

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

| | | |
|--|---|------------|
| KENTUCKY CABLE TELECOMMUNICATIONS ASSOCIATION |) | |
| |) | |
| COMPLAINANT |) | |
| |) | |
| V. |) | CASE NO. |
| |) | 2014-00025 |
| LOUISVILLE GAS AND ELECTRIC COMPANY AND KENTUCKY UTILITIES COMPANY |) | |
| |) | |
| DEFENDANTS |) | |

ORDER

On January 24, 2014, the Kentucky Cable Telecommunications Association (“KCTA”) filed a formal complaint against Louisville Gas and Electric Company (“LG&E”) and Kentucky Utilities Company (“KU”) (collectively “the Companies”).¹ In the complaint KCTA alleged, *inter alia*, that the rates LG&E and KU charge for pole attachments are not fair, just, and reasonable. The KCTA alleged that these pole attachment rates, which the Commission approved in Case Nos. 2012-00221² and 2012-00222,³ do not follow the pole rate methodology established by the Commission in Administrative Case

¹ Formal Complaint of Kentucky Cable Telecommunications v. Louisville Gas and Electric Company and Kentucky Utilities Company, filed Jan. 24, 2014 (“Complaint”).

² Case No. 2012-00221, *Application of Kentucky Utilities Company for an Adjustment of Its Electric Rates* (Ky. PSC Dec. 20, 2012).

³ Case No. 2012-00222, *Application of Louisville Gas and Electric Company for an Adjustment of Its Electric and Gas Rates* (Ky. PSC Dec. 20, 2012).

No. 251, and are thus unjust and unreasonable.⁴ KCTA requested that the Commission determine that the KCTA has established a *prima facie* case that the pole attachment rates are not fair, just and reasonable, and require LG&E and KU to file a formal answer.

BACKGROUND

On March 7, 2104, the Commission issued an Order finding that, based on the information set forth in the complaint, it could not determine whether KCTA has presented a *prima facie* case. The Commission noted that the complaint contained detailed allegations but was unsupported by any evidence or sworn testimony. The Commission ordered that, due to the technical issues raised in the complaint, LG&E and KU should file a detailed response to the complaint, at which point the Commission would determine the next appropriate action.

On March 17, 2014, LG&E and KU jointly filed an answer to KCTA's complaint. The Companies also jointly filed a motion to dismiss the complaint. In their motion to dismiss, LG&E and KU argued, *inter alia*, that the complaint should be dismissed for four reasons: (1) the complaint is a collateral attack on Commission final orders and is barred by the doctrine of *res judicata*; (2) the complaint is contrary to public policy and the principles of administrative economy because it will require the re-litigation of the reasonableness of the pole attachment rates previously examined in Case Nos. 2012-00221 and 2012-00222; (3) the complaint lacked any supporting testimony or analysis; and (4) the KCTA lacked standing to bring the complaint.

⁴ Administrative Case No. 251, *The Adoption of a Standard Methodology for Establishing Rates for CATV Pole Attachments* (Ky. PSC Sept. 17, 1982).

KCTA filed its response to the motion to dismiss on March 24, 2014.⁵ In its Opposition to First Motion to Dismiss, KCTA argued that: (1) its complaint was not barred by collateral estoppel because it had not participated in Case Nos. 2012-00221 and 2012-00222; (2) administrative economy did not require dismissal of the complaint because KCTA had the right under KRS 278.260(1) to challenge any rates; (3) the complaint established a *prima facie* case; and, (4) KCTA had standing because the Commission had repeatedly allowed KCTA to file complaints on behalf of its members.

