

April 9, 2019

VIA ECFS

Marlene J. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street SW
Washington, DC 20554

Re: **MAW Communications, Inc.'s Opposition to PPL Motion for Leave to Respond to New Allegations in Reply (Proceeding Number 19-29; Bureau ID Number EB-19-MD-001)**

Ms. Dortch:

Please find attached MAW Communications, Inc.'s Opposition to PPL Motion for Leave to Respond to New Allegations in Reply in Proceeding Number 19-29; Bureau ID Number EB-19-MD-001.

Sincerely,

Davis Wright Tremaine LLP



Maria Browne

Attachment

cc: Lisa Saks, Enforcement Bureau
Adam Suppes, Enforcement Bureau

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

MAW Communications, Inc.,

Complainant,

v.

PPL Electric Utilities Corporation,

Defendant.

Proceeding Number 19-29
Bureau ID Number EB-19-MD-001

**MAW OPPOSITION TO PPL MOTION FOR LEAVE
TO RESPOND TO NEW ALLEGATIONS IN REPLY**

MAW Communications, Inc. (“MAW”) respectfully submits this Opposition to PPL Electric Utilities Corporation’s (“PPL” or “Pole Owner”) Motion for Leave to Respond to New Allegations in Reply (“Motion”) in the above-captioned Amended Pole Attachment Complaint (“Complaint”) pursuant to Subpart J of the Federal Communications Commission (“FCC” or “Commission”) Rules, 47 C.F.R. §§ 1.1401 *et seq.* for an ongoing denial of access to PPL’s poles.

MAW disputes PPL’s characterization that MAW’s Reply raises entirely new allegations that warrant a response. In fact, it appears that PPL simply wants a second bite at the apple, and so is asking the Commission to deviate from the briefing schedule prescribed in its Rules to give the defendant, rather than the complainant, the last word. As illustrated below, the allegations to which PPL claims it needs supplemental briefing to respond were already raised in and/or entirely consistent with MAW’s allegations in its Complaint; to the extent MAW expands upon allegations raised there, it does so to respond to PPL’s allegations raised in its Answer and/or address claims that only came to light in discovery, after MAW’s Complaint was filed. Each of

the challenged allegations are material to the extent that the FCC finds that “PPL’s efforts to police its system to keep bad actors like MAW in check” is a sufficient basis to deny MAW access to PPL poles. While MAW contends that no additional response from PPL is necessary, should the Commission grant PPL leave to file an additional response to MAW’s Reply, MAW seeks the Commission’s leave to file a sur-reply, and to avoid extending the schedule out beyond the current timeframe.

I. THE ALLEGATIONS IN THE COMPLAINT ARE NOT NEW, ARE RESPONSIVE TO ISSUES RAISED IN PPL’S ANSWER, AND/OR ADDRESS MATERIAL PRODUCED BY PPL IN DISCOVERY

Specifically, with regard to each of the six allegation categories described in PPL’s Motion as warranting a sur-reply, MAW responds as follows:

PPL ASSERTION: “First, MAW alleges for the first time in its Reply that ‘many of the alleged safety-related violations’ were caused by either the City of Lancaster or LCSC.”

MAW RESPONSE: In fact, this is simply another way of saying, as MAW did throughout the Complaint, that the attachments are part of the J-and-raise of the City’s and LCSC’s existing network. Since MAW attached using the City and/or LCSC’s through bolt locations, and the violations concern separation at the pole, the violations necessarily pre-dated MAW’s attachments. MAW restated this position here to reply to PPL’s assertion that it created unsafe attachments—an assertion that MAW could only address in its Reply. Moreover, PPL asserts in its Answer that 534 City/LCSC attachments were unauthorized, thereby raising the specter that the City/LCSC’s unauthorized attachments gave rise to violations.

In terms of materiality, as stated in MAW’s Reply, it does not believe that PPL has effectively raised a defense of safety, capacity or reliability in its Answer. However,

PPL takes the position in its Answer at pp. 82 and 84, that “PPL’s efforts to police its system to keep bad actors like MAW in check are certainly related to ‘capacity, safety, reliability, or engineering standards.’” Thus, to the extent that the FCC considers this to be an acceptable basis for denying access, the extent to which MAW or another entity (the City, LCSC or PPL) created the alleged safety violations is material.

PPL ASSERTION: “Second, MAW alleges for the first time in its Reply that PPL allowed City-caused safety violations to remain in place for many years, supporting this allegation with an audit conducted by PPL in 2009, which MAW also mentions for the first time in its Reply.”

