, 2004). Nothing in the Commission's procedural rules governing formal complaints requires supporting evidence or sworn testimony. *See* 807 KAR 5:001, § 20. Indeed, there are several cases pending before the Commission that commenced with Complaints that lacked supporting evidence or sworn testimony. *See, e.g.*, *Cumberland Cellular, Inc. v. BellSouth Telecomm., Inc.*, Case No. 2013-00168, Compl. (Ky. PSC April 23, 2013); *Forest Creek, LLC v. Jessamine-South Elkhorn Water Dist.*, Case No. 2011-00297, Compl. (Ky. PSC Aug. 5, 2011).

Unlike utilities that have all of the facts readily available, challengers who exercise their rights under KRS 278.260 must act on evidence in the public record. In its Complaint, KCTA alleged facts that are supported by evidence in the public record that are sufficient to warrant an inquiry into whether the Companies' pole attachment rates are fair, just, and reasonable. *See* Compl., at ¶ 22. If uncontradicted, the facts alleged in the Complaint state a ground for relief. It is unclear what more KCTA could attach or say in its Complaint without the benefit of discovery, because the remaining relevant facts are in the Companies' possession.

[3] KCTA opposes the Companies' request that, should the Commission deny their Motion to Dismiss, the Commission hold KCTA's Complaint in abeyance pending the filing of new applications for rate adjustments by the Companies. KCTA seeks relief from the Companies' unreasonable pole attachment rates as soon as possible, rather than at an indeterminate date in the future.

The Companies' reliance on *Schimmoeller v. Kentucky-American Water Co.* is misplaced. In that case, the Commission had approved the construction of a 20-million gallon per day water treatment facility. *Schimmoeller*, Case No. 2009-00096, Order, at 1-2 (Ky. PSC Nov. 24, 2009). After construction began, the complainant submitted a letter to the Commission, asking it to re-examine the need for the facility because of "changing economic circumstances" that may affect the demand for water. *Id.* at 2, 5. But the complaint was vague, failed to elaborate the nature of those changed economic circumstances, and otherwise contained no allegation that supported the contention that the facility was no longer needed. *Id.* at 5. Here, KCTA has made specific allegations regarding why the Companies' pole attachment rates are unreasonable.

Similarly, the Companies' reliance on *Kentucky Industrial Utility Customers v. Louisville Gas & Electric* is also misplaced. Although the complaint in that matter is not available, the Commission order dismissing the complaint noted that the complainant referred only vaguely to the utility's cost of common equity being "too high in view of current capital markets and interest rates," and failed to attach any analysis or support for the allegation. *Ky Indus. Util. Customers v. Louisville Gas & Elec.*, Case No. 9847, Order, at 1 (Ky. PSC Feb. 2, 1987). Unlike the Commission's description of the allegations in the *Kentucky Industrial Utility Customers* complaint, the allegations in KCTA's Complaint are specific and state a clear basis for relief.

IV. KCTA Has Standing.

Finally, the Companies advance the long-discredited argument that KCTA lacks standing to bring its Complaint. The Commission has roundly rejected this argument. *See, e.g.*, *KCTA v. Gen. Tel. Co. of Ky.*, Case No. 8982, Order Denying Motion to Dismiss, at 2 (Ky. PSC May 2, 1984) ("1984 Order") ("[C]ertain members of Ky. CATV are clearly 'directly' affected by the

Commission's approval of [Defendant]'s pole attachment tariff."); *see also Ky. Indus. Util. Customers, Inc. v. Louisville Gas & Elec.*, Case No. 99-082, Order, at 5 (Ky. PSC April 13, 1999) (quoting *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 202 (Ky. 1989) ("[T]he Supreme Court . . . found that the corporation had a 'judicially recognizable interest in the subject matter of a suit' based solely upon its members' interest.").

The Companies admit that six members of KCTA attach their equipment to the Companies' utility poles. Mem., at 2. And the Commission has explained that the effect of dismissing a complaint filed by KCTA "would merely force a refiling of the complaint on behalf of one or more of Ky. CATV's members," which would "delay th[e] proceeding and the ultimate resolution of the rate question." 1984 Order, at 2. The Commission explained that KCTA "has participated in prior cable pole attachment matters before both th[e] Commission and the courts," and that "objection to the status of Ky. CATV's status as a complainant *has no merit.*" *Id.* (emphasis added).

CONCLUSION

For the reasons stated above, KCTA asks the Commission to deny the Companies' Motion to Dismiss. As outlined above, the arguments raised by the Companies are inconsistent with both Kentucky statutes and Commission precedent. Based on those expressions of the law, KCTA is entitled to have its Complaint resolved by the Commission on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Kentucky Cable Telecommunications Association's Opposition to the Companies' Motion to Dismiss has been served on all parties of record via hand delivery, facsimile, or electronically this 24th day of March, 2014.

/s/ Laurence J. Zielke
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