

FAC Determinations

1. 2024.02.29 FAC Determination – Dispute No. 23-13 (OpenFiber Breach of Wholesaler Agreement Dispute)
2. 2024.09.13 FAC Determination – Dispute No. 24-04 (Replacement Huts Dispute)



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No. 23-13

February 29, 2024

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RE: The Next Generation Kentucky Information Highway ("NG-KIH") Project –
Contract Dispute Regarding the Wholesaler Agreement.

Dear Counsel:

The Finance and Administration Cabinet ("Finance") is in receipt of the Joint Stipulation and Request by all Parties to Determine June 6, 2023, Dispute, submitted on October 19, 2023, by OpenFiber Kentucky Company, LLC ("OpenFiber"), the Commonwealth of Kentucky, the Kentucky Communications Network Authority ("KCNA"), and Kentucky Wired Operations Company, LLC ("KWOC") (collectively, the "Parties"). The Joint Stipulation requested that the Finance and Administration Cabinet Secretary resume consideration of the dispute originally submitted on June 6, 2023, by OpenFiber, which was ultimately denied based solely upon the failure to act according to the Dispute Resolution Procedures set forth in Schedule 2 of the Wholesaler Agreement prior to requesting a Determination. As the Parties have now stipulated to submitting the matter to the Finance Secretary, thereby waiving the relevant Dispute Resolution Procedures set forth in the Wholesaler Agreement, the matter is properly before the Finance Secretary.

Under the Kentucky Model Procurement Code, KRS Chapter 45A ("KMPC"), the Secretary is authorized, subject to limitations otherwise established by law, to resolve claims or controversies involving state contracts. Specifically, KRS 45A.230 authorizes the Secretary to:

...settle, compromise, pay, or otherwise adjust the claim by or against, or controversy with, a contractor relating to a contract entered into by the Finance and Administration Cabinet on behalf of the Commonwealth or any state agency, including a claim or controversy based on breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission...

KRS 45A.235 further states in relevant part that if a controversy regarding a state contract cannot be resolved by agreement, the Secretary shall issue a decision in writing and that decision shall be final and conclusive.

BACKGROUND

The state contract in question involves the Next Generation Kentucky Information Highway (“NG-KIH”), which is Kentucky’s project to establish the infrastructure for a high-speed statewide internet communication system. KCNA was created to oversee that project. The instant NG-KIH System contract dispute arises from a disagreement concerning the Wholesaler Agreement, a contract involving KCNA, OpenFiber, and KWOC. OpenFiber stated in the June 6, 2023, Dispute Notice that the matter was submitted to Finance pursuant to the October 13, 2017, Wholesaler Agreement. OpenFiber, the Wholesaler in the relevant agreement, has alleged that KCNA and KWOC breached the Wholesaler Agreement and have therefore interfered with OpenFiber’s “contracted-for rights to access and use the” NG-KIH System. KCNA’s position is that OpenFiber’s access to the NG-KIH System, and actions in question, must be authorized by KCNA, and are therefore at the discretion of the Commonwealth, pursuant to the provisions of the Wholesaler Agreement. *See* June 14, 2023, KCNA letter.

In support of their respective positions and pursuant to the subsequent briefing schedules, set forth in Notices dated June 9, 2023, July 12, 2023, and November 16, 2023, OpenFiber, KCNA, and KWOC submitted the following to the Secretary:

1. OpenFiber’s initial letter noticing this contract dispute dated June 6, 2023;
2. KCNA’s “preliminary correspondence” dated June 14, 2023;
3. KCNA’s and KWOC’s Response Briefs, with enclosures, dated July 21, 2023;
4. KWOC’s Response to the Notice Concerning KCNA;
5. OpenFiber’s Reply, dated August 21, 2023;
6. KCNA’s Sur-Reply, dated September 8, 2023;
7. OpenFiber’s Objection to KCNA’s Sur-Reply, dated September 15, 2023;¹
8. The Parties’ Joint Stipulation and Request by All Parties to Determine June 6, 2023 Dispute sent on October 19, 2023;
9. OpenFiber’s Notices sent on November 20, 2023;
10. KCNA’s Supplemental Submission dated December 20, 2023.

As mentioned above, OpenFiber’s Dispute Notice stems from an alleged breach of the October 13, 2017, Wholesaler Agreement between the parties. OpenFiber Dispute Notice, p. 1. OpenFiber claims KCNA and KWOC have breached the Wholesaler Agreement by interfering with OpenFiber’s “contracted-for rights to access and use the Next Generation Kentucky Information Highway.” *Id.* More specifically, OpenFiber alleges that “KCNA has asserted non-existent requirements under the Wholesaler Agreement in an effort to extort payments, contractual concessions, and customer information from OpenFiber as a precondition to OpenFiber’s lawful access to and use of the NG-KIH System.” *Id.* OpenFiber claims the “NG-KIH System was designed and built for two purposes: to support the communications networking needs of certain public agencies within the Commonwealth and to enable a private contractor, in this case OpenFiber, to commercialize the additional or excess capacity of the network assets (called “Additional Capacity”), both to expand network access throughout the Commonwealth and to

¹ The Secretary declines to rule on the allowance of KCNA’s 9/8/23 Sur-Reply and OpenFiber’s 9/15/23 Objection to the filing.

generate a stream of long-term revenue in which the Commonwealth would share.” *Id.* at 2. OpenFiber’s Dispute Notice claims it “has the exclusive right to sell capacity and services over the Additional Capacity of the NG-KIH System, including through assets constructed by OpenFiber to provide connectivity to customer locations.” *Id.*

NG-KIH System capacity is addressed in the Wholesaler Agreement, which states, in part, that “[T]he parties acknowledge that the NG-KIH System has been sized, in respect of the fiber strand count, at approximately double the capacity necessary to support the requirements of the PPP Services ...” Wholesaler Agreement, Section 3.1(c). Further, the NG-KIH was reported as “an approximately 3,300-mile-long middle mile broadband network ... [that] will consist of approximately 3,300 miles of fiber optic cable serving over 1,000 network sites statewide. The fiber optic cable consists of 288 strands, of which 144 strands will be available for government agencies, and the other 144 strands will be available to local common exchange carriers for last mile service to business and individuals. *See* KCNA’s Response Brief, Exhibit 1: Strategic Plan – KY Broadband Planning: 2019 Update.

OpenFiber claims “KCNA has unlawfully interfered with OpenFiber’s contractual right to access and use the NG-KIH System in breach of the Commonwealth’s obligations under the Wholesaler Agreement.” *See* OpenFiber Dispute Notice. OpenFiber claims the “Wholesaler Agreement distinguishes between the network assets owned by the Commonwealth (which KCNA oversees) and the network assets built and owned by OpenFiber, which are not part of the NG-KIH System (and which KCNA does not oversee).” *Id.* at 3. OpenFiber therefore claims an “unfettered right provided by the Wholesaler Agreement to access and use the Additional Capacity of the NG-KIH System to route user traffic over it.” *Id.* (emphasis original). Ultimately, OpenFiber claims “KCNA has no authority or discretion to approve, evaluate, or otherwise interfere with OpenFiber’s right to route user traffic over the Additional Capacity built into the NG-KIH System.” *Id.* OpenFiber further alleges “[I]n the Wholesaler Agreement, the Commonwealth granted to OpenFiber ‘the exclusive right to use the Additional Capacity for the provision of Wholesaler Services.’” OpenFiber thereafter defines “Additional Capacity” as “the capacity of the PPP Network Assets ‘not otherwise reserved or required for the PPP Services’ – essentially the part of the network not being used by the Commonwealth.” *Id.* at 4 (citing Wholesaler Agreement, Section 1.1).

Due to the NG-KIH being sized “at approximately double the capacity necessary to support the requirements of the PPP Services,” OpenFiber claims such excess was created “so the Wholesaler could sell the Additional Capacity to third-party users to generate revenues for the benefit of itself and the Commonwealth. *Id.* (citing Wholesaler Agreement, Section 3.1(c)). OpenFiber ultimately asserts that the Wholesaler Agreement affirms that KCNA “shall provide the Wholesaler with access to the PPP Network Assets to the extent required for the provision of Wholesaler services.” *Id.* at 5 (citing Wholesaler Agreement, Section 3.1(b)). As such, OpenFiber claims “these rights of access and usage are not discretionary.” *Id.* Ultimately, OpenFiber’s Dispute Notice requests the Secretary to issue an opinion affirming the following:

1. The Wholesaler Agreement contemplates two types of changes related to Wholesaler’s rights to access the NG-KIH System: an NG-KIH System Change

- and an Operations Co. Services Change (described by OpenFiber as a “KWOC Services Change”).
2. Wholesaler requests for interconnection (e.g. splice requests) to the NG-KIH System are not PPP Changes or NG-KIH System Changes if such interconnection, directly or indirectly, is between Wholesaler Assets and PPP Network Assets that provide Additional Capacity (*i.e.*, Ancillary PPP Network Assets), and thus are Operations Co. Service Changes.
 3. KCNA is prohibited from mandating specifically or implicitly, the use of the Change processes under Schedule 6 of the Project Implementation Agreement for changes that are not NG-KIH System Changes.
 4. KWOC is prohibited from mandating, specifically or implicitly, that OpenFiber use the Change process under Schedule 6 of the Project Implementation Agreement for non-NG-KIH System Changes.
 5. KWOC and KCNA are prohibited from mandating that they receive customer or proprietary information, compensation not provided under the Wholesaler Agreement, or imposing other conditions not expressly provided in the Wholesaler Agreement as part of the interconnection process.

Id. at 11. OpenFiber claims the actions of KCNA have negatively affected “OpenFiber’s customers, which include rural healthcare providers, addiction clinics, public education service providers, and high-tech industrial manufacturing[,]” and thereby preventing broadband access for such private customers. *Id.* at 4.

KCNA takes exception to the allegations set forth by OpenFiber. In sum, KCNA argues that the actions in question, particularly the allegation that KCNA is obstructing OpenFiber’s access to businesses receiving high-speed broadband services, highlight the fundamental basis of the instant dispute, that OpenFiber is attempting to act as a last-mile provider, contrary to the terms of the Wholesaler Agreement. *See* KCNA June 14, 2023, Correspondence, at 3 (citing Wholesaler Agreement, section 3.5). KCNA argues that “[T]he ‘exclusive right’ afforded to OpenFiber that it has continually cited in its Dispute letter is governed by the Wholesaler Agreement and, therefore, is restricted to wholesaler services, not to whatever service OpenFiber desires.” *Id.* at 4. Further, KCNA argues “OpenFiber’s access to the Network is not ‘unfettered,’ it too is limited to the provision of wholesaler services, must be authorized by KCNA, and is at the discretion of the Commonwealth. If OpenFiber acts however it wishes, the requirement to provide services to Users under the Wholesaler Agreement would be rendered meaningless.” *Id.*

KCNA further argues the “customers” referenced by OpenFiber “are not internet service providers and telecommunications companies with Last-Mile Networks.” *See* KCNA Response Brief, p. 2. Such “customers” are described by KCNA as “businesses and other consumers that require significant infrastructure to connect them to the NG-KIH Network” and therefore “[T]his OpenFiber ‘Last-Mile’ network cannot qualify as a Wholesaler Asset; it is not for the provision of Wholesaler Services.” *Id.* Ultimately, KCNA claims that “[A]ny request to access the NG-KIH Network, a so-called ‘interconnection’ request, *is* a change to the NG-KIH Network requiring Commonwealth approval.” *Id.* (emphasis original).

