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September 22, 2010

PSC STAFF OPINION NO. 2010-023

William K. Grigsby
Vice-President/General Manager
Thacker-Grigsby Telephone Company
P.O. Box 789
Hindman, Kentucky 41822

Re: Thacker-Grigsby Staff Opinion Request –
Is Thacker-Grigsby required to obtain a Certificate of Public Convenience
and Necessity for the proposed construction of fiber-to-the-home network?

Dear Mr. Grigsby.

Commission Staff is in receipt of your letter of September 2, 2010 regarding the need to obtain a Certificate of Public Convenience and Necessity ("CPCN") for the construction of fiber-to-the-home network in order to deploy a broadband network to various areas of rural Breathitt County.

In your letter, you present the following facts: On August 23, 2010, Thacker-Grigsby was notified that its Broadband Infrastructure application under the America Recovery and Reinvestment Act ("ARRA") had been approved for funding by the Rural Utilities Service's ("RUS") Broadband Initiatives Program; RUS will provide a grant for \$5,185,932 and a loan for \$2,222,542 to Thacker-Grigsby for deployment of this fiber; broadband service is currently not available in this area of Breathitt County.

In your letter, you also state that it is Thacker-Grigsby's belief that it does not need to apply for a CPCN for this project based on Thacker-Grigsby's reading of KRS 278.300(10) that the project, because it is broadband deployment, will be a non-regulated service and not subject to the Commission's jurisdiction. You further state that, to the extent that there are non-regulated and/or joint costs (revenues) accrued by the regulated service, Thacker-Grigsby will appropriately allocate those costs to the non-regulated entity pursuant to Thacker-Grigsby's Cost Allocation Manual.

Your letter poses the following issue: Is Thacker-Grigsby's interpretation of KRS 278.300(10) correct and Thacker-Grigsby is not required to obtain a CPCN because the deployment of fiber involves a service that the Commission does not regulate?

KRS 278.300, in general, addresses the rules governing the Commission's approval of issuance or assumption of securities by utilities. KRS 278.300(10) provides, in pertinent part, that:

This section does not apply in any instance where the issuance of securities or evidence of indebtedness is subject to the supervision or control of the federal government or any agency thereof

KRS 278.300(10) only exempts Thacker-Grigsby from Commission approval of incurring indebtedness, not from approval of a construction project. The Commission cannot review Thacker-Grigsby's proposed indebtedness to RUS, but that does not restrict the Commission from reviewing the construction of the proposed project under KRS 278.020(1). Moreover, KRS 278.300(10) does not exempt any utility from Commission review because of the offering of a non-regulated service.

If, in fact, the proposed project will be used exclusively to provide broadband internet service pursuant to KRS 278.5462 and not be interconnected to the public switched network to transmit or receive messages pursuant to 278.010(3)(f), then approval under KRS 278.020 is not required. However, Commission Staff is aware of similarly funded projects by other rural carriers that incorporate telephone service over a single network and are therefore subject to KRS 278.020. Failure to appropriately seek approval of construction of a network to be used for telephone service may result in the Commission's not allowing the recovery of the costs to implement the project and ultimately not allowing the utility to recover those costs in rates. Therefore, it is Commission Staff's opinion that approval is required.

This letter represents Commission Staff's interpretation of the law as applied to the facts presented. This opinion is advisory in nature and not binding on the Commission should the issues herein be formally presented to the Commission for approval. Questions concerning this opinion should be directed to J.E.B. Pinney, Staff Attorney, at (502) 564-3940, Extension 427.

Sincerely,

Jeff Derouen
Executive Director