COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC INVESTIGATION OF THE PROPOSED POLE ATTACHMENT TARIFFS OF RURAL ELECTRIC COOPERATIVE CORPORATIONS	))))	CASE NO. 2022-00106

O R D E R

On February 28, 2022, pursuant to 807 KAR 5:015, Big Rivers Electric Corporation, Big Sandy R.E.C.C., Blue Grass Energy Cooperative Corp., Clark Energy Cooperative, Inc., Cumberland Valley Electric, Inc., Farmers R.E.C.C., Fleming-Mason Energy Cooperative, Inc., Grayson R.E.C.C., Inter-County Energy Cooperative Corporation, Jackson Energy Cooperative Corporation, Jackson Purchase Energy Corporation, Kenergy Corp., Licking Valley R.E.C.C., Meade County R.E.C.C., Nolin R.E.C.C., Owen Electric Cooperative, Inc., Salt River Electric Cooperative Corp., Shelby Energy Cooperative, Inc., South Kentucky R.E.C.C., and Taylor County R.E.C.C., filed amendments to their respective pole attachment tariffs with proposed an effective dates of March 31, 2022. On March 18, 2022, East Kentucky Power Cooperative, Inc. (EKPC) filed amendments to its pole attachment tariff with a proposed effective date of March 31, 2022.[1] BellSouth Telecommunications, LLC d/b/a AT&T Kentucky (AT&T Kentucky) and the Kentucky Broadband and Cable Association (KBCA) filed objections to the tariffs filed by the cooperatives (collectively, RECCs). The Commission suspended the RECCs'

[1] They did not file an objection to Duke Kentucky's tariff specifically, but some of the objections raised to the other utilities' tariff could apply to Duke Kentucky's tariff.

tariffs and initiated this case to investigate them and the objections thereto. AT&T Kentucky and KBCA were made parties to this proceeding. No other requests for intervention were received. The parties filed testimony, submitted and responded to requests for information, and filed briefs. No party requested a hearing. This matter is now before the Commission for the decision on the merits.

BACKGROUND

The Commission promulgated 807 KAR 5:015, which became effective February 1, 2022, to establish "specific criteria and procedures for obtaining access to utility poles within the [C]ommission's jurisdiction."[2] Among other things, 807 KAR 5:015, Section 3(7) required all pole owning utilities to file tariffs conforming to the requirements of the regulation by February 28, 2022.

To comply with 807 KAR 5:015, the RECCs each field separate pole attachment tariffs. However, while there are some differences in the tariffs, they are based on the same form and largely include the same general terms. KBCA and AT&T Kentucky's objections primarily pertain to common or similar terms in all of the RECCs pole attachment tariffs, but they did object to some specific terms in the tariffs as discussed below.

Specifically, KBCA raised the following general objections to the RECC's tariffs:

1. KBCA alleged that the manner in which the RECCs allocated the cost of non-red tagged poles was unreasonable, because it allocates all of the cost for the make ready replacement of a non-red tagged pole to the new attacher requesting the make ready.
2. KBCA alleged that it was unreasonable for the RECC's to reserve space on their poles for their sole use, unless the reservation of space is tied to a specific, known plan to provide core electric services.

[2] 807 KAR 5:015, Necessity, Function, and Conformity.

3. KBCA alleged that provisions in the RECCs tariffs requiring a pole-loading analysis certified by a professional engineer licensed in Kentucky are unreasonable and violate 807 KAR 5:015.
4. KBCA alleged that a requirement in the RECCs' tariffs that the "[o]verlashing parties shall also be responsible for reasonable engineering, survey and inspection costs incurred by [the Cooperative] in connection with overlashing activity" is unreasonable.
5. KBCA objected to any provision imposing penalties for breaches, other than an unauthorized attachment fee to compensate a pole owner for non-payment of rent as unreasonable.
6. KBCA alleged that the requirement in the RECCs tariffs that an attachers' contractors and subcontractors must maintain the same insurance coverage as required of attacher was unreasonable.
7. KBCA alleged that any indemnity language in the tariffs that makes an attacher responsible for the negligence of the pole owner is unreasonable.

KBCA also objected to the proposed $100 "administrative review fee" in the tariff of Clark Energy Cooperative.[3]

AT&T Kentucky made the following objections to the tariffs filed by the RECCs.[4]

1. AT&T Kentucky alleged that the RECCs' definition of "attachment" was unreasonable and should be narrowed.
2. AT&T Kentucky alleged that the RECCs' definition of "service drop" was unreasonable.
3. AT&T Kentucky alleged that the RECCs' definition of "supply space" was unreasonable and inconsistent among the different RECCs.
4. AT&T Kentucky alleged that provisions in the RECCs' tariffs that result in make-ready estimates being automatically withdrawn after 14 days were unreasonable.
5. AT&T Kentucky alleged that including charges for guying and anchoring in the pole attachment tariffs was unreasonable if attachers have to pay for guys and anchors they installed at their own cost.
6. AT&T Kentucky alleged that several portions of the provision relating to "Inventory" in the RECCs' tariffs were unreasonable. AT&T Kentucky asserts, *inter alia*, that "foreign owned pole" should be defined, inventory costs should not be imposed by the pole owners for inventorying poles it does not own, and several changes should be made to the portion addressing when an attaching party must bring non-compliant facilities into compliance.
7. AT&T Kentucky alleged that the proposed unauthorized attachment fee was unreasonable because it is punitive.

[3] KBCA Objections at 6-7, 23, 31, 35.

[4] Comments of AT&T Kentucky in Response to March 2, 2022 Commission Order (AT&T's Initial Objections) at 2-18 (filed Mar. 17, 2022).

8. AT&T Kentucky alleged that the requiring a professional engineer to certify an attacher's design was unreasonable and is overkill.
9. AT&T Kentucky alleged that the proposed requirement that a professional engineer for conduct a pole loading analysis when an attacher seeks to overlash was unreasonable.
10. AT&T Kentucky alleged that the proposed provision governing mid-span taps was unreasonable because would require a professional engineer to design the tap and conduct a pole loading analysis.
11. AT&T Kentucky objected to the cover page of Big Sandy R.E.C.C.'s pole tariff because it indicated it was for CATV attachment.

DISCUSSION

Allocation of Costs to Replace Poles That Are Not Red Tagged

KBCA objected to any provision assigning all of the make ready cost of replacing a pole that is not red-tagged to new attachers, including the requirement in the RECCs tariffs that:

> Licensee shall pay all of the necessary Make-ready cost of attaching to a new pole, including any costs associated with replacing or Transferring Licensee's Attachments or any Outside Parties Attachments, except when the pole has been red-tagged for replacement.[5]

KBCA asserts that it should only pay its reasonable share of a pole replacement and that it is unreasonable to charge it the full make ready cost of a non-red tagged pole replacement.[6]

Dr. Patricia Kravtin, who was KBCA's primary witness in support of its proposed methodology, argued that the utilities are the primary beneficiary of non-red tagged pole replacements, because the utilities get a new pole with a longer remaining service to

[5] *See, e.g.* Blue Grass Energy Cooperative Corporation's Tariff, PSC KY NO. 2, Original Sheet No. 205, Article VIII, A(i).

[6] KBCA Objections at 6.

provide their core service.[7] She also stated that utilities will receive additional benefits from the non-red tagged pole replacements, including:

- Operational benefits of the replacement pole such as additional strength, height, and resilience and lower operational costs;
- Strategic benefits such as the ability to provide additional services and network enhancements;
- Revenue-enhancing benefits such as additional space for more attachments; and
- Additional tax savings arising from accelerated depreciation.[8]

Dr. Kravtin asserted that the utilities will be required to replace the non-red tagged pole eventually, and therefore, that the make ready pole replacement to accommodate a new attacher only shifts the timing of the replacement.[9] Dr. Kravtin and KBCA argued that if third party attacher pays the undepreciated cost of the existing pole, i.e. the net book value of the pole that the third party attacher will have covered the cost of replacing the pole early caused by the new attachment request.[10] Dr. Kravtin and KBCA also argued that the net book value of a pole should be calculated by taking the net book value of the poles recorded in each account and using the number of poles to calculate an average, unless a utility or a new attacher can present evidence that something other than the average should be used.[11]

The RECCs' witness, Sean Knowles, stated that "[t]here has long been a standard principle in joint use and pole attachment relationships (and, really, in many contexts

[7] Direct Testimony of Patricia D. Kravtin (Kravtin Testimony) at 8, 13.

[8] Kravtin Testimony at 40.

[9] Kravtin Testimony at 16-17.

