

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC INVESTIGATION OF THE)	CASE NO.
PROPOSED POLE ATTACHMENT TARIFFS OF)	2022-00107
RURAL LOCAL EXCHANGE CARRIERS)	

ORDER

On February 28, 2022, Duo County Telephone Cooperative Corporation, Inc. (Duo County), a rural local exchange carrier (RLEC), filed amendments to its pole attachment tariff pursuant to 807 KAR 5:015. Several RLECs,¹ on February 28, 2022, filed proposed schedules that would delete their current pole attachment tariffs and concur in Duo County's tariff. The RLECs all proposed an effective date of March 31, 2022, for each of their tariffs.

On March 30, 2022, the Commission suspended the RLECs' proposed tariffs pursuant to KRS 278.190(2) through August 31, 2022. The Commission made the Kentucky Broadband and Cable Association (KBCA) a party to the proceeding because KBCA objected to the proposed tariffs of Ballard Telephone, Brandenburg Telephone, Logan Telephone, South Central Telephone, and Thacker-Grigsby Telephone, or rather,

¹ Ballard Rural Telephone Cooperative Corporation, (Ballard Telephone), Inc. Brandenburg Telephone Company, Inc. (Brandenburg Telephone), Foothills Rural Telephone Cooperative Corporation, Inc. (Foothills Telephone), Gearheart Communications Company, Inc. (Gearheart Communications), Highland Telephone Cooperative, Inc., (Highland Telephone), Logan Telephone Cooperative, Inc. dba LTC Connect (LTC Connect), Mountain Rural Telephone Cooperative Corporation (Mountain Telephone), North Central Telephone Cooperative, Inc. (North Central Telephone), Peoples Rural Telephone Cooperative Corporation, Inc. (Peoples Telephone), South Central Rural Telecommunications Cooperative, Inc.(South Central Telephone), and Thacker-Grigsby Telephone Company, Incorporated, (Thacker-Grigsby Telephone).

KBCA objected to the Duo County Telephone proposed tariff in which those RLECs had concurred. The Commission also established a procedural schedule for the processing of this review.²

KBCA was made a party this case. No other requests for intervention were received. Each RLEC responded to KBCA's objections and written requests for information from Commission Staff and KBCA. KBCA filed written testimony in support of its objections, and then responded to a single round of requests for information from Commission Staff and the RLECs. The RLECs then filed written rebuttal testimony. The parties filed briefs and response briefs. No party requested a hearing. This matter now stands ready for a decision.

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."³ 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. The RLECs all concur in Duo County's pole attachment tariff. RLECs have historically concurred in portions of Duo County's tariff for industry-wide issues that affected the RLECs equally.⁴

² Case No. 2022-00064, *Electronic Review of Pole Attachment Tariffs Filed Pursuant to 807 KAR 5:015, Section 3, Objections of the Kentucky Broadband and Cable Association to Newly filed Kentucky Tariffs (KBCA Objections)* (filed Mar. 6, 2022).

³ 807 KAR 5:015, Necessity, Function, and Conformity.

⁴ See, e.g., Case No. 2006-00076, *Petition of Duo County Telephone Cooperative Corporation, Inc. to Amend Presubscribed Interexchange Carrier (Pic) Change Charges* (Ky. PSC Mar. 20, 2006).

KBCA, as the only intervenor, objected to several portions of Duo County's proposed pole attachment tariff, which would be applicable to all RLECs. Those objections were to:

1. The allocation of all make ready costs for the replacement of poles that are not red tagged poles to the new attacher requiring the make ready in Section 18.19 of the tariff;
2. The indemnity requirement in Section 18.8 of the tariff that "that makes an attacher responsible for the negligence of the pole owner;" and
3. The termination of attachment authority in Section 18.11 of the tariff, which KBCA asserted gives the RLECs a broad right to terminate KBCA's rights under the tariff and remove its attachments "[i]f the Attacher shall fail to comply with any of the provisions of this tariff, including . . . timely payment of any amounts due, and shall fail for thirty (30) days after written notice from the Company to correct such non-compliance."⁵

