



Commonwealth of Kentucky
Governor's Office

Andy Beshear
Governor

Kentucky Communications Network Authority
500 Mero Street, Suite 1 – 1NC
Frankfort, KY 40601
(502) 782-9549

Stewart Douglas Hendrix
Executive Director

May 4, 2023

Via E-Mail

Tara Mackay
Torys LLP
1114 Avenue of the Americas, 23 Floor
New York, New York 10036.7703

Re: April 12, 2023 Letter Regarding Schedule 19 Service Provider Contract Refresh

Dear Tara:

The Commonwealth of Kentucky, the Kentucky Communications Network Authority (“KCNA”) and the Kentucky Wired Infrastructure Company (“KWIC”) (collectively, KWIC and KCNA will be referred to herein as “the Commonwealth”). [REDACTED]

[REDACTED]. Unfortunately, within the context of the Market Testing Procedures under Schedule 19 of the Project Agreement¹, it is unclear what [REDACTED]

[REDACTED] It is clear, however, that the April 12, 2023 correspondence requires no response from the Commonwealth. To the extent that the proposal is KWOC’s attempt to meet certain obligations under Schedule 19 of the Project Implementation Agreement, it misses the mark. This letter outlines the Commonwealth’s concerns regarding KWOC’s April 12, 2023 correspondence, KWOC’s performance of its obligations under Schedule 19 of the Project Agreement, the steps KWOC needed to take to prepare for the First System Refresh, and what must happen immediately to ensure completion of the First System Refresh prior to the impending expiration of the Service Provider’s contract in 2025.

I. Introduction

The April 12, 2023 highlights KWOC’s inactions as they relate to the preparation for the First System Refresh and [REDACTED]. KWOC’s letter purports to be a

¹ The Amended & Restated Project Agreement and Amended & Restated Project Implementation Agreement are collectively referred to as the “Project Agreement.” All references to Schedule 19 refer to both Schedule 19 of the Project Agreement and Schedule 19 of the Project Implementation Agreement.

recommendation that the Commonwealth accept [REDACTED]
[REDACTED] The letter presupposes the Commonwealth and KWOC have reached an agreement on the Service Specifications and the System Refresh Baseline Requirements. Furthermore, given that KWOC must be objective and impartial when it establishes any tender evaluation criteria made available to Service Tenderers with respect to these specifications and requirements, [REDACTED]
[REDACTED]. Schedule 19, at § 3.1(f).

II. January Meeting

In January 2023, the parties met and agreed the Service Specifications would remain unchanged from those currently in the Project Agreement. KWOC has yet to provide the Draft Market Testing Proposal capturing this agreement.

Also, during the January 2023 meeting, the Commonwealth requested that KWOC provide an analysis of the System Refresh Baseline Requirements in order to seek an understanding of the equipment in need of replacement and a timeline for the replacement. At all subsequent meetings [REDACTED]
[REDACTED] The Commonwealth has not yet received an analysis of the System Refresh Baseline Requirements nor have the Parties had an opportunity to discuss and/or agree on the requirements. Without explanation, [REDACTED]
[REDACTED] The cost of the First System Refresh and whether the costs inclusive or exclusive is the exact type of detail the Parties need to agree to before they are subsequently captured in the Draft Market Testing Proposal.

Unfortunately, as of today, the Parties do not have an agreement on these important issues, the Service Provider's "proposal" only underscores the need to immediately address the overdue and needed work by KWOC as outlined in Schedule 19 of the Project Agreement.

III. Market Testing Under Schedule 19

Schedule 19 of the Project Agreement is clear and defines each KWOC obligation. Specifically, KWOC is required to: (1) provide appropriate notice of a timely Market Testing Meeting, (2) hold the first Market Testing Meeting by March 3, 2021, (3) prepare a Draft Market Testing Proposal and deliver a timely proposal, and (4) complete the Market Testing of the Services and First System Refresh.

The purpose of the Market Testing Meetings is for the parties to agree on revised Service Specifications and the System Refresh Baseline Requirements for the First System Refresh. Schedule 19 provides, "[t]he Market Testing of the Services and the relevant System Refresh shall be the responsibility of [KWOC] and shall be carried out in accordance with Schedule 19" Section 3.1(a) of Schedule 19 requires, "[a]t least 24 months before each Market Testing Date, the parties shall hold Market Testing Meetings" The Market Testing Date is calculated as March 3, 2023, meaning the first Market Testing Meeting was to occur no later than March 3, 2021, with notice thereof by February 3, 2021.