[10] *See* Kravtin Testimony at 17; Brief of the Kentucky Broadband and Cable Association (KBCA's Initial Brief) KBCA's Initial Brief at 3.

[11] *See* Kravtin Testimony at 18; KBCA's Initial Brief at 3-4.

involving ratemaking) that 'the cost causer pays.'"[12] He stated that this principal aligns costs with incentives.[13] The RECCs' similarly argued in their brief that their "framework is consistent with the longstanding cost causation principle that rates for service reflect the costs imposed by customers of that service—a principle at the core of utility ratemaking in Kentucky, designed to avoid subsidization and ensure the fair recovery of costs from appropriate ratepayers."[14]

Mr. Knowles also argued that "[t]he notion that a cost-causing attacher should be able to dictate how and when a pole owner invests in its own infrastructure is troubling and patently unreasonable."[15] He noted that "[t]he RECCs necessarily manage their systems on limited financial and operational resources, typically pursuant to a construction work plan with a multi-year time horizon."[16] He asserted that if RECCs become responsible for non-red tagged pole replacements, based on the schedules of the third party attachers as opposed to the needs of the RECCs, that it would undermine the ability of the RECCs to manage their budgets, which could require the RECCs to delay or forego other important projects and result in other customers rates going up.[17]

Mr. Knowles also stated that the position that pole owners should pay for non-red tagged pole replacements ignores the extensive federal, state, and local subsidies the

[12] Rebuttal Testimony of Sean Knowles (Knowles Rebuttal Testimony) (filed Jul. 11, 2022) at 12.

[13] Knowles Rebuttal Testimony at 12.

[14] Response Brief of the Rural Electric Cooperative Corporations (RECCs Response Brief) (filed Oct. 18, 2022) at 3.

[15] Knowles Rebuttal Testimony at 12.

[16] Knowles Rebuttal Testimony at 12-13.

[17] Knowles Rebuttal Testimony at 13.

broadband industry has received to assist with the cost of deployment, including expected pole replacement costs.[18] He noted that KBCA's members were "even instrumental in successfully lobbying the Kentucky Legislature for a 'pole replacement fund,' which passed as Section 5 of House Bill 315 earlier this year."[19]

Red tagged poles are defined in the regulation as any pole that "is designated for replacement based on the pole's non-compliance with an applicable safety standard;" "is designated for replacement within two (2) years of the date of its actual replacement for any reason unrelated to a new attacher's request for attachment," and "would have needed to be replaced at the time of replacement even if the new attachment were not made."[20] The regulation assigns the cost of red tagged pole replacements to the utility unless the attacher requests a larger pole in which case the attacher would only be responsible for the difference in the cost of the pole the utility would have installed and the cost of the larger pole.[21] The regulation does not establish a specific allocation methodology for the costs of non-red tagged pole replacements.[22]

As noted by the RECCs, the dispute regarding the allocation of make ready costs for non-red tagged pole replacements is not a dispute about whether the utility or a new attacher should be responsible for the cost, but rather, is about whether the new attacher or the RECCs' other customers should be responsible for the cost, because a utility is entitled to an opportunity to recover any cost reasonably incurred from its customers and

[18] Knowles Rebuttal Testimony at 13.

[19] Knowles Rebuttal Testimony at 13.

[20] 807 KAR 5:015, Section 1.

[21] 807 KAR 5:015, Section 4(6)(b).

[22] 807 KAR 5:015, Section 4(6)(b)4.

in the case of RECCs, which are non-profit and member owned, even retained capital is used to lower future rates or offset future rate increases. When determining how a utility's costs should be allocated among customers, the Commission has long stated that the basic tenant of rate-making is that that costs should be allocated to the cost-causer.[23] This generally means that "the consumers whose service demand causes [the utility] to incur additional investment expenditures and expenses should pay these costs."[24]

Here, a non-red tag pole replacement, by definition, would not be taking place at the time of the replacement if the replacement was not necessary to accommodate the new attacher, and therefore, the new attacher would be the "but for" and proximate cause of the pole replacement. The other utility customers may eventually benefit from the installation of the new pole installed to accommodate a new attacher as alleged by KBCA. However, those benefits are much more limited than alleged by KBCA and they are speculative.

For instance, Dr. Kravtin asserted that utilities would obtain operational benefits from the non-red tagged pole replacements such as additional strength, height, and resilience, which she argued would reduce operating and maintenance costs, among other things.[25] However, again, such replacements are, by definition, not needed, and

[23] Case No. 2002-00169, *Application of Kentucky Power Company d/b/a American Electric Power for Approval of an Amended Compliance Plan for Purposes of Recovering the Costs of New and Additional Pollution Control Facilities and to Amend its Environmental Cost Recovery Surcharge Tariff* (Ky. PSC Mar. 31, 2003), Order.

[24] Case Nos. 8847, 8879, *In Re: South Central Bell Telephone Company* (Ky. PSC Jan. 18, 1984), Order.

[25] *See* KBCA's Response to Commission Staff's First Request for Information (KBCA's Response to Staff's First Request), Item 12.

therefore, not necessary to provide adequate service to a utility's other customers.[26] Absent the request by a new attacher a utility would be prohibited from constructing the new pole and recovering the cost from its customers.[27] Further, Dr. Kravtin provided no evidence that new poles that are not otherwise needed would tangibly reduce a utility's operation and maintenance expense.[28]

Dr. Kravtin also argued that utilities will see tax benefits from the non-red tagged pole replacements in the form of accelerated tax depreciation of the capital expenditure that can be used to offset tax expense. However, for the most part, utilities are prohibited by federal law from passing along the direct benefits of accelerated tax depreciation on to customers.[29] Further, even if utilities could pass those benefits on to customers, the Commission fails to see how a comparatively small accelerated tax decrease would be a net benefit to other customers that would justify requiring them to pay the bulk of the cost

[26] The Commission notes that Dr. Kravtin also provided testimony that purported to show that utilities are failing to make-pole replacements at rates that correspond to their depreciation rates, which KBCA has alleged establishes that utilities are sitting on necessary pole replacements and will ultimately require attachers to pay for those attachments. Based on the depreciation rates for many of the utilities poles, which were occasionally based on useful lives of less than 30 years, a major explanation for the discrepancy between depreciation and replacement rates, is likely that many of the depreciation rates, which are often the result of settlements, are based on useful lives that are too short. However, even if Dr. Kravtin's testimony established that utilities were sitting on necessary pole replacements, it would not justify requiring other customers to cover the cost of non-red tagged poles, but rather, would be evidence that could be used to establish that a utility is seeking to improperly charge an attacher for red-tagged pole replacements.

[27] *See* KRS 278.020 (requiring a utility to obtain a certificate of public convenience (CPCN) and necessity before beginning the construction of any plant, equipment, property, or facility for furnishing to the public any utility, including water and sewer service, except for extensions in the ordinary course of business); *see also Kentucky Utilities Co. v. Pub. Serv. Comm'n.*, 252 S.W.2d 885 (Ky. 1952) (noting that to obtain a CPCN that a utility must establish a need for the plant and the absence of wasteful duplication, and defining wasteful duplication, in part, as "an excess of capacity over need"); 807 KAR 5:001, Section 15(3) (noting that an extension in the ordinary course of business may not result in wasteful duplication of plant, equipment, property, or facilities).

[28] *See* KBCA's Response to Staff's First Request, Item 12(d).

[29] *See* 26 U.S.C.A. § 168(f)(2) (stating that accelerated depreciation may not be used for "public utility property" if the "taxpayer does not use a normalization method of accounting").

for the new pole, through depreciation expense and carrying costs, that is not need to provide them service. Additionally, in the case of non-profit entities such as the RECCs, an accelerated tax deduction would be of little use to other customers even if it could be passed on to those customers.

The Commission acknowledges that non-red tagged pole replacements may ultimately benefit other utility customers by extending the useful lives of the poles replaced. However, the Commission believes that benefit is speculative, because it will only accrue if the pole at issue is needed beyond the point at which the original pole would have reached the end of its useful life, which is not certain given the long lives of the assets at issue. Conversely, the benefit of a non-red tagged pole replacement to a new attacher is immediate and obvious, because the replacement is being made to specifically accommodate the new attacher and to allow the new attacher to build out its system. Yet, the cost allocation method proposed by KBCA would generally only require the new attacher to pay a small amount, because KBCA is only proposing to pay the undepreciated original cost of poles that were installed years or even decades ago. Given the obvious benefit to the new attacher and the speculative nature of any benefit to the RECCs, the Commission finds that it is reasonable for new attachers to pay the make ready costs for non-red tagged pole replacements. Thus, the Commission finds that the RECCs' tariffs reasonably allocate the costs of non-red tagged pole replacements.[30]

Reservation of Space on the RECCs Poles

[30] *Cf. Old Dominion Elec. Co-Op., Inc. v. F.E.R.C.*, 518 F.3d 43, 51 (D.C. Cir. 2008)(in which the D.C. Circuit affirmed FERC's order allocating 100 percent of the costs of transmission upgrades required for the generation owner to owner to interconnect to the transmission system to the generation owner, despite ancillary benefits to the system, because the transmission upgrades would not have been needed "but for" the generation owners need to interconnect).