KBCA also objected to the proposed survey fee estimates of South Central Telephone, Brandenburg Telephone, and Thacker-Grigsby Telephone.⁶

The RLECs argued that their tariffs are reasonable and consistent with 807 KAR 5:015 as discussed in more detail below. However, the RLECS acknowledged a clerical error in the Duo County tariff. PSC KY No. 2A, Original Page 18- 15, 3. Payments, b. Payment of Make Ready Estimates reads:

Within fourteen (14) days of providing a response granting access pursuant to <subsection (2)(b)4. of this section>, the Company shall send a new Attacher whose application for access has been granted a detailed, itemized estimate in writing, on a pole-by-pole basis if requested and reasonably calculable of charges to perform all necessary make-ready.

⁵ Objections of the Kentucky Broadband and Cable Association to Newly Filed Kentucky Tariffs ("KBCA Objections") (filed Mar. 27, 2022) at 6-7, 23, 31, 35.

⁶ KBCA Objections at 6-7, 23, 31, 35.

The RLECs asserted that “<subsection (2)(b)4. of this section>” is a clerical error and the correct reference is to section 18.16(2)(d) of Duo County’s proposed tariff. The RLECs proposed amending this section to specifically refer to “section 18.16(2)(d)” to avoid any confusion and the RLECs would adopt Duo County Telephone’s proposed tariff with such revision.⁷

LEGAL STANDARD

KRS 278.030(2) allows a utility to “establish reasonable rules governing the conduct of its business and the conditions under which it shall be required to render service.”⁸ The burden of establishing the reasonableness of a proposed rate change is on the utility proposing the change.⁹ Conversely, the party challenging existing tariff provisions bears the burden of establishing that the provisions are unreasonable or unlawful.¹⁰

DISCUSSION

Allocation of Costs to Replace Poles That Are Not Red Tagged

KBCA objects to any provision assigning the entire make ready cost of replacing a pole that is not red-tagged to new attachers, including the requirement in the Duo

⁷ See *e.g.*, Ballard Telephone’s Response to Commission Staff’s First Request for Information (Staff’s First Request), Item 1.

⁸ See also 807 KAR 5:015, Section 3(4) (“The tariff may include terms, subject to approval by the commission, that are fair, just and reasonable and consistent with the requirements of this administrative regulation and KRS Chapter 278, such as certain limitations on liability, indemnification and insurance requirements, and restrictions on access to utility poles for reasons of lack of capacity, safety, reliability, or generally applicable engineering standards”).

⁹ See Case No. 2007-00461, *Hardin County Water District No. 1* (Ky. PSC Aug. 14, 2008), Order at 3; see also KRS 278.190(3).

¹⁰ See Case No. 2005-00322, *East Clark Water District v. City of Winchester, Kentucky* (Ky. PSC Apr. 3, 2006), Order at 1.

County tariff that “[t]he make-ready cost, if any, for a pole that is not a red tagged pole to be replaced with a new Pole to accommodate the new Attacher's attachment shall be charged the Company's cost in accordance with the Company's tariff or a special contract regarding pole attachments between the Company and the new Attacher.”¹¹ 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.¹²

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 provide their core service.¹³ 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.¹⁴

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

¹¹ Duo County Tariff PSC KY NO. 2A, Original page 18-18, Section 18.19.

¹² KBCA Objections at 6.

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

¹⁴ Kravtin Testimony at 40.

new attacher only shifts the timing of the replacement.¹⁵ 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.¹⁶ 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.¹⁷

The RLEC's witness, Keith Gabbard, stated that "if an attachment request necessitates a larger (or different type) pole, then it is the requesting attacher who is causing the pole replacement to occur."¹⁸ The RLECs argued that KBCA's argument against the tariff provision regarding non-red tagged pole replacement costs abandons the long-standing Commission principle that the party causing the cost is responsible to pay the cost.¹⁹ The RLECs also note that KBCA's arguments regarding pole replacement costs are predicated on evidence and arguments presented by other utilities, and not the

¹⁵ Kravtin Testimony at 16-17.

