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EXECUTIVE BRANCH ETHICS COMMISSION

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Executive Branch Ethics Commission
ADVISORY OPINION 21-07
May 19, 2021

RE: May a former public servant in an officer position work for a company that has a current contract with his former agency if the contract does not result in the contractor receiving state funds?

DECISION: Yes, because the contractor is not "doing business with" the former public servant's agency, as defined in KRS 11A.010(14), the post-employment provisions in KRS 11A.040(7) would not prohibit the former public servant from accepting the employment during the first year after state service. However, the public servant must limit his contacts with his former agency in compliance with the provisions of KRS 11A.040(9).

This opinion is issued in response to your May 5, 2021, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the May 19, 2021 meeting of the Commission and the following opinion is issued pursuant to KRS 11A.110(1).

You are a current employee of the Kentucky Communications Network Authority (KCNA). KCNA manages and oversees the KentuckyWired Network (the Network), the Commonwealths' open-access broadband network. KCNA has a contract with OpenFiber Kentucky Company, LLC, (OpenFiber) to act as the wholesaler to sell access to the Network. You ask whether you may seek employment immediately after leaving state service with OpenFiber. As part of your job duties for KCNA, you have worked directly with OpenFiber in the planning for this phase of the project and have worked on the contract that KCNA has with OpenFiber. You indicate the following facts that will be integral for the Commission to determine the answer to your request.

Prior to your service with KCNA, you worked for 33 years as an electrical and telecommunications engineer and are a licensed Professional Engineer. You will be using your professional license in your post-employment if you are allowed to go to work for OpenFiber.

The Network was designed to deliver 288 strands of fiber optic cable to all of Kentucky's counties. In 2014, KCNA entered a separate agreement with Macquarie Infrastructure Developments, LLC, (Macquarie) to design, build, finance, operate, and maintain the Network. Macquarie has since assigned these responsibilities under the original agreement to KentuckyWired Operations Company (KWOC). When complete, the Network will connect government offices, universities, community colleges, state police posts, state parks, and other government institutions to the global internet. Approximately half of the fiber optic strands will be reserved for the Commonwealth's use. By owning its own communications network, the Commonwealth can repurpose the costs it currently pays to private companies for internet access to pay for a portion of the Network's construction. The other half of the fiber optic strands not being used for public entities will be leased to private companies.

In 2017, KCNA entered into a separate agreement with OpenFiber for the commercialization of the additional capacity for third party users. Macquarie assigned all of its rights and obligations under the original agreement to OpenFiber related to the commercialization of the additional capacity to third party users. Under the 2017 agreement, OpenFiber was created to be the exclusive wholesale partner of the Commonwealth and is responsible for leasing the excess capacity to Internet Service Providers, cellular providers, and other private companies. KCNA, KWOC, and OpenFiber entered into a Wholesaler Agreement in 2017, which specifies that 75% to 90% of the ancillary revenues generated by OpenFiber through the third party sales will be paid to the Commonwealth.

You have provided a copy of the Wholesaler Agreement to the Commission for its review. On page 25 of the Wholesaler Agreement, Section 9.2 indicates that payments shall be paid by OpenFiber to KCNA and KWOC as determined by the Revenue Sharing provisions, which are listed on page 21 of the Wholesaler Agreement. The Revenue Sharing provisions state as follows:

- (a) The Wholesaler will pay to the Authority a portion of the revenue generated by Wholesaler Services that rely in whole or in part on access to, or otherwise utilize, Ancillary PPP Network Assets as follows:
 - (1) The Wholesaler shall pay to the Authority 90% of all Gross Ancillary Revenues generated from Core Dark Fiber IRUs;
 - (2) The Wholesaler shall pay to the Authority 80% of all Net Ancillary Revenues generated from Ancillary Dark Fiber IRUs; and
 - (3) The Wholesaler shall pay to the Authority 75% of all Net Ancillary Revenues generated from Lit Fiber Services.

- (b) The Wholesaler shall make lump sum quarterly payments to the Authority not later than 30 days following the end of each calendar quarter, in the amounts calculated in accordance with Section 3.4(a). The Wholesaler will provide along with each quarterly payment detailed information concerning the revenue sources, calculations and any overdue billings relating to such payment.

As such, you contend that OpenFiber is not receiving payment by the Commonwealth in exchange for the services it is providing under the 2017 agreement. Any payments it will receive will be from the third parties paying for access to the Network. You further indicate that OpenFiber is not regulated by KCNA. Therefore, you contend that the post-employment provisions should not limit you from immediately accepting employment with OpenFiber after you leave state service. The legal advisors for KCNA have confirmed that the Wholesaler Agreement would not result in OpenFiber receiving state funds.

There are four post-employment provisions in the Executive Branch Code of Ethics codified at KRS 11A.040(6)-(9). In your position as an Executive Advisor, you are considered to be an "officer" as defined in KRS 11A.010(7). As such, all four post-employment provisions will apply to you during your first year of post-employment. The Commission will conduct a review of all four provisions and determine how they will apply to your individual scenario.

KRS 11A.040(6) provides that a former officer may not enter into a contract with their former agency during the first year post-employment. You are not contemplating entering into a contract with your former agency in your personal or professional capacity. Therefore, this provision is not an issue for your proposed scenario.

