



Matthew G. Bevin
Governor

Charles G. Snavely
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

Michael J. Schmitt
Chairman

Robert Cicero
Vice Chairman

Talina R. Mathews
Commissioner

July 17, 2018

PSC STAFF OPINION 2018-011

Phillip K. Brown
Executive Director
Kentucky Communications Network Authority
209 St. Clair Street, 4th Floor
Frankfort, Kentucky 40601-3462

Re: Request for Commission Staff Opinion

Rights of a Competitive Local Exchange Carrier Under Pole Attachment Agreements and the Commission's Jurisdiction Regarding Pole Attachment Agreements With Municipal Utilities and Entities Regulated By the Tennessee Valley Authority

Dear Mr. Brown:

Commission Staff acknowledges receipt of your letter dated April 26, 2018, requesting a staff advisory opinion to address issues relating to pole attachment agreements ("PAA"). 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.

In your letter, you state that the Kentucky Communications Network Authority ("KCNA") is the state agency tasked with overseeing KentuckyWired project, a project to provide the Commonwealth with a state-wide fiber optic broadband network. You request an opinion from Commission Staff regarding the rights of KCNA, a Competitive Local Exchange Carrier ("CLEC"), under PAAs, and the Commission's jurisdiction regarding PAAs with municipal utilities and entities regulated by the Tennessee Valley Authority ("TVA"). Specifically, you request an opinion on the five questions:

1. If a PAA is silent on time frames to review and approve applications to attach to poles or perform make ready engineering ("MRE") or make ready construction ("MRC"), what time frames will apply in Kentucky?
2. What remedy is available to a party filing applications to attach to poles if the owner fails to approve an application or perform MRE or MRC within a designated time frames or within a reasonable time if there is no designated time frame?
3. If a pole owner has indicated that an entity currently attached to its pole must move its equipment as part of MRC, what time frame to move this equipment applies in Kentucky?
4. If an attacher fails to move its equipment within a designated time frame, does the party requesting an attachment have the right of self-help to move that equipment?
5. Does a pole owner grant the right to use its right-of-way to a licensee when it enters into a PAA with that licensee?

Background

You state that the KentuckyWired network, when completed, will, *inter alia*, be over 3,000 miles of fiber optic cable, and have a presence in each county in the Commonwealth. You state that the majority of the network will be attached to an estimated 57,000 poles, that KCNA does not intend to own any poles and that KCNA has entered into PAAs with private entities and municipal utility boards and commissions. You state that KCNA registered with the Commission as a CLEC to assist in the pole attachment process.

You state that:

- The Commonwealth's contractor oversees the process for attachment application, make ready engineering ("MRE"), and make ready construction ("MRC").
- In the application process, the contractor prepares and remits the application for pole attachments.
- Generally, the pole owner then reviews and approves the engineering and attachment, and that this approval indicates the location of the fiber, and whether the attachment requires a new pole or additional attachments.

- Once the attachment is approved, the pole owner provides the cost of the MRE and submits it to the contractor, which then pays the pole owner to complete the work, and that after the MRE is complete, the MRC process begins.
- The MRC includes moving other attachers' equipment on the pole, which is a significant amount of work because many different attachers may already be on the pole.

You state that the Commonwealth is experiencing delays at three steps in the process. Specifically you state that some utilities take many months to approve the applications and MRE and, once the MRE is complete, some utilities take many months to move the equipment. You state that some PAAs have strict deadlines that allow the contractor to "self-help" by moving attached facilities if the utility does not act within a specified time, however, some PAAs are silent on this issue, thus prompting this request for a staff opinion.

In your letter you correctly note that the Commission has exercised reverse preemption in its exercise of jurisdiction over pole attachments¹, adopted a standard rate methodology for pole attachments², and, subsequently, that the Kentucky Court of Appeals has upheld the Commission's jurisdiction.³ You assert that the Commission has broad jurisdiction over a utility's rates and services, and this jurisdiction applies equally to pole attachments. You further assert that the timely performance of the steps necessary to attach to a pole is indispensable to any entity with a PAA.

You state that while the Commission has jurisdiction over PAAs and related rates and services, there are no statutes, regulations, or case law addressing the process for attaching to poles. You provide recommendations for questions 1-4 presented in your letter. You recommend that Commission Staff adopt the federal standards for the pole attachment process in 47 C.F.R. § 1.1420, which establishes a timeline for access to utility poles for pole attachments. Under 47 C.F.R. § 1.1420, for example, a pole owner must, within 45 days, respond to a complete application with a survey of affected poles and, if the pole owner fails to do so, the applicant may hire a contractor to perform the survey. This regulation also provides, *inter alia*, that if a third-party attacher fails to move its facilities within a specified time, the applicant may engage in self-help and complete the necessary make ready work. You state it would be reasonable for Commission Staff to adopt these standards as well.

¹ PSC Case Nos. 8040 and 8090, *Regulations of Rates, Terms and Conditions for the Provision of Pole Attachment Space to Cable Television Companies* (Ky. PSC Oct. 28, 1982)

² PSC Administrative Case No. 251 (Ky. PSC Aug. 12, 1982).

³ *Kentucky CATV Ass'n v. Volz*, 675 S.W.2d 393 (Ky. App. 1984).