KBCA objected to a provision in the RECCs tariff allowing the pole owner to reserve additional space on a newly installed pole for the pole owner's "sole use" "in anticipation of [its] future requirements or additions."[31] KBCA noted that the regulation states that "[a] pole owner may only deny access to its poles 'on a non-discriminatory basis where there is insufficient capacity or for reasons of safety, reliability, and generally applicable engineering purposes.'"[32] KBCA also asserted that "[t]ariff provisions that allow pole owners to reserve space for broad purposes are anticompetitive, discriminatory, and deter and increase the cost of broadband deployment in Kentucky," which it noted could allow a pole owner to deny access to a new attacher even if there is space available on the poles.[33] KBCA argued that it would be unjust and unreasonable for the Commission to allow a pole owner "to adopt a blanket reservation of space for unstated purposes," and noted that the Federal Communications Commission does not allow a pole owner to reserve space unless "such reservation is consistent with a bona fide development plan that reasonably and specifically projects a need for that space in the provision of its core utility service."[34]

The RECCs claimed that KBCA has blown the language allowing a reservation of space out of proportion. They asserted that "[t]his language was included to avoid the situation when a pole owner selects a larger pole to accommodate its anticipated use, pays for it and installs it, and then soon thereafter is approached by an attacher which

[31] KBCA Objections at 4-5, 8-9, 11-13, 15-16, 18-19, 25-30, 32, 34.

[32] KBCA's Initial Brief at 18 *citing* 807 KAR 5:015, Section 2(1)(a).

[33] KBCA's Initial Brief at 18.

[34] KBCA's Initial Brief at 18.

seeks to attach to a pole that would otherwise appear to welcome another attachment."[35] The RECCs argued that KBCA is simply conceiving of an "unreasonable application" of the tariff term. They argued that it is fair "to presume the reasonable application of tariffs by a utility," and therefore, the "logical course of action is for the Commission to approve the [RECCs'] tariffs as fair, just, and reasonable, warn against abusive practices or interpretations of those tariffs, and deal with any actual, real world disputes through the Pole Attachment Regulation's contemplated dispute process."[36]

The Commission agrees with the KBCA, at least in part, in that it would be unreasonable to permit a pole owning utility to reserve space on a pole for some unspecified future use. As noted by KBCA, 807 KAR 5:015 allows a pole owning utility to deny access to a pole based on a lack of capacity, but if there is capacity on the pole, and there is no other issue justifying denying access, then the pole owning utility is required to grant access to the pole. It would be inconsistent with 807 KAR 5:015 to allow a pole owning utility to deny access based on a lack of capacity if it was reserving space without justification. However, it would be both reasonable and consistent with 807 KAR 5:015 for an RECC to reserve space on a pole if it has a specific future need for the space—much like a new attacher that has been approved to access a pole would have space reserved while it is making its attachments.

The language proposed by the RECCs is somewhat ambiguous with respect to the circumstances in which an RECC would be permitted to reserve space pursuant to the

[35] RECC's Response Brief at 10-11.

[36] RECC's Response at 11.

provision at issue, but there clearly are limits on that ability in the proposed tariff. The language in the RECCs generally tariffs states in relevant part:

> In the event Cooperative installs a pole larger than is initially required for Electric Utility's and Licensee's use in anticipation of Cooperative's future requirements or additions, the additional space provided by Electric Utility shall be reserved for Cooperative's sole use. Licensee may request documentation to validate the need for future space.[37]

Based on that language, the RECC would be able to reserve space "[i]n the event Cooperative installs a pole larger than is initially required . . . in anticipation of Cooperative's future requirements or additions," which implies that the pole was constructed with excess capacity with a specific need in mind. The last sentence similarly implies that an RECC would only be able to reserve space in the event that it has a specific need for the space by indicating that the attacher may request validation of the RECCs future needs for the space. The Commission finds that the general ability to reserve space on a pole is reasonable, provided, however, that the reservation is tied to a specific identifiable expected future need.

Pole-Loading Surveys for Overlashing

The RECCs' overlashing provisions require a person seeking overlashing to provide 30 days advanced written notice:

> [T]o the Cooperative describing the proposed activity along with submission of the complete information required under APPENDIX A, including a pole-loading analysis certified by a professional engineer licensed in Kentucky, in the method and form reasonably required by Cooperative.

[37] *See, e.g.* Blue Grass Energy Cooperative Corporation's Tariff, PSC KY NO. 2, Original Sheet No. 206, Article VIII, A.iii.

The appendix referred to in that provision is the RECC's pole attachment application that would be filed when the attacher is requesting a new attachment.

KBCA objected to the requirement that overlashing customers submit a pole loading analysis certified by a professional engineer in addition to a notice of planned overlashing.[38] KBCA argued that "[r]equiring an attacher to obtain a certified pole loading analysis along with the overlash notice is tantamount to a permit requirement and will unnecessarily increase the time and costs of overlashing."[39] KBCA argues that requiring a pole loading analysis with the overlash notice is contrary to the plain text of 807 KAR 5:015, which only requires notice of overlashing.[40] KBCA noted that the Federal Communications Commission (FCC) rejected similar requirements as converting the notice requirement into a quasi-application or quasi-pre-approval requirement. [41] KBCA stated that a sounder approach would be for overlashers to:

> [P]rovide pole owners with information related to the cable or fiber type, weight per foot, and diameter of the proposed overlashing, as well as the pole number and any existing safety issues. Once the notice is provided, a pole owner has 30 days to review and address that information. If a pole owner reasonably believes that a pole loading analysis is necessary, once it receives a notice, it should complete the pole loading analysis within that existing 30-day notice period.[42]

[38] KBCA's Initial Brief at 7.

[39] KBCA's Initial Brief at 8.

[40] KBCA's Initial Brief at 8.

[41] KBCA's Initial Brief at 8.

[42] KBCA's Initial Brief at 8 (internal citations omitted); *see also* Direct Testimony of Richard Bast (Bast Testimony) (filed Jun. 9, 2022) at 3.

AT&T Kentucky similarly argued that the requirement that overlashers file a "pole-loading analysis certified by a professional engineer" turns the notice overlashing that utilities are entitled to require into an application requirement and is excessive. AT&T Kentucky noted that a party seeking to overlash would have its own in-house engineering and pole loading analysis capabilities. AT&T Kentucky suggested, at minimum, that the language quoted above be amended to allow any "qualified person Licensee employs or contracts" to perform the pole-loading analysis.[43]

The Commission's pole attachment regulation states that "[a] utility may require no more than 30 days' advance notice of planned overlashing."[44] This requirement is notably distinct from the applications that utilities may require for wholly new attachment requests, and therefore, must be interpreted to mean something different than the application permitted under other sections of the regulation. Further, as noted by KBCA, the FCC, discussing a similar provision in its regulation, found that requiring engineering studies to be filed with notice of overlashing would convert the notice requirement into a quasi-application process. The Commission agrees that requiring the filing of the engineering analysis as proposed by the RECCs would impose a quasi-application requirement on the attachers that is not contemplated by the regulation. Thus, while an RECC could perform its own analysis where appropriate, as discussed in more detail below, the Commission finds that the most reasonable interpretation of the regulation would be that a utility cannot require an attacher to file the type of pole-loading analysis contemplated by the RECCs, and therefore, that that requirement in the RECCs tariffs is unreasonable

[43] Testimony of Daniel Rhinehart on behalf of AT&T (Rhinehart Testimony) (filed Jun. 9, 2022) at 19-20.

[44] 807 KAR 5:015, Section 3(5)(c)1.

and is not approved. However, none of the other notice requirements for overlashing should be affected by this finding.