¹⁶ See Kravtin Testimony at 17; Brief of the Kentucky Broadband and Cable Association (KBCA's Initial Brief) KBCA's Initial Brief at 3.

¹⁷ See Kravtin Testimony at 18; KBCA's Initial Brief at 3-4.

¹⁸ Rebuttal Testimony of Keith Gabbard (Gabbard Rebuttal Testimony) (filed Jul. 11, 2022) at 10.

¹⁹ Response Brief of all Rural Local Exchange Carriers (RLEC Response Brief) (filed Oct. 18, 2022) at 4; Gabbard Rebuttal Testimony at 10.

RLECs, and that the Commission should not reject tariffs based upon evidence presented by other utilities.²⁰

The RLECs also noted that “the fact that the cable industry now has access to record levels of federal, state, and local subsidies to assist with the cost of broadband deployment,” including the “pole replacement fund” approved by the Kentucky Legislature in March 2022.²¹ The RLECs asserted that the make ready costs for pole replacements that attachers will have to incur was one of the bases for the cable industry requesting such subsidies.²² The RLECs argued that shifting the cost of non-red tagged pole replacements to them “essentially double-taxes them in light of the new subsidies made available (from taxpayer funds) to the cable industry for these very costs.”²³

The RLECs indicated that shifting the cost of non-red tagged pole replacements to them would, in part, shift control over their capital budgets to third party attachers, which they stated “could significantly undermine our ability to effectively plan and operate our business” and “creates unreasonable cost pressure on the cost of our services.”²⁴ The RLECs also noted that they have been working for the past 20 years to bring broadband to their rural, underserved service areas, which they assert have been ignored by for-

²⁰ RLEC Response Brief at 5; see also Gabbard Rebuttal Testimony at 7 (“[I]n responding to the RLEC’s Request for Information, KBCA was unable to point to a single issue caused by an RLEC entity, instead relying upon theoretical concerns, while simultaneously refusing to provide any information as to whether KBCA members have attachments on RLEC poles or plan to attach to RLEC.”)

²¹ Gabbard Rebuttal Testimony at 10-11.

²² Gabbard Rebuttal Testimony at 10-11.

²³ Gabbard Rebuttal Testimony at 11.

²⁴ Gabbard Rebuttal Testimony at 12.

profit companies, and that shifting the cost of non-red tagged pole replacements necessary to serve new attachers could undermine the RLECs financially.²⁵

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.”²⁶ 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.²⁷ The regulation does not establish a specific allocation methodology for the costs of non-red tagged pole replacements.²⁸

As an initial matter, the Commission notes that 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 RLECs’ 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, which would include make ready necessary to provide pole attachment service. When determining how a utility’s costs should be allocated among customers,

²⁵ Gabbard Rebuttal Testimony at 3-8.

²⁶ 807 KAR 5:015, Section 1.

²⁷ 807 KAR 5:015, Section 4(6)(b).

²⁸ 807 KAR 5:015, Section 4(6)(b)4.

the Commission has long stated that the basic tenant of rate-making is that that costs should be allocated to the cost-causer.²⁹ This generally means that “the consumers whose service demand causes [the utility] to incur additional investment expenditures and expenses should pay these costs.”³⁰

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.³¹ However, again, such replacements are, by definition, not needed, and therefore, not necessary to provide adequate service to a utility’s other customers.³² Absent the request by a new

²⁹ 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.

³⁰ Case Nos. 8847, 8879, *In Re: South Central Bell Telephone Company* (Ky. PSC Jan. 18, 1984), Order.

³¹ See KBCA’s Response to Commission Staff’s First Request for Information (KBCA’s Response to Staff’s First Request), Item 12.

