

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC INVESTIGATION OF THE)	CASE NO.
PROPOSED POLE ATTACHMENT TARIFFS OF)	2022-00108
INCUMBENT LOCAL EXCHANGE CARRIERS)	

ORDER

On February 28, 2022, incumbent local exchange carriers (ILECs) BellSouth Telecommunications, LLC d/b/a AT&T Kentucky (AT&T Kentucky) and Cincinnati Bell Telephone Company, LLC d/b/a altafiber (altafiber), filed amendments to their respective pole attachment tariffs pursuant to 807 KAR 5:015 with proposed effective dates on March 31, 2022. On March 22, 2022, Windstream Kentucky East, LLC, (Windstream Kentucky East) and Windstream Kentucky West, LLC (Windstream Kentucky West) (collectively Windstream Kentucky), both ILECs, filed identical amendments to their respective pole attachment tariffs pursuant to 807 KAR 5:015.

On March 30, 2022, the Commission suspended the ILECs' proposed tariffs pursuant to KRS 278.190(2) through August 31, 2022. Windstream Kentucky did not tender its filing until March 22, 2022, and, pursuant to KRS 278.190(2) the earliest its proposed filing could go into effect was September 22, 2022.¹ The Commission made the Kentucky Broadband and Cable Association (KBCA) a party to the proceeding

¹ The Commission will address Windstream Kentucky's proposed pole attachment revisions by separate order.

because of KBCA's filed objections to altafiber's and AT&T Kentucky's tariffs.² KBCA subsequently filed objections to Windstream Kentucky's pole attachment agreements.³ The Commission also established a procedural schedule for the processing of this review.

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."⁴ 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.

KBCA objects to several portions of the tariffs of AT&T Kentucky and altafiber. KBCA objects to three specific provisions in AT&T Kentucky's proposed tariff relating to: sanctions for declining to participate in an inventory survey; claim limitations, and indemnity issues.⁵ KBCA objects to two provisions in altafiber's tariff relating to pole replacement costs and a 10 percent addition to the costs of pole attachments.

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

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 Objections of the Kentucky Broadband and Cable Association to Windstream Tariffs (filed Apr. 7, 2022).

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

⁵ KBCA Objections at 3-4.

service.”⁶ The burden of establishing the reasonableness of a proposed rate change is on the utility proposing the change. Conversely, the party challenging existing tariff provisions bears the burden of establishing that the provisions are unreasonable or unlawful.

DISCUSSION AND FINDINGS

AT&T Kentucky

Inventory Survey Penalty

First, KBCA objects to the provision in AT&T Kentucky’s tariff that provides:

If Attaching Party declines to participate in an Inventory Survey (i.e., providing the locations of its existing attachments), and AT&T Kentucky discovers an unauthorized attachment by Attaching Party, AT&T will also be entitled to invoice Attaching Party a sanction of \$100.00 for each such unauthorized attachment that AT&T discovers.⁷

KBCA argues that in order for this penalty to apply that there must be a meaningful opportunity for the attaching party to participate in an audit. If an attacher participates by cooperating with AT&T Kentucky during the audit process (without actually going out in the field with the auditors, which may not be possible), KBCA argues that cooperation should constitute participation under the tariff provision and that AT&T Kentucky should

⁶ 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”).

⁷ Tariff of BellSouth Telecommunications Kentucky, PSC KY. Tariff 2A, Original Page 66, Section 18.2.2.

be required to clarify that an attacher's cooperation in a survey, and not partaking in field work, is "participation in the survey."⁸

AT&T Kentucky argues that this provision is reasonable for several reasons, including: (1) the Federal Communications Commission (FCC) has determined that a sanction of \$100 per pole is reasonable if the violation is found by the pole owner in an inspection that the attacher declined to participate in;⁹ (2) the tariff requires written notice of the sanction to the attachee; (3) the tariff provides a reasonable process for resolving factual disputes; (4) the provision will reduce the number of unauthorized attachments, ensuring the safety of structure access; (5) the provision would ensure all attachers are treated the same whether they have an interconnection agreement, standalone structure access agreement, or attach pursuant to the tariff; and (6) the tariff is consistent with AT&T Kentucky's structure access agreements in the 21 states it operates as an ILEC and the FCC has stated it is presumptively reasonable.¹⁰ AT&T Kentucky also clarified that "participation" does not require actual field work with auditors.¹¹

