

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), 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 filed their tariffs on March 22, 2022, with a proposed effective date of March 31, 2022. Because the filings did not comply with 807 KAR 5:011, the tariffs could not become effective as a matter of law.¹ The tariffs filed were similarly the same as the cable and television (CATV) pole attachment tariffs already on file. Windstream claims that it made the filings because,

¹ See, *City of Russellville v. Public Service Com'n of Kentucky*, 2003-CA-002132-MR, 2005 WL 385077, at *2 (Ky. App. Feb. 18, 2005).

due to an administrative oversight, Windstream was not aware that it had to file a tariff until the date had passed and updated its current CATV tariffs to comply with the new regulation.² Windstream stated it would subsequently amend the tariff to comply with the regulations.³ Windstream, in response to a Commission Staff data request, ultimately submitted a proposed revised tariff with no effective date as an exhibit to Windstream's responses.⁴ The filing is an uncoordinated collection of redlines and deletions, rendering review of the proposed changes extremely difficult.

The Commission made the Kentucky Broadband and Cable Association (KBCA) a party to the proceeding because of KBCA's filed objections to altafiber's and AT&T Kentucky's tariffs.⁵ No other requests for intervention were received. KBCA subsequently filed objections to Windstream's pole attachment tariffs.⁶ Windstream responded to some of KBCA's objections, KBCA's requests for information, and three rounds of requests for information from Commission Staff. KBCA filed testimony, a brief, and a reply brief. No party requested a hearing.

On December 28, 2022, the Commission issued an Order approving the pole attachment tariffs of AT&T Kentucky and altafiber. In that same Order the Commission

² Windstream Kentucky East's Responses to Commission Staff's First Request for Information (filed May 5, 2022) (Windstream's Response to Staff's First Request), Item 1.

³ Windstream's Response to Staff's First Request, Item 1.

⁴ Windstream Kentucky East's Responses to Commission Staff's Third Request for Information (filed July 7, 2022) (Windstream's Response to Staff's Third Request), Exhibit A.

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

⁶ Objections of the Kentucky Broadband and Cable Association to Windstream Tariffs (filed Apr. 7, 2022).

stated that it would address Windstream’s proposed pole attachment revisions by separate order.⁷

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.”⁸ 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 Windstream’s tariffs.

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.”⁹ 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.

⁷ Case No. 2022-00108, *Electronic Investigation of the Proposed Pole Attachment Tariffs of Incumbent Local Exchange Carriers* (Ky. PSC Dec. 28, 2022) Order at 1, footnote 1.

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

⁹ 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”).

DISCUSSION AND FINDINGS

Windstream East Kentucky and Windstream West Kentucky each filed separate tariffs, however the provisions in the tariffs are identical, therefore the Commission's discussion and findings apply to the proposed tariffs of both Windstream Kentucky East and Windstream Kentucky West. The Commission's discussion and findings reference and discuss the tariffs that were submitted on March 22, 2022, and, unless indicated otherwise, as modified by the proposed redlines in Windstream's July 7, 2022 filing. Windstream's July 7, 2022 filing proposed to remove several of the provisions to which KBCA objected, thus, the Commission does not discuss KBCA's objections below.

Where the Commission below orders Windstream to submit tariffs, as modified by the Commission, it is ordering Windstream to file tariffs that include the proposed changes contained in the July 7, 2022 filing.

Requests to Attach

KBCA objects to any distinction or separate application process for simple and complex make ready work, asserting that 807 KAR 5:015 makes no such distinction.¹⁰

Windstream filed no response to this objection.

Windstream proposes two separate application forms, one titled, "Complex Make-Ready Application (Enhanced Non-OTMR)"¹¹ and the other, "Simple Make-Ready Application (OTMR)."¹² Except for the title, each application is identical and requires the same information.

¹⁰ KBCA's Objections to Proposed Tariffs (filed Apr. 7, 2022) at 3.

¹¹ Windstream's Proposed Tariff, P.S.C. KY. No 11, Original Page 52, Exhibit B.

¹² Windstream's Proposed Tariff, P.S.C. KY. No 11, Original Page 53, Exhibit B-1.

