

# **INTERIM JOINT COMMITTEE ON TOURISM, SMALL BUSINESS, AND INFORMATION TECHNOLOGY**

## **Minutes of the 4th Meeting of the 2020 Interim**

**September 24, 2020**

### **Call to Order and Roll Call**

The 4th meeting of the Interim Joint Committee on Tourism, Small Business, and Information Technology was held on Thursday, September 24, 2020, at 1:00 PM, in Room 171 of the Capitol Annex. Senator Danny Carroll, Chair, called the meeting to order, and the secretary called the roll.

Present were:

Members: Senator Danny Carroll, Co-Chair; and Representatives Phillip Pratt, Co-Chair; Senators Karen Berg, Denise Harper Angel, Jimmy Higdon, Alice Forgy Kerr, Wil Schroder, Reginald Thomas, Mike Wilson, and Max Wise; Representatives Lynn Bechler, Tina Bojanowski, Terri Branham Clark, George Brown Jr, Jeffery Donohue, Deanna Frazier, Chris Freeland, Chris Fugate, David Hale, Richard Heath, Cluster Howard, Kim King, Adam Koenig, Bobby McCool, Michael Meredith, Ruth Ann Palumbo, Josie Raymond, Brandon Reed, Rachel Roberts, Steve Sheldon, Maria Sorolis, Cherlynn Stevenson, Ashley Tackett Laferty, Nancy Tate, Richard White, and Rob Wiederstein.

Guests: Nancy Galvagni, President, Kentucky Hospital Association; Shelia Currans, CEO, Harrison Memorial Hospital; Jeff Hohn, CEO, Kenergy Corporation; Leslye Krampe, Commercial Accounts and Economic Development Specialist, Kenergy Corporation; Sharla Wells, Director of Legislative Affairs and Government Relations, Big Rivers Electric Corporation; Robert L. Swisher, Commissioner, Department of Workers' Claims; Jeff Borkowski, Chief Executive Officer, ClearPath Mutual; Amy Staed, Executive Director, Kentucky Association of Private Providers; and Jeremy Terry, Vice President of Policyholder Services, Kentucky Employers' Mutual Insurance.

LRC Staff: Andrew Manno, Audrey Ernstberger, Drew Baldwin, and Sasche Allen.

### **Update on Effect of COVID-19 on Kentucky Hospitals**

Nancy Galvagni, the President of the Kentucky Hospital Association, explained that the COVID-19 pandemic differs in many ways from previous pandemics. The disease has had rapid movement and the government has intervened much sooner than with the SARS pandemic in 2002 or with the Swine Flu in 2009. The first cluster of pneumonia like illnesses was reported in Wuhan, China in late December 2019 with a declaration by China to the World Health Organization on December 31, 2019. Within 24 hours the source of

the outbreak had been identified and the virus was definitively identified by January 7, 2020. The first case was reported in the U.S. on January 21, 2020 and CDC test kits were available by January 27, 2020. Less than a month later, multiple pharmaceutical companies and research facilities had already began the clinical vaccine trial process. A vaccine developed was initially sent to the National Institute for Allergy and Infectious Diseases on February 24, 2020. Ms. Galvagni stated that knowing the rapid timeline of COVID-19 is important in understanding how it was able to bring the economy to a sudden halt.

Hospitals have been effected by the pandemic just as much as all other industries have across the state. Kentucky's hospitals are the front line in fighting the pandemic and are important economic drivers. The hospitals have been willing partners in working with the state and federal government, including the shutdown of elective procedures which are the very procedures that hospitals derive their working capital. It is estimated that the hospital industry's total losses for 2020 will exceed \$2.6 billion due to the needed pandemic response, and federal relief funds have covered less than half of that amount. In addition, hospitals are facing ongoing losses due to the fear and anxiety of the public to return to the hospital. Inpatient services have returned to about 80 to 90 percent of pre COVID-19 levels but the use of emergency rooms has not risen above 70 percent. Ms. Galvagni also described scenarios in which patients' lost their lives, because they were too afraid to visit the hospital. She gave assurance that Kentucky hospitals are some of the safest places people can visit due to the extraordinary precautions that have been taken.

Many hospitals have requested advanced payments from Medicare to assist with cash flow when the elective procedures were halted. Under the federal CARES Act, these payments are treated as loans and have to be repaid within four months from the time the hospitals received the funds. The law also requires that 100 percent of the Medicare payments be recouped until the advances are repaid in full. Ms. Galvagni explained that the Kentucky Hospital Association has worked closely with its congressional delegation in an effort to have these recoupments delayed. The losses that hospitals are currently facing may cause some of the most critical economic drivers to shut down. The economic impact has already been seen with approximately 3000 workers being furloughed. If hospitals are forced to close in the future, it will be devastating to communities across the state.