Overlashing Costs

The RECCs' tariffs provisions on overlashing describe how the RECCs will review notices of overlashing and complete inspections of overlashing within 90 days of the work being completed and then states that the "[o]verlashing parties shall also be responsible for reasonable engineering, survey, and inspection costs incurred by Cooperative in connection with overlashing activity." KBCA objected to that provision and argued that it improperly and unreasonably required overlashers to pay any costs incurred by the utility in evaluating the proposed overlashing or inspecting the proposed overlashing after it has been inspected, because such evaluations and inspections are not generally necessary.[45] KBCA also argued, consistent with jurisdictions in which the FCC regulated pole attachments, that overlashers should only be charged for costs incurred in evaluating the proposed overlashing if the evaluation identifies an issue with the overlashing.[46]

The RECCs argued that:

> [T]he proposed tariffs submitted by the RECCs are intended to minimize the risk associated with overlashing and ensure costs incurred by a utility related to overlashing are appropriately recovered (as opposed to being shouldered by cooperative electric ratepayers, who, of course, do not benefit at all from this activity).[47]

[45] Brief of the Kentucky Broadband and Cable Association (KBCA's Initial Brief) (filed Oct. 11, 2022) at 7-10; Reply Brief of the Kentucky Broadband and Cable Association (KBCA Reply Brief) (filed Oct. 18, 2022) at 4-5.

[46] KBCA Reply Brief at 5.

[47] Joint Response of Rural Electric Cooperative Corporations to Objections filed by KBCA and AT&T (RECCs Response to Initial Objections) (filed Apr. 14, 2022) at 4.

The Commission agrees that the language in the RECCs' tariffs allowing them to recover "reasonable engineering, survey, and inspection costs" connected to an attachers overlashing activity is consistent with the regulation and reasonable. The Commission largely adopted KBCA's proposed language regarding overlashing but explicitly removed the prohibition on charging overlashers, in part, to allow utilities to charge overlashers the cost of reviewing proposed overlashing in the same manner that other new attachers are charged for the review and survey work associate with a utilities review of an attachment request.[48] Further, as even KBCA acknowledged, there are legitimate circumstances in which a utility could perform a pole-loading or some other analysis of an overlashing that has been noticed, and some inspection of newly overlashed facilities is also legitimate, so the RECCs would be incurring legitimate costs in reviewing proposed overlashings and inspecting new overlashings. The RECCs' cost recovery provisions for overlashing are also limited to "reasonable engineering, survey, and inspection costs," which would allow an attacher to object and file a complaint with the Commission to the extent that an RECC attempts to pass along unreasonable costs.

Conversely, KBCA's proposal that overlashers should only be charged for the review or inspection of overlashing if the review or inspection finds an issue with the overlashing is illogical, because it assumes an engineering or other review of construction is only justified if the review finds an issue. This is especially true given KBCA's position that attachers should not be required to provide any engineering study as part of their

[48] Amendments after Comments and Statement of Consideration for 807 KAR 5:015 at 52 (filed Sept. 15, 2021) ("The Commission will also remove the prohibition on charging a fee to overlashers. Reviewing potential overlashing, like new attachments, will result in costs and there may be instances where an overlashing evaluation requires a more complicated review, such as an engineering study, and this is a cost that the overlasher, not the utility's customers, should bear.").

notice of overlashing. Thus, the Commission finds that the provision in the RECCs tariffs allowing them to recover "reasonable engineering, survey, and inspection costs" is reasonable and is consistent with 807 KAR 5:015.

Unauthorized Attachment Fees

KBCA objected to any provision imposing penalties for breaches other than an unauthorized attachment fee to compensate a pole owner for non-payment of rent. With respect to the RECCs tariffs, KBCA specifically objects to a provision that generally states that:

> Cooperative may impose a penalty in the amount of one hundred dollars ($100) per pole for any violation caused by Licensee that is not corrected in accordance with the timelines listed in ARTICLE VII SECTION D - CORRECTIONS, and an additional one hundred dollars ($100) every ninetieth (90th) day thereafter until Licensee addresses the violation(s) to Cooperative's reasonable satisfaction.[49]

However, KBCA did not provide testimony in support of the objection or otherwise explain this objection beyond its initial objection to the tariffs before this matter was suspended.

AT&T Kentucky similarly objected to this penalty and argued that it is unreasonable, because it is excessive, rigid, and there is no dispute resolution process. AT&T Kentucky also specifically argued that the time frames in Article VII, Section D are too short, and asserted that attachers should be given 90 days to correct any violations identified by the RECCS.[50]

The RECCs argued that they are responsible for the safety and reliability of the pole and must have tools to enforce the technical requirements and specifications

[49] *See, e.g.* South Kentucky RECC's P.S.C. No. 7, Original Page No. 19.19, Article VII, Section D; *see also* KBCA Objections at 4-5, 8-9, 11-13, 15-16, 18-19, 25-30, 32, 34.

[50] Rhinehart Testimony at 17, Exhibit DPR-2 at 9-12.

applicable to attachments. They asserted that the penalty is intended to provide a mechanism to ensure remedial efforts are timely pursued by attachers who are in violation of the National Electric Safety Code (NESC), the utility's specifications, and other stated rules governing attachment. The RECCs noted that attachers are given a grace period to correct the violation before the penalty is imposed. The RECCs argued that "[n]either the timeframes (including grace period) nor the penalty amounts are oppressive or unreasonable."[51]

As an initial matter, the Commission notes that the timeframes in Section D, to which AT&T specifically objected, vary based on the circumstances. Specifically, Section D of the RECCs tariffs states, in relevant part, that:

> If any of Licensee's Attachments fail to conform with the technical requirements and specifications of this Schedule, Licensee shall, upon notice by Cooperative, correct such nonconformance within thirty (30) days of notification of such nonconformance, provided however, that Cooperative may specify a shorter timeframe, with which Licensee shall comply, if in the exercise of Cooperative's sole judgment and discretion, safety considerations require Licensee to take corrective action within such shorter period. Further, in the event the parties agree, such agreement not to be unreasonably withheld, that such nonconformance is of a nature that it cannot be reasonably corrected within thirty (30) days, the parties shall mutually agree on an additional time period in which Licensee shall complete the required corrections.[52]

The Commission believes that the timeframes in Section D are reasonable timeframes within which to require attachers to correct violations and non-complaint attachments, because they only permit the RECCs to shorten the period if required by

[51] RECCs Response to Initial Objections at 8.

[52] *See, e.g.* South Kentucky RECC's P.S.C. No. 7, Original Page No. 19.18, Article VII, Section D.

safety considerations and require the RECCs to extend the period if the attachments could not reasonably be corrected within 30 days. The Commission also generally agrees that if attachers are given an opportunity to correct a violation and fail or refuse to do so that it would be reasonable to impose a penalty on the attachers.

Pole owning utilities should not be required to become the contractors for attachers that fail to comply with the NESC and utility's standards, which would be the obvious result if there was no penalty when a utility is forced to perform work to bring a third party attacher's facilities into compliance. Further, while the Commission has disfavored penalties that are not cost based, the Commission finds that a $100 penalty is reasonable for an attacher that fails or refuses to correct violations of the NESC or other utility standards that could cause a safety or reliability issue after being given the opportunity to correct the issue.

However, the Commission's finding that the penalty is reasonable is contingent on an attachers' ability to avoid the penalty. While the Commission agrees that legitimate safety issues should accelerate the timeline for when violations should be corrected, the Commission finds that it would be unreasonable to allow the RECCs, in their "sole judgment and discretion," the authority to set a timeline shorter than 30 days within which an attacher would have to perform work in order to avoid the $100 per pole penalty. Thus, while an attacher should be permitted to set a shorter deadline or correct the violation itself if required by safety concerns as allowed by Article VII, Section D – Corrections, the Commission finds that the RECCs' tariffs should be modified to state that the initial penalty in Article VII, Section E – Penalties may not be imposed unless the attacher fails to correct a violation within 30 days of receiving notice.

Indemnity as a Condition of Pole Attachment Service

KBCA objected to any standard that would hold an attacher responsible for the negligence of the pole owner.[53] Specifically, KBCA objected to the proposed requirement in the RECCs tariffs stating that:

> Licensee agrees to indemnify, defend and hold harmless Cooperative . . . from and against any and all claims, liabilities, losses, damages, costs, discovery requests, demands, judgments, actions, causes of action, disbursements and expenses in connection therewith (including, without limitation, the reimbursement of all such costs, fees, expenses and disbursements, including reasonable attorneys' fees, as and when incurred, of investigating, preparing for, responding to or defending against any action, suit, proceeding, investigation, subpoena or other inquiry (whether or not Cooperative is a party to the proceedings or litigation at issue) in connection with actual or threatened actions) ("Losses") relating to or arising out of Licensee's activities under this Schedule, its presence on or near Cooperative's property, or any action or inaction by Licensee. . . . Licensee will not be liable under this indemnity to the extent any of the foregoing Losses are determined, in a final judgment by a court of competent jurisdiction, not subject to further appeal, to have resulted from the sole gross negligence or willful misconduct of any Indemnified Person.[54]

KBCA's witness, Jerry Avery, stated that:

> While each party on a pole should be responsible for any issues that it causes, no party should be responsible for issues it did not cause, especially when the damaging party is negligent.[55]

Mr. Avery, who is an Area Vice President for Charter Communications, further stated that he was not aware of any situation where an attacher has sought to shift blame to a utility

[53] KBCA Objections at 6; KBCA's Initial Brief at 15-16.