The penalty included in the proposed inventory survey process is not cost based and the Commission has generally found that charges that are not cost based are unreasonable. AT&T Kentucky's tariff includes another penalty for unauthorized attachments that is charged regardless of whether an attacher participates in the

⁸ Initial Brief of the Kentucky Broadband and Cable Association (filed Oct. 11, 2022) (KBCA Initial Brief) at 16 -17.

⁹ Rebuttal Testimony of Dan Rhinehart (filed July 11, 2022) (Rhinehart Rebuttal Testimony) at 2; AT&T Kentucky Reply Brief (filed Oct. 18, 2022) at 2.

¹⁰ Rhinehart Rebuttal Testimony at 5.

¹¹ AT&T Kentucky's Response to KBCA Objections of the proposed Pole Attachment Tariffs, (AT&T Kentucky's Response to KBCA Objections) (filed Apr. 14, 2022) at 6.

inventory process, which is set at five times the annual rental charge, and is intended to recover the rental charges between attachment surveys.

However, as AT&T Kentucky noted, both the penalty based on the rental charge and the \$100 penalty have been found reasonable by the FCC with the protections such as those included in AT&T Kentucky's tariff. Further, KBCA only appears to object to the penalties if its members would be required to physically participate in the surveys in order to avoid the penalty, however AT&T Kentucky in this proceedings has clarified that its tariff would not require that level of participation. The Commission, therefore, finds that the proposed inventory survey process is fair, just and reasonable and should be approved.

Limitation on Claims

KBCA next objects to a limitation on claims in AT&T Kentucky's tariff that requires any legal action for a claim arising from AT&T Kentucky's licensing agreement to be filed within two years from the date the attacher knew or should have known of the occurrence that gave rise to the claim.¹² KBCA objects to Section 29.1, which provides in part

Except as otherwise specifically provided for in this Agreement, no claim may be brought for any dispute arising from this Agreement more than 24 months from the date the occurrence which gives rise to the dispute is discovered or reasonably should have been discovered with the exercise of due care and attention. Any legal action arising in connection with this Agreement must be filed within 24 months after the cause of action accrues, with the exception of a Continuing Violation, or it will be deemed time-barred and waived. The parties waive any statute of limitations to the contrary.¹³

¹² KBCA Objections at 3.

¹³ Tariff of BellSouth Telecommunications Kentucky, PSC KY. Tariff 2A, Original Page 66, Section 29.1.

KBCA argues that restricting the timeframe in which an attacher may bring a dispute that “should have been discovered” is not realistic and will discourage parties from working cooperatively.¹⁴ KBCA claims that it often takes months for attachers to discover problems and to negotiate resolution and claims that, because of the short timeframe, attachers “would have no choice but to bring [sic] lawsuit to preserve their claims. . . .”¹⁵ KBCA proposes, because 807 KAR 5:015 does not establish a time period in which a dispute may be brought, that the Commission establish a deadline between three years and ten years.¹⁶

AT&T Kentucky argues that the Commission has repeatedly approved similar language in its interconnection agreements and that the provision would ensure that all attachers would be treated similarly.¹⁷ AT&T Kentucky asserts that the 24-month claim period strikes a balance for both parties because, while an attacher must file a billing dispute within 24 months of a bill, AT&T Kentucky may only back bill an attacher for 24 months if the attacher fails to submit an invoice.¹⁸ AT&T Kentucky also notes that the claim limitation is similar to structure access agreements AT&T Kentucky has in 21 other states.¹⁹

¹⁴ KBCA Initial Brief at 17.

¹⁵ KBCA Initial Brief at 17.

¹⁶ KBCA Initial Brief at 17.

