



Steven L. Beshear
Governor

Leonard K. Peters
Secretary
Energy and Environment Cabinet

Commonwealth of Kentucky
Public Service Commission
211 Sower Blvd.
P.O. Box 615
Frankfort, Kentucky 40602-0615
Telephone: (502) 564-3940
Fax: (502) 564-3460
psc.ky.gov

David L. Armstrong
Chairman

James W. Gardner
Vice Chairman

Linda Breathitt
Commissioner

November 19, 2012

PSC STAFF OPINION 2012-029

Katherine K. Yunker, Esquire
Counsel for tw telecom of Kentucky, LLC
P.O. Box 21784
Lexington, KY 40522-1784

RE: Request for Legal Staff Opinion
Commission jurisdiction over the rates, terms and conditions of service for utility pole attachment rates applicable to telephone service providers.

Dear Ms. Yunker:

Commission Staff acknowledges receipt of your letter dated August 15, 2012, filed on behalf of tw telecom of Kentucky, LLC ("TWTC"), requesting a staff advisory opinion concerning whether or not the Commission has elected to exercise jurisdiction over the rates, terms, and conditions of service for utility pole attachment rates applicable to telephone service providers ("TSP"). Your letter also requests Commission Staff to advise whether and how the Commission had satisfied the reverse pre-emption requirements of 47 USC § 224(c)(1)-(3).

This letter responds to your request. It represents Commission Staff's interpretation of the law as applied to the facts presented. This Opinion is advisory in nature and not binding upon the Commission should the issues presented herein be formally presented for Commission resolution.

Commission Staff understands that TWTC believes the facts are as follows:

Prior to the Federal Telecommunications Act of 1996, the Communications Act of 1934, as amended, governed cable television service providers' access to utility poles. Pursuant to provisions permitting state commission regulation, Kentucky notified the FCC of its election to exercise reverse pre-emption authority in the late 1980s. At the time of this election to invoke state jurisdiction, Section 224 permitted state commission regulation of rates, terms, and conditions

of utility pole attachments for cable television services, subject to the satisfaction of certain conditions. This election was evidenced by the KPSC's adoption of rules and regulations applicable to attachments of cable television service providers, its certification to the Federal Communications Commission ("FCC") of its compliance with Section 224, and subsequent dockets considering **cable television services** utility pole attachment issues. Section 224 was amended by Congress in 1996 making reverse pre-emption and jurisdiction available to state commissions for cable television providers **and** TSP pole attachments. Section 224 was amended by the Telecommunications Act of 1996

The FCC's latest acknowledgement of Section 224 elections . . . released on May 19, 2012, listing Kentucky as one of 21 states electing to exercise jurisdiction over pole attachments The Notice make no reference nor does it differentiate between the reverse pre-emption election for cable television service attachments and TSP attachments, although Section 224 section apply to both. (Emphasis in original). (Citations omitted).

You state that it is unclear whether Kentucky has intended to exercise the same jurisdiction over attachments for TSPs that it exercises over cable attachments under 47 U.S.C. § 214. You also cite to 47 U.S.C. § 224(c)(3)(A) which states: "For the purposes of this section, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments."

You state that the Commission has made no affirmative showing of election pursuant to the reverse pre-emption provisions subsequent to 1990. You also assert that the Commission, since 1996, has not considered the interests of the subscribers of the TSP services offered via such attachments, as well as the interests of the consumers of the utility providing and attaching services. You further state that the Commission has not considered or adopted rules and regulations applicable to TSP attachments, nor certified to the FCC that the Commission regulates such rates, terms, and conditions.

Katherine K. Yunker, Esquire
November 19, 2012
Page 3

You state that the FCC recently issued an order eliminating much of the disparity between TSP and cable television pole attachment rates and that the order provides formulas for application by utilities to calculate appropriate rates. You state that if the Commission has not exercised reverse pre-emption for TSPs, TWTC can avail itself of the FCC's recent order in its negotiations.