[54] *See* KBCA Objections.

[55] Direct Testimony of Jerry Avery (Avery Testimony) (filed June 9, 2022) at 11; KBCA's Initial Brief at 15-16.

for damage that it caused and asserted it was unreasonable to allow a utility to shift liability for its own negligence based on the hypothetical situation of an attacher attempting to shift liability.[56]

The RECCs stated that contractual indemnity provisions are typically among those most debated provisions when negotiating an agreement.[57] They asserted that these terms significantly impact liability, "so both service providers and service seekers must carefully weigh the risk they are willing to bear to engage in a transaction."[58] They stated that the indemnity provisions are favorable to the RECCs to limit the financial risk that they should be subjected to as a consequence of complying with the law to require third parties to use their assets.[59] Thus, they argued that the indemnity provisions should be approved by the Commission without change.[60]

The Commission has concerns about the reasonableness of the broad indemnity language in RECCs tariffs. While the Commission recognizes that it is common in commercial contracts, such broad indemnity language, which could require an attacher to indemnify the RECCs for their own negligence, is not universal in commercial contracts, and Kentucky courts have historically disfavored such provisions, and therefore, strictly construe them against the parties relying upon them.[61] The Commission also has concerns about allowing such provisions in conditions for pole attachment tariffs for

[56] Avery Testimony at 12; KBCA's Initial Brief at 15-16.

[57] RECCs' Response Brief at 10.

[58] RECCs' Response Brief at 10.

[59] RECCs' Response Brief at 10.

[60] RECCs' Response Brief at 13.

[61] *See Speedway SuperAmerica, LLC v. Erwin*, 250 S.W.3d 339, 341 (Ky. 2008).

regulated utilities given the bargaining power that utilities have against non-pole owning attachers.

However, the Commission ultimately finds that the RECC's indemnity provisions are reasonable, because they generally assign costs—responsibility for claims and damages—to attachers that arise from the RECCs accommodation of the attachers equipment i.e. costs relating to or arise out of actions involving the attachers or their presence on the RECCs' poles. As with the cost for non-red tagged pole replacements, the alternative would generally be requiring other RECC customers to pay for such claims and damages through other rates, which would be inconsistent with cost causation principals and unreasonable since such costs would arise from the RECC's pole attachment service. Thus, the Commission finds that the RECC's indemnity provisions are reasonable and should be permitted in their tariffs at this time, but the Commission does still have reservations about them and notes that it may further investigate such provisions in rate cases or pursuant to KRS 278.260 to determine if they are being applied fairly.

RECCs' Bonding Requirements

The RECCs include a requirement that a new attacher obtain a "performance bond" secured by a third party surety.[62] When questioned about the purpose of the performance bond, the RECCs stated that it is "intended to cover the cooperative's costs to safely remove the attacher's facilities from the cooperatives poles in the event that attacher ceases to operate or otherwise fails or refuses to address its obligations under

[62] *See, e.g.* South Kentucky RECC's P.S.C. No. 7, Original Page No. 19.29, Article XXI, Section A, 6 – Performance Bond.

the Proposed Tariff."[63] However, the performance bond required by the tariffs is much broader, stating:

> The purpose of the bond is to ensure Licensee's performance of all of its obligations under this Schedule and for the payment by the Licensee of any damages, claims, liens, taxes, liquidated damages, penalties, or fees due to Cooperative which arise by reason of the construction, installation, operation, maintenance, transfer, relocation, or removal of Licensee's Attachments or Communications Facilities on or about Cooperative's Poles. This shall include claims for damages to Cooperative Facilities caused by Licensee, or its contractors and agents. Cooperative shall have the right to draw funds from the bond to recover damages to Cooperative Facilities caused by Licensee, its contractors, or agents. Provision shall be made to permit Cooperative to draw against the bond. Licensee shall not use such bond for other purposes and shall not assign, pledge or otherwise use the bond as security for any other purpose.[64]

The Commission was concerned about the extent of the market for such broad bonds, but the RECCs provided evidence that there is a market for such bonds, including promotional materials for pole attachment bonds that appear to provide coverage similar to that required by the tariffs.[65] Further, the RECCs also provided evidence that the required bonds would provide coverage for losses that would not typically be covered by required insurance coverages. Thus, the Commission finds that the RECCs bonding requirements are reasonable, and therefore, should be approved, but the Commission cautions the RECCs that it may revisit the bonding requirement if attachers have difficulty obtaining such broad bonds from the market.

[63] *See, e.g.* South Kentucky RECC's response to Staff's First Request, Item 19.

[64] *See, e.g.* South Kentucky RECC's P.S.C. No. 7, Original Page No. 19.29, Article XXI, Section A, 6 – Performance Bond.

[65] *See, e.g.* South Kentucky RECC's response to Commission Staff's Second Request for Information (Staff's Second Request), Item 6.

Contractor and Subcontractor Insurance Requirements

The RECCs included conditions in their tariffs that require pole attachment customers and their contractors and subcontractors to maintain certain insurance coverages. KBCA did not object to the requirements that attachment customers themselves maintain insurance coverage but argued that it was unreasonable to require third party attachers' contractors and subcontractors to maintain such insurance coverage.[66]

KBCA claimed that it would not be possible for its members to comply with utilities insurance requirements, because they negotiate comprehensive contracts with their contractors that include specific insurance requirements and all of the utilities have different insurance requirements. KBCA asserted that it cannot simply re-negotiate and rewrite each contract with each agent, contractor, or subcontractor to satisfy each utility's unique insurance preferences. Even if attachers could negotiate such insurance requirements with their contractors, they claim that such an undertaking is not necessary because attachers are ultimately on the hook if their own contractor's insurance is inadequate. KBCA claims that the "utilities efforts to superintend the relationships between attachers and their own contractors is an unjust, unreasonable, and unnecessary overreach."[67]

The RECCs asserted that an attacher's contractor can cause damage to cooperative property or personal injury and that the RECCs are entitled to assurances that minimum amounts of insurance will be maintained to cover such damages. The

[66] KBCA's Initial Objections at 20-23; KBCA's Initial Brief at 14-15.

[67] KBCA's Initial Brief at 14-15; Direct Testimony of Jerry Avery (Avery Testimony) (filed June 9, 2022) at 10.

RECCs noted that KBCA argued that its "members require a certain level of insurance from their contractors that the member believes will protect it," and argued that the RECCs insurance requirements are similarly intended to adequately protect the cooperative and its property.[68] The RECCs also noted that KBCA refused to provide any information about the insurance requirements in its members' agreements with contractors and argued that those agreements were not were not at issue despite claiming that they had adequate insurance requirements.[69]

Based on the indemnity language in the RECCs' tariffs and attachment agreements, attachers would likely be directly liable for certain losses caused by their contractors, subcontractors, and agents. However, as a matter of law, attachers would not generally be independently liable in tort for the actions of third party contractors and without such liability the attachers insurance coverage, which could provide pole owners security against non-payment (and the ability to resolve disputes quickly) may not provide coverage for the loss. Further, KBCA failed to establish that attachers would be unable to negotiate or enter into agreements with their contractors that required them to meet the insurance requirements of a utility on whose poles the contractor works, and it is not credible that there would be no way to require contractors to meet a utilities' insurance requirements, given that KBCA's members apparently already require their contractors to meet certain insurance requirements. Thus, the Commission finds that the RECCs' insurance requirements to which KBCA objected are reasonable and should be approved.

Definition of Attachment and Service Drops

[68] RECCs' Response Brief at 8-9.

[69] RECC's Response Brief at 8-9.

