

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

AT RICHMOND, AUGUST 21, 2020

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PETITION OF

SUNSET DIGITAL COMMUNICATIONS (DE), LLC
(USED IN VA BY: SUNSET DIGITAL
COMMUNICATIONS, LLC),
D/B/A POINT BROADBAND

CASE NO. PUR-2020-00143

For injunctive relief against
Powell Valley Electric Cooperative

ORDER IMPLEMENTING VIRGINIA STATUTORY REQUIREMENTS

On July 20, 2020, Sunset Digital Communications (DE), LLC (USED IN VA BY: Sunset Digital Communications, LLC), d/b/a Point Broadband ("Point"), filed a Complaint and Petition for Injunctive Relief and Request for Expedited Action ("Petition") with the State Corporation Commission ("Commission") pursuant to 5 VAC 5-20-100 of the Commission's Rules of Practice and Procedure requesting injunctive relief and expedited action against Powell Valley Electric Cooperative ("PVEC") regarding a dispute between Point and PVEC concerning a January 1, 2017, Joint Use Agreement ("Agreement") and pole attachments in PVEC's service territory.

On July 31, 2020, PVEC filed a Motion to Dismiss and Demurrer. On August 6, 2020, Point filed a Reply and a Motion for Preliminary Injunction. On August 12, 2020, PVEC filed a Response. On August 14, 2020, Point filed a Reply.

On August 19, 2020, the Commission convened an oral argument in this matter via Skype for Business, with no party present in the Commission's courtroom.

NOW THE COMMISSION, upon consideration hereof, is of the opinion and orders as follows.

1. PVEC and Point shall negotiate in good faith to arrive at a mutually agreeable contract.

Code § 56-466.1 B directs as follows:

Upon request by a telecommunications service provider or cable television system to a public utility, both the public utility and the telecommunications service provider or cable television system shall negotiate in good faith to arrive at a mutually agreeable contract for attachments to the public utility's poles by the telecommunications service provider or cable television system.

PVEC and Point disagree on the status of "good faith negotiations" between the parties.

PVEC asserts that they have not begun.¹ Point contests this assertion.² The answer to this disagreement does not alter the implementation of the statutory plain language. Point has clearly requested good faith negotiations pursuant to Code § 56-466.1 B.³ In response, PVEC stresses it does not want to negotiate until PVEC is satisfied that other issues are resolved.⁴ The Virginia statute, however, does not give PVEC this option. Accordingly, as required by the above statute, the Commission finds – and herein orders – that PVEC and Point shall negotiate in good faith to arrive at a mutually agreeable contract for attachments to the public utility's poles by the telecommunications service provider or cable television system.⁵

2. PVEC and Point shall abide by the status quo terms of the Agreement until a new agreement is reached.

Code § 56-466.1 F states in part:

The Commission is authorized to determine just and reasonable rates, and terms and conditions of service, excluding safety and debt collection, for

¹ See, e.g., PVEC's July 31, 2020, Motion to Dismiss and Demurrer at 8, and August 12, 2020, Response at 17.

² See, e.g., Point's August 14, 2020, Reply at 15.

³ See, e.g., Point's July 20, 2020, Petition at 10, August 6, 2020, Reply at 6, and August 14, 2020, Reply at 11.

⁴ See, e.g., Tr. 44, 62-63, 65-68.

⁵ Moreover, the Commission agrees with Point that a party cannot avoid the statutory requirements herein by refusing to enter into "good faith" negotiations. See, e.g., Point's August 14, 2020, Reply at 16.

attachments to electric cooperative poles by telecommunications service providers or cable television systems if, following good faith negotiations to do so, the parties cannot reach agreement thereon; however, the Commission shall not determine rates or terms and conditions for any existing agreement until it expires or is terminated pursuant to its own terms. The terms of an expired or terminated agreement shall continue to govern while good faith negotiations or Commission review pursuant to this section are pending.

Pursuant to the above statute, the Commission finds – and herein orders – that the status quo terms of the Agreement currently govern for attachments to PVEC's poles by Point.

PVEC asserts that the Agreement has been terminated.⁶ Point contests this assertion.⁷

The Commission, however, need not address this contractual dispute to apply the above statutory plain language. That is, if the Agreement has been terminated as asserted by PVEC, Code § 56-466.1 F unambiguously directs that such Agreement "shall continue to govern while good faith negotiations or Commission review pursuant to this section are pending." Moreover, the Commission also notes that both parties supported operating under the existing Agreement while good faith negotiations are taking place for a new one.⁸

⁶ See, e.g., PVEC's July 31, 2020, Motion to Dismiss and Demurrer at 3, 14.

⁷ See, e.g., Point's July 20, 2020, Petition at 7, and August 6, 2020, Motion for Preliminary Injunction at 6-7.