³² 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,

attacher a utility would be prohibited from constructing the new pole and recovering the cost from its customers.³³ Further, Dr. Kravtin provided no evidence that new poles that are not otherwise needed would tangibly reduce a utility's operation and maintenance expense.³⁴

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.³⁵ 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 for the new pole, through depreciation expense and carrying costs, that is not needed to provide them service. Additionally, in the case of non-profit entities such as the RLECs,

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.

³³ 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).

³⁴ See KBCA's Response to Staff's First Request, Item 12(d).

³⁵ 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").

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 year 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. This is especially true for the RLECs which generally own very few poles, comparatively speaking,³⁶ and may elect to eliminate all poles that they own within their system.³⁷ In fact, Ballard Telephone noted that it was currently in the process of decommissioning its poles and scheduling all remaining poles in service for removal.³⁸ Thus, the Commission finds that the extension of the useful lives of poles from the non-red tagged pole replacements is speculative.

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

³⁶ See, e.g. LTC Connect's Response to Staff's First Request, Item 9 (indicating it controls 67 poles); Duo County Telephone's Response to Staff's First Request, Item 9 (indicating it controls 5,622 poles); Gearheart Telephone's Response to Staff's First Request, Item 9 (indicating it controls 3,518 poles); Highland Telephone's Response to Staff's First Request, Item 9 (indicating it controls 2,690 poles); Brandenburg Telephone's Response to Staff's First Request, Item 9 (indicating it controls 11,858 poles); Mountain Rural Telephone's Response to Staff's First Request, Item 9 (indicating it controls 11,858 poles).

³⁷ See Ballard Telephone's Response to Staff's First Request, Item 2.

³⁸ Ballard Telephone's Response to Staff's First Request, Item 2.

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 RLECs, 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 RLECs' tariffs reasonably allocate the costs of non-red tagged pole replacements.³⁹

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.⁴⁰ Specifically, KBCA objected to the proposed requirement in Duo County Telephone's tariff, which was incorporated by the other RLECs, stating that:

Attacher shall indemnify, protect, and hold harmless the Company and other joint-users of said poles from and against any and all loss, cost, claims. . . arising out of . . . the joint negligence of the Attacher and the Company and/or any joint users.⁴¹

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.⁴²

³⁹ 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 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).

⁴⁰ KBCA Objections at 6; KBCA's Initial Brief at 15-16.

⁴¹ Duo County Tariff PSC KY NO. 2A, Original page 18-7, Section 18.8(1).

⁴² Direct Testimony of Jerry Avery (Avery Testimony) (filed June 9, 2022) at 11; KBCA's Initial Brief at 15-16.

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 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.⁴³

The RLECs asserted that proposed indemnity provision is designed to ensure that there are adequate mechanisms in place to ensure that the RLECs are not responsible for damages or injuries caused or contributed to by an Attacher.⁴⁴ The RLECs also argued that the indemnity provision should be approved, because the Commission has already approved the same provision as fair, just and reasonable for CATV pole attachments in the RLECs' existing CATV pole attachment tariffs.⁴⁵ The RLECs noted that KBCA members have agreed to similar indemnity provisions in other jurisdictions.⁴⁶

The Commission has concerns about the reasonableness of the broad indemnity language in RLECs tariffs. While the Commission recognizes that it is common in commercial contracts, such broad indemnity language, which could require an attacher to indemnify the RLECs 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.⁴⁷ The Commission also has concerns about allowing such provisions in conditions for pole attachment tariffs for

⁴³ Avery Testimony at 12; KBCA's Initial Brief at 15-16.

⁴⁴ RLECs Response to KBCA's Objections at 20.

⁴⁵ RLEC Response Brief at 12.

⁴⁶ RLEC Response Brief at 13.

⁴⁷ 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, though that is less of an issue for the RLECs given the limited number of poles they own and control.

However, the Commission ultimately finds that the RLEC's indemnity provisions are reasonable, because they generally assign costs—responsibility for claims and damages—to attachers that arise from the RLECs accommodation of the attachers equipment i.e. costs that arise from actions involving or jointly involving the attachers. As with the cost for non-red tagged pole replacements, the alternative would generally be requiring other RLEC 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 RLEC's pole attachment service. Thus, the Commission finds that the RLEC'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.