¹⁷ AT&T Kentucky Reply Brief at 8.

¹⁸ AT&T Kentucky's Response to KBCA Objections at 8.

¹⁹ AT&T Kentucky's Response to KBCA Objections at 8.

Assuming such claims would be considered contract claims, they would have a five or fifteen year statute of limitation absent a modification limiting the statute.²⁰ Under Commission precedent, KRS 418.120(2) limits the time in which a customer of a utility may bring an action with the Commission within five years against a utility for charging the incorrect rate.²¹ Such language limiting the period in which contract claims can be brought is a common method to limit liability for claims in the distant past, and the Commission believes two years appears to be reasonable. Claims arising from attachments to ILECs poles' in jurisdictions in which pole attachments are regulated by the FCC are also subject to a two year statute of limitations. Kentucky courts have also found such two year limitations periods are reasonable in the case of car insurance policies.²² Two years is also consistent with the limitation in KRS 278.225 regarding the period during which a utility is permitted to bill a customer for service. The Commission, therefore, finds that the two year limitation on claims is fair, just and reasonable.

Indemnity

Finally, KBCA objects to any standard that would hold an attacher responsible for the negligence of the pole owner. KBCA specifically objects to the provision which provides:

Attaching Party will indemnify, hold harmless, and, on request, defend AT&T from any Claim or Liability, if such

²⁰ See KRS 413.120(1); KRS 413.090.

²¹ See e.g. Case No. 2000-00379, *The Harbor at Harrods Creek Condominium Association vs. Fourth Avenue Corp.-Long Corp., Joint Venture, d/b/a Shadow Wood Subdivision Sewer Service* (Ky. PSC Aug. 14, 2001).

²² See *Gordon v. Kentucky Farm Bureau Ins. Co.*, 914 S.W.2d 331 (Ky. 1995); see also *State Farm Mutual Automobile Insurance Company v. Riggs*, 484 S.W.3d 724, 730-1 (Ky. 2016) (finding that a 2 years claims limitation period in an underinsured or uninsured motorist policy was reasonable).

Claim and/or Liability arises out of Attaching Party's work in, on, or in the vicinity of AT&T's Structure and /or Attaching Party's access to or use of AT&T's Structure, except to the extent caused by AT&T's willful or intentional misconduct, or gross negligence.²³

KBCA objects to any standard that would hold an attacher responsible for the negligence of the pole owner.²⁴ 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.²⁵

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.²⁶

AT&T Kentucky asserts that its indemnity provision is reasonable and first notes that established industry safety standards for aloft work require attachers' personnel to examine each pole prior to working aloft on the pole.²⁷ AT&T Kentucky asserts that the indemnity provision is standard and properly apportions risk, placing the responsibility for determining the viability of the pole on the attacher.²⁸ AT&T Kentucky argues that KBCA's

²³ Tariff of BellSouth Telecommunications Kentucky, PSC KY. Tariff 2A, Original Page 70, Section 22.2.

²⁴ KBCA Objections at 6.

²⁵ Direct Testimony of Jerry Avery (Avery Testimony) at 11.

²⁶ Avery Testimony at 12.

²⁷ AT&T Kentucky's Response to KBCA Objections at 8-9.

²⁸ AT&T Kentucky's Response to KBCA Objections at 8.

objection to any standard holding an attacher responsible for the negligence of a pole owner is inconsistent with well-established industry precedent.²⁹ AT&T Kentucky notes that the indemnity language is consistent with similar provisions in its interconnection agreements and structure access agreements.³⁰ Finally, AT&T Kentucky points to its proposed tariff which provides:

AT&T will indemnify, hold harmless, and, on request, defend Attaching Party from any Claim or Liability, if such Claim and/or Liability arises out of AT&T's work in, on, or in the vicinity of AT&T's Structure and/or AT&T's access to or use of AT&T's Structure, except to the extent caused by Attaching Party's willful or intentional misconduct, or gross negligence.³¹

AT&T Kentucky argues that this provision is reciprocal because it also indemnifies attachers for claims arising from AT&T Kentucky's work or attachments on AT&T Kentucky's poles.³²

The Commission, generally, has concerns about the reasonableness of the broad indemnity language in utilities' tariffs. While the Commission recognizes in commercial contracts such broad indemnity language, which could require an attacher to indemnify the utilities 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.³³ The Commission also has concerns about allowing such provisions in conditions for pole attachment tariffs for

²⁹ AT&T Kentucky's Response to KBCA Objections at 9.