Shelia Currans, the CEO of Harrison Memorial Hospital in Cynthiana, testified about her rural nonprofit hospital's struggles throughout the pandemic. Harrison Memorial Hospital is an independent hospital that services primarily the counties of Harrison, Robertson, and Pendleton and employs over 450 people. Harrison Memorial Hospital was the first Kentucky hospital to treat a COVID-19 positive patient in early March. The patient was not displaying all of the common symptoms and had not traveled outside of her home county of Harrison. Therefore, the hospital was not immediately sent a COVID-19 test from the state for the patient and treated the patient according to its normal protocol without the proper PPE. Once a positive result was confirmed, Ms. Currans explained that there was constant communication with the CDC and state officials, thorough sanitizing

performed, and about 54 hospital staff members directed to quarantine. Being a relatively small hospital with that amount of staff members in quarantine, Ms. Currans made the decision to cancel elective procedures on March 7, 2020, 16 days before the entirety of the state was directed to do so, in an effort to have enough staff to adequately address emergencies. With the expectation of a surge in COVID-19 patients, the increase of testing that subsequently followed, the changes made to the hospital to create separate entrances for possible positive patients, and the suspension of elective procedure, Harrison Memorial Hospital ended the month of April with a -159 percent operating margin. Ms. Currans is hopeful that the hospital will end the current fiscal year with a -22 to a -25 percent operating margin.

Answering a question from Co-Chair Danny Carroll, Ms. Galvagni stated alternate care facilities were considered by some hospitals during preparation for the surge of COVID-19 patients but that would be an option taken if there were no beds available. Ms. Currans added that telehealth capabilities have been helpful in some cases, especially with behavioral health. Responding to a follow up question, Ms. Galvagni said that hospitals and ICU's in Kentucky are not at capacity with COVID-19 patients.

Responding to Co-Chair Phillip Pratt, Ms. Galvagni explained that the number of COVID-19 patients varies across the state and some areas have become hotspots for a short period of time. Overall, Kentucky has not been labeled as a hotspot for COVID-19. Answering a follow up, Ms. Galvagni clarified that hospital are well below pre pandemic levels.

Addressing a question from Representative Lynn Bechler, Ms. Galvagni said more analysis of the data pertaining to Medicaid patients had to be done.

Replying to Representative Steve Sheldon, Ms. Galvagni pointed out that public service announcements have already been released to attempt to decrease the fear and anxiety related to the virus but said a broader campaign may be compiled that can reach more people across the state.

### **Update on Expanding Broadband Services**

Jeff Hohn, the CEO of Kenergy Corporation; Leslye Krampe, the Commercial Accounts and Economic Development Specialist for Kenergy Corporation; and Sharla Wells, Director of Legislative Affairs and Government Relations for Big Rivers Electric Corporation, gave an overview of Kenergy and detailed their plan to expand broadband services in Kenergy's service area in Western Kentucky. Kenergy is an electric distribution co-op that services approximately 44,615 members in 14 counties. Big Rivers supplies wholesale electric generation and transmission service for Kenergy, Jackson Purchase Energy Corporation, and Meade County Rural Electric Cooperative Corporation. Big Rivers is a non-for-profit electric cooperative that is owned by the member-owners, or customers, it serves. Combined, members provide electric service for more than 122,000

retail homes and businesses in 22 Western Kentucky counties. Big Rivers and its member-owners are regulated utilities which includes oversight by the Kentucky Public Service Commission.

In 2014 Hancock County Industrial Foundation began approaching Kenergy to provide broadband services. Kenergy provides all of Hancock County's electric service. In 2019, Big Rivers agreed to provide a portion of the funds for a broadband feasibility study. After reviewing the results, in February of 2020 Kenergy's Board unanimously voted to pursue broadband services and began reviewing regulatory hurdles that need to be addressed. According to Ms. Krampe, the western part of the state is underserved when it comes to broadband. The Federal Communications Commission's definition of served is 25 megabits per second (Mbps) in download speed and three Mbps in upload speed. Many residents and businesses in Kenergy's service area utilize dial-up, satellite, and digital subscriber lines (DSL) for internet sources. Dial-up internet is connect through a phone line and has a download speed of up to 56 kilobits per second (Kbps). Satellite internet has wireless connection and has a download speed of 400 kbps to two Mbps. DSL internet is also connected through phone lines and has a download range of 768 Kbps to six Mbps. None of these sources come close to the FCC's definition. Other faster sources include cable modem and fiber connections. Fiber is by far the best option with 100 Mbps to one gigabyte per second but is costly and has expensive infrastructure. The availability of fiber broadband service is scarce throughout the state but has a greater availability in the eastern part of the state compared to the western part. Kenergy's service area has virtually no current option for fiber broadband and some areas do not have internet option at all of any kind. Presently in Kentucky large telecoms such as AT&T, Charter Communications, and Spectrum can offer fiber along with municipals, telephone cooperatives, and TVA's electric cooperatives.