Survey Fee Estimates

KBCA, specifically, objected to the survey fee estimates for Brandenburg Telephone Company (\$225 per pole)⁴⁸, South Central Rural Telecommunications Cooperative (\$162.77 per pole)⁴⁹, and Thacker-Grigsby Telephone Company (\$119 per

⁴⁸ KBCA Objections at 6.

⁴⁹ KBCA Objections at 32.

pole).⁵⁰ The fees are supposed to be trued-up once all work is complete,⁵¹ but KBCA indicates that it would be an administrative nightmare to reconcile the up-front and reimbursed fees.⁵² KBCA argues that survey fees must be based on actual costs, that these fees are excessive and that a reasonable survey fee estimate would fall between \$30 and \$50 per pole.⁵³ However, KBCA only based this on the experience of their witness and did not provide any additional support for the range of survey fees.

The individual survey fees per pole for each RLEC are contained in Duo County's tariff.⁵⁴ These fees are paid upfront and are related to reviewing a pole to determine whether make ready is necessary. The fees range from \$84.63 per pole to \$307.62 per pole. There are no survey fees for Ballard Telephone or West Kentucky Telephone. Ballard Telephone states that it is decommissioning all of its poles and will remove all of its poles from service, and does not anticipate conducting any surveys for make ready work, but, it states that if a request for an attachment is made, Ballard Telephone will transfer the pole to the requesting attacher.⁵⁵ West Kentucky Telephone states that it did not create a survey fee because currently all of its attachers are subject to joint use agreements, but it will create a rate upon request of an attacher.⁵⁶ West Kentucky

⁵⁰ KBCA Objections at 35.

⁵¹ 807 KAR 5:015, Section 4 (2)(6)(b).

⁵² Direct Testimony of Richard Bast (Bast Testimony) at 4; Brief of the Kentucky Broadband and Cable Association (Initial KBCA Brief) at 11.

⁵³ Bast Testimony at 4; Initial KBCA Brief at 10.

⁵⁴ Duo County Tariff PSC KY NO. 2A, Original page 18-28, Section 18.26.

⁵⁵ Ballard Telephone's Response to Staff's First Request, Item 2.

⁵⁶ West Kentucky Telephone's Response to the Commission Staff's Second Request for Information (Staff's Second Request), Item 2.

Telephone subsequently clarified that that it was installing no new poles and doesn't replace poles because of its efforts to bury its facilities. Consequently, West Kentucky Telephone states that for poles not removed because of the presence of an attacher, it has transferred ownership of the pole to the attacher.⁵⁷

In their response to KBCA's objections to the per pole survey fees of Brandenburg Telephone, South Central Telephone and Thacker-Grigsby Telephone, the RLECs indicate that they are not accustomed to receiving pole attachment requests, making it difficult to come up with an estimate.⁵⁸ The RLECs state that they have done their best to provide good faith estimates of survey costs, and note that the costs are subject to true up.⁵⁹ They also note that their costs are likely to be higher than costs KBCA's members are used to in urban areas, because the RLECs get so few requests they are unable to take advantage of economies of scale to lower costs like some of the larger utilities.⁶⁰

Each RLEC provided, in response to Commission Staff Requests for information, justification for the calculation of the initial survey fees. The majority of the RLECs based their calculations on the hourly rate to perform the survey such as a field survey, mapping, or vehicle travel.⁶¹ The other RLECs, except Ballard Telephone and West Kentucky Telephone, base their \$119 survey fee upon the fee negotiated with the Commonwealth

⁵⁷ West Kentucky Telephone's Response to Staff's Second Request, Item 2.

⁵⁸ Gabbard Rebuttal Testimony at 16.

⁵⁹ Gabbard Rebuttal Testimony at 15-16.

⁶⁰ Gabbard Rebuttal Testimony at 16.