The Commission takes notice that Kentucky Utilities (KU) and Louisville Gas and Electric Company (LG&E) have somewhat similar requirements in their approved pole attachment tariffs that bar combined request for simple make-ready work and complex make-ready work in one touch make ready applications.¹³ Other utilities may not have separate applications for complex make-ready and simple make-ready, however, those utilities require that an applicant clearly designate what requests require complex make-ready and those that will utilize one touch make ready. The Commission finds that, because the majority of pole attachment tariffs requires designation of complex make-ready versus simple make-ready in an application or separate applications, Windstream's proposed method of applications is reasonable and should be approved.

Application Limitation

KBCA objects to any limitation on the number of poles for which it may submit an application, or the number of poles included in each application. KBCA argues that 807 KAR 5:015 Section 4(7) provides procedures and timelines for large orders.¹⁴

Windstream asserts that Windstream's proposed process is not unduly burdensome but states that it is willing to add language to incorporate 807 KAR 5:015 Section 4(7) to address large pole attachment orders.¹⁵

The Commission finds that in order to avoid any confusion and based upon Windstream's willingness to change the language, Windstream should incorporate the language of 807 KAR 5:015 Section 4(7) into this proposed tariff provision. With this

¹³ Tariff of Louisville Gas and Electric Company, Electric No. 13, Sheet No. 40.11.

¹⁴ KBCA's Objections to Proposed Tariffs at 3.

¹⁵ Windstream's Responses to KBCA's Objection (filed Apr. 18, 2022) at 2.

addition, the Commission find that the proposed provision is reasonable and should be approved.

Complex Make Ready

KBCA objects to the requirement that “Licensee shall submit payment in the amount of the Make- Ready Estimate together with the Application Fee and engineering survey costs to Licensor within fourteen (14) days of receipt of the Make-Ready Estimate and invoice for such amounts.” KBCA asserts that this process does not comply with 807 KAR 5:015.

Windstream asserts that this does not violate the timeframes in 807 KAR 5:015, allows it to invoice the survey and make-ready estimates at the same time, and give the attacher a specific period of time to pay.¹⁶

The Commission finds that the proposed tariff provision is reasonable and should be approved. 807 KAR 5:015 allows a pole owner to withdraw an outstanding estimate of charges to perform make ready beginning 14 days after the estimate is presented. On its face, the proposed provision appears consistent with the regulation. The Commission takes notice that it has approved similar automatic withdrawal language in LG&E/KU and Kentucky Power’s tariffs.¹⁷

Simple Make Ready

KBCA objects to three parts of the proposed provision: (1) the requirement that it bear responsibility for surveying Licensor’s poles, and send notice in advance of any such survey, citing to 807 KAR 5:015 Section 4(2)(b); (2) the requirement that Licensee shall

¹⁶ Windstream’s Responses to KBCA’s Objection at 2.

¹⁷ See, e.g., Tariff of Louisville Gas and Electric Company, Electric No. 13, Sheet No. 40.8, see also, Tariff of Kentucky Power Company, P.S.C. KY. No. 12, 1st Revised Sheet No. 16-3.

not be authorized to move the attachments of a third party without first obtaining their consent, citing to 807 KAR 5:015 Section 4(10)(a); and (3) the third-party notice requirements.¹⁸

Windstream asserts that KBCA cites incorrectly to 807 KAR 5:015 Section 4(2)(b) alleging that section is related to one touch make ready work. Windstream asserts that the correct cite is 807 KAR 5:015 Section 10(2)(b) which, Windstream argues, requires attachers to be responsible for surveys.¹⁹

Windstream is incorrect that KBCA cited the wrong regulation. Commission regulation 807 KAR 5:015 Section 4(2)(b) governs a utility's obligation to survey its own poles when an application for attachment has been filed—the offending tariff provision does not address one touch make ready work. Windstream appears to confuse this requirement with 807 KAR 5:015 Section 4(10) which does address one touch make ready work. Based upon the incongruity between the applicable regulation provisions and the proposed tariff, the Commission finds that the proposed tariff provision is unreasonable, should be rejected, and Windstream be required to file a tariff provision with language comporting to the requirements in 807 KAR 5:015 Section 4(2)(b) and (10).

Overlapping

KBCA objects to the contents of the notice that it must give Windstream before overlapping. Windstream requires such information as: the date of overlapping, pole location and number; description of the overlapping; and other representations. KBCA

¹⁸ KBCA's Objections to Proposed Tariffs at 3.

¹⁹ Windstream's Responses to KBCA's Objection at 2.

asserts that these requirements impose burdens that exceed the requirements in 807 KAR 5:015 Section 3.²⁰

Windstream provided no response to KBCA's objection.

