



Matthew G. Bevin
Governor

Charles G. Snavelly
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

Daniel E. Logsdon Jr.
Vice Chairman

Robert Cicero
Commissioner

June 20, 2016

PSC STAFF OPINION 2016-012

Natasha Ernst
Assistant General Counsel, Access
Lighttower Fiber Networks
300 Meridian Centre
Rochester, NY 14618.

RE: Request for Legal Staff Opinion

Wireless Telecommunications Carriers' Attachment of Facilities to Electric Utility Poles

Dear Ms. Ernst:

Commission Staff acknowledges receipt your letter dated February 8, 2016 filed on behalf Fibertech Technologies Networks, L.L.C. ("Fibertech") requesting a staff advisory opinion to address issues relating to the attachment of wireless equipment and facilities attachments on electric utility poles. This opinion represents Commission Staff's interpretation of the law as applied to the facts presented, is advisory in nature, and is not binding on the Commission should the issues herein be formally presented for Commission resolution.

You specifically request a legal staff opinion on the following questions:

1. Do a utility's preexisting cable television attachment charges ("CTAC") tariffs or other tariffs establishing attachment rates for competitive local exchange carriers (collectively, "attachment tariffs") govern the attachment of wireless facilities to the electric facility's poles by telephone service providers ("TSP")?
2. Must a utility permit attachment of wireless equipment or appliances, including a customer-owned electric meter, by a TSP where such attachment complies with National Electric Safety Code ("NESC") standards and will not interfere with the electric utility's electric service requirements or other licensees using the electric utility's poles?

You state that that Fibertech is certified as a competitive local exchange carrier ("CLEC") in Kentucky and that this designates Fibertech as a TSP for the purposes of pole attachments. You also state that Fibertech deploys fiber networks, including wireless telecommunications equipment.

You reference PSC Staff Opinion 2014-014, issued on October 23, 2014, in which Commission Staff responded to a request for an opinion from Louisville Gas and Electric Company and Kentucky Utilities, Inc. ("LG&E/KU"). You state that Commission Staff, in that Staff Opinion, concluded that the Commission had jurisdiction over the rates, terms and conditions that electric utilities impose for wireless telecommunications carrier's use of space on the electric utility's poles. You further state that, in that same Opinion, Commission Staff concluded that existing tariff provisions regarding pole attachments were sufficient to govern the wireless telecommunications carrier's attachments to LG&E/KU's poles.

You state that, in the October 23, 2014 Opinion letter, it appears that Commission Staff has unequivocally concluded that the existing attachment tariffs set forth the costs to be paid by wireless telecommunications providers when attaching wireless equipment to an electric utility's poles. You state that Fibertech seeks confirmation that this interpretation is correct.

You also request Commission Staff's opinion on whether a utility must permit a TSP to attach wireless equipment, including customer-owned electric meters, on its poles, where such attachments are NESC compliant and will not interfere with the electric utility's service or other uses of the pole. You state that Fibertech intends to deploy small cells and small cell equipment. Included in this deployment is a pole-top antenna and equipment, including batteries for the operation of the equipment and a customer-owned electric meter. You state that this equipment is able to be attached to the pole in a NESC compliant matter.

You state that as the deployment of wireless equipment, including small cells, has become increasingly prevalent, TSP's and electric utilities disagree about the scope and types of wireless equipment that may be lawfully attached to electric poles. You assert that policies permitting the attachment of wireless telecommunications equipment, including small cell equipment and electric meters, will bolster the deployment of state-of-the-art telecommunications systems in Kentucky, thereby benefitting consumers, and furthering the spirit and intent of the General Assembly in enacting KRS 278.546, which contains legislative findings that telecommunications services are essential to improving the lives of Kentucky citizens, and create investment, jobs, and economic growth. You contend that attachments made under attachment tariffs and/or other agreements should be broadly construed to include attachments that may be lawfully made, including small cells equipment such as electric meters and batteries.

Commission Staff notes that attachments to a utility's poles are a service jurisdictional to the Commission and that the revenue generated from the attachments should be used in calculating base rates. The rates charged for these attachments also fall under the Commission's jurisdiction. As the Court of Appeals stated:

[T]he utilities are clearly providing a "service" to cable TV when they allow CATV operators to attach their cables to unused space on an existing utility pole. The term "service" not only includes the basic services for which a utility is created, but it also includes any service which arises from the use of a utility's facilities, such as its poles. Such use provides additional revenue to the utility which must be considered in determining the "rates" it charges its customers for its basic utility services.

Kentucky CATV Ass'n v. Volz, 675 S.W.2d 393, 396 (Ky. App. 1983)

With regard to the first question you raise, you are correct that Commission Staff believes that existing pole attachment tariffs should be sufficient to address costs of wireless carriers' (or other third party) attachments to a utility's pole, assuming the attachments are made within the pole space designated for such attachments. Commission Staff notes that in the event the party seeking to attach facilities to a utility's pole is unable to negotiate an attachment agreement with the utility, the party seeking the attachment may petition the Commission for relief. Commission Staff also notes that the Commission's standard rate methodology as developed in 1982 designated the top of an electric utility's poles as "usable space" for the electric utility.¹ Consequently, whether an electric utility is actually utilizing the top of the pole and whether that space is available for an attachment are questions of fact to be determined on a case-by-case basis. However, assuming space is available at the top of the pole and an attachment agreement is negotiated, Commission Staff is not aware of any reason why the cost of such attachment should not be at the same per-foot rate as attachments further down the pole.

With regard to whether a utility must permit attachment of a TSP's wireless equipment where such attachment is NESC compliant, Commission Staff's opinion is that such attachments are limited by a utility's tariff language with regard to pole attachments. If a utility's attachment tariff allows the type of attachment sought, then the tariff provision should govern the attachment. However, if a utility's tariff prohibits such attachments, then the party seeking attachment may petition the Commission for relief. Pursuant to KRS 278.260, the Commission has jurisdiction to investigate complaints against a utility that the utility's regulation, practice or act affecting or relating to service is unreasonable, unsafe, insufficient, or unjustly discriminatory. Likewise, if a utility's tariff is silent on a particular manner or location of attaching to the utility's pole,

¹ Administrative Case No. 251, *Adoption of a Standard Methodology for Establishing Rates for CATV Pole Attachments*, (Ky. PSC Sep. 17, 1982) at 14.

and the utility and the party seeking attachment cannot otherwise reach an agreement on the terms and rates of the attachment, the party seeking the attachment may petition the Commission for relief. Finally, Commission Staff notes that the 1982 rate methodology was based on an allocation of usable pole space for making attachments which comply with minimum clearance requirements. Thus, issues such as the ability to attach customer-owned electric meters and the rate for such attachments will need to be determined based on the location of the proposed attachments.

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 for Commission resolution. Questions concerning this opinion should be directed to Staff Attorney J.E.B. Pinney at 502-782-2587 or at jeb.pinney@ky.gov.

Sincerely,



Aaron D. Greenwell
Acting Executive Director

JEB/ph