⁶¹ See *generally*, the responses of Brandenburg Telephone, LTC Connect, Highlands Telephone, North Central Telephone, South Central Telephone, and Duo County Telephone to Staff's First Request, Request No. 3.

of Kentucky, presumably for projects associated with the Kentucky Communication Network Authority.⁶²

Regarding make-ready survey fees, the RLECs provided support for its make-ready survey fees. While the amount is considerably more than the range proposed by KBCA, the Commission finds the fees to be reasonable given the RLEC's rural locations and their size, which makes it more difficult to have efficient processes in place to handle pole attachment requests. Further, the regulations require that the fees be trued up upon completion of the work. However, regarding refunds, the Commission finds that because its regulations require utilities to provide a detailed, itemized final invoice of the actual make ready costs to attachers, the RLECS should add language to their tariffs explicitly stating that a refund will be made for any overpayment for survey or make ready costs no matter the amount of the difference.

Termination of Service/Default

KBCA objected to the broad default language in the Duo County Tariff that allows an RLEC to terminate attachers' rights under the tariff and remove attachments.⁶³ The tariff provision states:

If the Attacher shall fail to comply with any of the provisions of this tariff, including compliance with the specifications previously referred to, the maintenance of required insurance coverage and surety bond requirements, and the timely payment of any amounts due, and shall fail for thirty (30) days after written notice from the Company to correct such non-compliance, the Company, at its option, may terminate the Attacher's right to continue any or all use of poles provided under this tariff and may act to remove the Attacher equipment at the Attacher's sole risk and expense. The Company shall

⁶² See *generally*, Foothills Telephone, Gearheart Communications, Mountain Telephone, Peoples Telephone, and Thacker-Grigsby Telephone's Responses to Staff's First Request, Item 3.

⁶³ KBCA Objections at 7, 32, and 35.

be responsible for its own negligence in the event such action becomes necessary.⁶⁴

KBCA noted that 807 KAR 5:015, Section 6(1) requires 60 days' written notice, at a minimum prior to the removal of an attacher's facilities.⁶⁵ KBCA argued that because utilities have control and ownership of poles, it is unreasonable for utilities to have unfettered discretion to remove an attachment for any violation of a tariff, especially if the violation is in dispute.⁶⁶

The RLECs contended that the ability to remove attachments in violation of a tariff give the RLEC's "teeth" and the absence of this could disincentivize compliance and is otherwise unreasonable from financial, technical, and operational perspectives.⁶⁷ The RLECs contended that 807 KAR 5:015 introduced timeframes and complaint procedures to ensure the timely resolution of actual disputes. The RLECs asserted they intentionally included the removal provisions in the Duo County Telephone tariff so that attachers have an incentive to comply with the tariff.⁶⁸ The RLECs asserted that this will improve administrative efficiency by removing any incentive for an attacher to file a complaint to delay the removal of attachments and "secure leverage" over a continuing default.⁶⁹

KBCA argued that the RLECs are mistaken that they need the additional authority to ensure compliance with their tariffs. KBCA asserted that attachers have every

⁶⁴ Duo County Tariff PSC KY NO. 2A, Original page 18-10, Section 18.11.

⁶⁵ KBCA Initial Brief at 12.

⁶⁶ KBCA Initial Brief at 13.

⁶⁷ See e.g., Ballard Telephone's Response to KBCA's First Request, Item 6.

⁶⁸ Gabbard Rebuttal Testimony at 21.

⁶⁹ Gabbard Rebuttal Testimony at 21.

incentive to ensure their facilities are properly installed and maintained in order to provide reliable service. KBCA also posits that other provisions in the Duo County Telephone tariff provide sufficient remedies for the RLECs to ensure compliance with their tariffs.⁷⁰

Section 6(1) of 807 KAR 5:015 states in relevant part that:

a utility shall provide an existing attacher no less than sixty (60) days written notice prior to:

- (a) Removal of facilities or termination of any service to those facilities if that removal or termination arises out of a rate, term, or condition of the utility's pole attachment tariff or any special contract regarding pole attachments between the utility and the attacher.
- (b) Any modification of facilities by the utility other than make-ready noticed pursuant to Section 4 of this administrative regulation, routine maintenance, or modifications in response to emergencies.⁷¹

An attacher may request a stay of the proposed removal or modification from the Commission pursuant to 807 KAR 5:015, Section 6(2).