⁸ See, e.g., Tr. 8, 79-80. In addition, the Commission rejects PVEC's claim that the Commission must resolve contested issues of contract before concluding that the Agreement has been terminated for purposes of applying the above statute. PVEC has repeatedly asserted in this proceeding that it terminated the Agreement; in such instance, the statute mandates that the terms of the Agreement continue while a new one is being either negotiated in good faith or litigated before the Commission. For purposes of the instant order, PVEC cannot now claim that the Agreement was somehow *not* terminated. See, e.g., *Board of Supervisors of Loudoun County v. State Corp. Comm'n*, 292 Va. 444, 455 n.11 ("Under appropriate-reprobate principles, as we recently explained, 'a litigant may not take successive positions in the course of litigation that are either inconsistent with each other or mutually contradictory.'") (internal quotation marks omitted) (quoting *Babcock & Wilcox Co. v. Areva NP, Inc.*, 292 Va. 165, 204 (2016) (quoting *Lewis v. City of Alexandria*, 287 Va. 474, 480 (2014))).

3. PVEC shall not require Point to remove its attachments from PVEC's poles while this proceeding remains pending.

In accordance with the above two directives implementing Code § 56-466.1, the Commission herein orders that PVEC shall not require Point to remove its attachments from PVEC's poles while this case remains pending. Moreover, although PVEC previously directed Point to remove its attachments within 30 days,⁹ PVEC has subsequently assured that it "has no intention of forcing Point to take down its lines while this dispute is pending..."¹⁰

4. PVEC and Point shall report jointly to the Commission on the status of the good faith negotiations ordered herein.

On or before two weeks from the date of this order, PVEC and Point shall file a joint report on the status of good faith negotiations. Further proceedings herein shall be conducted by a Commission Hearing Examiner, as set forth below.

5. A Hearing Examiner is appointed to conduct further proceedings as necessary.

As provided by Code § 12.1-31 and 5 VAC 5-20-120, *Procedure before Hearing Examiners*, of the Commission's Rules of Practice and Procedure, a Hearing Examiner is appointed to conduct further proceedings in this matter on behalf of the Commission and to file a final report. If the parties are unable to reach agreement (within the aforementioned two weeks or a reasonably extended time period as determined by the Hearing Examiner), the Hearing Examiner shall conduct proceedings and file a final report with the Commission in accordance with the Commission's obligations under Code § 56-466.1.

⁹ See, e.g., PVEC's July 31, 2020, Motion to Dismiss and Demurrer at Exhibit A; Point's August 6, 2020, Motion for Preliminary Injunction at 6.

¹⁰ PVEC's August 12, 2020, Response at 6.

If the Hearing Examiner is required to conduct such proceeding, it shall include both legal and factual issues to the extent necessary. For example, although PVEC and Point discuss the extent to which the Commission's jurisdiction may be preempted by the Tennessee Valley Authority ("TVA"), the parties agree that such issue need not be addressed at this preliminary stage of the proceeding.¹¹ Moreover, while PVEC states that the Commission's "rate" jurisdiction is preempted by TVA, PVEC does not assert that the current proceeding, or other portions of Code § 56-466.1, are so preempted.¹² Further in this regard, Point affirms that it is not asking the Commission to set pole attachment "rates."¹³

In addition, a significant portion of the pleadings and argument to date have addressed issues that PVEC alleges involve matters related to "safety." As noted above, Code § 56-466.1 F expressly excludes "safety and debt collection" from the Commission's authority to determine just and reasonable terms and conditions of service thereunder. The instant order makes no findings on PVEC's safety allegations and, likewise, does not address the extent to which specific terms and conditions are necessarily outside the scope of the Commission's authority under Code § 56-466.1 F. In any proceeding under Code § 56-466.1 F, the party asserting that a specific term or condition of service is a "safety" term or condition – and thus outside of the Commission's authority – shall have the burden of proof thereon. Such burden shall include, but not necessarily be limited to, establishing that such term or condition represents a reasonable and legitimate issue of "safety" for purposes of pole attachments under Virginia law and reasonably accepted public utility practice.

¹¹ See, e.g., Point's August 6, 2020, Reply at 7; PVEC's August 12, 2020, Response at 17 n.43.

¹² See, e.g., Tr. 27-28.

¹³ See, e.g., Tr. 7.

Next, the Commission emphasizes that this order, and any subsequent proceedings before the Hearing Examiner, are limited to the requirements of Code § 56-466.1 and do not address contractual disputes between PVEC and Point related to the existing Agreement.

Finally, in accordance with the Commission's directives herein, PVEC's Motion to Dismiss is thus denied. In exercising the Commission's discretion and in applying the statutory plain language, any specific requests in Point's Petition and Motion for Preliminary Injunction that are not required by the findings and directives in the instant order are likewise denied.

Accordingly, IT IS SO ORDERED, and this matter is CONTINUED.

A COPY hereof shall be sent electronically by the Clerk of the Commission to:
Michael J. Quinan, Esquire, and Cliona Mary Robb, Esquire, Thompson McMullan, 100 Shockoe Slip, 3rd Floor, Richmond, Virginia 23219; mquinan@t-mlaw.com; crobb@t-mlaw.com; Timothy E. Biller, Esquire, and James G. Ritter, Esquire, Hunton Andrews Kurth LLP, Riverfront Plaza, East Tower, 951 East Byrd Street, Richmond, Virginia 23219; tbiller@HuntonAK.com; ritterj@HuntonAK.com.