There are 19 electric cooperatives in the state that are regulated by the Public Service Commission (PSC) that cannot provide broadband under current state statute and Kenergy is one of those cooperatives. Kenergy has filed an application with the PSC for a waiver of KRS 278.2213(14). Current statute allows regulated entities to establish subsidiaries for the purpose of providing non-regulated services. In addition, the current statute does not allow cooperatives to provide funding for start-up costs. The project that Kenergy is proposing would be broken in six phases and each phase would require Kenergy Board approval. The electric cooperative would own the fiber and the operating entity would own the equipment. The entire project would be \$165,922,423, and Kenergy does not need any state funding to complete the project. Kenergy's project, that is to be completed over six years, would average 250 jobs per year and would increase economic activity measured by Kentucky's gross state product by \$140 million annually. That equates to an average of 1500 jobs and an economic impact of \$840 million.

Co-Chair Phillip Pratt expressed his support for the project.

Replying to Co-Chair Danny Carroll, Ms. Wells stated legislation is being drafted, and Kenergy has been working with the area telephone cooperatives. Answering a follow up question, Ms. Wells explained there are some concerns about pole attachments but PSC has jurisdiction over that area.

Answering a question from Representative Lynn Bechler, Mr. Hohn said that Kenergy would own the fiber but lease to the subsidiaries. The subsidiaries may then lease to whomever they choose. Ms. Wells added there are no boundaries for service providers for internet.

Responding to Co-Chair Phillip Pratt, Mr. Hohn said Kenergy's intent is to provide broadband for its entire current service area.

Addressing a question from Senator Karen Berg, Ms. Krampe said that the project's broadband service cost data has been gathered but cannot be disclosed, but she offered assurance that the costs will be fair and reasonable for customers. Answering a follow up question, Ms. Wells said that although assistance to those who may not be able to afford their broadband bill, there are other state entities that are addressing the issue.

Replying to Representative Steve Sheldon, Mr. Hohn explained Kenergy does has funds set aside in the event that the PSC does not approve its waiver application. Those funds would be seed money from the members' equity.

### **Workers' Compensation and Independent Contractors**

At the center of the Workers' Compensation Act, KRS Chapter 342, is the relationship between an employer and employee. Without that relationship, the Act does not apply and does not allow benefits to be provided for workplace injuries or occupational diseases. According to KRS 342.340 every employers shall "(a) insure and keep insured its liability for compensation in some corporation, association, or organization authorized to transact the business of workers' compensation insurance in this state; or (b) furnish to the commissioner satisfactory proof of its financial ability to pay directly the compensation in the amount and manner and when due as provided in this chapter." The statutory definition of an employee as it pertains to workers' compensation is considered to be broad. It states that an employer is "(1) any person, other than one engaged solely in agriculture, that has in this one (1) or more employees subject to this chapter, (2) the state, any agency therefor" "or any other political subdivision or political entity of the state that has one (1) or more employees subject to this chapter." In regard to employee, the statute says that an employee is any person "in the service of an employers under any contract of hire or apprenticeship, express or implied". There are about 11 exemptions of classes of employees from coverage that can found in KRS 342.650. For workers' compensation purposes, there has been a nine factor test used for determining whether an employer-employee or an independent contractor relationship exists beginning with *Ratliff v. Redmon* (1965). The test was further refined with *Chambers' v. Wooten's IGA Foodliner* (1969)

which narrowed the determination down to four main aspects that include the extent to which the employer controlled the work, the nature of the work as it relates to the work of the employer, the professional skill of the alleged employee, and the true intentions of both parties. Commissioner Swisher pointed out KRS 342.700 which states “A principal contractor, intermediate, or subcontractor shall be liable for compensation to any employee injured while in the employ of any one (1) of his intermediate or subcontractors and engaged upon the subject matter of the contract, to the same extent as the immediate employer.” Commissioner Swisher said that it is very difficult to make a blanket statement about whether any group of employees that work for a particular employer or in a particular field are independent contractors.

Jeremy Terry, the Vice President of Policyholder Services for Kentucky Employers' Mutual Insurance (KEMI) spoke about how his organization fits into the discussion of workers' compensation and independent contractors. KEMI is the largest provider of workers compensation insurance in the state with over 21,000 insured businesses. The public school districts and the state's public and private universities are insured through KEMI along with businesses in the thoroughbred, coal, construction, and manufacturing industries. Of the businesses that KEMI insures, about 18,000 pay less than \$5000 a year in premium. Mr. Terry explained that in offering coverage to policy holders, KEMI strives to provide a high level of customer service, fair premiums, and adequate coverage. Contract labor poses issues when determining a business's final premium however, and is predominately seen by KEMI in the construction industry. KEMI does make an effort to work with businesses to determine if people are employees or independent contractors which will factor into the final premium. There is often times misclassification when it comes to determining if a person is an employee or independent contractor that can be intentional or unintentional.