AT&T Kentucky argued that the RECCs' tariffs could be read as indicating that the rental charges are based on each attachment. AT&T Kentucky argued that the RECCs' broad definition of attachment could be read as including many things and that the RECCs' rates are uniformly applied to "each of Licensee's Attachments."[70] AT&T Kentucky argued that the language tying rental charges to attachments in addition to the broad definition of the term attachment in the tariffs could result in excessive charges as an attacher could be charged for multiple "attachments" within the same space at a rate that was developed on a space used basis. AT&T Kentucky is specifically concerned about being charged for the attachment of the wireline to the pole and again for the attachment of the service line to the same pole or being charged for the original attachment and each line overlashing the original attachment. AT&T Kentucky is also concerned that the broad definition could be read as applying the permitting or attachment applications to service drops. AT&T Kentucky requests that the Commission require the tariffs be modified such that the rental charges are clearly based on usable space or that the Commission provide such clarification in the final order.[71]

AT&T Kentucky also objects to the RECCs' specific definition of a service drop as a line that "shall run directly from a Pole to a specific customer, without the use of any other poles."[72] AT&T Kentucky points out that maintaining service terminals on all poles is cost prohibitive, so service drops must frequently be run from one pole with a terminal to the next pole or mid-span to accomplish the shortest path from the cable to the

[70] Rhinehart Testimony at 11-12.

[71] Rhinehart Testimony a 7-8, 11-12, Exhibit DPR-2 at 2-4.

[72] Rhinehart Testimony at 12-13, Exhibit DPR-2 at 4-5.

premises due to vegetation, to maintain required clearances, or for safety purposes. AT&T Kentucky argues that the RECCs' definition would consider such service drops to be attachments such that every such service drop would require a full application and pole survey. AT&T Kentucky suggested modifying the RECCs' definition of service drop to read that: "A service drop shall run from a pole directly to a specific customer using the shortest practical route while maintaining the required clearances and safety parameters."[73]

AT&T Kentucky objected to language in the RECCs' tariffs that "[a]ny guying and anchoring required to accommodate the Attachments of the Licensee shall be provided by and at the full expense of the Licensee and to the reasonable satisfaction of the Cooperative," along with similar language at other places in the tariffs that made the attacher responsible for guying and anchoring required to accommodate the attachment. AT&T Kentucky was concerned that attachers could be charged a rental rate for such guying and anchoring given the broad definition of attachment, which included several undefined terms such as appurtenance, equipment, and apparatus of any type. AT&T Kentucky stated that:

> Guys and anchors provided by attaching entities should not be chargeable by the pole owner. Thus, AT&T again recommends that the Commission, by order or mandated changes in RECC tariff language, specify that attacher-provided guys and anchors, among other things, are not chargeable under the RECC tariffs.[74]

[73] Rhinehart Testimony at 12-13, Exhibit DPR-2 at 4-5.

[74] Rhinehart Testimony at 16-17.

The RECCs asserted that they do not seek to charge a separate annual rental fee for overlashing.[75] The RECCs were silent regarding whether and when a service drop would be subject to a separate annual rental fee but indicated that service drops would not be subject to application requirements, unless the service drop runs to a pole on which an attacher does not already have an attachment or the attachment uses space outside that allocated to attacher, stating:

> Put plainly, if something is attached to RECC poles, the RECC should know about it. Further, if a third party is using available space on a pole, that space should be paid for consistent with the tariff. Finally, of note, cooperatives generally permit service drops to run directly from poles with an existing licensee attachment to a customer's location, but not by first attaching to other poles to which the licensee is not attached (i.e., adding a J-hook to a pole with an existing attachment is typically acceptable, but attaching to one or more new primary poles without cooperative review is not). It is the RECCs' intent to specifically exclude all previously unattached-to secondary or lift poles for the purpose of being able to review, in-advance, ground clearances and separation from the power space.[76]

Finally, with respect to charges for guys and anchors, the RECCs noted that they did not propose any changes to their rates in this tariff revision. They argued that charges for guys and anchors, including for shared anchors, are not new and asserted that they reflect the fact that basically every "hole" in a pole impacts that infrastructure and imposes a cost.[77]

The Commission does not read the RECCs tariffs as imposing a separate charge for overlashing despite the broad definition of attachment about which AT&T Kentucky

[75] RECCs Response to Initial Objections at 13.

[76] RECCs Response to Initial Objections at 13.

[77] RECCs Response to Initial Objections at 18.

complains. While the RECCs annual charges may differ, the language defining the charges typically look as follows:[78]

> Cooperative will invoice Licensee in arrears with respect to amounts owed annually for each of Licensee's Attachments, at the following rates for each full or partial year:
>
> | Annual charge as follows: | |
> |---|---|
> | Two-party Pole Attachment | $3.63 |
> | Three-party Pole Attachment | $2.47 |
> | Two-party Grounding Attachment | $3.97 |
> | Three-party Grounding Attachment | $2.68 |
> | Two-party Anchor Attachment | $3.44 |
> | Three-party Anchor Attachment | $2.27 |

While there is some ambiguity, the Commission does not read that language as generally requiring an attacher to pay the rental charges for overlashing, which is consistent with the RECCs representations that they do not intend to charge rental rates for overlashing. Rather, the Commission believes that the Two-party Pole Attachment and Three-party Pole Attachment indicate that the attacher is being charged based on space used, which is why the charges decrease when a third party is added to the pole. Thus, unless the overlashing requires a new grounding attachment or anchor that it not already on the pole, the overlashing would not result in an additional charge.

The RECCs do apparently charge separately for the use of available space in the Two-party Pole Attachment and Three-party Pole Attachment charges and the use of an anchor and grounding attachment, but all of the those charges have been in the RECCs' existing tariffs for decades, and while it complained about the charges, AT&T Kentucky did not provide any evidence that the charges themselves or the manner in which they

[78] South Kentucky RECC's P.S.C. No. 7, Original Page No. 19.40, APPENDIX E – FEES AND CHARGES.

have been applied is unreasonable. Thus, the Commission expects that the rental charges will continue to apply under the same circumstances that they have historically and in the same amounts and cannot find that the rental charges are unreasonable under the circumstances (especially since many of the charges have not been updated for decades).

The Commission does believe that the RECCs tariffs are ambiguous with respect to whether service drops would require an application and approval pursuant to Article IV of the RECCs tariffs and whether there will be a charge for service drops. In the RECCs response quoted above, they seem to indicate that their intent was not to require an application for a service drop that is not attaching to a new pole on which the attacher did not have a previous attachment, and their tariffs seem to indicate that a service drop that does not go outside of the communications space allocated for their use would not result in an additional charge.[79] For the reasons raised by AT&T Kentucky, the Commission finds that it is necessary to clarify the ambiguity in the RECC's tariffs regarding service drops and that it would be unreasonable to charge or require an application for a service drop except in situations in which a service drop is connected to a new pole on which an attacher does not have another attachment and in situations in which the service drop is attacher outside of the communications space allocated for the attachers use. Thus, the Commission finds that the RECCs tariffs should be modified to explicitly state that an application will not be required and an attacher will not be charged for a service drop in those circumstances.

[79] *See, e.g.* South Kentucky RECC's P.S.C. No. 7, Original Page No. 19.5, Article IV, Section A, 1.

Definition of Supply Space

AT&T Kentucky objected to language in the RECCs' tariffs that: "Licensee will make its initial Attachments one foot above the lowest possible point that provides such ground clearance, which is within the Communications Space." AT&T Kentucky noted that the RECCs indicated their intent was to ensure that an attacher uses the lowest available point on the pole, but AT&T Kentucky argued that the NESC does not require one foot of clearance between communications attachments. AT&T Kentucky proposes that the quoted language be replaced with the following language: "Licensee will expend reasonable efforts to make its Attachments at the lowest available position within the Communications Space on a pole consistent with NESC requirements."[80]

The RECCs argued that the provision to which AT&T Kentucky objected was intended to:

> [T]o ensure attachers utilize the next-lowest available foot within the Communications Space on a pole, thereby promoting the efficient use of the pole. Lowest available clearance is an objective, measurable determination that any party can make independently based on NESC (with which all parties are expected to be familiar). This approach should speed broadband deployment because it is consistent and allows the relevant party to act on its own.[81]

As indicated by AT&T Kentucky's witness, pole attachment rates have typically been charged based on a foot of usable space based on the premise that attachments are using that foot of space.[82] In fact, AT&T Kentucky noted that its own tariff specifically

[80] Rhinehart Testimony at 14.

[81] RECCs Response to Initial Objections at 15-16.

[82] Rhinehart Testimony at 7-8.

charges attachers on a "Per foot of usable space" basis,[83] which is consistent with the expectation that attachers will maintain one of foot separation between attachments. Thus, contrary to AT&T Kentucky's assertion, the Commission believes that it is reasonable for the RECCs to require attachments to be spaced one foot apart.

Nevertheless, the Commission does question the reasonableness of the language to which AT&T Kentucky objected, because it does not accomplish what the RECCs intended for it to do. Specifically, the language requires an attacher to make an initial attachment one foot above "the lowest possible point that provides such ground clearance." As written, the language would require the first attacher on any pole to make their attachment one foot above the lowest possible space to make their attachment, which would effectively reserve the lowest point at which an attachment could be made, and thereby eliminate one foot of usable space on the poles.