The additional information required in the notice does not appear to be overly burdensome. The Commission, therefore, finds that the proposed tariff provision is reasonable and should be approved. The Commission notes that it approved similar language and requirements in the pole attachment tariffs of the rural local exchange carriers.²¹

Definitions

KBCA objects to the following definitions: (1) "Make Ready Estimate" and "Pole Attachment Fee" to the extent that they conflict with 807 KAR 5:015; (2) Pole Attachment Fee" to the extent it defines the fees as applying to each foot of space occupied, and (3) Force Majeure Event," Hazardous Materials," Licensee Contractor," "Overlashing," "Pole," and "Right of Way" as overbroad and unreasonable.²²

Windstream asserts that regarding "Make Ready Estimate," there is no conflict with 807 KAR 5:015, furthermore, the Windstream tariffs provide that if there is a conflict, the regulation governs. Regarding "Force Majeure," Windstream argues that this is standard language contained in numerous agreements and is neither unreasonable nor overly broad. Regarding "Hazardous Materials" Windstream argues that this is standard language contained in numerous agreements and is neither unreasonable nor overly

²⁰ KBCA's Objections to Proposed Tariffs at 3-4.

²¹ See, e.g., Tariff of Due County Telephone Cooperative Corporation, Incorporated, PSC KY Tariff No. 1, Original Sheet 14, Part V.

²² KBCA's Objections to Proposed Tariffs at 4.

broad. Regarding “Licensee Contractor” Windstream argues that this is standard language contained in numerous agreements and is neither unreasonable nor overly broad. Windstream also asserts that it is only ensuring that it knows the entities working on its poles. Regarding “Overlapping,” Windstream asserts that because 807 KAR 5:015 does not define it, there is no conflict. Regarding “Pole,” Windstream asserts that the definition is not overly broad or unreasonable and does not conflict with 807 KAR 5:015. Regarding “Right-of-Way,” Windstream asserts that the definition is not overly broad or unreasonable and does not conflict with 807 KAR 5:015.²³

It appears to the Commission that the definitions to which KBCA take exception are reasonable and are standard in the industry, or substantially similar definitions in the tariffs of other ILECs. Furthermore, there is a saving clause in Windstream’s tariffs providing for 807 KAR 5:015 to prevail if there is a conflict between the tariffs and the regulation. Accordingly, the Commission finds that this proposed provision is reasonable and should be approved.

Termination of Licenses

KBCA objects to the tariff provision that provides that if Windstream is notified by a governmental entity or private property owner that use of a pole is not authorized, then KBCA must remove its attachments immediately. KBCA contends that this conflicts with 807 KAR 5:015 Section 6(1) which requires 60 days’ notice before removal.²⁴

Windstream clarified that this tariff provision is addressing situations in which it has been notified by a governmental entity that Windstream must move its pole. Windstream

²³ Windstream’s Responses to KBCA’s Objection at 2-3.

²⁴ KBCA’s Objections to Proposed Tariffs at 6.

claims that in these instances it is limited to the notification given by the governmental entity which might be shorter than the 60 days required by 807 KAR 5:015.²⁵

The Commission, given Windstream's clarification, finds that the proposed provision is reasonable and should be approved.

Allocation of Costs to Replace Poles That Are Not Red Tagged:

KBCA objects to any provision assigning the entire cost of replacing a pole that is not red-tagged to KBCA.²⁶ This includes the requirement that: "All charges for pole maintenance, including...removal of old Poles...shall be based upon the full cost and expense, including reasonable overhead...The cost to Licensee shall be determined in accordance with the regular and customary methods used by Licensor in determining such costs."²⁷

KBCA also objects to the proposed provision that provides, "if Licensor decides to replace the Pole with a larger pole that can accommodate Licensee's Attachments, bear the expense of such replacement and transfer its Attachments to the new pole."²⁸

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.²⁹ She also stated that utilities will receive additional benefits from the non-red tagged pole replacements, including:

²⁵ Windstream's Responses to KBCA's Objection at 6.

²⁶ KBCA's Objections to Proposed Tariffs at 6.

²⁷ Windstream's Proposed Tariff, P.S.C. KY. No 11, Original Page 20, S1.18.6.

²⁸ Windstream's Proposed Tariff, P.S.C. KY. No 11, Original Page 30, S1.18.13(f).

²⁹ Direct Testimony of Patricia D. Kravtin (Kravtin Testimony) at 8, 13.