On November 26, 2014, LG&E, in Case No. 2014-00372,⁶ and KU, in Case No. 2014-00371,⁷ filed applications for a general adjustment of their respective rates. The applications included no proposed changes to pole attachment rates. On December 16, 2014, LG&E and KU jointly filed a second motion to dismiss KCTA's complaint and for a declaration of legal obligations. The Companies requested that the Commission issue a declaration as to LG&E's and KU's obligations under Kentucky law to collect pole attachment fees as contained in their respective tariffs pending a final order in the pending rate cases. LG&E and KU argue in the motion for dismissal that: (1) the rate proceedings afford the most effective proceeding to review the reasonableness of pole attachment rates; (2) dismissal of KCTA's complaint would not prejudice KCTA or its members; and, (3) the Commission should affirm LG&E's and KU's legal obligation to collect pole attachment charges contained in their tariffs.

⁵ Kentucky Cable Telecommunications Association's Opposition to Louisville Gas and Electric and Kentucky Utilities Company's Motion to Dismiss, filed Mar. 24, 2014 ("Opposition to First Motion to Dismiss").

⁶ Case No. 2014-00372, *Application of Louisville Gas and Electric Company for an Adjustment of Its Electric and Gas Rates* (Ky. PSC filed Nov. 26, 2014).

⁷ Case No. 2014-00371, *Application of Kentucky Utilities Company for an Adjustment of Its Electric Rates* (Ky. PSC filed Nov. 26, 2014).

On December 23, 2014, KCTA filed its response to the Companies' second motion to dismiss⁸ and separately filed a motion to consolidate its complaint with the proceedings in the rate cases.⁹ In its Opposition to Second Motion to Dismiss, KCTA argued that: (1) dismissal of the complaint would be premature and prejudicial because KCTA seeks to review the reasonableness of the pole attachment rates based on costs that existed when the rates became effective, rather than on LG&E's and KU's current costs, which are relied on in support of their pending rate cases; and (2) the request for a declaration of legal obligations is premature and not a proper subject for this proceeding.¹⁰

Concurrent to filing its Opposition to Second Motion to Dismiss, KCTA filed its Motion to Consolidate this proceeding with the rate proceedings in Case Nos. 2014-00371 and 2014-00372.¹¹ Noting that it had moved for intervention in the rate cases, KCTA asserted that this proceeding and the rate cases involve common issues of fact and law. KCTA argued that consolidation will conserve time, energy and resources of the parties and the Commission.¹²

⁸ Kentucky Cable Telecommunications Association's Opposition to Louisville Gas and Electric and Kentucky Utilities Company's Second Motion to Dismiss and Motion for Declaration of Rights, filed Dec. 23, 2014 ("Opposition to Second Motion to Dismiss").

⁹ Kentucky Cable Telecommunications Association's Motion to Consolidate, filed Dec. 23, 2014 ("Motion to Consolidate").

¹⁰ KCTA's Opposition to Second Motion to Dismiss at 2-3.

¹¹ KCTA's Motion to Consolidate.

¹² *Id.* at 2.

On December 29, 2014, LG&E and KU filed their reply to KCTA's Opposition to Second Motion to Dismiss.¹³ LG&E and KU argued that: (1) KCTA's members will not be prejudiced by dismissal because the Commission lacks the authority to order retroactive reductions in pole attachment rates;¹⁴ and (2) consolidation of claims for retroactive relief with claims for prospective relief in the rate cases would create confusion and an unnecessary expenditure of resources and would not result in the economic disposition of the proceedings.

On January 5, 2015, KCTA filed a reply in support of its Motion to Consolidate.¹⁵ In its Reply in Support of Motion to Consolidate, KCTA clarified that it had not requested that the rate cases be consolidated, but had instead sought to incorporate the instant complaint into the respective proceedings. KCTA argued that consolidating the instant complaint into the records of the pending rate cases was warranted and would not confuse any issues. KCTA further asserted that LG&E and KU should provide support for their contention that consolidating both rate cases into one proceeding would be required if KCTA's Motion to Consolidate was granted. KCTA maintained that consolidating the complaint into the respective rate proceedings would preserve the rights of KCTA's members and that LG&E's and KU's petition to both dismiss the complaint and deny the opportunity to address the retrospective rate issues in the rate proceedings is contradictory and would prejudice KCTA's members. Finally, KCTA

¹³ Reply of Louisville Gas and Electric and Kentucky Utilities Company to Kentucky Cable Telecommunications Association's Response in Opposition to the Second Motion to Dismiss, filed Dec. 29, 2014.