KRS 11A.040(7) provides:

A present or former officer or public servant listed in KRS 11A.010(9)(a) to (g) shall not, within one (1) year following termination of his office or employment, accept employment, compensation, or other economic benefit from any person or business *that contracts or does business with*, or is regulated by, *the state in matters in which he was directly involved during the last thirty-six (36) months of his tenure*. This provision shall not prohibit an individual from returning to the same business, firm, occupation, or profession in which he was involved prior to taking office or beginning his term of employment, or for which he received, prior to his state employment, a professional degree or license, provided that, for a period of one (1) year, he personally refrains from working on any matter in which he was directly involved during the last thirty-six (36) months of his tenure in state government. This subsection shall not prohibit the performance of ministerial functions including, but not limited to, filing tax returns, filing applications for permits or licenses, or filing incorporation papers, nor shall it

prohibit the former officer or public servant from receiving public funds disbursed through entitlement programs.

(emphasis provided). "Directly involved" is defined in KRS 11A.010(18) to mean "to work on personally or to supervise someone who works on personally." The term "doing business with" is defined by KRS 11A.010(14) to mean "contracting, entering into an agreement, leasing, or otherwise exchanging services or goods with a state agency *in return for payment by the state*, including accepting a grant, but not including accepting a state entitlement fund disbursement." (emphasis added). The term "regulated by" is not defined in the Executive Branch Code of Ethics, but it would generally mean that your agency has regulatory powers conferred either through statute or administrative regulation that gives it some form of power or authority over your prospective employer. This is the provision that is in play for our review.

Pursuant to KRS 11A.040(7), a former officer may not accept employment with an entity that contracts or does business with or is regulated by his former agency in matters in which he was directly involved during his last thirty-six (36) months with the state for a period of one (1) year after leaving employment with the state, unless he was returning to his former business or profession. You were a licensed professional engineer prior to your state service. Your intended post-employment will require you to use your professional license. Therefore, you will be returning to your former profession. As such, you will not be prohibited from taking a position with OpenFiber immediately after you leave state service, even though OpenFiber has a contract with your former agency.

Nevertheless, the Commission must determine whether you will be required during your first year post-employment to abstain from matters involving your former agency. The 2017 agreement that OpenFiber has with KCNA would be considered a matter as defined by 9 KAR 1:025. The Ethics Commission has defined the term "matter" to mean "any measurable case, litigation, decision, grant, proceeding, application, determination, *contract*, claim, investigation, charge, or legislative bill." (emphasis added) 9 KAR 1:025, Section 1(4). However, before the term matter comes into consideration, the term "doing business with" is the deciding factor in this scenario because it appears before the term matter in the language of KRS 11A.040(7); meaning the term "doing business with" is a qualifier and a condition upon which the term "matter" is defined for the purposes of this statutory provision's application. Therefore, for KRS 11A.040(7) to limit you in your post-employment, the contract that KCNA has with OpenFiber would have to result in OpenFiber receiving state funds, which it does not.

Taking all of these definitions into consideration, the Commission determines that KRS 11A.010(7) would not limit you from immediately going to work for OpenFiber and would not limit you from working on OpenFiber's business of selling access to the Network to third party users as part of the Wholesaler Agreement.

As for the remaining post-employment provisions, the provisions that apply to every public servant during the first year post-employment are contained in KRS 11A.040(8) and (9). They are as follows:

- (8) A former public servant shall not act as a lobbyist or lobbyist's principal in matters in which he was directly involved during the last thirty-six (36) months of his tenure for a period of one (1) year after the latter of:
 - (a) The date of leaving office or termination of employment; or
 - (b) The date the term of office expires to which the public servant was elected.
- (9) A former public servant shall not represent a person or business before a state agency *in a matter in which the former public servant was directly involved* during the last thirty-six (36) months of his tenure, for a period of one (1) year after the latter of:
 - (a) The date of leaving office or termination of employment; or
 - (b) The date the term of office expires to which the public servant was elected.

(emphasis added). KRS 11A.040(8) does not seem to apply to your intended post-employment as you will not be acting as a paid lobbyist.

However, 11A.040(9) may require you to limit the types of contacts you can have with KCNA during first year post-employment. KRS 11A.010(17) defines "represent" to mean "attend an agency proceeding, write a letter, or communicate with an employee of an agency on behalf of someone else." This definition of the term "represent" is analogous to you acting as the point of contact for your future employer in communicating with your former agency. As reasoned in the paragraphs above, the term "doing business as" is not a limiting factor in KRS 11A.040(9). Therefore, the fact that OpenFiber does not receive state funds is not a factor for the purposes of applying KRS 11A.040(9). As such, the key definition for applying KRS 11A.040(9) is for the term "matter" as stated in 9 KAR 1:025, Section 1(4), which would cover the contract KCNA has with OpenFiber.

In summary, the collective effect of these statutory provisions would mean that you will be at liberty to immediately go to work for OpenFiber after you leave state service. You also may immediately work on the contract between KCNA and OpenFiber during your employment for OpenFiber. However, during your first year post-employment, you will not be at liberty to engage in communications with the staff of KCNA on behalf of OpenFiber. You will have to ensure that someone else at OpenFiber engages in such communications with KCNA in your place. You may advise OpenFiber about the content of the communications, but you cannot participate in those communications yourself, either in person or through other forms of communication.

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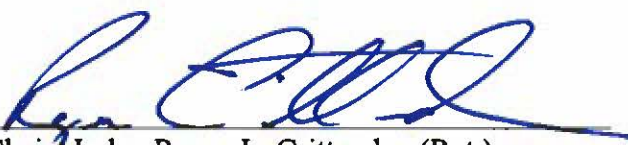
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As the Commission has stated in the past, those wishing to follow the advice in this Advisory Opinion for their individual scenarios should seek further guidance from the Commission before proceeding as the nuances in the post-employment provisions of the Code of Ethics may apply differently given a varying set of facts.

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By Chair Judge Roger L. Crittenden (Ret.)