As discussed above, unless there is a specific need for the reservation of space, the Commission finds that it would be unreasonable for a utility to reserve usable space on its poles. The RECCs did not provide a basis for the reservation of that one foot of space on the poles, and perhaps, did not intend for the language to be read in that way, because they asserted the provision was intended to "ensure attachers utilize the next-lowest available foot within the Communications Space on a pole, thereby promoting the efficient use of the pole."[84] Thus, the Commission finds that the provision as written is unreasonable and is not approved, and further finds, that the provision should be modified to state that "Licensee will make its initial Attachments at the lowest possible point within

[83] Rhinehart Testimony at 8.

[84] RECCs Response to Initial Objections at 15-16.

the Communications Space that provides such ground clearance and provides one foot of separation from the nearest attachment."

Supply Space Reservation in Blue Grass Energy's Tariff

AT&T Kentucky noted that Blue Grass Energy's tariff specifies that the uppermost nine feet, measured from the top of pole, is Supply Space on both 35-foot and 40 foot poles. Conversely, AT&T Kentucky noted that all but one other RECC (Taylor County) reserved six and a half feet on 35-foot poles and nine feet on 40-foot poles. AT&T Kentucky explained that:

> [P]oles are assumed to be buried 6 feet, have a clearance of 20 feet to the first attachment, and to have 3.33 feet of required safety space. Even with more conservative measures for buried depth of 5.5 feet (2 feet plus 10% of pole height), and only 18 feet to the first attachment, Blue Grass Energy claims more than the total height of 35-foot poles (5.5 buried + 18 feet clearance + 3.3 feet 8 safety + 9 feet reserved = 35.8 feet), leaving no space for attachments.[85]

Blue Grass Energy did not respond to this specific objection.

The Commission agrees with AT&T Kentucky that it is unreasonable for Blue Grass Energy to reserve nine feet for the Supply Space on a 35-foot pole. AT&T Kentucky established that the norm is for an electric utility to reserve six and a half feet and that the reservation of nine feet would leave no room for attachments. Further, Blue Grass Energy gave no explanation for its reservation of nine feet. Thus, the Commission finds that Blue Grass Energy's reservation of 9 feet on 35 foot poles should be reduced to six and a half feet.

[85] Rhinehart Testimony at 14-15.

Automatic Withdrawal of Make Ready Estimates

AT&T Kentucky objected to language in the RECCs tariffs indicating that make ready estimates that are not paid within 14 days will be automatically withdrawn. AT&T Kentucky acknowledged that the provisions are not inconsistent with 807 KAR 5:015,[86] which permits a utility to withdrawal a make ready estimate within 14 days if it is not paid by the attacher.[87] However, AT&T Kentucky asserted that "review, acceptance, and remittance of funds within 14 days may be challenging to some applicants," and therefore, that the "[a]utomatic termination of make-ready estimates can result in unnecessary resubmissions of applications, increased engineering work, and generally increased administrative burdens," which AT&T Kentucky argued could result in increased costs.[88]

The RECCs argued that the automatic withdrawal of the make ready estimates after 14 days is consistent with 807 KAR 5:015 and ensures that make ready estimates are acted on promptly in order to keep the make ready process moving and prevent estimates from becoming stale. They also argued that the automatic withdrawal reduced administrative burdens because the utilities would no longer have to send a second correspondence withdrawing make-ready estimates 14 days after the estimate is made. The RECCs indicated that without the automatic withdraw that there would be a risk that a make ready estimate would be overlooked and allowed to remain open indefinitely.[89]

[86] Rhinehart Testimony at 4; AT&T's Reply Brief (filed Oct. 18, 2022) at 3-5.

[87] *See* 807 KAR 5:015, Section 4(3)(c).

[88] Rhinehart Testimony at 4; *see also* AT&T's Reply Brief (filed Oct. 18, 2022) at 3-5.

[89] RECCs Response to Initial Objections at 15-16.

Section 4(3)(c) of 807 KAR 5:015, consistent with the FCC regulation, plainly allows pole owners to withdrawal make ready estimates after 14 days. Further, while there could be arguments both ways and the Commission may reevaluate the question if significant issues arise, the Commission finds that allowing the automatic withdrawal of make ready estimates is reasonable, because it will create certainty regarding when an estimate must be paid and eliminate the need to utilities to create a process to ensure that estimates are withdrawn after 14 days. Thus, the Commission finds that the provision allowing the automatic withdraw of make ready estimates after 14 days should be approved.

Pole Attachment Inventories

The RECCs' tariffs allow the RECCs to conduct an inventory survey or audit every five years to identify the number of attachments on each pole and requires all attachers to pay a pro-rata share of the cost of the inventory survey based on the number of attachments the attacher has the total number of pole attachments. Additionally, the RECCs' tariffs allows for safety inspections if they have reasonable cause to believe code violations or unsafe conditions exist on their system. The safety inspections are only permitted once every five years, and the tariffs state that "the Cooperative, Licensees and Outside Parties shall share proportionally in the cost" of the safety inspections. Finally, the RECCs' tariffs allow an attacher (or Licensee) specific safety inspection "[i]f the Cooperative has reasonable suspicion of a significant number of violations with respect

to a particular Licensee" and requires the attacher to pay for that inspection if more than five percent of the attachers equipment is found to be non-compliant.[90]

AT&T Kentucky objected to sharing in the cost of the five year safety inspection and argued that attachers should only be responsible for the cost of a safety inspection if a violation is found with respect to the attachers' equipment and then that they should only be responsible to the extent the inspection related to the violation found. AT&T Kentucky also objected to the use of the term "foreign-owned poles" when referring to how attachers' share of the pro-rata inventory survey should be calculated and argued that an RECC should not be able to charge an attacher for inventorying poles owned by others.[91]

The RECCs argue that ensuring the system is free of NESC and other violations is important to ensuring the safety and liability of the system and that there are sufficient safe guards in place to ensure that 5-year system safety inspections are not undertaken frivolously.[92] The RECCs did not respond to AT&T Kentucky's specific objection regarding the inclusion of foreign owned poles in the pole inventory survey.

The Commission agrees with AT&T Kentucky that it would be unreasonable for the RECCs to charge for pole inventory surveys on poles they do not own, and therefore, finds that the reference to "foreign-owned poles" in the tariffs when discussing how costs for the inventory surveys will be allocated should be removed. The Commission otherwise believes that it is reasonable the RECCs to perform an inventory inspection

[90] *See, e.g.* Blue Grass Energy Cooperative Corporation's Tariff, PSC KY NO. 2, Original Sheet No. 204, Article VIII, C.

[91] AT&T's Initial Objections at 9-11.

[92] RECCs Response to Initial Objections at 20-21.

every 5 years and to charge attachers on a pro-rata basis for those inspections. Thus, with the modification discussed above, the Commission finds that the provision in the RECCs tariffs should be approved.

However, the Commission questions allowing the RECCs to separately charge for the five year safety inspections. As noted above, the tariffs include a provision that allows a specific safety inspection of an attacher's equipment if there is reasonable suspicion of a significant number of violations with respect to a particular attacher and allows the RECC to charge for the inspection if more than five percent of the attacher's equipment is found to non-complaint. Further, the RECCs already have regulatory obligations to inspect their poles on a periodic basis.[93] While the RECCs argued those periodic pole inspections serve a different purpose,[94] the Commission believes that it would be difficult to distinguish the two and questions why a separate pole and safety inspection would be necessary. The proposed tariffs do not include a workable standard for how costs of such inspections will be allocated, because they state only that "the Cooperative, Licensees and Outside Parties shall share proportionally in the cost."[95] Thus, the Commission finds that the RECCs failed to establish that separately charging the attachers for the 5-year safety inspections is reasonable, and therefore, finds that the language requiring the attacher to share in the proportional cost of the 5-year safety inspections should not be approved and should be removed from the RECCs tariffs.

[93] *See* 807 KAR 5:006.

[94] *See, e.g.* South Kentucky RECC's Response to Commission Staff's First Request for Information.

[95] *See, e.g.* Blue Grass Energy Cooperative Corporation's Tariff, PSC KY NO. 2, Original Sheet No. 204, Article VIII, B.