¹⁴ *Id.* at 1-3.

¹⁵ Kentucky Cable Telecommunications Association's Reply in Support of Its Motion to Consolidate, filed Jan. 5, 2015 ("Reply in Support of Motion to Consolidate").

asserts that its arguments have been mischaracterized regarding the timing of any rate relief and that LG&E and KU should correct the record to accurately reflect KCTA's position.

DISCUSSION

The Commission must resolve two issues regarding this complaint: (1) whether to dismiss the KCTA complaint; and (2) whether to allow consolidation of the complaint with the pending rate cases. We address each issue in turn below.

The gravamen of KCTA's complaint is that LG&E's and KU's pole attachment rates, which became effective on January 1, 2013, do not follow the pole rate methodology established in Administrative Case No. 251, and are thus unjust and unreasonable. KCTA alleges several reasons why the pole attachment rates approved in Case Nos. 2012-00221 and 2012-00222 do not comply with Administrative Case No. 251¹⁶ and that, based on the belief that the rates are unreasonable, some of KCTA's members have not paid the new pole attachment rates, choosing instead to wait for the Commission's determination regarding proper pole attachment rates.¹⁷

Despite intervening and participating in previous LG&E and KU rate cases in which pole attachment rates were addressed, KCTA did not intervene or otherwise participate in Case Nos. 2012-00221 and 2012-00222, in which the current pole attachment rates were established. KCTA admits to having received notice of the hearing, but did not intervene because it mistakenly believed that the rate cases would

¹⁶ See, generally, Complaint at 4-6.

¹⁷ Complaint at 6.

not affect LG&E's and KU's pole attachment rates.¹⁸ Thus, KCTA claims that the first notice its members had that the rates had increased was when they received invoices reflecting the rate increase.¹⁹ KCTA further claims that its failure to participate in Case Nos. 2012-00221 and 2012-00222 does not bar it from protesting the reasonableness of the rates.

The Commission agrees with KCTA to the extent that failure to participate in a rate proceeding does not bar a party from subsequently challenging those rates in a subsequent complaint filed pursuant to KRS 278.260, KRS 278.270 and KRS 278.280. The bar does not apply even if the previous failure to seek intervention in the rate proceedings is based upon an admitted mistake, as is the case with KCTA.

The right to challenge a rate that is in effect, however, is limited to prospective review of that rate only. KCTA disputes that it is entitled solely to prospective relief, arguing that if the Commission were to determine the pole attachment rates were unreasonable, KCTA's members would be entitled to relief dating back at least to January 24, 2014, the date upon which KCTA filed its Complaint.²⁰ Citing to *dicta* from the Court of Appeals, KCTA argues that a filed rate holds constant until the rate is challenged by an interested party.²¹

¹⁸ KCTA's Opposition to First Motion to Dismiss at 4-5.

¹⁹ *Id.* at 6.

²⁰ KCTA's Opposition to Second Motion to Dismiss at 4.

²¹ *Id.* at 4, citing *Cincinnati Bell Tel. Co. v. Ky. PSC*, 223 S.W. 3d 829, 839 (Ky. App. 2007).

It is well established that a Commission's Order remains in full force and effect until amended or revoked by subsequent Commission Order or order by a court of competent jurisdiction.²² KRS 278.270 provides that:

Whenever the commission, upon its own motion or upon complaint as provided in KRS 278.260, and after a hearing upon reasonable notice, finds that any rate is unjust, unreasonable, insufficient, unjustly discriminatory or otherwise in violation of any provisions of this chapter, the commission shall by order prescribe a just and reasonable rate to be followed in the future.