KCNA requests the following in response to OpenFiber’s initiation of this dispute:

... the Secretary should affirm the process set out in the agreements, that the Commonwealth is entitled to a detailed description of any value of benefit of any proposal from KWOC, after it agrees to the Change with OpenFiber, and that the Commonwealth has the discretion to make any determination based on what information is available, including whether to grant access to the NG-KIH Network.

Id. at 3.²

DETERMINATION

The ultimate question presented by the Parties for a determination involves the underlying Wholesaler Agreement, Project Implementation Agreement, additional related agreements, and thereby what actions are authorized with respect to the NG-KIH Network. *See* OpenFiber's Dispute Notice, Attachments 1 and 2. As stated in the Amended and Restated Master Agreement, "the NG-KIH will consist of a statewide dark fiber middle-mile network constructed to provide communication services based on an optical fiber backbone which will improve the quality, reliability, and access to network services across the Commonwealth;[.]" *See* KCNA Response Brief, Exhibit 4: Project Implementation Agreement. "The NG-KIH System consists of a middle mile network consisting of fiber segments and sites" as identified in the Project Agreement. *Id.*, Exhibit 3. KCNA further describes the NG-KIH Network, and related networks as a:

"middle-mile network connecting the Internet secured from long-haul network to last-mile networks. A long-haul network is a connection over long distances, between countries, nationwide, and between states, large towns, cities and other political subdivisions ("Long-Haul Network"). A middle mile network ("Middle-Mile Network") is the connection between the last-mile connections and the Long-Haul Network. A Middle-Mile Network *does not* connect directly to retail consumers. Rather, a last-mile network is the final leg of an internet connection between an ISP [Internet Service Provider], and the consumer (residents and businesses) ("Last-Mile Network"). ... The Last Mile Network is the connectivity (from an ISP) that passes to a home or business to allow them to use the Internet through a Middle-Mile Network. The distinction between the Middle-Mile Network and Last-Mile Network is reflected in the 2019 Kentucky Broadband Planning Strategic Plan: "The completed network will be open access, meaning that all last mile providers will be able to lease fiber from the state network to run last mile fiber to homes and businesses. This expanded fiber footprint in Kentucky will encourage last mile providers to build off the network and provide service to underserved areas."

² KCNA requested additional relief by way of "counter determinations" in its Response, which were objected to by OpenFiber. The Secretary declines to rule at this time on such an objection, and further declines to rule at this time on the entirety of the requested "counter determinations." Due to the nature of the dispute, however, a portion of KCNA's "counter determinations" directly relate to the issues presented by OpenFiber and are therefore addressed accordingly in this Determination.

Id., p. 5 (citing Exhibit 1: Strategic Plan) (emphasis original). KCNA ultimately argues that OpenFiber is responsible for monetizing the NG-KIH Middle Mile-Network and has failed to do so.


Pursuant to the Wholesaler Agreement, KCNA granted OpenFiber, as the Wholesaler, the exclusive right to use the Additional Capacity of the NG-KIH for the provision of Wholesaler Services. *See* Wholesaler Agreement, Section 3.1(a). KCNA is further obligated to provide OpenFiber with access to the PPP Network Assets to the extent required for the provision of Wholesaler Services. *Id.*, Section 3.1(b). OpenFiber's limitation to providing Wholesaler Services is supported by the nature of the network in question, which was explicitly established as a Middle-Mile Network in the underlying Master Agreement. *See* KCNA Response Brief, Exhibit 2. Further, with respect to the Wholesaler Agreement, it states that "[T]he Wholesaler agrees that none of this Additional Capacity will be reserved for Wholesaler Services; provided that once the Wholesaler has entered into a User Agreement to provide Wholesaler Services that depend upon the Additional Capacity, such Additional Capacity will be reserved for such Wholesaler Services for the term of such User Agreement." Wholesaler Agreement, Section 3.1(c). As such, the role of OpenFiber in relation to the NG-KIH System is that of a Wholesaler. Further, the Wholesaler Agreement stems from the Master Agreement, which describes the NG-KIH System as a middle-mile network. The Strategic Plan – KY Broadband Planning: 2019 Update, cited by KCNA, notes that the KG-KIH System will not provide internet service to end users such as individuals or businesses. KCNA Response Brief, Exhibit 1. Therefore, the relevant agreements define the Parties' roles in a manner contrary to OpenFiber's claims. The customers referenced by OpenFiber, such as rural healthcare providers and addiction clinics, are not subject recipients of Wholesaler Services, as set forth in the Wholesaler Agreement. Accordingly, OpenFiber's interpretation of the Wholesaler Agreement authorizing it to act as a Last-Mile Network provider, particularly with no input from KCNA, is not supported by the documents provided in the instant dispute and must be rejected by the Secretary.

OpenFiber's argument that the Wholesaler Agreement contemplates two types of Changes related to the Wholesaler's right to access the NG-KIH System, ultimately affording OpenFiber "an unfettered right provided by the Wholesaler Agreement to access and use the Additional Capacity of the NG-KIH System to route user traffic over it[.]" is likewise unsupported by the Wholesaler Agreement. OpenFiber Dispute Notice, p. 3. The Wholesaler Agreement unambiguously states that the Commonwealth "hereby grants to the Wholesaler the exclusive right to use the Additional Capacity for the provision of Wholesaler Services during the Term." Wholesaler Agreement, Section 3.1(a). As the relevant role of OpenFiber as a Wholesaler is set forth in the Wholesaler Agreement, coupled with the supporting documentation describing the NG-KIH System as a Middle-Mile Network, the customers claimed by OpenFiber do not align with the requirement of acting as a Wholesaler. Therefore, OpenFiber does not have such an unlimited right to act as set forth in the Dispute Notice.

With respect to the OpenFiber's remaining arguments regarding the applicability of various changes to the NG-KIH System, such changes are specifically defined in submitted documents, including the Wholesaler Agreement, Schedule 1, Changes and Minor Works. A "Change" is defined broadly in the Wholesaler Agreement as "an NG-KIH System Change or an Operations Co Services Change as the context requires[.]" As discussed above, OpenFiber is not granted

unlimited rights with respect to the noted actions affecting the NG-KIH System and neither is OpenFiber provided the opportunity to act outside the relevant Change procedures. Therefore, OpenFiber is again not provided any “unfettered” right to act outside the terms of the Wholesaler Agreement, and related documents. Further, to the extent information related to a Change is required by KCNA, such is also controlled by the Change procedures. *See* Wholesaler Agreement, Schedule 1, Changes and Minor Works, Section 2. KCNA must comply with the parameters set forth in the Wholesaler Agreement when requesting relevant Change information, but it is inherent in the underlying process that such a request for information is provided for in the agreements.

Therefore, the Finance Secretary hereby DENIES OpenFiber’s claims for breach of contract pursuant to the relevant agreements between the Parties. OpenFiber is required to act as a Wholesaler, as set forth in the Wholesaler Agreement, and related documents. To the extent changes to the NG-KIH System are proposed, the Change procedures also set forth in the Wholesaler Agreement, and related documents, control and must be complied with. In accordance with KRS 45A.235, the decision by the Secretary shall be final and conclusive.


Holly M. Johnson, Secretary
Finance and Administration Cabinet

cc: Kathy Robinson, OPS



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No. 24-04

September 13, 2024

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Determination No. 24-04
NG-KIH Contract Dispute
September 13, 2024

RE: The Next Generation Kentucky Information Highway (“NG-KIH”) Project –
Contract Dispute Regarding Wholesaler Agreement Change

Dear Counsel:

The Finance and Administration Cabinet (“Finance”) is in receipt of the Kentucky Communications Network Authority’s (“KCNA”) letter (“KCNA Dispute Notice”) noticing a contract dispute with OpenFiber Kentucky Company, LLC (“OpenFiber”) dated June 6, 2024.¹ Under the Kentucky Model Procurement Code, KRS Chapter 45A (“KMPC”), the Secretary is authorized, subject to limitations otherwise established by law, to resolve claims or controversies involving state contracts. Specifically, KRS 45A.230 authorizes the Secretary to:

...settle, compromise, pay, or otherwise adjust the claim by or against, or controversy with, a contractor relating to a contract entered into by the Finance and Administration Cabinet on behalf of the Commonwealth or any state agency, including a claim or controversy based on breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission...

KCNA submits this contract dispute pursuant to KRS 45A.235, which states in relevant part that if a controversy regarding a state contract cannot be resolved by agreement, the Secretary shall issue a decision in writing and that decision shall be final and conclusive. Upon review of the parties’ submissions, this matter is properly before the Secretary for Determination.

BACKGROUND

The NG-KIH is Kentucky’s project to establish the infrastructure for a high-speed statewide internet communication system. KCNA was created to oversee that project. KRS 154.15-020. The NG-KIH will provide broadband services to various sites throughout the state, which include state agencies and public universities. KCNA brings forth the instant contract dispute based upon a disagreement with OpenFiber concerning components of the NG-KIH, specifically “twenty physical structures referred to as communication shelters, or ‘Huts.’” KCNA Dispute Notice, p. 2. Prior proceedings before the Secretary addressed matters associated with the originally built Huts. (FAC Dispute Nos. 21-03 and 21-20). Due to issues with the original Huts, the parties entered into a Wholesaler Agreement Change, authorized by Section 4 of the Wholesaler Agreement, to remove the original Huts and build Replacement Huts. *Id.* p. 2; see also KCNA Dispute Notice Exhibit 1, Wholesaler Agreement.

The Wholesaler Agreement Change, dated October 29, 2020, was entered into by KCNA, referred to as the “Authority” in the relevant documents, OpenFiber, referred to as the “Wholesaler” in the relevant documents, and KentuckyWired Operations Company, LLC (“KWOC”), referred to as the “Operations Co.” in the relevant documents. These entities are the same parties subject to the underlying Wholesaler Agreement dated October 13, 2017. In short, the NG-KIH contract dispute arises from KCNA’s allegation that OpenFiber has refused to honor KCNA’s purchase of the Replacement Huts, as set forth in the Wholesaler Agreement Change, which set forth the purchase price of the Replacement Huts as \$7,756,991.23. Wholesaler

¹ Received on June 7, 2024.