- 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.³⁰

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.³¹ 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.³² 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.³³

Windstream did not file a response to KBCA's objection, the Commission, however, takes notice that it has approved similar provisions for the other utilities that filed pole attachment tariffs pursuant to 807 KAR 5:015.³⁴

³⁰ Kravtin Testimony at 40.

³¹ Kravtin Testimony at 16-17.

³² See Kravtin Testimony at 17; Brief of the Kentucky Broadband and Cable Association (KBCA's Initial Brief) at 3.

³³ See Kravtin Testimony at 18; KBCA's Initial Brief at 3-4.

³⁴ See generally, Case No. 2022-00105, *Electronic Investigation of the Proposed Pole Attachment Tariffs of Investor Owned Electric Utilities* (Ky. PSC Dec. 28, 2022), Order at 13-16.

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.”³⁵ 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.³⁶ The regulation does not establish a specific allocation methodology for the costs of non-red tagged pole replacements.³⁷

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 Windstream’s 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, the Commission has long stated that the basic tenant of rate-making is that costs should

³⁵ 807 KAR 5:015, Section 1.

³⁶ 807 KAR 5:015, Section 4(6)(b).

³⁷ 807 KAR 5:015, Section 4(6)(b)4.

be allocated to the cost-causer.³⁸ This generally means that “the consumers whose service demand causes [the utility] to incur additional investment expenditures and expenses should pay these costs.”³⁹

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.⁴⁰ However, again, such replacements are, by definition, not needed, and therefore, not necessary to provide adequate service to a utility’s other customers.⁴¹ Absent the request by a new

³⁸ 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.

³⁹ Case Nos. 8847, 8879, *In Re: South Central Bell Telephone Company* (Ky. PSC Jan. 18, 1984), Order.

⁴⁰ See KBCA’s Response to Commission Staff’s First Request for Information (KBCA’s Response to Staff’s First Request), Item 12.

⁴¹ 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. Kratin’s testimony established that utilities were sitting on necessary pole replacements, it would not justify

attacher a utility would be prohibited from constructing the new pole and recovering the cost from its customers.⁴² Further, Dr. Kravtin provided no evidence that new poles that are not otherwise needed would tangibly reduce a utility's operation and maintenance expense.⁴³

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.⁴⁴ 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.

The Commission acknowledges that non-red tagged pole replacements may ultimately benefit other utility customers by extending the useful lives of the poles

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.

⁴² 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).

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

⁴⁴ 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").

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.

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 Windstream, 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 Windstream's tariffs reasonably allocate the costs of non-red tagged pole replacements and should be approved.⁴⁵

Cost of Red-tagged Poles

Windstream, like the other utilities, acknowledges that it is responsible for the cost of red-tagged pole replacements pursuant to the regulation.⁴⁶ Although KBCA did not object to Windstream's proposed provision governing red-tagged poles, the Commission

⁴⁵ 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).

⁴⁶ Windstream's Responses to KBCA's Second Request, Item 2-2.

finds that in order to avoid confusion Windstream's provision governing the cost of red-tagged poles be amended to reflect that the cost of red-tagged pole replacement be allocated pursuant to 807 KAR 5:015, Section 4(6)(b). With this addition, the Commission finds that this provision is reasonable and should be accepted.

Unsupported and Unreasonable Costs

KBCA objects to any requirement that it bear the costs for damage, violations, or other issues that it did not cause or that it bear costs not required to be borne by 807 KAR 5:015. KBCA objects to:

[A]ll charges for pole maintenance, including emergency repairs and plant damage, field surveys, pole location/GIS mapping data information, inspections, engineering, replacement or rearrangements of Licensee's Attachments from Licensor's Poles and, without limitation, any other work performed for Licensee shall be based upon the full cost and expense, including reasonable overhead, incurred by Licensor or its representative for performing such work for Licensee to include, without limitation, costs to transfer or moving of Licensor facilities and removal of old Poles. The cost to Licensee shall be determined in accordance with the regular and customary methods used by Licensor in determining such costs.⁴⁷

Windstream states that KBCA is simply objecting to making KBCA responsible for work Windstream does on KBCA's behalf. Windstream states that, if KBCA wishes to avoid incurring such charges, KBCA could perform the work itself.⁴⁸

The Commission finds that with Windstream's' clarification the provision is reasonable and should be approved.

⁴⁷ KBCA's Objections to Proposed Tariffs at 7.

⁴⁸ Windstream's Responses to KBCA's Objection at 3-4.