Therefore, by statute, the Commission, if it determines that a rate is unreasonable, may "prescribe a just and reasonable rate to be followed in the future."²³ This statutory scheme thus makes it clear that if rates are found upon complaint to be unreasonable, any award of relief can only be prospective following the entry of an Order by the Commission.

KCTA argues that the Court of Appeals in *Cincinnati Bell* held differently. However, the Court of Appeals in *Cincinnati Bell*, regarding retroactive refunds of an effective rate, found that:

In light of the General Assembly's comprehensive ratemaking scheme, including only a narrowly defined circumstance under which refunds can be ordered, the filed rate can only be lawfully altered prospectively. KRS 278.270, *supra*. Under the requirements of the statute the rate the PSC authorized BellSouth to charge payphone service providers remained in full force and effect until the Commission modified it by its order of May 2003. Consequently, as a matter of law, BellSouth was never overpaid; no credits accrued; and no refunds were owed.²⁴

²² KRS 278.390.

²³ KRS 278.270.

²⁴ *Cincinnati Bell*, 223 S.W. 3d at 839.

The Court of Appeals was clear that changes in rates could only be made prospectively and that no refunds were due prior to entry of the Commission's Order changing the rates charged to payphone service providers. The same limitation applies to this case, and assuming the Commission were to find the current pole attachment rates charged by LG&E and KU to be unreasonable, KCTA would be entitled only to relief on a prospective basis.

The prohibition against retroactive relief is important because of its relation to KCTA's Motion to Consolidate this case with the ongoing rate cases of LG&E and KU. KCTA is an intervenor in each of those rate cases on behalf of its affected members and has the rights and privileges attendant to that designation, including, but not limited to, the right to request information from LG&E and KU, challenge LG&E's and KU's rates, file direct testimony, and participate in any hearings.

KCTA notes that the Commission has previously allowed the consolidation of a complaint with an ongoing rate case.²⁵ In *Big Rivers*, the Commission consolidated the complaint of National Southwire Aluminum ("NSA") with Big Rivers' rate case, filed nine days after NSA filed its complaint. In its complaint, NSA argued, *inter alia*, that the Commission should exclude costs of a Big Rivers' generating station because the station was neither used nor useful in providing electric service. NSA requested that the Commission reduce Big Rivers' electric rates to an appropriate level to exclude these costs. NSA moved to consolidate its complaint with the rate proceeding, asserting that the complaint and the rate proceeding had common questions of fact and law and that

²⁵ KCTA's Motion to Consolidate at 2, citing Case No. 9163, *Big Rivers Electric Corporation's Notice of Changes in Its Rates for Electricity Sold to Member Cooperatives* (Ky. PSC Dec. 28, 1984) ("*Big Rivers*").

consolidation would promote an economical and expeditious disposition. The Commission agreed with NSA and granted consolidation.

KCTA's complaint and NSA's complaint share some similarities: both protest the reasonableness of rates currently being charged by a utility. However, the complaints also differ. In *Big Rivers*, NSA was seeking prospective relief in the form of reduced rates to reflect the exclusion of costs associated with a generating station. NSA also sought the development of combined energy and demand charge. NSA was not seeking a refund based upon a Commission order changing rates; it was simply requesting that the Commission establish a rate on a prospective basis to allow it to remain financially competitive.²⁶ Although the alleged unreasonableness of the rate, inclusion of costs of the generating station, existed prior to the filing of the complaint, NSA sought only prospective relief. Moreover, the issues raised by NSA could be addressed and resolved by the same record and in the same proceeding as Big Rivers' rate application

KCTA seeks to recalculate the pole attachment rates as far back as the date on which it filed its complaint. As discussed above, it is seeking, *inter alia*, retroactive relief that the Commission is prohibited from granting. KCTA has also presented no testimony, affidavits, or other evidence in this case regarding the reasonableness of pole attachment fees; thus there is no record to incorporate into the rate proceedings. Absent retroactive relief, there is nothing to distinguish this complaint from the issues