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Agreement Change, p. 2. The Agreed Terms of Change included a cap for costs of 10% of the estimate without “the Authority’s prior written approval.” *Id.* KCNA claims it “stands ready to pay the Purchase Price of the Huts” in accordance with the Wholesaler Agreement Change at a price inclusive of the full 10% increase, which totals \$8,532,690.35. KCNA Dispute Notice, p. 3-4.

OpenFiber objects to KCNA’s attempt to purchase the Replacement Huts for the amount specified in the Wholesaler Agreement Change. Specifically, OpenFiber’s June 26, 2024, Response (“OpenFiber Response”) to KCNA’s Dispute Notice claims that KCNA requested improvements and changes that were not contemplated by the Wholesaler Change Agreement and states “OpenFiber incurred at least \$2,184,250.96 in additional costs to make improvements and changes that were not contemplated by the Change Agreement.” OpenFiber Response, p. 1. OpenFiber therefore argues that allowing KCNA to purchase the Replacement Huts at a price that allegedly “does not reflect the cost of those improvements and additions would unjustly enrich KCNA and unfairly deprive OpenFiber of costs it incurred in good faith.” To support OpenFiber’s position, it has provided various email correspondence between the parties discussing the construction and organization of the Replacement Huts. OpenFiber Response, Ex. B. OpenFiber claims such correspondence demonstrates that “KCNA required and approved material changes to the original scope of work under the Change Agreement” and the abovementioned purchase price for the Replacement Huts is therefore not applicable. OpenFiber Response, p. 9.

In support of their respective positions, and pursuant to Finance’s briefing schedule set forth in the June 12, 2024, Notice, the parties submitted the following to the Secretary regarding this contract dispute:

1. KCNA’s initial letter, with attachments, noticing this contract dispute dated June 6, 2024; and
2. OpenFiber’s Response Brief, with attachments, dated June 26, 2024.

Based upon a review of the relevant contract documents, the information provided by the Parties, and the reasons set forth below, the Secretary determines that KCNA’s request to purchase the Replacement Huts for the amount specified in the Wholesaler Agreement Change is supported by the relevant contract language.

ANALYSIS

As noted above, NG-KIH is Kentucky’s project to establish the infrastructure for a high-speed statewide internet communication system. To establish such a network, KCNA, a state agency, was created to oversee the project. The agreement central to this contract dispute is the Wholesaler Agreement Change, dated October 29, 2020, and entered into by KCNA (“Authority”), OpenFiber (“Wholesaler”), and KWOC (“Operations Co.”). The Wholesaler Agreement Change sets forth details regarding actions concerning the original NG-KIH Huts and the design and construction of Replacement Huts. The Wholesaler Agreement Change was entered into based upon Section 4.1, Section 4.2, and Schedule 1, Section 2.5 of the Wholesaler Agreement, which establishes “Wholesaler Assets,” “Ownership of Wholesaler Assets,” and Modification of Processes and Procedures. *See* KCNA Dispute Notice, Ex. 1.

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The Wholesaler Agreement Change states that the “Wholesaler is willing to request and enter into this Change to purchase, invest in, and procure the design and construction of new structures and related equipment to replace the Huts (the “Replacement Huts”) and allow for their use in connection with the NG-KIH System.” Wholesaler Agreement Change, Recital E. Further, the documents state that “the parties desire for initial ownership of the Replacement Huts to be with Wholesaler until Authority purchases (or is deemed to have purchased) the Replacement Huts as set forth in this Change. *Id.*, Recital F. The details of the removal of the original Huts, and the design and construction of the Replacement Huts, are further set forth in the documents, which state that such acts are termed “Wholesaler Hut Replacement Services.” *Id.*, Agreed Terms of Change, 1. The terms thereafter direct the Wholesaler to:

- (a) Remove and deliver the Huts to, or on behalf of the Authority to a location designated in writing by the Authority; and
- (b) Replace the Huts with Replacement Huts, which are to be situated on existing Hut sites set forth on the attached Schedule A (together “Wholesaler Hut Replacement Services”), in each case in accordance with the April 8, 2020 General Terms and Conditions of Sale and Statement of Work No. 9, Telecommunication Site Upgrades and Improvements, Quote Number 2020-052698 between Wholesaler and Fujitsu Network Communications, Inc., which the parties agree is in compliance with industry standards and the requirements of applicable law and regulations.

Id. The documents obligate the Wholesaler to “contribute such personnel and resources as are reasonably necessary to carry out the Wholesaler Replacement Services as efficiently and expeditiously as possible.” *Id.*

The Wholesaler Agreement Change also details payments for “Hut Improvement/Replacement.” *Id.*, Agreed Terms of Change 2. Specifically, the document states:

Wholesaler estimates the cost to provide the Wholesaler Hut Replacement Services to be approximately \$7,756,991.23, as further set forth in Schedule B. All expenditures will qualify as Capital Expenditures made in connection with Wholesaler Services under Section 1.1 of the Wholesaler Agreement. If the actual cost of the Wholesaler Hut Replacement Services exceeds the estimated amount set forth above, Wholesaler shall bear such excess costs, and the Purchase Prices (defined below) will be increased to reflect the excess costs; provided, however, Wholesaler shall not incur additional costs above the estimate for any tranche set forth in Schedule B in excess of ten percent (10%) of the estimate of such tranche as set forth on Schedule B without the Authority’s prior written approval. In addition, if the actual cost of the Wholesaler Hut Replacement Services is less than the estimate, the Purchase Prices (defined below) will be reduced accordingly. For clarity, the Purchase Prices set forth on Schedule B include all anticipated expenditures of Wholesaler in connection with the Wholesaler Replacement Services, including labor, but do not include the Capital Return that may accrue on such Purchase Prices in accordance with the Wholesaler Agreement. For further clarity, any such Capital Return shall (a) begin accruing on the date the Wholesaler

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actually makes such expenditure, (b) shall accrue only on the unpaid (including deemed paid) portion of the Purchase Prices, and (c) shall be amortized over five (5) years.

Id.

In addition to the above detailed cost breakdown set forth in the relevant documents, such also defines ownership related to the project. *Id.*, 3. Replacement Hut Ownership. The relevant portion states, in pertinent part, the following:

- (a) In accordance with Section 4.2 of the Wholesaler Agreement, the parties agree that the Replacement Huts (excluding any salvaged equipment from the Huts, which shall be property of the Authority and be transferred to the Authority at a location designated by the Authority at Wholesaler's sole cost and expense) will be Wholesaler Assets and will remain owned by Wholesaler until the Authority purchases or is deemed to purchase the Replacement Huts (in whole or as segregable components) as set forth in this Change, including Schedule B attached hereto. ...
- (b) The Authority shall: (i) purchase the Replacement Huts and identified components thereof for the prices set forth on Schedule B (as adjusted from time to time) ("Purchase Prices") by delivering cash or other immediately available funds to Wholesaler ...
- (c) The Authority may purchase the Replacement Huts and components thereof in any combination of Section 3(b)(i) and (ii) above (at the Authority's sole option), using funds from any source, at any time and without prepayment penalty. ...
- (d) ...
- (e) Receipt of the Purchase Price(s) will not constitute "revenue generated by Wholesaler Services" in accordance with the calculation of Net Ancillary Revenue under the Wholesaler Agreement.

Id.

In support of each party's position, email correspondence has been provided as exhibits to KCNA's Dispute Notice and OpenFiber's subsequent Response. Notably, the correspondence involving KCNA, OpenFiber, and related entities, discusses a variety of matters related to the Replacement Huts, such as network rack placement and cable management. *See* OpenFiber Response, Ex. B. However, upon review of such correspondence, as well as the remainder of the parties' filings, the record does not reflect a reference to the Agreed Terms of Change set forth in the Wholesaler Agreement Change. Specifically, the provided correspondence does not address the requirement set forth in the Agreed Terms of Change, 2. Payment for Hut Improvement/Replacement, that "Wholesaler shall not incur additional costs above the estimate for any tranche as set forth on Schedule B without the Authority's prior written approval." While OpenFiber argues that KCNA's responses related to the design process do amount to approval, and that holding otherwise would amount to unjust enrichment, such an argument is not supported by the record, as it lacks any notice to KCNA that the estimated prices exceed the original estimate plus the related 10% increase. *See* OpenFiber Response, p. 2.

OpenFiber's correspondence does not detail a notice to KCNA that the costs associated

Determination No. 24-04
NG-KIH Contract Dispute
September 13, 2024

with the Replacement Huts project exceeded the original estimate of \$7,756,991.23, nor the 10% cap, set forth in the relevant contract section, which obligated OpenFiber to receive prior written approval from KCNA. Therefore, the Secretary finds, based upon the submissions in the record, that KCNA is entitled to proceed with the purchase as established by the Wholesaler Agreement Change.

DETERMINATION

Pursuant to KRS 45A.230 the Secretary has express authority to, “settle, compromise, pay, or otherwise adjust the claim by or against, or controversy with, a contractor relating to a contract entered into by the Finance and Administration Cabinet on behalf of the Commonwealth,” prior to the institution of an action in civil court. KCNA’s present dispute directly relates to the contractual obligations of OpenFiber, and the Secretary finds that it is appropriate to issue a Determination addressing the purchase set forth in the Wholesaler Agreement Change. As the record does not reflect notice to KCNA, as required by Agreed Terms of Change, 2. Payment for Hut Improvement/Replacement of the Wholesaler Agreement Change, and the required permission to exceed the estimated price and 10% increase related to such Hut Improvement/Replacement, the Secretary finds that KCNA is entitled to proceed with the purchase as outlined in the relevant contract documents.

In accordance with KRS 45A.235, the decision by the Secretary shall be final and conclusive.

DocuSigned by:

Holly M. Johnson

81C993F6FA23433

Holly M. Johnson, Secretary
Finance and Administration Cabinet

Cc: Kathy Robinson, OPS

Franklin Circuit Court Orders

1. 2023.11.22 Order Granting TRO
2. 2024.06.11 Order Denying OFKy's Motion for Temporary Injunction
3. 2024.09.24 Order Denying OFKy's Motion for Summary Judgment
4. 2024.02.27 Order Denying OFKy's Motion for Temporary Injunction
5. 2024.03.17 Order Granting OFKy's Motion Seeking Clarification On Required Information Disclosure

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**COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 23-CI-01049**

**COMMONWEALTH OF KENTUCKY, THE
KENTUCKY COMMUNICATIONS
NETWORK AUTHORITY**

PLAINTIFF

v.

