

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION  
CASE NO. 2007-00464

RECEIVED  
MAR 31 2008  
PUBLIC SERVICE  
COMMISSION

IN THE MATTER OF:

PETITION OF THE KENTUCKY COMMISSION  
ON THE DEAF AND HARD OF HEARING TO  
EXPAND THE FUNDING BASE FOR THE  
KENTUCKY TELECOMMUNICATIONS  
ACCESS PROGRAM (TAP)

**KENTUCKY COMMISSION ON THE DEAF AND  
HARD OF HEARING'S (KCDHH) RESPONSE TO  
T-MOBILE'S FEBRUARY 8, 2008 LETTER**

Comes the KCDHH and submits the following Response:

**I. INTRODUCTION**

KCDHH has filed an Application to expand the funding base for the Telecommunications Access Program ("TAP"). TAP provides funding for specialized telecommunications devices to the deaf, deaf-blind, hard-of-hearing, and speech-impaired residents of Kentucky to allow equal access to telecommunications.

The funding mechanism for TAP is controlled by KRS 278.5499. That statute provides, among other things, a one (1) cent per access line per month from "subscribers of telecommunications utilities". That statute also provides in subsection (3) that the Commission shall "consider whether a telecommunications utility experiences a competitive disadvantage resulting from the funding mechanism when compared to other communications utilities."

It is the position of the KCDHH that this statute explicitly and directly permits the Public Service Commission to order the collection of a one (1) cent per line per month for wireless lines

in addition to landlines. The fact that the one (1) cent surcharge is currently not being accessed on wireless lines should be considered a “competitive disadvantage resulting from the funding mechanism” for the wire-line providers, which is prohibited by KRS 278.5499.

TAP provides the specialized equipment, whereas the Telecommunications Relay Service (“TRS”) provides the actual services for the users of specialized communications equipment. The statutes required that TRS be available to the public no later than July 1, 1992, twenty-four (24) hours a day, seven (7) days a week. Those statutes required the Commission to initiate an investigation and conduct public hearings, and to determine the appropriate funding mechanism for TRS. (See KRS 278.548 and 278.549.) Pursuant to its mandate, the PSC determined the aggregate funds necessary to properly operate the TRS system and then determined the amount to charge per landline. The wireless industry was in its infancy in 1991 and 1992 when the TRS funding mechanism was established. However, the PSC has evidenced its unilateral authority to review the TRS surcharge and to make adjustments to it, as it did by Order dated May 31, 2006. (Attached as Exhibit A) In that Order the PSC lowered the TRS surcharge per landline in response to a determination of a “decrease in the cost of Telecommunications Relay Service (“TRS”)” from nine (9) cents to seven (7) cents, its current level.

The PSC has thus determined that currently a seven (7) cent per line surcharge is reasonable and necessary to provide these special telecommunication services otherwise required by both state and federal law. The funding mechanisms for TRS and TAP have always been closely related. In fact, the TAP funding statute, KRS 278.5499, which provides for a one (1) cent per line to fund the cost of the TAP equipment, includes within it the mandate that the PSC, when determining the funding mechanism for TAP, to consider the funding mechanism for TRS.

Thus, the Legislature has given the PSC both explicit and implied authority to act regarding the TRS funding mechanism.

T-Mobile's position is that the action by the PSC to include wireless customers with wireline customers is an increase of the funding base. However, the inclusion of wireless is nothing more than an adjustment of the "telecommunications utilities" over which the PSC has authority. To include wireless devices in the overall funding mechanism is not an increase in the funding base, but rather a re-allocation. Including wireless customers will most likely result in a decrease of the current seven (7) cent per line surcharge. The KCDHH takes the position that the inclusion of wireless customers, who unquestionably benefit from TRS and TAP, is not an establishment or increase in fee. Most recently, the PSC has determined that seven (7) cents per line is needed to meet the aggregate costs necessary to run the TRS program. The mere inclusion of additional, new technology which is dominating the industry into the pool is not an establishment of a new fee.

## **II. THE COMMISSION HAS EXPRESS AUTHORITY TO SET THE RATE OR SURCHARGE MECHANISMS**

The Kentucky Public Service Commission has been directed by the General Assembly in KRS 278.030 and KRS 278.040 to insure that utilities charge "fair, just, and reasonable rates". Although the telecommunications industry has been largely exempted from regulation by KRS 278.512 and other law, the TRS and TAP surcharge remains unquestionably within the authority of the PSC. The mandate from the General Assembly is to determine the "fair, just, and reasonable rates". A necessary corollary to that statutory directive is the delegation to the PSC of authority to determine the correct method necessary to set those "fair, just, and reasonable rates". Kentucky statutes are to be construed liberally to effectuate the intent of the Legislature. KRS 446.080; Hardin Co. Fiscal Ct. v. Hardin Co. Bd. of Health, 899 S.W.2d 859 (Ky. App. 1995).

