

Patrick Hughes
Phone: (859) 426-2151
Fax:
Email: phughes@dbllaw.com

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VIA ELECTRONIC MAIL

Administrative Regulations Working Group
Kentucky Public Service Commission
P.O. Box 615
Frankfort, KY 40602
psc.regulations@ky.gov

Re: Written Comments on Proposed Pole Attachment Regulation

Dear Kentucky Public Service Commission:

On behalf of our client, OpenFiber Kentucky, LLC, we appreciate the opportunity to offer these comments on the proposed regulation addressing access and attachment to utility poles and facilities.¹ As you consider this necessary proposed regulation, we urge you to consider the benefits of including additional language from the Federal Communications Commission (“FCC”) Orders and Rulings on the same issue.

As a preliminary matter, this proposed regulation is very much needed as it addresses a void in our current regulatory scheme regarding the negotiation and execution of pole attachment agreements. Kentucky courts and Commission Staff seem to agree that the Commission has exclusive jurisdiction over this issue, but it has not promulgated any regulations to provide guidance on the pole attachment process. While the Commission’s drafted proposed regulation largely follows the FCC regulations, it is our opinion that the regulation should go farther and also address some additional points in order to reduce barriers to broadband deployment.

OVERLASHING

First, the drafted proposed regulation fails to address the longstanding policy of “overlashing” by attachers. This important process helps maximize the usable space on the pole. The FCC codified this rule in 2018 to improve its pole attachment rules and

¹ Identified as “807 KAR 50XX Pole Attachment Regulation” on the Kentucky Public Service Commission’s website: <https://psc.ky.gov/home/pscregulations>.

speed up the broadband deployment process.² More specifically, the FCC found that the ability to overlash often means “the difference between being able to serve a customer’s broadband needs within weeks versus six or more months when delivery of service is dependent on a new attachment.”³ Like the FCC, Kentucky’s regulations should also address this critical issue. The Commission should adopt an overlashing policy that requires pre-notification without pre-approval. Pre-approval will slow deployment of broadband services. Consistent with the FCC rules, the Commission should add language to its proposed pole attachment regulation that will establish the following parameters for overlashing:

- (1) Utilities may not require pre-approval for third-party overlashing of an existing attachment, when such overlashing is conducted with the permission of the existing attacher.
- (2) Utilities may require from overlashers 15 days advance notice of overlashing work. This will promote safety and allow utilities to protect its interests without imposing unnecessary burdens on overlashing attachers.
- (3) If the utility determines through its own engineering analysis that the noticed overlash would compromise the pole’s safety, reliability, or integrity, the utility must provide specific documentation demonstrating the overlashing issue within the 15 day advance notice period and the overlasher must address those identified issues before continuing with the overlash work.
- (4) If the utilities elect to establish an advance notice requirement, the utility must provide advanced written notice to attachers or include the requirement in its pole attachment agreements.

The Commission’s proposed regulation, which is currently silent on overlashing, needs to address this well-established and widely accepted policy prohibiting pole utilities from imposing unreasonable conditions on broadband providers. Providing guidance will confirm that this process is available in the Commonwealth, likely reduce disputes, and ensure overlashers receive timely and cost-effective pole access.

RATE DISPARITIES

Second, the Commission should also address rate disparities in its proposed regulation to ensure that similarly situated attachers pay comparable pole attachment rates. For example, Competitive Local Exchange Carriers (“CLECs”) should not be charged a higher rate than comparable telecommunications carriers or cable television companies. If the Commission does not address this critical issue, it is our fear that such disparities will negatively impact competition, and ultimately reduce the cost and quality of services provided in the Commonwealth. In 2018, the FCC addressed this issue and

² See *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, FCC 18-111 (2018) at ¶¶ 115-120.

³ *Id.* at ¶ 115.

revised its rules to establish a presumption that, for newly-negotiated and newly-renewed pole attachment agreements between incumbent Local Exchange Carriers (“LECs”) and utilities, an incumbent LEC will receive comparable rates and conditions as similarly-situated telecommunications carriers.⁴ In Kentucky, the Commission has never approved higher rates for CLECS, yet many pole utilities are proposing rates that are disproportionately high for these CLECS. The Commission has the authority, and the duty, to ensure that utilities charge just and reasonable attachment rates to all providers of telecommunications services, including CLECs and cable television companies. Thus, we propose that the Commission add regulatory language to create a presumption that similarly situated telecommunications carriers and CLECs will receive comparable pole attachment rates from utilities.