**ORDER GRANTING RESTRAINING ORDER
(CR 65.03)**

**OPENFIBER KENTUCKY COMPANY, LLC
AND KENTUCKYWIRED OPERATIONS
COMPANY, LLC, et al.**

DEFENDANTS

This action came before the Court on the Plaintiff's *Motion for Injunctive Relief by Temporary Restraining Order and Temporary Injunction*, which was heard on Monday, November 20, 2023, in Courtroom H of the Franklin County Circuit Court. This Court, having reviewed the record and being sufficiently advised, **RESERVES RULING** on the Plaintiff's Motion for Temporary Injunction under CR 65.04, but **GRANTS** a limited **RESTRAINING ORDER** under **CR 65.03** for reasons stated more fully below.

Factual Background

The Commonwealth alleges that, "Defendant OpenFiber has engaged in a pattern and practice of accessing and altering the NG-KIH System without obtaining the requisite authorization, written consent, and supervision." *See Pl. 's Verified Compl. For Inj. Relief*, at 8. Further, the Plaintiff claims Defendant has been making changes to sites on the NG-KIH System (the "System") without obtaining a PPP Change Certificate as well as written consent from KWOC. *Id.* Taken together, the Commonwealth asserts that Defendant's access to and alteration of the System constitutes breach of the parties' Wholesaler Agreement and risks service

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disruption and undocumented changes to the System configuration. *See Pl. 's Verified Compl.*, *supra* at 9.

The Plaintiff's *Verified Complaint* alleged three various events that demonstrate OpenFiber's wrongful actions taken with respect to the System, all of which occur between September to October 2023. *Id.* at 9-21. The Commonwealth emphasizes that the Wholesaler Agreement provides the procedures for accessing and altering the System, but that OpenFiber has failed to comply with the procedures by taking unilateral action on preliminary change instructions (PCI). *Id.* at 21. Plaintiff argues that the Defendant's actions (splicing) cannot be undone, reflecting an immediate harm. *Id.* at 23.

In response to the alleged wrongful actions of Defendant in accessing and altering the system from September to October 2023, the parties entered an interim agreement from November 2 to November 15, 2023. *Id.* at 25. Ultimately, the Commonwealth's *Verified Complaint* seeks to enjoin OpenFiber from "accessing the NG-KIH System without written consent from KWOC, altering or otherwise changing the NG-KIH System without the issuance of a PPP Change Certificate, or otherwise performing work without proper supervision." *Id.* at 26-27.

Burden of Proof

Motions for Temporary Restraining Orders are granted if three prongs are satisfied under CR 65.03(1). The three prongs of a TRO require that the:

- (1) applicant's rights are being or will be violated by the adverse party; (2) the applicant will suffer immediate and irreparable injury, loss or damage before the adverse party or his attorney can be heard in opposition; and (3) the applicant's attorney must certify in writing any efforts made to give notice to the adverse party, including an explanation of why notice should not be required.

Because the parties appeared for the Court's hearing and notice was given to the Defendant, the proper analysis will focus on a Motion for Temporary Injunction.

Motions for Temporary Injunctions are decided under CR 65.04, which requires the movant to clearly show an immediate and irreparable injury to its rights that would tend to make a final judgment ineffectual in the absence of injunctive relief. Kentucky courts are guided by the *Maupin* test in analyzing whether three necessary elements are satisfied to grant a temporary injunction. *See Maupin v. Stansbury*, 575 S.W.2d 695, 699 (Ky. Ct. App. 1978). *Maupin* first instructs that the Court find a showing of irreparable injury. *Id.* Next, the *Maupin* test requires a balancing of the equities involved in the case, including the non-exhaustive factors of possible detriment to the public interest, harm to the defendant, and whether injunctive relief would maintain the status quo. *Id.* Last, *Maupin* requires the movant to present a substantial question on the merits, without the Court deciding the actual merits in its ruling on the motion for the Temporary Injunction. *Id.*

Analysis

Maupin: Immediate & Irreparable Harm

In *The Commonwealth's Motion for Injunctive Relief by Temporary Restraining Order and Temporary Injunction*, the Plaintiff asserted its rights in the System were concrete and personal and entitled Plaintiff to protect its current and future use. *See Pl.'s Mot. For Inj. Relief*, at 11. Plaintiff contends its rights in the System were harmed by OpenFiber's access and alteration of the System without authorization or supervision. *Id.* Further, OpenFiber's failure to follow the Wholesaler Agreement procedures may put the Plaintiff's right to use the System in the future at risk. *Id.* The Defendant's failure to obtain authorized access will apparently

permanently change the character and nature of the system in a way that threatens online access for 766 state agencies. *See Pl. 's Mot. For Inj. Relief, supra* at 12, 14.

OpenFiber, in its *Opposition to Plaintiff's Motion for Temporary Restraining Order and Temporary Injunction*, argued no evidence supports Plaintiff's contention that the unauthorized access and alterations interfere with the character and nature of the System. *See Opp'n to Pl. 's Mot. for Temp. Restraining Order and Temp. Inj.*, at 5. Specifically, OpenFiber responds that there is no allegation their access caused any harm and that KWOC had already approved the technical proposals in the apparently unauthorized actions on the System. *Id.* at 7. Ultimately, OpenFiber argued whatever rights the Plaintiff (KCNA) has in the system, such as the right to approve commercially sound transactions related to connections with the System, can be rectified with money, so there is no immediate and irreparable harm sufficient to issue injunctive relief. *Id.* at 8.

The Court finds the Commonwealth has sufficiently alleged immediate and irreparable harm to its rights in the System to satisfy the first *Maupin* prong. The alleged wrongful access and alterations from Defendant have already occurred and may continue to occur in the absence of injunctive relief. Therefore, the Court finds the Plaintiff has alleged immediate and irreparable harm. OpenFiber argues that the only possible injury to the Plaintiff is monetary, and therefore the alleged injury is not irreparable and cannot afford a basis for injunctive relief. In order to preserve the status quo until the Court can more fully evaluate the merits of these arguments, the Court finds that the issuance of a Restraining Order is necessary.

Maupin: Balancing of Equities

The Commonwealth argues that three factors weigh the balance of the equities in its favor: detriment to the public interest, harm to defendant, and preservation of the status quo. *See*

Pl. 's Mot. For Inj. Relief, supra at 17. The Plaintiff alleges that without injunctive relief, “the majority of the Commonwealth’s Sites, which are SLA3 and vulnerable to losing access to the NG-KIH System, would be at risk of being compromised by future unauthorized acts by OpenFiber.” *Id.* Additionally, the Plaintiff asserted its interests in “maintaining the sanctity of the NG-KIH System outweigh OpenFiber’s “individual business interests” in accessing the NG-KIH System to profit from it.” *See Pl. 's Mot. For Inj. Relief, supra* at 17. Last, the Commonwealth argues injunctive relief will preserve the status quo by protecting the System by requiring access and alterations to be authorized. *Id.* at 17.

OpenFiber counters that requiring approval for every routine interaction is logistically unsupportable and imposes substantial harm on the public interest. *See Opp'n to Pl. 's Mot. for Temp. Restraining Order and Temp. Inj., supra* at 8. Specifically, it argues that the people and businesses of Kentucky are being done a great disservice when the Plaintiffs demand *quid pro quo* compliance with its reinterpretation of the Wholesaler Agreement. *Id.* Particularly affected are the customers OpenFiber says are currently under contract to access the System but who will be unable to access their broadband connection. *Id.* at 9. The Court highlights OpenFiber’s contention that essential facilities like outpatient clinics, addiction centers, and mental health clinics are all adversely affected when routine splicing interactions are not reasonably consented to by KCNA. *Id.* Additionally, OpenFiber persuasively argues that KCNA’s blanket refusals to consent to access and alterations to the System will effectively force it to shut down as it awaits the outcome of trial, while also depriving the Commonwealth of a potential revenue stream. *Id.*

The Court finds that the balance of the equities weighs in favor of granting limited relief that requires the Defendant to comply with the compliance procedures for access and alteration of the System laid out in the Schedules of the Wholesaler Agreement, but that the

Commonwealth must also be prohibited from unreasonably withholding consent to PCI's submitted by Defendant OpenFiber that were contemplated by the contract (Wholesaler Agreement) and approved by KWOC.

Maupin: Substantial Question on Merits

The Commonwealth alleges that it has raised a substantial question on the merits on the issue of whether OpenFiber failed to comply with the PCI procedures in the Wholesaler Agreement. *See Pl.'s Mot. For Inj. Relief, supra* at 18. The Wholesaler Agreement contemplated injunctive relief in the event of non-compliance with access and alteration procedures. *Id.* at 19.

OpenFiber argues that the Plaintiff relies on a misinterpretation of the operative Wholesaler Agreement. *See Opp'n to Pl.'s Mot. for Temp. Restraining Order and Temp. Inj., supra* at 10. Under the Defendant's preferred interpretation, OpenFiber would not need permission from Plaintiff to perform routine splices that would not degrade fibers or harm the integrity of the System. *Id.* Consequently, the Defendant's position is that routine splicing interactions are outside the scope of changes to the System that require PPP certificates from KCNA. *Id.*

The Court finds that the Commonwealth has raised a substantial question over the correct interpretation of scope of the contract's requirement for OpenFiber to obtain prior authorization for its actions from the Commonwealth under the Wholesaler Agreement. The Defendant may still be able to show the Commonwealth has unreasonably withheld consent to routine interactions contemplated in the expectations of the contract, or that its actions in routine splicing of wire to gain access to the system for new customers are not subject to review and approval by the Commonwealth. However, at this early stage of the proceedings a substantial question has been raised by the Plaintiff sufficient to issue limited injunctive relief. This

finding by the Court is reinforced by the on-going administrative review of the contract issue by the Secretary of Finance & Administration pursuant to KRS Chapter 45A, and it will preserve the status quo until the Secretary is able to decide the issue of contract interpretation as required by law. Moreover, the Court is mindful that this entire project is funded by public dollars, and the public interest demands that the Plaintiff, OpenFiber and KWOC all work cooperatively to achieve the vital goals and objectives of expanding access to high speed internet throughout the Commonwealth. Accordingly, the Court expects all parties to work cooperatively to achieve that goal while this legal dispute over interpretation of the rights and duties of the parties is adjudicated.

Conclusion

WHEREFORE, the Plaintiffs' Motion for a Restraining Order is **GRANTED**. The Court orders an extension of the parties' Agreed Order entered into on November 17, 2023, and attached as Exhibit A to the Plaintiff's November 21, 2023 filing of its *Notice and Motion to Extend Agreed Order*. The Court further **RESTRAINS** OpenFiber from conducting any splicing (or other interactions which require a physical alteration) of the System, unless it has obtained consent from KWOC and KCNA as contemplated in the procedures in the various Schedules of the Wholesale Agreement. The Court further **ORDERS** that the Plaintiff KCNA shall not unreasonably withhold timely consent to routine splicing interactions contemplated in the contract.

OpenFiber is **RESTRAINED** from making physical alterations to the system prior to obtaining approval for its proposed PCI's from KWOC and KCNA after giving adequate notice. If the Plaintiff KCNA fails to give timely consent to such routine interactions that require

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splicing or other reasonably contemplated technical alterations (as documented in PCI's), then
OpenFiber may seek expedited relief from this Restraining Order in this Court.