The case of National-Southwire Aluminum Co. v. Big River Electrical Corp., 785 S.W.2d 503 (Ky. App. 1990), is instructive. In that case, the authority of the PSC to establish a variable rate was being challenged. That case declared that the “ultimate resulting rate should be a more important consideration than some specific, mandated method for determining it,” and that the “real goal for the PSC is to establish fair, just, and reasonable rates. There is no litmus test for this and there is no single prescribed method to accomplish the goal.” Id. at 511 and 513.

National-Southwire stands for the proposition that the Commission has extremely broad discretion in its choice of rate-making methodology:

[T]he PSC has many appropriate rate-making methodologies available to it, and it must have some discretion in choosing the best one for each situation . . . Again, we must look more to whether the result is fair, just and reasonable rather than at the particular methodology used to reach the result. Id. at 516.

Similarly, the Supreme Court in Kentucky Power Co. v. Energy Regulatory Comm’n., 623 S.W.2d 905 (Ky. 1981), required the PSC to permit a utility to recover by surcharge a revenue shortfall resulting from a change in the fuel-adjustment cost formula.

The General Assembly has left methods of rate setting, including the TAP and TRS surcharges, to the Commission’s sound discretion.

**III. THE COMMISSION POSSESSES NOT ONLY POWERS EXPLICITLY DELEGATED TO IT, BUT ALSO POWERS NECESSARILY IMPLIED BY THE SPECIFIC STATUTORY DELEGATION**

“Powers of administrative boards and agencies are those conferred expressly or by necessary or fair implication. . . . It is a general principal of law that where the end is required, the appropriate means are implied.” Ashland-Boyd Co. City-County Health Dept. v. Riggs, 252 S.W.2d 922, 923 (Ky. 1952). The “appropriate means” for the specific funding mechanism is thus implicitly left to the PSC’s discretion. The Commission has been expressly directed by the

General Assembly to both set fair, just, and reasonable rates, and also to “consider whether a telecommunications utility experiences a competitive disadvantage resulting from the funding mechanism when compared to other telecommunication utilities.” KRS 278.030 and KRS 278.5499(3). The two explicit directives also give the PSC implicit authority to accomplish its goals.

It is clear that the PSC has the authority to approve reasonable rate mechanisms, including surcharges, that are subject to interim review.

#### **IV. ESTABLISHED LAW CANNOT BE REPEALED BY IMPLICATION**

T-Mobile argued that KRS 13A.100, combined with 13A.255, now requires an administrative regulation to establish or increase any “fee”. The KCDHH does not agree that the TAP or TRS surcharges are “fees” subject to 13A; however, even if so, the specific authority given to the PSC by the General Assembly in KRS 278 has not been set aside. Taken to its natural end, T-Mobile’s argument would obliterate the PSC’s authority in the rate-making process and its authority to regulate public utilities, including the telecommunications industry. There is no reason that the enactment of 13A.255, which is a general statute, should be interpreted to set aside the long-standing PSC authority otherwise given in KRS 278.549 and 278.5499. The Legislative intent must be unmistakably clear before it may be presumed that settled law has been changed by an act of the Legislature. Northern Kentucky Port Authority, Inc. v. Cornett, 700 S.W.2d 392 (Ky. 1985). It is obvious that there is no clear Legislative intent to strip the PSC of its authority in regard to TAP and TRS funding.

The PSC is fully aware of its rate-making authority set out in KRS 278.180, which allows the Commission to set a “rate” within thirty days of its effective date. Presumably, the term “rate” as defined by KRS 278.010(12), includes the TRS and/or TAP surcharge. The PSC has

the authority to set utility rates, including the telecommunication surcharges, and has authority to employ its reasonable discretion to choose the appropriate means. Accordingly, an internal review and interim adjustment, to include wireless service providers, is well within the authority of the PSC.

**V. ALTERNATIVELY, THE CHANGE IN THE TRS FUNDING  
MECHANISM MAY BE ACCOMPLISHED BY EMERGENCY  
ADMINISTRATIVE REGULATION**

The KCDHH is of the position that 13A and a resulting administrative regulation is not necessary to change the funding mechanism for TAP or TRS. However, in the event the PSC should conclude otherwise, the KCDHH requests that an emergency administrative regulation should be filed. KRS 13A.190 provides the guidelines for the issuance of an emergency administrative regulation. Certainly, the imminent threat to the deaf and hard-of-hearing population resulting from a severe decrease or elimination of services to that population meets the criteria of KRS 13A.190(1)(a), in that there is an imminent threat to public health, safety, and welfare, and for the protection of human health. If, in fact the funding mechanism for TAP is to remain conjoined with that for TRS, and if a hearing and resulting administrative regulation is deemed necessary to include wireless in the funding base for TRS, then TAP and the public it serves will effectively be paralyzed. An emergency administrative regulation could allow the TRS (and TAP) funding mechanism to immediately include wireless. The TRS surcharge, coupled with the TAP surcharge, could be implemented prior to the June 30, 2008 deadline necessary to keep the TAP program functioning.