MAW RESPONSE: As MAW stated in its Reply at page 6, n.16, to defend against the allegations in PPL’s Answer that MAW created numerous safety violations and its Attachment D, Exhibit 4, which makes it appear as though MAW made hundreds of unsafe attachments, MAW compared the 2009 Audit results with PPL’s Attachment D, Exhibit 4. In doing so, it found pole violations that existed on both the 2009 Audit and PPL’s Attachment D, Exhibit 4. Moreover, the 2009 Audit document was created by PPL and PPL asserts in its Answer that 534 City/LCSC attachments were unauthorized, thereby raising the specter that the City/LCSC unauthorized attachments gave rise to violations.

In terms of materiality, as stated in MAW’s Reply, it does not believe that PPL has effectively raised a defense of safety, capacity or reliability in its Answer. However, PPL takes the position in its Answer at pp. 82 and 84, that “PPL’s efforts to police its system to keep bad actors like MAW in check are certainly related to ‘capacity, safety, reliability, or engineering standards.’” Thus, to the extent that the FCC considers this to

be an acceptable basis for denying access, the extent to which MAW or another entity (the City, LCSC or PPL) created the alleged safety violations is material.

PPL ASSERTION: “Third, MAW suggests for the first time in its Reply that ‘based on circumstantial evidence produced by PPL,’ PPL in some unknown way conspired with the City against MAW.”

MAW RESPONSE: PPL asserts in its Answer at page 34 that 534 City/LCSC attachments were unauthorized, thereby raising the specter that the City/LCSC unauthorized attachments gave rise to violations: “The remaining 534 municipal network attachments were attached to PPL’s poles without authorization.” Thus, it is logical to deduce that PPL knew about those violations but somehow failed to correct those violations. In addition, in its Response to MAW’s First Set of Interrogatories, submitted after MAW filed its Amended Complaint, PPL listed two agreements referring to the City of Lancaster, one of which also refers to the Lancaster Community Safety Coalition. *See* Reply, Attachment A, Declaration of Frank Wiczowski, Exh. 4 (PPL Discovery Response: “Ryan J. Yanek Documents 2,” line 218 (“Lancaster County – City of Lancaster Agreement.pdf,” Mar. 19, 2018), line 231 (“Private Agreement – Lancaster City-Lancaster Community Safety Coalition (3316).pdf,” Mar. 19, 2018)). The FCC rules do not, on their face, provide for discovery of documents. However, the Commission may allow for additional discovery, including document production, in light of the needs of the particular case. *See* 47 C.F.R. § 1.730(f). Accordingly, if the Commission believes it would be helpful to understand the nature of the listed agreements, it may require PPL to produce them. Again, to address PPL’s allegations that MAW created hundreds of unsafe attachments, MAW compared the 2009 Audit with

PPL's Attachment D, Exhibit 4. In doing so, it found alleged pole attachment violations that existed on both documents.

In terms of materiality, as stated in MAW's Reply, it does not believe that PPL has effectively raised a defense of safety, capacity or reliability in its Answer. However, PPL takes the position in its Answer at pp. 82 and 84, that "PPL's efforts to police its system to keep bad actors like MAW in check are certainly related to 'capacity, safety, reliability, or engineering standards.'" Thus, to the extent that the FCC considers this to be an acceptable basis for denying access, the extent to which MAW or another entity (the City, LCSC or PPL) created the alleged safety violations is material.

PPL ASSERTION: "Fourth, the Reply for the first time makes a number of new pronouncements regarding the National Electrical Safety Code, based solely on the testimony of MAW's President, who is not a Professional Engineer."

MAW RESPONSE: This is simply not true. MAW explained in its Complaint that the ADSS cables are not conductive and thus, can be located closer to electric facilities, consistent with NESC rules. (Compl. ¶ 21.) In addition, MAW explained in its Complaint, and its witness agreed, that the 2012 NESC allowed communications facilities to be attached as close as 20 inches to streetlights. (Compl. ¶ 50.) Thus, in responding to PPL's allegations that MAW created unsafe attachments, it reviewed the descriptions in PPL's Attachment D, Exhibit 4, to determine which attachments were described as being at least 20 inches from a streetlight. This is not a new NESC pronouncement.