So **ORDERED** this 22nd day of November, 2023.



PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

Bond: Not required under CR 81A

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**COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CONSOLIDATED CIVIL ACTION NOS. 23-CI-01049
24-CI-00333**

**COMMONWEALTH OF KENTUCKY,
KENTUCKY COMMUNICATIONS
NETWORK AUTHORITY**

PLAINTIFF

V.

**OPENFIBER KENTUCKY COMPANY, LLC, and
KENTUCKY WIRED OPERATIONS COMPANY, LLC**

DEFENDANTS

V.

ORDER

OPENFIBER KENTUCKY COMPANY, LLC

PLAINTIFF

V.

**COMMONWEALTH OF KENTUCKY,
KENTUCKY COMMUNICATIONS
NETWORK AUTHORITY, and
KENTUCKY WIRED OPERATIONS COMPANY, LLC**

DEFENDANTS

The Court has considered the parties' submissions in response to the directive in its May 31, 2024, Order following the May 29, 2024, hearing. Having reviewed those submissions, the parties' briefs and papers, and having considered the parties' arguments and the testimony presented at the hearing, the Court hereby makes the following findings.

The Court notes that KCNA's supplemental filing in the form of an avowal, which included the Affidavit of KCNA Controller, Mitchell Powers, and other financial documents filed under seal (Notice in Response to Court's Order, Exhibit A, file date June 3, 2024), while potentially relevant to the disposition of the underlying case against OpenFiber, is not relevant to the pending motion for injunctive relief. The Court notes the avowal of KCNA presents significant issues that

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need to be developed in the record, and which could bear on the merits of the claims and defenses being asserted herein.

However, the Court is persuaded that OpenFiber has failed to provide sufficient evidence to satisfy its burden of establishing that it is entitled to a temporary injunction under CR 65.04(1) and *Maupin v. Stansbury*, 575 S.W.2d 695, 698 (Ky. App. 1978).

The Supreme Court of Kentucky has enunciated the standard for determining whether to award a temporary injunction in the following manner:

CR 65.04(1) provides that a temporary injunction may be issued by the circuit court if it is clearly shown that the moving party's rights are being violated, or will be violated, by an adverse party and that the moving party will suffer immediate and irreparable injury, loss, or damage pending a final judgment in the action, or that the acts of the adverse party will tend to render such final judgment ineffectual. "Because the elements of CR 65.04 must often be tempered by the equities of the particular situation, injunctive relief is basically addressed to the sound discretion of the circuit court." *Maupin v. Stansbury*, 575 S.W.2d 695, 698 (Ky.App.1978) (citing *Bartman v. Shobe*, 353 S.W.2d 550 (Ky.1962)).

Clearly, OpenFiber will not suffer *direct* immediate and irreparable injury if the Court does not enter an injunction requiring KCNA to approve connections of the 15 KDE sites. As OpenFiber itself point out:

The connections are necessary so Kentucky schools can keep pace with the increasing reliance on technology-based instruction in schools, which has greatly accelerated since the COVID-19 pandemic. Absent a mandatory injunction, there will not be enough time for all the necessary work to be done to effectuate the KDE-location connections in time for the upcoming school year.

(Mot. for Temp. Inj. p. 11.) OpenFiber's argument makes clear that if any entity is to suffer from the failure to connect the 15 KDE sites before the "deadline" that OpenFiber insists is crucial, it is either Education Networks of America Services, LLC (ENA), with whom OpenFiber has contracts, or the Kentucky Department of Education (KDE), with whom ENA is contracted, neither of whom are parties to this litigation, rather than OpenFiber itself. In fact, OpenFiber failed to present

testimony from a representative of either ENA or KDE to establish the alleged immediate and irreparable injury that either one might face if the temporary injunction were not granted.

The only evidence potentially reflecting either of these entity's positions on the issues before the Court is an email purportedly from KDE Associate Commissioner David Couch to Brad Kilbey of Aceelecom dated Friday, May 10, 2024, in which he states the following:

Our current federal e-rate eligible contract (i.e., KIH3) ends on 30 June 2024 and we are far past any opportunity to continue to make it e-rate eligible beyond that 30 June 2024 date. Therefore, it is crucial that we transition all our current 171 districts from KIH3 to Education Network of America's (ENA) service by June 2024.

(Mot. for Temp. Inj., Ex. 8.) Thus, while it appears that KDE would like to keep its federal contract e-rate eligible by complying with a June 30, 2024, connectivity deadline, that fact is a far cry from satisfying a requirement of "immediate and irreparable injury" for purposes of a temporary injunction under CR 65.04(1).

On the contrary, the testimony at the May 29, 2024, hearing indicated that multiple options exist for connecting to the Next Generation – Kentucky Infrastructure Highway (NG-KIH) System. The testimony indicated that the KDE sites could be connected prior to the beginning of the school year and that any intervening deadlines could be extended. Moreover, it is important to note that the 15 KDE sites in question currently have internet service, and even if they were not connected to the NG-KIH System prior to the beginning of the school year, they would not be without internet service.

Because the Court finds that OpenFiber cannot satisfy its burden of establishing immediate and irreparable harm in accordance with CR 65.04(1), it is unnecessary to undergo further analysis of the requirements of *Maupin v. Stansbury*.

Therefore, IT IS HEREBY ORDERED AND ADJUDGED that OpenFiber's *Motion for Temporary Injunction* is **DENIED**.

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SO ORDERED this 10th day of June 2024.



PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

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All Counsel

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**COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 23-CI-01049
CONSOLIDATED WITH CIVIL ACTION NO. 24-CI-333**

**COMMONWEALTH OF KENTUCKY, THE
KENTUCKY COMMUNICATIONS
NETWORK AUTHORITY**

PLAINTIFF

v.

ORDER

**OPENFIBER KENTUCKY COMPANY, LLC
AND KENTUCKYWIRED OPERATIONS
COMPANY, LLC, et al.**

And

KENTUCKY WIRED OPERATIONS COMPANY, LLC

DEFENDANTS

This matter is before the court on Defendant's Motion for Partial Summary Judgment. The underlying dispute concerns the interpretation of a public contract, the Wholesaler Agreement between the Commonwealth of Kentucky, Kentucky Communications Network Authority (KCNA) and OpenFiber Kentucky Company, LLC, the private entity hired by the Commonwealth to construct the infrastructure for the extension of high-speed internet throughout the Commonwealth. Defendant OpenFiber seeks declaratory relief on three distinct grounds. First, OpenFiber asks the Court to declare that they may sell access to the Next Generation-Kentucky Infrastructure Highway System to any third party. Second, OpenFiber asks the Court to determine that Kentucky Communications Network Authority (KCNA) does not have the right to review and approve OpenFiber's customers. Finally, OpenFiber asks the Court to declare that KCNA must utilize any oversight authority in good faith, which it defines in its motion as

applying OpenFiber's interpretation of its contract with KCNA. The Court finds that there are disputed issues of material fact on all of these issues, and therefore **DENIES** Defendant's Motion.

BACKGROUND

The Next Generation-Kentucky Infrastructure Highway System (NG-KIH) is a middle-mile network meant to connect last-mile Internet Service Providers (ISPs) to long-haul networks. *See Pl.'s Response in Opposition to Def.'s Mot. for Partial Summ. J.*, at 1-2. The Commonwealth initiated the project with the goal of addressing the public problem of a lack of access to the internet in Kentucky. The NG-KIH System was constructed with approximately double the necessary capacity in order to anticipate future needs in state-run sectors and to encourage the development of a competitive private sector market in the Commonwealth. This Additional Capacity would also be an asset for the Commonwealth to commercialize to maximize the return on the initial investment. *Id.* at 2. In order to commercialize this Additional Capacity and make the NG-KIH System into a financially sustainable asset, the Commonwealth contracted with Macquarie Infrastructure Developments, LLC, a wholly owned subsidiary of Macquarie Capital (Macquarie). *Id.* at 3. OpenFiber appears to be a subsidiary private entity owned and controlled by Macquarie, and established for the purpose of implementing Macquarie's obligations to the Commonwealth. The Commonwealth also contracted with KentuckyWired Infrastructure Company, Inc., (KWIC) agreeing that KWIC would design, build, operate, and maintain the NG-KIH System, later assigning those duties to KentuckyWired Operations Company, LLC (KWOC). *Id.* The Commonwealth then entered into a Wholesaler Agreement with KWOC and OpenFiber. *Id.* at 3-4.

This litigation was first initiated by KCNA, when it filed suit to obtain declaratory and injunctive relief against OpenFiber, on November 16, 2023. KCNA claimed that OpenFiber was “accessing, altering, or otherwise changing the NG-KIH System” in violation of the Wholesaler Agreement in a manner that undermined the integrity of the system and inflicted irreparable injury on the Commonwealth. At the heart of this dispute was an on-going disagreement over interpretation of the contract between KCNA and OpenFiber, which was then pending before the Secretary of Finance & Administration, under KRS 45A.235. After the Secretary of Finance & Administration rejected OpenFiber’s interpretation of the Wholesaler Agreement (in a ruling dated February 29, 2024)¹, OpenFiber filed this action for judicial review of the final ruling of the Secretary. *OpenFiber v. KCNA*, Case No. 2024-CI-333, which was then consolidated with the earlier filed Case No. 23-CI-1049. OpenFiber now seeks summary judgment on its interpretation of the Wholesaler Agreement.

A. The Dispute over terms of the Wholesaler Agreement.

OpenFiber contends that the terms of the Wholesaler Agreement explicitly afford them the exclusive right to supply Wholesaler Services to any third party interested in purchasing access to the NG-KIH System from them. The contract defines “Wholesaler Services” as “communication and/or maintenance services provided by the Wholesaler to third parties.” *See Wholesaler Agreement* § 1.1. The contract then states that “the Authority hereby grants to the Wholesaler the exclusive right to use the Additional Capacity for the provision of Wholesaler Services.” *Id* § 3.1(a). Defining “third parties” as “anyone who is not a party to the contract,” OpenFiber takes these contract terms to

¹ Exhibit 6, Complaint, Case No. 24-CI-333.

mean that they, as the Wholesaler, may sell access to the Additional Capacity to any third-party customer, regardless of that customer's identity. KCNA, in contrast, argues that the entire agreement, titled "Wholesaler Agreement" contemplates that that the parties to whom OpenFiber may sell access are limited to third-parties within the context of middle-mile network that is governed by the Agreement, not to end users such as individuals or businesses. KCNA argues that to interpret the contract to eliminate any limitations on OpenFiber's third party sales would defeat the purpose of the entire agreement, and would undermine the efficacy of the network in a manner that would be inconsistent with the Master Agreement, which governs the Wholesaler Agreement.