Excessive Requirements for Pole Attachment Applications

AT&T Kentucky objected to provisions in each of the RECCs tariffs requiring that an attachment application be signed and sealed by a professional engineer, registered in the State of Kentucky, certifying that

> **Licensee's [i.e. the attacher's] aerial cable design fully complies with the NESC and Cooperative's Construction Standards and any other applicable federal, state or local codes and/or requirements**, or Licensee will pay Cooperative for actual costs for necessary engineering and post-construction inspection and to ensure Licensee's design fully complies with the NESC and Electric Utility's Construction Standards and any other applicable federal, state or local codes and/or requirements.[96]

The requirement further states that:

> This certification shall include the confirmation that the design is in accordance with pole strength requirements of the NESC, taking into account the effects of Cooperative's facilities and other Attaching Entities' facilities that exist on the poles without regard to the condition of the existing facilities.[97]

AT&T Kentucky argued that current local practice does not require professional engineer pole loading or professional engineer engineering design for any aerial applications and that this requirement will slow and possibly stop fiber development and argued this will result in duplicative engineering work. AT&T Kentucky proposed in its initial objections that the bolded language be changed to simply state that the Licensee's aerial cable design comply with the applicable standards, and in its testimony, it changed

[96] *See, e.g.* Blue Grass Energy Cooperative Corporation's Tariff, PSC KY NO. 2, Original Sheet No. 221, D.1.

[97] *See, e.g.* Blue Grass Energy Cooperative Corporation's Tariff, PSC KY NO. 2, Original Sheet No. 221, D.2.

the proposal slightly by suggesting that the language simply require that a qualified person, as opposed to an engineer, make the certification.

The RECCs argued that most of the not-for profit cooperatives do not have the in-house resources to timely perform or administer engineering for all intended attachers. They argued that AT&T Kentucky is attempting to shift further burdens on to the utilities. They also argued that they consider their poles to be vital to the continued provision of safe, reliable, and affordable electric service, and therefore, argue that a cautious approach is appropriate. They argued that AT&T Kentucky has not demonstrated, and cannot demonstrate, that requiring engineering and a professional approach to pole attachments is unreasonable.[98]

The Commission notes that attachers or their contractors are being granted access to facilities that play a key role in ensuring the Kentuckians have access to safe and reliable energy, and therefore, believes that the RECCs' concerns about whether attachments comply with applicable standards or will negatively affect their poles and equipment are reasonable. Further, while it suggested that other qualified persons be permitted to make the certification, AT&T Kentucky did not explain who other than a professional engineer could certify that "the design is in accordance with pole strength requirements of the NESC, taking into account the effects of Cooperative's facilities and other Attaching Entities' facilities that exist on the poles without regard to the condition of the existing facilities." The Commission questions why a professional engineer would not already be involved in designing and managing the construction of any significant deployment of new attachments. Thus, except in the case of overlashing as discussed

[98] RECCs Response to Initial Objections at 24-25.

above, the Commission believes that the requirements of the RECCs' attachment application are reasonable.

The Commission does agree with AT&T Kentucky that it would result in duplicative costs and be unreasonable to require a new attacher to perform and file a pole loading or some other similar engineering analysis and then attempt to charge the new attacher for the same analysis performed internally by the RECCs, unless there is some specific reason that makes a follow-up analysis necessary. However, the RECCs do not seem to intend to charge for duplicate analysis, since they mention their limited resources as a basis for requiring the attachers to file the analysis. Further, the tariff provisions only allow the RECCs to charge for "*necessary* engineering . . . to ensure Licensee's design fully complies with the NESC and Electric Utility's Construction Standards,"[99] which should prevent an RECC from charging for unnecessary, duplicative engineering analysis. Thus, except in the case of overlashing as discussed above, the Commission believes that the requirements of the RECCs' attachment application are reasonable and should be approved.

Mid-Span Taps

AT&T Kentucky objected to provisions in the RECCs' tariffs that required separate applications mid-span taps. AT&T Kentucky noted that requirement will mean that mid-span tabs, which include service drops to customers, will require engineering and pole loading analysis. AT&T Kentucky argued this is design overkill and will add significant costs and slow and possibly stop fiber deployment.[100]

[99] *See, e.g.* Blue Grass Energy Cooperative Corporation's Tariff, PSC KY NO. 2, Original Sheet No. 221, D.1.

[100] Rhinehart Testimony at 20, Exhibit DPR-2 at 16-18.

The RECCs stated that they are concerned that the requirement that they allow third party overlashing will incentivize mid-span taps directly to another pole not directly connected to the existing wireline, which will change the load on all three poles. They argue that requiring engineering be done for the desired work will ensure that poles do not experience overloading. The RECCs argued that safety and reliability should not be sacrificed to promote the economic objections of third parties.[101]

As noted above, the poles that attachers are permitted to access are important for ensuring that Kentuckians have access to safe and reliable energy. The RECCs also provided evidence in rebuttal testimony showing how lines pulling perpendicular from the direction of other lines, which will occur with a mid-span tab, can cause a pole to lean without proper guying or supports,[102] which support the RECCs' concerns. However, the Commission does question requiring a full application for mid-span service drops, and does not believe that the RECCs have established that it is reasonable to apply the full application and engineering process to such service drops. Thus, the Commission finds that requiring a permitting application for mid-span taps, other than service drops, is reasonable for the reasons raised by the RECCs, and therefore, that the RECCs permitting requirements for mid-span drops should be approved, except for service drops.

Cover Sheet of Big Sandy RECC's Pole Attachment Tariff

AT&T Kentucky noted that Big Sandy RECC's tariff cover sheet titles the tariff "Rates, Rules and Regulations for Furnishing CATV" in its service areas. The Commission notes that Big Sandy RECC's tariff allows other attachments that this title is

[101] RECCs Response to Initial Objections at 27.

[102] Knowles Rebuttal Testimony at 9, Exhibit 2.

likely just an oversight. However, for the sake of clarity, the Commission finds that Big Sandy RECC should title the tariff "Rates, Rules and Regulations for Pole Attachments."

Clark Energy Cooperative's $100 Completeness Review Fee

Clark Energy's tariff include a requirement that new attachers tender a $38.40 per-pole survey fee and a $100 per application administrative review fee with any application for a pole attachment.[103] KBCA generally objected to Clark Energy's $100 administrative review fee in its initial objections.[104] Clark Energy's application review fee was not specifically mentioned in KBCA's testimony filed in this proceeding. However, KBCA did generally state that it believed that the preconstruction survey cost per pole in Kentucky should be about $30 to $50.[105]

In response to a request for information, Clark Energy explained that "significant administrative work flow and processing is required in receiving, reviewing, scheduling field personnel, tracking, notifications to existing attachers, invoicing, and documentation of attachment applications" due to the specific time-lines and processes imposed by the regulation.[106] Clark Energy explained that this process starts with the receipt of the application and continues through all the time lines listed in the tariff, which can span several weeks beginning to end. Clark Energy asserted that the "proposed $100 administrative fee is intended to cover the cost of performing these operations and is an

[103] Clark Energy's P.S.C. No. 2 First Revised Page No. 116, ARTICLE W - ESTABLISHING ATTACHMENTS TO POLES, Section B; Clark Energy's P.S.C. No. 2 Original Page No. 118.34, APPENDIX E - FEES AND CHARGES.

[104] KBCA Objections at 8.

[105] Direct Testimony of Richard Bast at 10.

[106] Clark Energy's response to Commission Staff's First Request for Information (Staff's First Request), Item 15.

estimated cost based on an employee cost of $44.56 and estimated 2.25 hours of dedicated time to complete all the above items, per application."[107]

The Commission believes that Clark Energy's estimate of 2.25 hours for administrative work described above is reasonable given the amount of the work involved. The Commission further finds that estimate annual hourly rate is reasonable. The Commission notes that it has recently prohibited utilities from recovering non-recurring charges for work performed by salaried employees during normal business hours. However, unlike other utility rates, pole attachment rates to not typically include recovery of general and administrative expenses, and in any case, a prospective pole attachment customer may never pay the pole attachment rate, because they might decline to move forward with an attachment, so the Commission believes that it is reasonable for an RECC to recover these administrative costs as part of the make ready costs for a new attachment. Thus, the Commission finds that Clark Energy's $100 administrative fee is reasonable, and therefore, should be approved.

IT IS THEREFORE ORDERED that:

1. The RECCs proposed pole attachment tariff, (revised as discussed herein) is approved for service rendered on and after the date of this Order.

2. Within 30 days of the date of this Order, the each RECCs shall file with the Commission, using the Commission's electronic Tariff Filing System, their proposed tariffs (revised as discussed herein), setting out the rates and terms approved herein and reflecting that they were approved pursuant to this Order.

3. This case is closed and removed from the Commission's docket.

[107] Clark Energy's response to Staff's First Request, Item 15.

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DEC 28 2022 bsb
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