The language in Dou County Telephone's tariff is generally consistent with Section 6(1) of the regulation, and it is reasonable that noncompliance with a utilities tariff will ultimately result in the termination of service, subject to oversight by the Commission pursuant to 807 KAR 5:015, Section 6(2). The RLECs' proposed tariff, however, allows removal if the attacher fails to cure a deficiency within 30 days, which is inconsistent with the regulation, which provides for a minimum of 60-days' notice before equipment may be removed. Further, other than modifications made pursuant to the exceptions in 807

⁷⁰ KBCA Initial Brief at 13.

⁷¹ 807 KAR 5:015, Section 6(1).

KAR 5:015, Section 6(1)(b), the regulation requires 60-days' notice of the action to be taken pursuant to Section 6(1)(b).⁷² The Commission therefore finds that the RLECs' tariff should be amended to allow for a minimum of 60 days' notice that the attachers facilities may be removed before an attacher's facilities are removed for default, unless modification without such notice would be permitted pursuant 807 KAR 5:015, Section 6(1)(b).

Clerical Error

The RLEC's pole attachment tariff at PSC KY No. 2A, Original Page 18- 15, 3. Payments, b. Payment of Make Ready Estimates reads:

Within fourteen (14) days of providing a response granting access pursuant to <subsection (2)(b)4. of this section>, the Company shall send a new Attacher whose application for access has been granted a detailed, itemized estimate in writing, on a pole-by-pole basis if requested and reasonably calculable of charges to perform all necessary make-ready.

The RLECs asserted that "<subsection (2)(b)4. of this section>" is a clerical error and the correct reference is to section 18.16(2)(d) of Duo County's proposed tariff. The RLECs proposed amending this section to specifically refer to "section 18.16(2)(d)" to avoid any confusion and the RLECs would adopt Duo County Telephone's proposed tariff with such revision.⁷³ The Commission agrees that the reference to "<subsection (2)(b)4. of this section>" in that section should be amended to refer to "section 18.16(2)(d)" as proposed, because the original reference was clearly a clerical error and correcting it will avoid confusion and ensure the tariff is applied appropriately.

⁷² This is clear based on the statement in 807 KAR 5:015, Section 6(2)(a) that "[a]n existing attacher may request a stay *of the action contained in a notice* received pursuant to subsection (1) of this section."

⁷³ See e.g., Ballard Telephone's Response to Staff's First Request, Item 1.

Adoption of Duo County Tariff

The Commission is also concerned that the RLECs concurring in or adopting Duo County's tariff may not comply with KRS 278.160, which requires each utility to maintain "schedules showing all rates and conditions for service established by it and collected or enforced." To avoid a possible issue with the application of KRS 278.160, and regulations implementing it, the Commission finds that the RLECs, therefore, should each file individual tariffs containing their respective pole attachment tariffs as approved herein. However, the Commission further finds that West Kentucky Telephone and Ballard Telephone, because they have or are retiring all of their poles and will transfer ownership of control to a requesting attacher, should include in their pole attachment tariff provisions setting out the procedure for when and how the ownership of a pole will be transferred.

The Commission, having considered the evidence of record and being otherwise sufficiently advised, finds that the RLECs' proposed pole attachment tariffs (revised as discussed herein), are appropriate, reasonable, and should be approved.

IT IS THEREFORE ORDERED that:

1. The RLECs 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 RLECs 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.

PUBLIC SERVICE COMMISSION

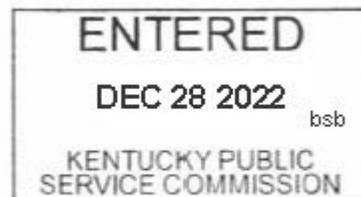


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