Following along the Market Testing Procedure, beginning no later than March 3, 2021, the parties were to "review the Service Specification and other applicable provisions of this Project Agreement related to the

Services . . . and agree on the appropriate amendments to such provisions having reference to Customary Industry Practice and prevailing market standards in effect at the time . . .” Schedule 19, at § 3.1(a)(1).

As a culmination of the aforementioned work, no later than 12 months before March 3, 2022, KWOC shall prepare and deliver to the Commonwealth a Draft Market Testing Proposal describing in detail KWOC’s proposal for the Service Specifications and System Refresh Baseline Requirements agreed to during the Market Testing Meetings. The proposal forms the contract that the Preferred Service Tenderer is required to accept.

As it stands, the Market Testing deadlines proscribed under Schedule 19 have passed, placing the work needed to complete the First System Refresh at least two years behind schedule. While the Commonwealth remains committed to the Market Testing Procedures, the Commonwealth will not bear the consequences of KWOC’s failures to carry out Market Testing Procedures in accordance with Schedule 19. Given the explicit contractual obligations set forth in Schedule 19 and the required Service Tender procedure, KWOC may not delegate its responsibilities to the Service Provider. Moreover, pursuant to § 2.1(b) of Schedule 19, *KWOC shall remain responsible to ensure the continued provision of Services* if KWOC is unable to complete the applicable Market Testing for any reason on the relevant Market Testing Date.

IV. Market Testing System Refresh and Contract Renewal

Approximately eighteen months remain between the date of this letter and [REDACTED]. The Commonwealth believes KWOC has time to remedy its failure and comply with the Schedule 19 procedures. The Project Agreements are clear, “[i]n the event that [KWOC] does not comply with all requirements for Market Testing, then, without limiting any other remedies of the Commonwealth under this Project Agreement or otherwise, [KWOC] shall re-perform the relevant Market Testing in accordance with such requirements.” Schedule 19, § 3.4(e). Accordingly, the Commonwealth directs KWOC to comply with all requirements for Market Testing immediately. In order to meaningfully engage in its responsibilities under Schedule 19, the Commonwealth directs KWOC to hire dedicated staff member(s) to complete the necessary obligations set forth under Schedule 19, establish service specifications for the First System Refresh, provide the proposed Service Specifications for the First System Refresh Baseline Requirements, produce a Draft Market Testing Proposal and service price, and adhere to the Service Tender process. KWOC shall bear all costs, fees, and expenses associated with this work.

To the extent KWOC believes there is some agreement between the parties for both the Service Specifications and the System Refresh Baseline Requirements KWOC should prepare and deliver the Draft Market Testing Proposal. The Commonwealth does not believe, however, there has been any discussion, let alone agreement, on the System Refresh Baseline Requirements. The Commonwealth has requested an analysis of equipment to be replaced and a schedule associated therewith but that request has not been answered—the Leducor letter does not provide any of the necessary specifics. Accordingly, the Commonwealth encourages KWOC to provide an analysis of the existing Services Specifications and prevailing market standards so that the parties may establish the specifications for the First System Refresh.

V. The Commonwealth's Rights and Non-Waiver

KWOC's failure to follow the Market Testing Procedures and prepare for the First System Refresh and the impending 2025 expiration of the Service Provider's contract has placed the Commonwealth in a position where it is reasonably likely to be materially deprived of the benefits of the Project Agreements. While the Commonwealth is hopeful KWOC may remedy these series of failures, the Commonwealth is prepared to seek all available remedies associated with these series of failures and any continuation of failures. Nothing in this letter is intended to or shall be deemed or construed to in any way waive, alter, or impair the obligations or any of the rights or remedies of the Commonwealth. The Commonwealth's decision not to enforce a provision of the Project Agreement will not constitute a waiver of its rights to subsequently enforce such provision or any other provision of the Project Agreement. The Commonwealth specifically reserves any claim, whether known or unknown, arising from or relating to any past, present, or future non-compliance with respect to the matters set forth herein. The Commonwealth makes no representations as to what actions, if any, it will take as a result of KWOC's non-compliance with Schedule 19, and hereby reserves all rights and remedies relating to the same.

Sincerely,

A handwritten signature in black ink, appearing to read 'A. Adkins', written over a horizontal line.

Adam T. Adkins
General Counsel

Kentucky Communications Network Authority