³⁰ AT&T Kentucky's Response to KBCA Objections at 9.

³¹ Tariff of BellSouth Telecommunications Kentucky, PSC KY. Tariff 2A, Original Page 70, Section 22.3.

³² AT&T Kentucky's Response to KBCA Objections at 9-10.

³³ 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 such provisions, including AT&T Kentucky's, are fair, just and reasonable, because they generally assign costs—responsibility for claims and damages—to attachers that arise from their accommodation of the attachers equipment i.e. costs that arise from or are related to the utilities' pole attachment service. Furthermore, AT&T Kentucky's indemnity language differs from that of other utilities' proposed indemnity language because of its reciprocal nature, which would likely further limit the circumstances under which an attacher could be held liable for AT&T Kentucky's negligence, providing additional protections to attachers.

As with the cost for non-red tagged pole replacements, the alternative would generally be requiring other electric customers, such as residential or industrial commercial customers, to pay for such claims and damages through base rates, which would be inconsistent with cost causation principals and unreasonable since such costs would arise from the utilities pole attachment service. Such indemnity language is also common in commercial contracts as a means of allocating risk, and while pole owning utilities do have significant bargaining power, pole attachments are not the only means for attachers to deliver their service.

Altafiber

Allocation of Costs to Replace Poles That Are Not Red Tagged

KBCA objects to altafiber's tariff provision regarding the cost to replace poles which states, in part, that:

The charge for replacement of a pole, required to accommodate attachee's communications facilities, in

accordance with 2.6.1(G) shall be based on the Telephone Company's fully installed costs less salvage value, if any, and depreciation expense when applicable.³⁴

KBCA has filed similar objections to other utilities' proposed tariffs regarding the costs to replace poles. KBCA objects to the extent this requirement conflicts with the Commission's red-tagged pole framework in 807 KAR 5:015.³⁵ KBCA further objects to any provision requiring it to pay more than its reasonable share of pole replacement costs, outside the red-tagged pole context.³⁶

KBCA argued that the Companies unreasonably imposed the entire cost of replacing non-red tagged poles on the third party attachers.³⁷ 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. 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.

³⁴ Tariff of Cincinnati Bell Telephone Company, PSC KY. Tariff No. 1, 3rd Revised Page 41, Section 3.2.2.

³⁵ KBCA Objections at 7.

³⁶ KBCA Objections at 7.

³⁷ Brief of the Kentucky Broadband and Cable Association (Initial KBCA Brief) at 3.

Dr. Kravtin asserted that the utilities will be required to replace the non-red tagged poled replaced to accommodate a new attacher eventually, and therefore, that the make ready pole replacement to accommodate a new attacher only shifts the timing of the replacement. Thus, 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. 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.³⁸

Altafiber asserts that KBCA has proposed no changes to the tariff provision, that the tariff provision has been in effect since 1995, and promulgation of 807 KAR 5:015 did not require any changes to the provision.³⁹ Altafiber asserts that Section 3.2.2 of its proposed tariff applies in a narrow context, as Section 2.6.1(G) referenced in Section 3.2.2 addresses situations where a new attachment requires the replacement of the pole and the new attacher elects to take ownership of the replacement pole instead of becoming an attacher. Altafiber asserts nothing requires an attacher to take ownership of a pole. Altafiber argues that having a new attacher pay for the full cost of a new pole that the attacher will own is consistent with 897 KAR 5:015.⁴⁰

³⁸ Initial KBCA Brief at 3-4.