Regarding question number 5, whether a pole owner grants the right to use its right-of-way to a licensee when it enters into a PAA with that licensee, you state that several governing bodies have recognized that apportioning rights in an existing utility easement is the most economically feasible way of installing cable systems, and that prohibiting attachers from using the easements until the property owner is paid (or condemnation proceedings are necessary) significantly increases the cost to the attachers. You state that the Federal Communications Commission (“FCC”) has previously addressed this issue and found that a PAA grants unfettered access to poles and underlying easements.⁴ You ask whether or not the Commission will adopt the “friendliest” approach to consumers, or part with the FCC’s practice.

You state that to the extent a pole owner has a right to install a pole on private property, it can grant such a right to a licensee. You state that the question, “[i]s whether a prescriptive easement is an easement in gross (not assignable) or an easement appurtenant (assignable).”⁵ You state that, generally, an easement in gross is not favored, that an easement is not assumed to be a personal right when it can be construed to be appurtenant to some estate, and that prescriptive easements have long been treated as appurtenant. You state that sharing an underlying easement lowers another barrier that pole owners may rely upon to thwart an applicant from attaching to poles.

Discussion

Outside of the standards and rules for pole attachments set out in the Commission’s existing administrative orders and more generally applicable standards and rules governing utility rates and services, a utility’s tariff governs pole attachments, and it is up to the utility (subject to Commission approval) to include in its tariff the conditions for service with respect to pole attachments pursuant to regulations prescribed by the Commission regarding tariffs.⁶ Pursuant to KRS 278.260, however, 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 the procedure or timeline for requesting and installing a pole attachment, and the utility and the party seeking attachment cannot otherwise reach an agreement on the installation of the attachment, the party seeking the attachment may file with the Commission a complaint against the pole owner setting forth the pertinent facts and the relief requested.

⁴ See, *Cable Television Ass’n of Georgia v. Georgia Power Co.*, 18 F.C.C.R. 16333, 2003 WL 21878639 (August 7, 2003).

⁵ April 26, 2018 Letter from Philip K. Brown to Gwen Pinson, Executive Director, Public Service Commission at 5.

⁶ See KRS 278.160 (“Under rules prescribed by the commission, each utility shall file with the commission, within such time and in such form as the commission designates, schedules showing all rates and conditions for service established by it and collected or enforced.”).

With regard to questions 1-4, Commission Staff has no authority to adopt the standards and procedures for pole attachments contained in FCC regulations. Assuming, *arguendo*, that Commission Staff did adopt such standards, the standards would have no force or effect on PAAs or pole attachments. The Commission, through its orders or regulations, is the only entity that can enact or promulgate such requirements that are applicable to all pole attachments. Commission Staff's adoption of such standards would be meaningless and powerless.

With regard to question number 5, whether a pole owner grants the right to use its right-of-way to a licensee when it enters into a PAA with that licensee, Commission Staff answers in the affirmative. Commission Staff notes, as an initial matter, that its opinion does not address the rights to private property other than that which the pole owner has already obtained, as the Commission does not have jurisdiction over private property. Commission Staff's opinion on this issue presumes that the pole owner's easement allows the type of attachment which KCNA requests from the pole owner. Commission Staff notes, however, that the Commission would have the jurisdiction to review and interpret an easement to determine if the easement does allow for a third party attacher, thus the Commission could determine if it has jurisdiction over the dispute.⁷

Although the Commission has not adopted a definition of a "pole attachment", 47 U.S.C. § 224(a)(4) defines "pole attachment" as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or *right-of-way* owned or controlled by a utility." (Emphasis added.) In *Georgia Power*, the FCC noted that a utility is not entitled to require a pole attacher to negotiate a separate agreement for the use of any easement or right-of way owned or controlled by the utility, relying upon the definition of a pole attachment in U.S.C. § 224(a)(4).⁸ Given that the Commission's reverse preemption is predicated on complying with the requirements enumerated in 47 U.S.C. § 224 *et seq.*, and that those requirements make frequent reference to pole attachments (as defined in U.S.C. § 224(a)(4)), it is logical to conclude that a pole attachment under Kentucky law includes, by definition, access to an existing easement or right-of-way own or controlled by the utility when the pole attachment is made. Thus, a pole attacher should not be required to obtain a separate easement or right of way so long as the attachment is within the scope of the underlying easement or right-of-way.

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

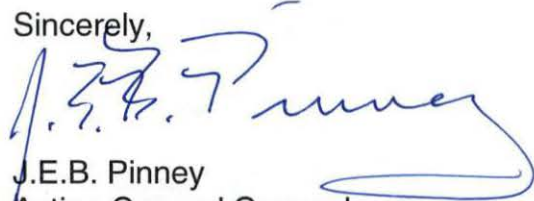
⁷ See *City of Greenup v. Public Service Commission*, 182 S.W.3d 535, 539 (Ky. App. 2005).

⁸ *Georgia Power Co.*, 18 F.C.C.R at 16344; see also *UCA, L.L.C. v. Lansdowne Community Development, LLC*, 215 F. Supp. 2d 742 (E.D. Va. 2002) (where the court held that a utility's obligation to provide non-discriminatory access to poles required it to provide access where permitted by its underlying easement subject to the regulations promulgated pursuant to 47 U.S.C. § 224 but did not require it to provide access where prohibited by the underlying easement, because it did not own or control that right).

Phillip K. Brown
KCNA Opinion Request
July 17, 2018
Page 6

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

Sincerely,



J.E.B. Pinney

J.E.B. Pinney
Acting General Counsel