**CONCLUSION**

The PSC has the authority to regulate the surcharge changes for both TRS and TAP. Certainly, the TAP surcharge per line is explicitly provided for in KRS 278.5499. Although the

exact surcharge amount per line for TRS is not established in KRS 278.549, the PSC otherwise has explicit authority to regulate any changes. The discretion and authority given by the General Assembly in KRS 278 has not otherwise been set aside by the passage of KRS 13A.255.

In the alternative, the petitioner asks for an emergency regulation in order that the funding for TAP, and its resulting services, not be severely restricted as of June 30, 2008.

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Attorney for Kentucky Commission on the Deaf  
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CERTIFICATION:

I hereby certify that the foregoing Response has been served by mailing true copies hereof to the following on this the 28<sup>th</sup> day of March, 2008:

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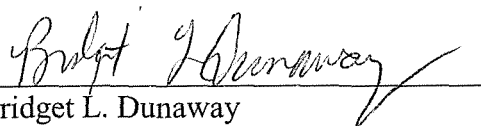
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Bridget L. Dunaway



COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

REQUEST FOR PROPOSAL AND SELECTION	)	ADMINISTRATIVE
OF A VENDOR FOR TELECOMMUNICATIONS	)	CASE NO. 372
RELAY SERVICE	)	

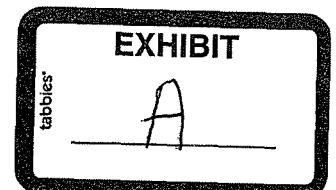
ORDER

The Commission has determined that, due to a decrease in the cost of Telecommunications Relay Service ("TRS"), the monthly surcharge for each local exchange carrier<sup>1</sup> ("LEC") customer access line should be decreased by two cents to seven cents per month.

Two changes arise from Legislation passed by the 2006 General Assembly with regard to the Telecommunications Devices for the Deaf ("TDD") Distribution Program. Senate Bill 88 changes the name of the program to Telecommunications Access Program ("TAP"). Also, House Bill 380, the budget bill, included the following language for the Telecommunications Access Program: "Notwithstanding KRS 278.5499, the funding mechanism for the telecommunication device for the deaf distribution program shall allocate not more than two cents per access line per month." The current surcharge is capped at one cent per access line.

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<sup>1</sup> Local exchange carriers include all incumbent and competitive local exchange carriers.



The Executive Director of the Kentucky Commission on the Deaf and Hard of Hearing ("KCDHH") has requested the Commission increase the surcharge to two cents per access line as now allowed by the budget bill.

Consistent with the legislation, the name of the program will be changed on the form. At the request of the KCDHH Executive Director, the surcharge for TAP will increase to two cents per access line. The increase of the TAP surcharge will only be effective for the period of July 1, 2006 through June 30, 2008. After this date it will revert to the one cent cap contained in the statute.

As in the past, these items may be shown as a combined charge on a single line of the customer's bill as "TRS/TAP Surcharge." The combined charges shall be nine cents, a decrease of one cent from the current combined charges. All LECs shall submit to the Commission updated tariffs to reflect this change no later than June 15, 2006, to be effective July 1, 2006

Carriers shall continue to submit reports to the administrator and the Commission on a monthly or quarterly basis as directed in the instructions. Attached is the revised form to reflect the new surcharge amount and the instructions.

IT IS THEREFORE ORDERED that:

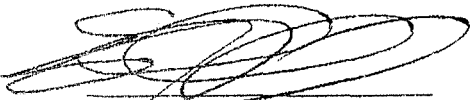
1. The surcharge for TRS shall be decreased by two cents per month beginning with all bills for service rendered after July 1, 2006.
2. The Telecommunications Devices for the Deaf program shall now be renamed "Telecommunications Access Program."
3. The surcharge for TAP shall be increased by one cent per month beginning with all bills for service rendered after July 1, 2006 continuing until June 30, 2008.

4. All LECs shall submit to the Commission tariffs to reflect this change by June 15, 2006.

Done at Frankfort, Kentucky, this 31<sup>st</sup> day of May, 2006.

By the Commission

ATTEST:

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end, positioned above a solid horizontal line.

Executive Director