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October 23, 2014

PSC STAFF OPINION 2014-014

Kendrick Riggs
2000 PNC Plaza
500 West Jefferson Street
Louisville, Kentucky 40202-2828

Re: Request for Legal Staff Opinion
An Electric Utility's Rental of Pole Space to Wireless Telecommunications Carriers

Dear Mr. Riggs:

Commission Staff acknowledges receipt your letter dated May 20, 2014, filed on behalf Louisville Gas and Electric Company (LG&E") and Kentucky Utilities Company ("KU"), requesting a staff advisory opinion to address an electric utility's rental of pole space to wireless telecommunications carriers. 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.

Specifically, LG&E/KY present the following questions:

1. Does the Commission possess jurisdiction over the rates and conditions that electric utilities impose for a wireless telecommunication carrier's use of space on the utilities' poles for wireless facility attachments?
2. When developing and negotiating any charges of fees and terms for a wireless telecommunications carrier's wireless facility attachments, may LG&E/KU adopt cost-based rates and conditions of service that reflect the unique characteristics of wireless telecommunications attachments?
3. May LG&E/KU negotiate contracts with the wireless telecommunications providers setting forth rates and conditions for use of pole space in lieu of establishing a rate schedule for such service?

You state that 47 U.S.C. § 224 generally requires a utility to make its distribution poles available to telecommunications carriers, which includes wireless carriers, whether providing voice or data communication. You further state that the Federal Communications Commission (“FCC”) has held that 47 U.S.C. § 224 applies to wireless communications attachments.

You state that 47 U.S.C. § 224 does not apply in situations where a state regulates the rates, terms and conditions of pole attachments. You note that the Commission, in 1981, declared that providing space on a utility pole fell within the definition of “service” under KRS 278.020(13), was thus subject to Commission jurisdiction, and the Commission certified to the FCC its jurisdiction over pole attachments.¹ You also note that Kentucky Courts have affirmed the Commission’s jurisdiction over these attachments as well as have expanded this jurisdiction to joint pole use agreements.

You state that when the Commission made its certification to the FCC in 1981, 47 U.S.C. § 224(f)(1) contained no reference to any “telecommunications carrier,” which was only added when Congress amended the statute in 1996. You also state that the FCC, when adopting rules for wireless carrier attachments to electric poles, expressly made its rules applicable to states that have not asserted jurisdiction over pole attachments and identified Kentucky as a state that had asserted jurisdiction over pole attachments.² However, you note that the Commission’s regulations refer only to cable and television (“CATV”) pole attachments.

You state that the Commission, in Case No. 2004-00036³, explicitly affirmed its jurisdiction over all attachments to Commission regulated utility poles. You also state that the Commission, in Case No. 2004-00036, stated that it would allow electric and telecommunications carriers to negotiate rates and conditions of pole attachments, and, absent an agreement, the Commission will determine the fair, just and reasonable rate to be charged.

You conclude that the attachment requested by the wireless telecommunications provider is a service under KRS 278.030. You request that Commission Staff: (1) confirm that LG&E/KU correctly interpret Case No. 2004-00036 to hold that the Commission exercises jurisdiction over the rates, terms, and conditions that an electric utility imposes for use of its pole space on wireless telecommunications attachments; (2) describe the extent of the Commission’s jurisdiction in this area if Commission disagrees with LG&E/KU’s interpretation of Case No. 2004-00036; (3) confirm that the

¹ PSC Case No. 8040, *The Regulation of Rates, Terms and Conditions for the Provision of Pole Attachment Space to Cable Television Systems by Telephone Companies* (Ky. PSC Aug 26, 1981).

² *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order on Reconsideration, 26 FCC Rcd 5240 (2011). (“Section 224 Order”).

³ *Ballard Rural Telephone Cooperative Corp. v. Jackson Purchase Energy Corp.* (Ky. PSC Mar. 23, 2005.)

original 1981 certification to the FCC is necessary to inform the FCC that the Commission's original exercise of jurisdiction over pole attachments is not limited solely to CATV attachments and extends to all pole attachments; (4) confirm that the original 1981 certification of the Commission's exercise of jurisdiction over CATV attachments was sufficient to notify the FCC that the Commission exercised jurisdiction over all pole attachments, regardless of whether the definition of "pole attachment" was subsequently expanded or contracted.

You state that LG&E/KU believe that the differences between CATV attachments and wireless telecommunications attachments require that different rates and rules apply to wireless telecommunications attachments versus CATV attachments, and that the FCC has noted these differences. You state that LG&E/KU intend to develop rates for wireless telecommunications attachments that reflect the cost of providing the service, but that LG&E/KU believe that strict adherence to the rate methodology for CATV attachments is not appropriate and that a negotiated agreement would more accurately reflect the unique characteristics of wireless telecommunications attachments and would better serve the public interest. You request that Commission Staff opine as to whether or not it is appropriate for LG&E/KU, in negotiating and developing rates and conditions of service for wireless telecommunications attachments, LG&E/KU may adopt cost-based rates and conditions of service that reflect the unique characteristics of wireless telecommunications attachments.