SELF HELP AND LABOR AGREEMENTS

Third, the Commission should expand its language related to the self-help remedy in Section 5 of the proposed regulation. Currently, the regulation states that the new attacher must use a contractor from the utility-provided list to perform self-help work that is complex or above the communications space. If the utility provides a contractor list for simple work the new attacher must choose a contractor from the list to do that work. While it is understandable that this language is necessary to limit concerns about contractor qualifications, some proposed pole attachment agreements take this one step too far. For example, it has been insisted by some utilities who are parties to collective bargaining and labor agreements that these agreements restrict who an attacher can hire, thereby effectively eliminating the self help remedy. These restrictions contradict the FCC’s ruling that agreements which limit a utilities’ ability to hire outside contractors do **not** restrict who the attachers can hire.⁵ The FCC rejected the argument that attachers’ use of outside contractors exposes the utilities to any liability for the work performed.⁶ In sum, the Commission should adopt a rule that would permit attachers to use outside contractors to perform simple make ready work and make ready work that is not timely completed even if the utilities or incumbent carriers have unionized workforces and labor agreements.

POLE TOPS

Fourth, the Commission should add language to the proposed regulation that allows for wireless attachments on pole tops. The FCC has ruled that blanket prohibitions against allowing wireless attachers to access space above the “communications space” are not permitted.⁷ Importantly, “a wireless carrier’s right to

⁴ *Id.* at ¶123.

⁵ *In the Matter of Implementation of Section 224 of the Act A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, FCC 11-50, (2011) at ¶ 52.

⁶ *Id.*

⁷ FCC 18-111 at ¶ 77.


attach to pole tops is the same as it is to attach to any other part of the pole.”⁸ Utilities may only deny access to pole tops for safety and reliability, and other generally applicable engineering purposes. The proposed regulation does outline a new timeline for attachments above the “communications space,” but it does not clearly state that utilities have a duty to provide access and wireless carriers have a right to attach to this part of the pole.⁹ While additional time for make-ready regarding wireless pole-top attachments is justified, creating this timeline without the express right will only cause confusion and further disputes between utilities and attachers.

SIGN AND SUE

Finally, the Commission should add language to the proposed pole attachment regulation adopting the FCC’s “sign and sue” rule.¹⁰ The FCC’s longstanding “sign and sue” rule allows an attacher to challenge the lawfulness of the terms in an executed pole attachment agreement where the attacher claims it was coerced to accept those terms to gain access to utility poles. In other words, an attacher may execute a pole attachment agreement with a utility and later file a complaint challenging the lawfulness of that agreement. In 2011, the FCC declined to eliminate or amend this rule.¹¹ The FCC encourages pre-planning and coordination among pole owners and attachers to the greatest extent and as early in the process as possible. An attacher is entitled to relief under the sign and sue rule only if it can show that a rate, term, or condition is unlawful under federal law, not merely unfavorable to the attacher.¹² Code of Federal Regulations Section 1.1404 codifies the “sign and sue” rule. As such, we encourage the Commission to adopt this helpful policy and mirror the federal regulations, allowing for attachers to sign agreements and then sue if those agreements violate state regulations.

We commend the Commission for drafting this much-needed regulation to update its rules to reflect issues that broadband service providers like CLECs are facing in the modern communications marketplace. We strongly urge the Commission to include the proposed language discussed in this letter, and promulgate this pole attachment regulation. Doing so will help ensure a faster deployment of broadband services for all Kentuckians—a worthy goal. Thank you for your consideration.

Respectfully submitted,


Patrick Hughes
Dressman Benzinger LaVelle psc

⁸ *Id.*

⁹ 807 KAR 5:0XX § 4 (4)(b).

¹⁰ *See* 47 CFR § 1.1404.

¹¹ FCC 11-50 at ¶ 119.

¹² *In the Matter of Implementation of Section 224 of the Act A Nat'l Broadband Plan for Our Future*, Order and Further Notice Of Proposed Rulemaking, FCC 10-84, (2010) at ¶106.