³⁹ altafiber's Response to Objections of the Kentucky Broadband and Cable Association (altafiber's Response to Objections) (filed Apr. 14, 2022) at 1.

⁴⁰ altafiber's Response to Objections at 1.

As an initial matter, altafiber's pole replacement cost tariff provision differs from many other utilities' provisions governing costs of pole replacements in that it appears to only apply to situations to where an attacher's requests requires a new pole and the attacher wishes to take ownership of the new pole. To the extent that KBCA objects to this provision, the Commission finds such objection meritless because (1) the attacher would actually own the pole; and (2) the attacher is not required to own the pole.

However, to the extent altafiber's tariff provision still offends KBCA, the Commission notes that the dispute regarding the allocation of 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 other utility customers should be responsible for the cost, because a utility is entitled to an opportunity to recover any cost reasonably incurred from its customers. 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.⁴¹ This generally means that "the consumers whose service demand causes [the utility] to incur additional investment expenditures and expenses should pay these costs."⁴²

Here, there is no dispute that 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"

⁴¹ 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.

⁴² Case Nos. 8847, 8879, *In Re: South Central Bell Telephone Company* (Ky. PSC Jan. 18, 1984), Order.

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,⁴³ but again, such replacements are, by definition, not needed, and therefore, not necessary to provide adequate service to a utility's other customers,⁴⁴ and Dr. Kravtin provided no evidence that new poles that are not otherwise needed would tangibly reduce a utility's operation and maintenance expense.⁴⁵ Dr. Kravtin also argued that utilities will see tax benefits from the red-tagged pole replacements in the form of accelerated tax depreciation of the capital expenditure that can be used to offset tax expense, but for the most part, utilities are prohibited by federal law from passing along the direct benefits of accelerated tax depreciation on to customers, and even if utilities could pass those benefits on to

⁴³ See KBCA's Response to Staff's First Request for Information (KBCA's Response to Staff's First Request), Item 12.

⁴⁴ 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. LG&E/KU also alleged that Dr. Kravtin's analysis did not account for all of its pole replacements and stated that it was actually replacing poles at a rate faster than its depreciation rate. 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 it for red-tagged pole replacements.

⁴⁵ See KBCA's Response to Staff's First Request, Item 12(d).

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 need to provide them service.⁴⁶

The Commission acknowledges that non-red tagged pole replacements may ultimately benefit other utility customers by extending the useful lives of the poles replaced, but the Commission agrees with the utilities that the 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. Further, given Mr. Tierney's time value of money analysis and the carrying costs associated with the early replacement of poles, the Commission believes the cost assigned to utilities under KBCA's method exceeds the benefits the utility would receive from the pole replacement even assuming that every replaced pole would be needed beyond the useful life of the original pole. Thus, the Commission finds that the altafiber's tariff reasonably allocates the costs of non-red tagged pole replacements.⁴⁷

Based upon the forgoing, the Commission finds that altafiber's tariff provision governing pole replacement costs is fair, just and reasonable, and should be approved.

⁴⁶ See Tierney Rebuttal Testimony at 10-11 (discussing the limited evidence in support of the benefits alleged by Dr. Kravtin).

⁴⁷ 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).

10 Percent Surcharge

KBCA also objects to another of altafiber's charges,⁴⁸ specifically the tariff provision providing that that all work performed by altafiber:

[I]n connection with the furnishing of pole accommodations as covered by this tariff shall be based upon the full cost, plus (10%) of such amount, to the Telephone Company for performance of such work. Such charges shall apply for, but not be limited to, prelicense survey, make-ready work, inspection and removal of attachee's communication facilities.⁴⁹

KBCA objects to this proposed charge because it argues that 807 KAR 5:015 allows for a pole owner to charge reasonable fees based on actual costs.⁵⁰ KBCA argues that altafiber has not identified any basis for the surcharge, and there is no basis for allowing for such surcharges, even if the Commission had previously approved the surcharge.⁵¹ Finally, KBCA argues that altafiber is a direct competitor of KBCA members and the Commission should not allow KBCA to charge anything more than actual costs.⁵²

Altafiber argues that the 10 percent premium represents an allocation of overhead expenses and that it is entitled to recover its full cost of doing work necessary to provide pole attachment, which would include overhead.⁵³ Altafiber states that the 10 percent premium has been in its tariff since 1983, when the Commission found in its June 1, 1983

⁴⁸ KBCA Objections at 7.