You state that LG&E/KU maintain tariffs with the Commission that contain rates for CATV pole attachments, but none for wireless telecommunications attachments. LG&E/KU, because wireless attachments are a recent development, propose to address requests for attachments from wireless providers through the use of negotiated contracts.

Commission Staff, as discussed below, mostly agrees with LG&E/KU's interpretation of the Commission's jurisdiction over wireless telecommunications attachments.

You raise seven topics in your letter, three questions and four issues where you request Commission Staff to confirm LG&E/KU's interpretation of the state of Commission jurisdiction over pole attachments in general and wireless telecommunications attachments in particular.

As an initial matter, it is important to note that although most pole attachments are located below the pole owner's facilities and not on the top of the pole, the Commission has determined that the top of a pole is "usable space" for the purposes of pole attachments.⁴ This designation is important because by being determined as "usable space," pole attachments made to the top of the pole are subject to the same Commission's regulation regarding pole attachments below the utility's lines.

⁴ Administrative Case No. 251, *The Adoption of a Standard Methodology for Establishing Rates for CATV Pole Attachments*, (Ky. PSC Sep 17, 1982) at 14.

With regard to your first question, “[d]oes the Commission possess jurisdiction over the rates and conditions that electric utilities impose for a wireless telecommunication carrier’s use of space on the utilities’ poles for wireless facility attachments . . .,” Commission Staff answers in the affirmative.

In Case No. 2004-00036, the Commission determined that, except for attachments by or between local exchange companies and electric utilities, pole attachments, other than CATV attachments, are also a service, and are thus subject to Commission regulations regarding pole attachments. The Commission has even reached this conclusion regarding attachments that are not sought by public utilities.⁵ Therefore, as a service, the Commission possesses jurisdiction over the rates and conditions that electric utilities impose for a wireless telecommunications carrier’s attachments to the electric utilities’ poles.

Wireless telecommunications attachments, because they would be attached above and below the utility’s facilities on a pole, may require additional “make ready” work before being attached. However, Commission Staff is unaware of specific evidence sufficient to support a claim that LG&E/KU’s tariffs are unreasonable for use in connection with wireless telecommunications attachments. Therefore, with regard to whether or not LG&E/KU may negotiate contracts with the wireless telecommunications providers setting forth rates and conditions for use of pole space in lieu of establishing a rate schedule for such service, Commission Staff concludes that existing tariff provisions of LG&E/KU apply to these attachments and separate agreements are not necessary. As discussed, *supra*, the Commission has determined that the top foot of a pole is “usable space” and should be made available for attachments. In making this determination, the Commission also included the top foot of the pole in establishing the methodology for determining rates for CATV attachments. Therefore, the per foot current rate that LG&E/KU charge for a CATV attachment would be the appropriate rate to charge for a wireless telecommunications attachment.

Likewise, LG&E/KU tariffs contain provisions applicable to CATV attachments that Commission Staff believes to obviate the necessity of negotiated agreements⁶ Based upon your representation of the facts regarding wireless telecommunications attachments, it appears to Commission Staff that these tariff provisions would cover these attachments and the arrangements and costs between LG&E/KU and the wireless telecommunications providers. Commission Staff is of the opinion that if no agreement is reached regarding wireless telecommunications attachments, the wireless telecommunications provider seeking attachment may petition the Commission for relief, or, alternatively, LG&E/KU may file a revised tariff with cost support justifying its reasonableness.

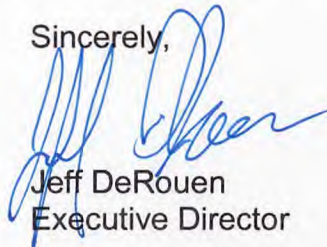
⁵ See Case No. 96-144, *Laurel County Board of Education v. GTE South, Incorporated*, (Ky. PSC Dec. 5, 1996) at 2.

⁶ See LG&E Tariff Electric P.S.C. No. 9, Original Sheet Nos. 40-40.7, KU Tariff P.S.C. No. 16. Original Sheet Nos. 40-40.7,

Regarding LG&E/KU's interpretation that the 1981 certification to the FCC was sufficient to inform the FCC that the Commission's exercise of jurisdiction is not limited solely to CATV attachments, Commission Staff cannot reach a conclusion over whether or not the FCC believes that this certification was sufficient to notify the FCC that the Commission's jurisdiction over pole attachments extended to all pole attachments regardless if the definition was expanded or contracted. Commission Staff notes, however, that the FCC, in its Section 224 Order, recognized that the Commission, among 20 other utility commissions, has certified that it regulates the "rates, terms, and conditions for pole attachments . . ."⁷ In the Section 224 Order the FCC also states that, "[c]ertification by a state preempts the Commission from accepting pole attachment complaints . . ."⁸ Perhaps this provides some indication as to the FCC's understanding regarding its jurisdiction over pole attachments in Kentucky.

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,



Jeff DeRouen
Executive Director

JEB/kg

⁷ Appendix C to the Section 224 Order, *see also*, *States That Have Certified That They Regulate Pole Attachments*, DC Docket No. 10-101, Public Notice, 25 FCC Rcd 5541 (WCB 2010).

⁸ *Id.*