In terms of materiality, as stated in MAW's Reply, it does not believe that PPL has effectively raised a defense of safety, capacity or reliability in its Answer. However,

PPL takes the position in its Answer at pp. 82 and 84, that “PPL’s efforts to police its system to keep bad actors like MAW in check are certainly related to ‘capacity, safety, reliability, or engineering standards.’” Thus, to the extent that the FCC considers this to be an acceptable basis for denying access, the extent to which MAW’s permanent attachments violate the NESC is material.

PPL ASSERTION: “Fifth, the Reply for the first time attaches a new document in the form of a draft letter by Mr. Staboleski that purports to explain Mr. Wiczkowski’s January 15, 2016 ‘letter.’”

MAW RESPONSE: MAW’s Reply necessarily responds to allegations in PPL’s Answer that the letter it attempted to provide PPL notifying it of the completion of the J-and-raise was fraudulent. MAW provided the metadata, drafts, and employee records associated with the creation of the letter to show it was created at that time. MAW does not deny that the letter may not have been sent or that PPL may not have received it.

In terms of materiality, MAW agrees that PPL’s allegation that the letter purporting to notify PPL of the completion of its J-and-raise is fraudulent is not relevant to the facts in dispute. MAW has long since filed applications for all of the attachments pursuant to the Lehigh County court order.

PPL ASSERTION: “Sixth, MAW alleges for the first time in its Reply that PPL stands to gain by driving MAW out of business, based on new allegations that PPL has an ongoing business relationship with MAW related to a ‘Reading, PA Metro Fiber Ring Network.’”

MAW RESPONSE: MAW raised this point in its Reply to counter the allegations of PPL that MAW is a bad actor and to shed light on possible motivations of PPL in

denying access to its poles. Accordingly, this is material to understanding the basis for PPL's denial of access.

II. IF PPL IS PERMITTED TO FILE A SUPPLEMENTAL PLEADING, MAW SHOULD BE PERMITTED TO FILE A SUR-REPLY AND THE OVERALL TIMEFRAME SHOULD NOT BE AFFECTED

As explained above, MAW opposes PPL's Motion because no further response is warranted by the circumstances. The Commission's pole attachment complaint pleading cycle was created to provide the Complainant an opportunity to reply to allegations raised in the Answer. 47 C.F.R. § 1.728. As set forth above, MAW raised the supposedly new allegations in response to positions raised by PPL in its Answer, as permitted by the FCC rules. *Id.* Moreover, the FCC is entitled to request the production of additional material by the parties. In fact, the complaint process also allows the Commission to order additional briefing. *Id.* § 1.732. Moreover, given that the discovery period does not close until after the reply is filed, briefing may well be necessary to account for additional evidence made available in later discovery.

However, in the event that the Commission allows PPL to file a response to MAW's Reply, MAW would ask that it be permitted to have the option of filing a sur-reply. This follows the intent of the FCC's complaint cycle.

MAW cannot afford to have the pleading cycle extended. In the event that additional filings are made, it should not affect the schedule, with the exception of moving the date for the joint statement to Monday, April 15, a change in the schedule suggested by PPL.

Respectfully submitted,

MAW Communications, Inc.

/s/ Maria T. Browne

By its Attorneys

Maria T. Browne

D. Van Fleet Bloys

Davis Wright Tremaine LLP

1919 Pennsylvania Avenue, N.W., Suite 800

Washington, D.C. 20006

202-973-4281 (Direct Phone)

202-973-4481 (Direct Fax)

202-973-4200 (Main Phone)

202-973-4499 (Main Fax)

mariabrowne@dwt.com

vanbloys@dwt.com

Date submitted: April 9, 2019

CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2019, I caused a copy of the foregoing Opposition to be served on the following (service method indicated):

Marlene J. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Room TW-A325
Washington, DC 20554
(via electronic filing)

Thomas P. Magee
Keller and Heckman LLP
1001 G Street, N.W.
Suite 500 West
Washington, DC 20001
(via email)

Lisa Saks
Federal Communications Commission
Enforcement Bureau
445 12th Street, SW
Washington, DC 20554
(via email)

Timothy A. Doughty
Keller and Heckman LLP
1001 G Street, N.W.
Suite 500 West
Washington, DC 20001
(via email)

Adam Suppes
Federal Communications Commission
Enforcement Bureau
445 12th Street, SW
Washington, DC 20554
(via email)

Secretary's Bureau
Pennsylvania Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265
(via U.S. mail)



Maria T. Browne