Jeff Borkowski, the Chief Executive Officer at ClearPath Mutual, discussed his company's stance on the issue of workers compensation and independent contractors. ClearPath Mutual, formally known as KESA, is a self-insured fund that offers employers an option for workers' compensation. ClearPath is the second largest workers' compensation provider in Kentucky. KEMI and ClearPath Mutual handle 37 percent of all workers' compensation premiums in the state. The use of independent contractors is estimated to have grown as much as 40 percent over the last few decades and most qualified under tests similar to the one Commissioner Swisher described as employees rather than independent contractors. Mr. Borkowski explained that legislation could help its claims and underwriting departments and would help make things easier for all parties involved through a consistent manner for determining whether a person is an employee or independent contractor. Ultimately, this will also make it easier for rate determinations for the state in the future.

Co-Chair Danny Carroll asked for clarification of the creation of the 2020 Classification of Workers in the Construction Industry Task Force, and Mr. Terry

confirmed that the main purpose is to establish consistent standards amongst state agencies that deal with whether a person is an employee or independent contractor. Mr. Borkowski said that consistency is needed amongst insurance carriers as well.

Amy Staed, the Executive Director of the Kentucky Association of Private Providers, discussed her organization and a current issue regarding independent contractors. The Kentucky Association of Private Providers is a trade association that represents over 100 providers of services, generally through Medicaid waivers, to individuals with intellectual and developmental disabilities. The types of services offered vary from provider to provider and some specialize in one type of service while others offer numerous services. Some services include 24 hour care, community based care, and behavior services. In the past, certain types of Medicaid waivers services have utilized independent contractors such as family home providers or adult foster care providers. These independent contractors usually determine their own schedule, do not have much daily oversight, and sometimes work for multiple agencies. Ms. Staed stated she has been contacted recently by numerous independent contractors who have been audited and reclassified as employees of their providers. After contacting her provider membership, she found that this issue has been occurring for the last several years. In some cases carriers have also required member providers to carry workers' compensation coverage on an independent contractor if the independent contractor does not have their own coverage even when it has been determined the person is not an employee. Ms. Staed said an unintended consequence of some individuals being reclassified as employees is worker retention. These reclassified employees may leave one provider and go to another organization where they can be classified as an independent contractor. It also puts an extra burden on providers who have to carry worker compensation coverage people who were reclassified.

In response to Co-Chair Danny Carroll, Commissioner Swisher said that workers compensation is typically a matter of state law, and the General Assembly does have the authority to make changes to the Workers' Compensation Act if they see fit. Answering a follow up question, Mr. Terry explained that in some cases the insurance carrier has to consider if the intent of the provider is more important or the nature of the operation as a whole, especially when a provider has half of their workers are employees and the other half are independent contractors.

Senator Karen Berg, a member of the 2020 Classification of Workers in the Construction Industry Task Force, offered her opinion of what has been discussed is task force meetings thus far. If an employer does not carry workers compensation on a worker who does carry their own policy, then ultimately the state is left to pay for any costs associated with a workplace injury. Addressing a question from Senator Berg, Mr. Borkowski described a process used in Maryland as a resolution. Maryland requires independent contractors to complete a form attesting to being an independent contractor that is choosing not to be covered because the law does not require it. A solution such as

this may aid in separating independent contractors from employees in the event of a workplace injury.

Replying to a question from Co-Chair Phillip Pratt, Mr. Terry said independent contractors that work with companies such as Mary Kay and Pampered Chef have not been a concern of his organization. Answering a follow up question, Commissioner Swisher explained that an independent contractor that is injured at a customer's home would be responsible for paying to their own care and treatment unless the homeowner intentionally did something to create or cause the injury.

Representative Terri Branham Clark, a member of the 2020 Classification of Workers in the Construction Industry Task Force, clarified that the task force has only been examining issues concerning misclassification of workers in the construction industry. Addressing a question from Representative Branham Clark, Mr. Terry said misclassification does have an impact on rates and a majority of the misclassification issues that KEMI sees is in the private sector and not the public sector. Commissioner Swisher added, in the scenario of an injured worker, if an independent contractor is deemed by an administrative law judge to be an employee of an employer who is uninsured, then benefits are paid by the Uninsured Employers' Fund. The fund's revenue source is part of the special fund assessment on workers' compensation premiums.

There being no further business, the meeting adjourned at 3:25 p.m.