In stark contrast to OpenFiber's interpretation of the contract, KCNA contends that the "Core Network Principles" section of the Wholesaler Agreement operates to prohibit the type of sales OpenFiber claims the absolute right to make. The very first item in the Core Network Principles states that the parties shall adhere to creating "an open access network...that separates physical network access from the delivery of services by multiple competing service providers." *Id.* § 3.2(a). As briefed before the Finance and Administration Cabinet, "an open access network is a concept through which: 'cities, partnerships, private companies, or other groups may acquire access to the middle-mile network through [ISPs] and telecommunications companies, but the network itself does not provide last-mile network services, meaning it is not designed to directly connect to the end consumer.'" *See Pl.'s Response* quoting FAC315-316, at 11. KCNA reiterates that the NG-KIH System is not intended to function as a last-mile network. They read this term in the Wholesaler Agreement's Core Network Principles to bind OpenFiber to creating an open access network whereby access to the NG-KIH System is brought to end

consumers through OpenFiber's sales to Internet Service Providers (ISPs). In essence, they read the Core Network Principles section of the Wholesaler Agreement to prohibit OpenFiber from selling access to end retail consumers directly.

B. The Dispute over when KCNA Oversight is allowed.

OpenFiber also contends that the set of "Change" procedures spelled out in the Wholesaler Agreement for connecting customers to the NG-KIH System does not include a right of review or approval for KCNA. The process for gaining access to the Additional Capacity requires OpenFiber to provide a Preliminary Change Instruction to KWOC. KWOC then assesses the scope and costs of any Change before moving forward. If a Change is a "PPP Change," it may only be implemented upon approval by KCNA. Thus, KCNA may only weigh in on a Preliminary Change Instruction if a PPP Change is proposed. *See OpenFiber's Motion for Partial Summary Judgment*, at 7-8. A PPP Change is defined in the Project Agreement as either an "NG-KIH System Change" or a "Services Change," two terms with nearly identical definitions. An NG-KIH System Change is defined as a change that includes "an addition, demolition, alteration, reconstruction or otherwise" to the NG-KIH System. *Id.* at 8. OpenFiber argues that there is a difference between an "addition" or "alteration" to the NG-KIH System and mere "access" to the System. It follows that, since KCNA may only review a PPP Change and OpenFiber's attempts to access the NG-KIH System do not amount to alterations as defined, KCNA has no right to review every Preliminary Change Instruction. OpenFiber contends that KCNA review and approval is only allowed in cases of structural or systemic changes in the system.

In opposition, KCNA contends that the Wholesaler Agreement does afford them the right to review and approve new connections to the NG-KIH System. KCNA rebuts OpenFiber's claim that the type of Change they wish to pursue is a "routine interconnection" by arguing that adding third-party connections to the System does in fact constitute a PPP Change as an "addition," "alteration," or "reconstruction" of the System. Thus, such connections fall within the Schedule 6 Change process, which gives the Commonwealth the right to oversight. *See Pl.'s Response*, at 8-9. KCNA references assessments showing that OpenFiber's contemplated activities often require splices, cuts to cables and other alterations of existing hardware in the System. *Id.* at 15. Therefore, KCNA claims that these terms in the Wholesaler Agreement must be interpreted to grant the Commonwealth oversight in connecting any third-party customers to the NG-KIH System.

C. Parallel Systems and Revenue

Another issue at the heart of this dispute concerns OpenFiber's creation of a parallel network system of equipment, which results in lost revenue to the Commonwealth. OpenFiber complains that KCNA is—in bad faith—going beyond the bounds of the contract to review and deny their attempts to connect customers to the NG-KIH System, holding up their ability to profit on the contract. KCNA complains that OpenFiber is—in bad faith—going beyond the bounds of the contract by usurping the role of a retail provider and improperly operating as a last-mile provider, avoiding their duty to extend middle-mile services to underserved communities and shirking their responsibility to secure revenue for the Commonwealth. They argue that OpenFiber's only duty under the Wholesaler Agreement is to commercialize the Additional Capacity

and broker an open-access network, attempting to attract as many purchasers as possible and reach underserved communities. *Id.* at 6. KCNA alleges that OpenFiber has constructed its own parallel system of equipment mirroring the Additional Capacity's equipment. There are unresolved factual issues as to whether OpenFiber equipment was purchased and installed at the cost of the Commonwealth, or at least whether public funds were used to subsidize OpenFiber's parallel network in order to create a last-mile network providing broadband to end consumers to the detriment of the Commonwealth. KCNA has demonstrated a concern that OpenFiber's strategy of developing its own parallel system will result in OpenFiber "cherry picking" profitable last mile customers, which could undermine the purpose of the agreement to extend internet services to the unserved and underserved.

KCNA argues that not only is the use of this parallel system contrary to OpenFiber's duty to create an open access network, but that it also deprives the Commonwealth of revenue expected under the contract. According to former KCNA Controller Mitchell Powers, in nearly five years of operation, OpenFiber has spent more than \$64.5 million, is operating at a loss of nearly \$40 million, and has not paid the Commonwealth anything from these efforts. *See Powers Aff.* at ¶¶ 24 & 31. Approximately \$22.5 million has been spent on electronics redundant to the technology available within the Additional Capacity of the NG-KIH System. *Id.* at ¶ 24. According to the Revenue Share Reports provided to KCNA by OpenFiber, the commercialization efforts have a very long way to go before the Commonwealth will receive any revenue share from Lit Fiber Services. *Id.* at ¶ 31. KCNA claims that, though Macquarie originally promised "near immediate profitability and exponential ramp up periods of

future revenue,” the lack of revenue and the “Cumulative Net Operating Loss” has entirely compromised the wholesaler business model. *See Pl.’s Response* at 18-19. While these issues are vigorously disputed, the Court cannot resolve this dispute without additional discovery, and ultimately, a trial on the merits.

STANDARD OF REVIEW

Summary Judgment is appropriate when the court concludes there is no genuine issue of material fact for which the law provides relief. CR 56.03. Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56.01.

The moving party bears the initial burden of showing the non-existence of a genuine issue of material fact, and the burden then shifts to the opposing party to affirmatively show that there is a genuine issue of material fact for trial. *Jones v. Abner*, 335 S.W.3d 471, 475 (Ky. Ct. App. 2011). The movant should not succeed unless it has shown “with such clarity that there is no room left for controversy.” *Steevest, Inc. v. Scansteel Service Ctr.*, 807 S.W. 2d 476, 482 (Ky. 1991). “The inquiry should be whether, from the evidence on record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial.” *Welch v. Am. Publ’g Co. of Kentucky*, 3 S.W.3d 724, 730 (Ky. 1999). In reviewing Motions for Summary Judgment, the Court views all facts in the light most favorable to the non-moving party and resolves all doubts in its favor, and summary judgment should only be granted when the facts indicate that

the nonmoving party cannot produce evidence at trial that would render a favorable judgment. *Steelvest*, 807 S.W. 2d at 480.

The Court recognizes that the summary judgment is a device that should be used with caution and is not a substitute for trial. “[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.” *Jones v. Abner*, 335 S.W.3d at 480. Summary judgment is not proper unless it is shown with clarity from the evidence on record that the adverse party cannot prevail, as a matter of law, under any circumstances. That difficult standard has not been met in this case.

ANALYSIS

Taking into consideration the standard for summary judgment, the Court finds that there remain genuine issues of material fact. Considering the facts in the light most favorable to the nonmoving party, KCNA could conceivably produce evidence at trial that would support a judgment in its favor. The language of the Wholesaler Agreement may reasonably be interpreted to support each of KCNA’s assertions.

I. OpenFiber sales to any third party

OpenFiber interprets the terms of the Wholesaler Agreement to allow them to sell Wholesaler Services to any interested third party. This reading stems from the language defining Wholesaler Services as “communication and/or maintenance services provided by the Wholesaler to third parties.” *See Wholesaler Agreement* § 1.1. Since the contract grants OpenFiber the exclusive authority to provide Wholesaler Services and defines Wholesaler Services as any services provided to third parties, OpenFiber argues that there are no limits on its ability to sell services to any third party. The Secretary of

Finance & Administration rejected this interpretation, and found that the Wholesaler Agreement is just that, a contract that applies to wholesaler transactions only, and does not grant any rights to sell to end (or “retail”) users.

KCNA argues that the terms of the Wholesaler Agreement should be interpreted in the context of the Master Agreement, and that OpenFiber contracted to build the infrastructure for a middle-mile network, rather than a means of delivery of services to end users. Under the Wholesaler Agreement, OpenFiber is bound to create an open access network, operating as a middle-mile provider, and that the references to third party sales must be construed within the context of the Wholesaler Agreement as a whole. There is no reference to OpenFiber’s right to sell retail services within the Wholesaler Agreement, and its attempt to expand its rights is incompatible with the purpose and text of the contract. KCNA argues the reference to sales to “third parties” must be construed in the context of the agreement as a whole. It would undermine the entire purpose and intent of the Wholesaler Agreement to allow OpenFiber to operate in the retail market for these services. Such retail sales by OpenFiber would undercut the whole concept of a free and open market access for these services. As discussed above, the Core Network Principles section of the Wholesaler Agreement stipulates that “an open access network will be provided that separates physical network access from the delivery of services by multiple competing service providers.” *See Wholesaler Agreement* §3.2(a). An “open access network” limits the middle-mile provider from selling services directly to end users, instead requiring them to foster a competitive market for ISPs. *See Pl.’s Response* quoting FAC315-316, at 11. In the context of OpenFiber’s assertion that they may sell Wholesaler Services to any interested customer, KCNA’s interpretation of

the Core Network Principles language to bar OpenFiber from acting as a last-mile provider has a reasonable basis in the language of the contract. Thus, there is a genuine dispute between two competing plausible interpretations of the terms of the Wholesaler Agreement. The Court must defer making finding on such disputed issues of fact until discovery is complete, and contract can be interpreted in context and applied with a full understanding of all relevant facts. Such a ruling would be premature at this early stage.

II. KCNA's oversight authority

While both parties agree on what language in the Wholesaler Agreement governs Changes, they disagree on whether accessing the NG-KIH system constitutes an “an addition, demolition, alteration, reconstruction or otherwise” to the NG-KIH System. *See OpenFiber's Motion*, at 8. OpenFiber contends that merely connecting a customer to the NG-KIH System is routine and falls short of disrupting the System in a manner that trigger's KCNA's right to review the connection. KCNA, on the other hand, contends that any third party's connection to the NG-KIH System constitutes a PPP Change as an “addition,” “alteration,” or “reconstruction” of the System, such that the Commonwealth's right to review is triggered under Schedule 6. *See Pl.'s Response*, at 8-9. KCNA brings evidence showing that many of the Changes that OpenFiber proposes involve physical alterations being done to the NG-KIH System, damaging the technology and heightening KCNA's interest in oversight. *Id.* at 15. This supports the interpretation that connections to the System constitute a PPP Change under the language of the Wholesaler Agreement. Thus, KCNA's interpretation of the language is not unreasonable.