It is unclear from your letter whether you believe that the Commission can exercise reverse pre-emption for TSP pole attachments by either notifying the FCC of such an exercise or if the exercise can originate at the administrative level by the Commission simply acting to regulate TSP pole attachments. Regarding notice to the FCC: The Commission has not notified the FCC that it regulates TSP pole attachments. Regarding whether the Commission has exercised jurisdiction over TSP pole attachments at the administrative level: The Commission has exercised jurisdiction over TSP pole attachments.

Case No. 2004-00036, *Ballard Rural Telephone Cooperative Corporation, Inc. v. Jackson Purchase Energy Corporation*, (final order entered August 2, 2004) is illustrative of the Commission's jurisdiction over TSP pole attachments. In that case, the Commission found that, in lieu of parties reaching an agreement regarding TSP pole attachment rates, the parties were to apply the rate methodology that the Commission had established for cable provider pole attachments. The Commission limited the decision in that case to the parties of the complaint. The Commission's rationale was based upon the idea that a negotiated agreement is preferential to a complaint case regarding the rates for TSP pole attachments, but, if parties are unable to agree upon rates for TSP pole attachments, either party may petition the Commission for relief and a determination of the proper and reasonable rates.

Commission staff has determined that the Commission has exercised reverse pre-emption with regard to TSP pole attachments and exercises jurisdiction over the rates, terms, and conditions of TSP pole attachments. Commission Staff does not believe that a separate certification to the FCC is necessary to inform the FCC of the Commission's exercise of jurisdiction over TSP pole attachments. The original 1988 certification of the Commission's exercise of jurisdiction over cable pole attachments was sufficient to notify the FCC that the Commission exercised jurisdiction over pole attachments, regardless of whether the definition of "pole attachment" was subsequently expanded or diminished.

Commission staff also has determined that it currently has in place "rules and regulations" implementing its regulatory authority over pole attachments. The Commission has specific rules regarding pole attachments. See Consolidated Case

Katherine K. Yunker, Esquire
November 19, 2012
Page 3

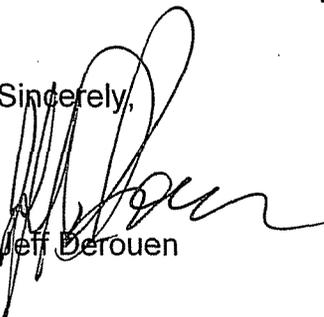
No. 8040, *The Regulation of Rates, Terms, and Conditions for the Provision of Pole Attachment Space to Cable Television Systems by Telephone Companies*, Case No. 8090; *The Regulation of Rates, Terms, and Conditions for the Provision of Pole Attachment Space to Cable Television Systems by Electric Utilities*; and Administrative Case No. 251, *The Adoption of a Standard Methodology for Establishing Rates for CATV Pole Attachments* (Ky. PSC Aug. 12, 1982).

The Commission also has general statutes that allow a party to seek review of any rate or service of a utility if it believes the rate to be unfair or unreasonable. See KRS 278.260. In Case No. 2004-00036, discussed above, the Commission, via a complaint brought under KRS 278.260, applied the methodology developed in Administrative Case No. 251 to TSP pole attachments on an electric utility's poles. Commission Staff has determined that this statute and Commission action are the "rules and regulations" implementing its regulatory authority over pole attachments.

Based on the foregoing, Commission Staff has determined that the Commission exercises jurisdiction over TSP pole attachments. Should parties be unable to reach an agreement as to rates for TSP pole attachments, either party may file a complaint with the Commission seeking resolution of the dispute.

Thank you for your August 15, 2012 request for an advisory opinion. Should you have any questions or concerns, please contact Staff Attorney J.E.B. Pinney at 502-782-2587 or at jeb.pinney@ky.gov.

Sincerely,



Jeff Derouen

JEP/kar