²⁶ See Case No. 9163, *Big Rivers Electric Corporation's Notice of Changes in Its Rates for Electricity Sold to Member Cooperatives* (Ky. PSC May. 6, 1985) at 25 (emphasis added). "It was in recognition of these facts that NSA filed its complaint against Big Rivers wherein the Commission was requested **to set a rate which would enable** NSA to operate competitively." ("To set" and "which would enable" are all future contemplated actions implying prospective relief.)

that KCTA has raised as an intervenor in the pending rate application proceedings.²⁷ The relief that the Commission can provide would be similar in the rate proceeding or the complaint, and it would be inefficient and confusing to maintain parallel proceedings addressing the same issue.

We find, based on the foregoing, that the most efficient way to address KCTA's claims is in the pending rate case proceedings and not in this complaint, and that this complaint should be dismissed. We also find, because the Commission cannot grant retroactive relief, that KCTA's claims in the complaint and the rate proceedings are the same; that KCTA has introduced no evidence in this proceeding; and, therefore, KCTA's Motion to Consolidate should be denied.

Finally, we find that KCTA will suffer no prejudice as a result of the dismissal of its complaint. All of KCTA's arguments challenging the reasonableness of LG&E's and KU's pole attachment rates, and any evidence in support thereof, can be presented in the pending LG&E and KU rate cases. KCTA may also participate in the hearings in the pending rate cases, scheduled to begin on April 21, 2015. And, pursuant to 278.270, any relief to which KCTA might be entitled in this complaint case can be only prospective in nature, which is the same type of relief that can be awarded in the pending rate cases.

IT IS THEREFORE ORDERED that:

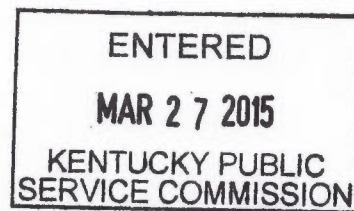
1. KCTA's Motion to Consolidate is denied.

²⁷ See, e.g., Case No. 2014-00372, KCTA's First Data Requests to LG&E, filed Jan. 8, 2015, Data Request 1-1, requesting that LG&E justify its current pole rates under the Commission's pole rate methodology set forth in Administrative Case No. 251. The other requests for information in the document relate almost solely to LG&E's calculation of pole attachment rates.

2. The reasonableness of LG&E's and KU's pole attachment rates shall be investigated in their respective pending rates cases, Case Nos. 2014-00372 and 2014-00371, with any changes implemented prospectively only.

3. This case is dismissed with prejudice.

By the Commission



ATTEST:



Executive Director

*Gardner F Gillespie
Sheppard Mullin Richter & Hampton LLP
1300 I Street NW
11th Floor East
Washington, DISTRICT OF COLUMBIA 20005

*Janice Theriot
Zielke Law Firm PLLC
1250 Meidinger Tower
462 South Fourth Avenue
Louisville, KENTUCKY 40202

*Kentucky Utilities Company
220 W. Main Street
P. O. Box 32010
Louisville, KY 40232-2010

*Laurence J Zielke
Zielke Law Firm PLLC
1250 Meidinger Tower
462 South Fourth Avenue
Louisville, KENTUCKY 40202

*Amanda M Lanham
Sheppard Mullin Richter & Hampton LLP
1300 I Street NW
11th Floor East
Washington, DISTRICT OF COLUMBIA 20005

*Louisville Gas and Electric Company
220 W. Main Street
P. O. Box 32010
Louisville, KY 40232-2010

*Rick E Lovekamp
Manager - Regulatory Affairs
LG&E and KU Energy LLC
220 West Main Street
Louisville, KENTUCKY 40202

*Ed Staton
LG&E and KU Energy LLC
220 West Main Street
Louisville, KENTUCKY 40202

*Honorable Allyson K Sturgeon
Senior Corporate Attorney
LG&E and KU Energy LLC
220 West Main Street
Louisville, KENTUCKY 40202