III. Duty of good faith

Finally, OpenFiber alleges that KCNA's practice of reviewing proposed connections to the NG-KIH System constitutes a bad faith attempt to vet OpenFiber's customers, conditioning approval on revenue against the terms of the contract. The Kentucky Model Procurement Code (KMPC) requires that every contract funded by the Commonwealth carries with it a duty that the parties perform in good faith. KRS 45A.015. OpenFiber argues that, even if KCNA's interpretation of the terms surrounding Change procedures is correct, KCNA does not have a good faith right to review the costs and revenue associated with a proposed Change, or a right to reject a proposal. As previously discussed, KCNA's interpretation that a connection to the NG-KIH System constitutes a PPP Change to the System is not manifestly unreasonable. This interpretation would subject a proposed Change to the process outlined on Schedule 6 of the Project Agreements. *See Wholesaler Agreement, Schedule 1*, at §2.4(b). Schedule 6 requires KWOC to present details on costs and implications of the Change to KCNA. *See Project Agreements, Schedule 6*, at §2.4. Since it is reasonable for KCNA to read the contract terms to give them oversight in the Change process, it is not unreasonable for KCNA to read the language of the contract as allowing them to request this information and deny approval. While the Court has limited facts before it on which to base such a judgment, it is clear that these issues are vigorously disputed between the parties, and additional discovery is necessary before the Court can issue a summary judgment.

If OpenFiber can convince the Court of its position that it has the unlimited right to sell to any third-party (including end users), then it may have a basis to challenge the

KCNA's broad application of its rights under the contract to accept or reject the changes proposed by OpenFiber to facilitate its retail sales. But the record is too undeveloped to address that question at this time.

Likewise, KCNA complains that OpenFiber has breached its duty of good faith under the KMPC to implement the duty of good faith codified at KRS 45A.015. If KCNA can demonstrate that OpenFiber constructed a parallel system of infrastructure to enhance its profits to the detriment of the Commonwealth, or that it used public funds to construct or subsidize its parallel system, then there may grounds to allege OpenFiber has breached its duty under KRS 45A.015. Under KRS 45A.015(2), "[e]very contract or duty under this code shall impose an obligation of good faith in its performance or enforcement." *See RAM Engineering & Construction v. University of Louisville*, 127 S.W.3d 579 (Ky. 2003). The parties to a contract under KMPC have a mutual duty to do "everything necessary" to implement the contract. *Id.* If one party seeks to profit to the detriment of the other, by constructing a parallel system that undermines the implementation of the information highway for high-speed internet, or by wrongfully withholding approval for changes in the System, then the party that breaches those duties must be held accountable.

CONCLUSION

Summary Judgment is not appropriate in this matter because Defendant has failed to demonstrate that no genuine issues of material fact exist concerning the various competing interpretations of contract terms. The terms of the contract cannot be construed without a placing them in context of factual allegations that are vigorously contested. The Court determines that, taken in the light most favorable to the non-moving

party, the facts show that KCNA could prevail on its claims if it can prove the facts it has alleged. Accordingly, Defendant's Motion for Partial Summary Judgment is hereby

DENIED.

SO ORDERED this 24th day of September, 2024.



PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

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COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CONSOLIDATED CIVIL ACTION NOS. 23-CI-01049
24-CI-00333

COMMONWEALTH OF KENTUCKY,
KENTUCKY COMMUNICATIONS
NETWORK AUTHORITY

PLAINTIFF

V.

OPENFIBER KENTUCKY COMPANY, LLC, and
KENTUCKY WIRED OPERATIONS COMPANY, LLC

DEFENDANTS

V.

ORDER DENYING TEMPORARY INJUNCTION

OPENFIBER KENTUCKY COMPANY, LLC

PLAINTIFF

V.

COMMONWEALTH OF KENTUCKY,
KENTUCKY COMMUNICATIONS
NETWORK AUTHORITY, and
KENTUCKY WIRED OPERATIONS COMPANY, LLC

DEFENDANTS

This matter is before the Court following the Court's Order of February 13, 2025, holding KCNA's *Motion to Dismiss* (file date January 22, 2025) in abeyance and requesting additional information prior to ruling on OpenFiber's *Motion for Temporary Injunction* (file date January 28, 2025).

Having considered the motions and reviewed the documents submitted by the parties, the Court **HEREBY DENIES** OpenFiber's *Motion for Temporary Injunction*.¹ Under the familiar test of *Maupin v. Stansbury*, 575 S.W.2d 695 (Ky. 1978), the trial court must consider whether the party seeking a temporary injunction has suffered, or is likely to suffer, irreparable injury, whether

¹ KCNA's *Motion to Dismiss* continues to be held in abeyance in accordance with the terms of the Court's prior Order.

the case presents a substantial legal issue on the merits, whether the public interest supports issuance of injunctive relief, and the balance of the equities. Here, the application for injunctive relief fails the critical first test. There is no showing of irreparable injury.

The Court of Appeals has recently reiterated the law of temporary injunctions:

The standard for granting a temporary injunction in Kentucky is well-settled. The trial court reviews applications for temporary injunctive relief under CR 65.04 on three levels:

First, the trial court should determine whether plaintiff has complied with CR 65.04 by showing irreparable injury. **This is a mandatory prerequisite to the issuance of any injunction.** Secondly, the trial court should weigh the various equities involved. Although not an exclusive list, the court should consider such things as possible detriment to the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo. Finally, the complaint should be evaluated to see whether a substantial question has been presented. If the party requesting relief has shown a probability of irreparable injury, presented a substantial question as to the merits, and the equities are in favor of issuance, the temporary injunction should be awarded. However, the actual overall merits of the case are not to be addressed in CR 65.04 motions.

Maupin v. Stansbury, 575 S.W.2d 695, 699 (Ky. App. 1978) (emphasis added in *Travelers* opinion, full cite below).

* * *

It is well settled that in the absence of irreparable injury, injunctive relief may not lie.

* * *

An injunction does not lie when money damages are a sufficient remedy. ‘Injunctions, generally, will not be granted, minus some positive provision of the law to the contrary, where there is a choice between ordinary processes of law and the extraordinary remedy by injunction, when the remedy at law is sufficient to furnish the injured party full relief to which he is entitled in the circumstances. *Cyprus Mountain Coal Corp. v. Brewer*, 828 S.W.2d 642, 645 (Ky. 1992).

(Emphasis added.) *Travelers Transitional Living, LLC v. Cabinet for Health and Family Services, et al.*, Franklin Circuit Court, Division I, No. 24-CI-00407, before the Court of Appeals on Motion for Interlocutory Relief, No. 2024-CA-0767-I, entered October 1, 2024, p. 4-6.²

The Court finds that OpenFiber has not met its burden of proving that it has suffered irreparable injury as required under the law as stated by the Court of Appeals in *Travelers* and *Maupin*. “An injury is irreparable if there exists no certain pecuniary standard for the measurement of the damages.” *Cyprus Mountain Coal Corp. v. Brewer*, 828 S.W.2d 642, 645 (Ky. 1992). Here, the gravamen of OpenFiber’s claim that it is entitled to a temporary injunction is that KCNA cannot terminate the Wholesaler Agreement and proceed with disconnection of services without exhausting the Dispute Resolution procedures outlined in the Agreement and that, furthermore, KCNA’s attempt to do so causes irreparable injury to OpenFiber that goes beyond mere financial harm. The Court disagrees.

OpenFiber has provided the Affidavits of Bradley H. Kilbey, OpenFiber’s Chief Executive Officer, and Van Macatee, OpenFiber’s Chief Operations Officer, at the Court’s request, for the purpose of supporting their CR 65.04 motion and showing facts supporting irreparable injury.³ OpenFiber states that if KCNA is allowed to disconnect OpenFiber’s assets, it will suffer irreparable harm in the nature of “being forced to (i) close its business in Kentucky; (ii) lay off its remaining employees in Kentucky; and (iii) lose the reputation and goodwill associated with its business.” OpenFiber Notice, Feb. 14, 2025, p. 2. However, the Court is not convinced that these results are anything other than financial harms or harms to OpenFiber’s business, which, it is well-

² While this is an unreported Court of Appeals opinion (relating to an appeal from a decision of this Court), the Court finds it is particularly relevant given its interpretation of *Maupin v. Stansbury*, CR 65.04, and the specific issue of the impact of mere financial harm on the question of irreparable injury.

³ In compliance with the Court’s Order, KCNA provided the Affidavits of Tom Snyder, Chief Operations Officer at Kentucky Wired Operations Company, LLC, and Stewart D. Hendrix, Executive Director of KCNA. The testimony contained therein is addressed primarily to the continuity of services in the event that KCNA proceeds with disconnecting OpenFiber from the NG-KIH System.

settled, may not be the sole source of irreparable injury for injunctive purposes. *Cameron v. EMW Women's Surgical Center, P.S.C.*, 664 S.W.3d 633, 660 (Ky. 2023) (“Further, the personal harm asserted by the abortion providers, the harm to their business, is not considered an irreparable injury for the purposes issuing a temporary injunction.”); *Norsworthy v. Kentucky Bd. of Med. Licensure*, 330 S.W.3d 58, 62 (Ky. 2009) (“In order to obtain a preliminary injunction, the harm that would result in the absence of the injunction must be irreparable, not merely substantial. Further, mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.”).

OpenFiber may continue to do business elsewhere in the Commonwealth or anywhere else. If it decides to let its employees go, that is a business decision. However, as OpenFiber notes, its employees are highly skilled and in high demand, and should be readily re-employable. OpenFiber has not cited Kentucky law establishing that the loss of customer goodwill associated with its business or “unique business opportunity” are appropriate considerations for irreparable harm under CR 65.04, and the Court does not find them to be so.

Even if the Court assumed, for the sake of OpenFiber’s argument, that KCNA could not terminate the Agreement for cause without exhausting the Dispute Resolution process provided by Schedule 2 of the Agreement, and the dispute were to proceed before the Secretary of the Finance and Administration Cabinet for decision (and possibly end up before the Court again), KCNA’s termination of the Agreement could still be construed as a **termination for convenience** pursuant to §§ 2.1(a) and (c) of the Agreement.⁴ In other words, KCNA could still terminate the Agreement,

⁴ The Court noted in its previous Order that

... the Dispute Resolution process set forth in Schedule 2 itself provides that it is subordinate to the state contracting requirements of the Model Procurement Code (“KRS 45A.225- 45A.290”), so OpenFiber must present these issues to the Secretary of Finance & Administration for decision under KRS 45A.230. Moreover, all state contracts are subject to the provisions of 200 KAR 5:312.

but the nature of OpenFiber's remedy under the Agreement would change. If KCNA is deemed to have terminated the Agreement for convenience rather than cause, OpenFiber could exercise its "Put Right" under § 14 of the Agreement, requiring the Commonwealth to "purchase all of the Wholesaler Assets for purchase price equal to the Fair Market Value of the Wholesaler Assets." Clearly, this section provides a monetary damages remedy for KCNA's termination of the Agreement. As noted at the outset of this discussion, "[a]n injunction does not lie when money damages are a sufficient remedy." *Travelers Transitional Living*, p. 6.