⁴⁹ Tariff of Cincinnati Bell Telephone Company, PSC KY. Tariff No. 1, 3rd Revised Page 41, Section 3.2.1.

⁵⁰ Initial KBCA Brief at 11.

⁵¹ Initial KBCA Brief at 12.

⁵² Initial KBCA Brief at 12.

⁵³ Altafiber's Response to Objections at 3.

Order in Administrative Case No. 251⁵⁴ that Kentucky Cable Television Association's objection to the 10 percent premium was unreasonable.⁵⁵ The Commission noted in the order that similar surcharges on customer-oriented construction are allowed in Cincinnati Bell's General Exchange Tariff, Section 5 Construction.⁵⁶ Altafiber argues that because the 10 percent premium is contained in an existing tariff it is the filed rate, that the Commission has found that a filed rate is presumed reasonable, and that the party challenging the filed rate has the burden of proof to show the rate is unreasonable.⁵⁷ Altafiber also asserts that the 10 percent markup covers administrative costs to process and manage third-party attachment requests that are not included in and amount billed to the contractors who perform the physical work, and that its practices regarding the processing of pole attachments has not changed materially since its pole attachment tariff was approved in 1983.⁵⁸

Altafiber's proposed tariff provisions to which KBCA objects are identical to tariff provisions that exist in its current pole attachment tariff, and which the Commission previously has either approved or let go into effect. Because the tariff provisions are the current filed rates, and have been since 1983, the burden is on an objecting party to show that the provisions are unfair, unjust or unreasonable. The Commission finds that KBCA

⁵⁴ Administrative Case No. 251-4, *the Adoption of a Standard Methodology for Establishing Rates for CATV Pole Attachments* (Ky. PSC June 1, 1983).

⁵⁵ altafiber's Response to Objections at 3.

⁵⁶ Administrative Case No. 251-4, *the Adoption of a Standard Methodology for Establishing Rates for CATV Pole Attachments* (Ky. PSC June 1, 1983) at 3.

⁵⁷ Reply Brief of Cincinnati Bell Telephone Company LLC, d/b/a altafiber (filed Oct. 18, 2022) at 2, *citing, In the Matter of East Clark County Water District*, Case No. 2005-00322, Order at p. 2 (Ky. PSC Apr. 3, 2006).

⁵⁸ Reply Brief of Cincinnati Bell Telephone Company LLC, d/b/a altafiber (filed Oct. 18, 2022) at 2 *citing* altafiber's Responses to Commission Staff's Second Request for Information, No. 7.b.

has not met the burden and altafiber's proposed pole attachment tariff is fair, just and reasonable and should be approved. The Commission, however, would likely not approve similar language in other utilities' tariffs unless the language existed prior to the promulgation of 807 KAR 5:015 or the utility presents compelling evidence that the surcharge is covering a legitimate cost, which was part of the part of the Commission's basis for originally approving altafiber's surcharge in 1983.

The Commission, having considered the evidence of record and being otherwise sufficiently advised, finds that the AT&T Kentucky's and altafiber's proposed pole attachment tariffs are appropriate, reasonable, and should be approved.

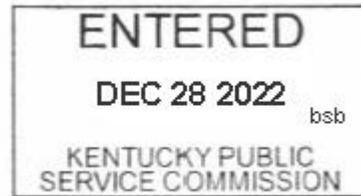
IT IS THEREFORE ORDERED that AT&T Kentucky's and altafiber's pole attachment tariffs are approved as proposed for service rendered on and after the date of this Order.

PUBLIC SERVICE COMMISSION


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Vice Chairman


Commissioner



ATTEST:


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