Because the Court finds that there is no irreparable injury to OpenFiber that would require the extraordinary remedy of injunctive relief, which is a "mandatory prerequisite to the issuance of any injunction," *Maupin* at 699, there is no need to address the other elements of the *Maupin* analysis at this time. OpenFiber makes vague claims regarding allegations of reputational interests and business opportunities. However, even if such claims were well founded (which they are not on the record before the Court), they do not constitute irreparable injury in the context of this case. OpenFiber's counsel stated in response to the Court's question at the hearing on this matter, that it is a business entity wholly owned by the Macquarie Group and UBS, two of the largest investment bankers in the world. There is no reason to believe, based on this record, that OpenFiber lacks the financial wherewithal to continue to operate and to effectively defend its legal rights in this litigation, in the absence of injunctive relief. Likewise, there is no reason to believe that this business dispute over interpretation of a contract gives rise to any kind of injury other than monetary damages.

Nonetheless, despite the fact that KCNA may terminate the Wholesaler Agreement without irreparable injury to OpenFiber that justifies a temporary injunction, the Court has serious concerns

Order, Feb. 13, 2025, ¶ 3.

about the impact of KCNA's decision on OpenFiber customers, and KCNA's ability to accomplish the necessary transition of internet service to such customers following OpenFiber's disconnection from the NG-KIH System. However, those issues are not before the Court, and no customer of OpenFiber has attempted to intervene in this action. In short, the Court's concerns are not fully addressed in the record presented by the parties on this motion.

WHEREFORE:

- OpenFiber's *Motion for a Temporary Injunction* is hereby **DENIED**:
- OpenFiber **shall immediately provide** both KCNA/KWOC with the information and specifications indicated by Tom Snyder and Stewart D. Hendrix in their Affidavits that they have requested from OpenFiber (and not received) so that KCNA/KWOC may assist with the facilitation of the provision or continuity of services to OpenFiber's customers. The principals of these entities shall meet and confer in order to accomplish this task expediently.
- KCNA shall give all disclosed customers of OpenFiber at least thirty (30) days notice prior to disconnection of OpenFiber from the NG-KIH system.
- The matter shall remain on the Court's docket while it is held in abeyance pursuant to the Court's previous Order, and OpenFiber may continue to pursue its claims, if any, under the Dispute Resolution procedures contained in Schedule 2 of the Wholesaler Agreement.
- The Parties shall contact the Court's Judicial Assistant (AmyFeldman@kycourts.net) to schedule this matter for a status conference at the end of 30 days.

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SO ORDERED this 26th day of February 2025.



PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

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**COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CONSOLIDATED CIVIL ACTION NOS. 23-CI-01049
24-CI-00333**

**COMMONWEALTH OF KENTUCKY,
KENTUCKY COMMUNICATIONS
NETWORK AUTHORITY**

PLAINTIFF

V.

**OPENFIBER KENTUCKY COMPANY, LLC, and
KENTUCKY WIRED OPERATIONS COMPANY, LLC**

DEFENDANTS

V. ORDER GRANTING CLARIFICATION OF FEBRUARY 27 ORDER

OPENFIBER KENTUCKY COMPANY, LLC

PLAINTIFF

V.

**COMMONWEALTH OF KENTUCKY,
KENTUCKY COMMUNICATIONS
NETWORK AUTHORITY, and
KENTUCKY WIRED OPERATIONS COMPANY, LLC**

DEFENDANTS

This matter is before the Court on Defendant OpenFiber Kentucky Company, LLC's (OpenFiber) *Motion for Reconsideration and Clarification of the Court's February 27 Order*, (file date February 28, 2025), which denied OpenFiber's *Motion for Temporary Injunction* (file date January 28, 2025).

In its argument before the Court on the *Motion for Temporary Injunction*, OpenFiber represented to the Court that KCNA should be enjoined from terminating its contract with OpenFiber and from immediately disconnecting OpenFiber from the NG-KIH System because doing so would cause serious disruption to OpenFiber's 217 customers in their 840 locations across the Commonwealth. OpenFiber argued that, in balancing the equities and considering the public interest, the Court should be cognizant of Kentucky Communications Network Authority's

(KCNA) likely inability to provide continuity of service to OpenFiber's customers if OpenFiber is disconnected. Many of these customers are public entities and government agencies. The Court requested additional information from the parties in an Order dated February 13, 2025, and in response, KCNA provided the Affidavits of Tom Snyder of Defendant Kentucky Wired Operations Company, LLC (KWOC), and Stewart D. Hendrix of KCNA, who indicated that OpenFiber needed to provide them with certain specific additional customer information in order for them to implement their plans following termination of the contract and to ensure continuity of service with OpenFiber's customers. Therefore, in its February 27, 2025, Order (February 27 Order), denying the *Motion for Temporary Injunction*, the Court also directed OpenFiber to provide KCNA/KWOC with the additional information that the KCNA Affidavits of Snyder/Hendrix indicated was needed. February 27 Order, p. 6, 2nd bullet pt.

However, having considered the instant motion and the responsive pleadings thereto, and having heard the parties' arguments on the matter, it appears that such information is not necessary, at least at this time, to the Court's ruling to deny the temporary injunction. Therefore, that portion of the ruling is **HEREBY SET ASIDE**. OpenFiber has voluntarily agreed to supplement its responses to KCNA/KWOC with the information contained on Page 7 of its *Motion for Reconsideration and Clarification of the Court's February 27 Order*, and the Court directs OpenFiber to provide that information to them within seven days from the date of this Order. By deleting the requirement contained in the February 27 Order, the Court is not addressing the question of whether that information is potentially privileged, confidential, proprietary, a violation of federal law, or in any other way inappropriate subject matter for production in this litigation. Neither is the Court making any ruling regarding whether such information may be subject to discovery if it appears reasonably calculated to lead to the discovery of admissible evidence in

accordance with CR 26. The Court merely holds that producing such information is not necessary to the Court's ruling on the motion for temporary injunction.

The Court required the filing of this information to address the issue of whether the termination of the Wholesale Agreement, and the disconnection of OpenFiber from the system, would injure the public interest, and what impact those actions of KCNA might have on the balance of the equities for purposes of injunctive relief. It appears from the record, and the arguments of counsel, that the potential for interruption of continuity of service to OpenFiber's retail customers is not currently ripe for review. No customer of OpenFiber has attempted to intervene, or has asserted an imminent injury. The Court has required KCNA to give at least 30 days notice to these customers prior to disconnection of OpenFiber. KCNA has represented to the Court its willingness to work with any customer of OpenFiber to assure continuity of service. Open Fiber and KCNA have many options for working out a resolution to this potential problem by mutual agreement pending the resolution of this lawsuit. Accordingly, providing this information does not currently impact the balance of the equities or the public interest factors that must be considered in granting or denying injunctive relief under *Maupin v. Stansbury*, 575 S.W.2d 695 (Ky. 1978). OpenFiber has failed to demonstrate that the balance of the equities or the public interest require the granting of injunctive relief. But it has demonstrated that the provision of the additional information request in the KCNA Affidavits are not necessary to the Court's ruling denying injunctive relief. Therefore, the Court's directive to OpenFiber to provide this information was improvidently issued, and the Court relieves OpenFiber of the obligation to immediately provide such information at this juncture.

In all other aspects, the Court's February 27 Order denying the temporary injunction remains in place.

SO ORDERED this 17th day of March 2025.



PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

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Kentucky Court of Appeals Orders

1. 2025.04.23 Order Denying OFKy's Motion for Emergency Relief under Appellate Rule 20(D)

Commonwealth of Kentucky

Court of Appeals

NO. 2025-CA-0354-I

OPENFIBER KENTUCKY
COMPANY, LLC

MOVANT

v. ON MOTION FOR INTERLOCUTORY RELIEF
ARISING FROM FRANKLIN CIRCUIT COURT
ACTION NO. 23-CI-01049 AND 24-CI-00333
HONORABLE PHILLIP SHEPHERD, JUDGE

THE COMMONWEALTH OF
KENTUCKY, KENTUCKY
COMMUNICATIONS NETWORK
COMPANY, ET AL.

RESPONDENTS

ORDER

* * * * *

On April 16, 2025, Movant filed a motion for emergency relief pursuant to Kentucky Rule of Appellate Procedure (RAP) 20(D). Specifically, Movant seeks a stay preventing Respondents from disconnecting OpenFiber from the KentuckyWired network until such time as the Court has considered her motion under RAP 20(B). Respondents filed a response on April 21, 2025. Having considered the motion for emergency relief, the response, and otherwise

being sufficiently advised, the motion shall be, and hereby is, DENIED.

To merit relief on an emergency motion, the movant must show it will suffer irreparable injury in the absence of relief. RAP 20(D). “Irreparable injury” is defined as “incalculable damage to the applicant . . . either to the liberty of his person, or to his property rights, or other far-reaching and conjectural consequences.” *Hoskins v. Maricle*, 150 S.W.3d 1, 19 (Ky. 2004) (internal quotation marks and citation omitted). The injury must be “something of a ruinous nature.” *Robertson v. Burdette*, 397 S.W.3d 886, 891 (Ky. 2013).

Movant argues that it will be unable to provide its customers with wireless internet service if it is disconnected from the KentuckyWired network. The plain language of RAP 20(D), however, requires that the movant display its own irreparable injury. While the public interest is an appropriate consideration when a trial court balances the equities of issuing a temporary injunction, a movant must show its own harm. *Cameron v. EMW Women’s Surgical Center*, P.S.C. 664 S.W.3d 633, 660 (Ky. 2023).

In terms of its own injury, Movant can only argue that the loss of goodwill it will suffer is irreparable. However, “economic and reputational injuries are generally not irreparable.” *Norsworthy v. Kentucky Bd. of Medical Licensure*, 330 S.W.3d 58, 62 (Ky. 2009) (quoting *Zirkle v. District of Columbia*, 830 A.2d 1250, 1256–1257 (D.C. 2003)). “Further, mere injuries, however

substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.” *Norsworthy*, 330 S.W.3d at 62 (quotation omitted).

Accordingly, Movant’s motion for emergency relief under RAP 20(D) is DENIED. Its motion for interlocutory relief pursuant to RAP 20(B) shall be decided by a three-Judge panel of this Court.

ENTERED: 04/23/2025


JUDGE, COURT OF APPEALS