Overlashing

KBCA objects to the requirement of a field check at its expense to determine if proposed overlashing will require additional support. KBCA also objects to submitting an application for overlashing, or paying pole rent for overlashing.⁴⁹

Windstream did not respond to this objection.

The Commission takes notice that neither of the other ILECs, Cincinnati Bell nor AT&T Kentucky, require a field check before overlashing is conducted. AT&T Kentucky requires 15-days' notice before a party conducts overlashing but has no other *a priori* requirements.⁵⁰ The Commission therefore finds that the requirement that a field check be performed before overlashing occurs is unreasonable and should be rejected. The Commission also finds that any application requirement related to overlashing is inconsistent with 807 KAR 5:015 and should be rejected.

Inventories

KBCA objects to any requirement that inventories be conducted more frequently than every five years and also objects to any inventories of which it did not have at least 90 days written notice. KBCA also asserts that any inventory must include all attachers so that costs of the inventory will be shared.⁵¹

Windstream did not file a response to this objection.

The tariff provision at issue provides:

Upon written notice to Licensee, the total number and location of Licensee's Attachments on Licensor's Poles may be determined, at Licensor's discretion, through a survey which

⁴⁹ KBCA's Objections to Proposed Tariffs at 8.

⁵⁰ Tariff of BellSouth Telecommunications Kentucky, PSC KY Tariff 2A, Original Page 65.

⁵¹ KBCA's Objections to Proposed Tariffs at 9.

may be made not more than once per calendar year by Licensor. If so requested, Licensee and /or any other entity owning or jointly using the Poles with Licensor may participate in the survey. The costs incurred by Licensor to conduct the survey shall be reimbursed to Licensor by Licensee upon demand by Licensor regardless of whether or not Licensee participates in the survey. If the Attachments of more than one licensee are surveyed, each such licensee shall contribute a proportionate share of the costs reimbursed to Licensor.⁵²

The tariff provision appears to be reasonable. It provides for written notice to an attacher and that if the attachments of more than one attacher are inspected, the costs are shared proportionally. Some utilities do not have inventory procedures; however, Windstream's proposed inventory provision is similar to AT&T Kentucky's approved pole attachment tariff as well as Kentucky Power's.⁵³ AT&T Kentucky's tariff does restrict an inventory to no sooner than every five years, but Kentucky Power's tariff has no such restriction. AT&T Kentucky provides for 60 days written notice, whereas Kentucky Power's simply provides for "advance notice." Given the range of similar, already-approved inventory procedures, the Commission finds that Windstream's proposed inventory provision is reasonable and should be approved.

Inventory Survey Process

KBCA objects to the provision in Windstream's tariff that "if the Unauthorized Attachment is discovered during a survey where Licensee declined to participate an additional fee of \$100 per Unauthorized Attachment shall be charged to Licensee."⁵⁴

⁵² Windstream's Proposed Tariff, P.S.C. KY. No 11, Original Page 33, S1.18.17(b).

⁵³ Tariff of BellSouth Telecommunications Kentucky, PSC KY Tariff 2A, Original Page 69; Tariff of Kentucky Power Company, P.S.C. KY. No. 12, Original Sheet No. 16-7.

⁵⁴ KBCA's Objections to Proposed Tariffs at 9, quoting Windstream's Proposed Tariff, P.S.C. KY. No 11, Original Page 33, S1.18.18(b).

KBCA states that for the penalty to apply, there must be an opportunity to participate in an audit.

The Commission takes notice that KBCA raised the same objection to a similar provision in AT&T Kentucky's pole attachment tariff. The Commission approved AT&T Kentucky's proposed provision, noting that KBCA's primary objection was to being required to physically participate in the inventory survey but also noting that AT&T Kentucky, clarified that physical participation was not necessary for an attacher to be deemed to have cooperated.⁵⁵ Windstream has made a similar clarification in response to KBCA's initial request for information stating that it, "would consider a third-party attacher who cooperates, but does not go into the field with the auditors."⁵⁶

The Commission, in approving AT&T Kentucky's similar provision stated that:

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 proceeding 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.⁵⁷

Given the Commission's prior approval of AT&T Kentucky's similar provision, the Commission finds that Windstream's provision is reasonable and should be approved.

⁵⁵ Case No. 2022-00108, *Electronic Investigation of the Proposed Pole Attachment Tariffs of Incumbent Local Exchange Carriers* (Ky. PSC Dec. 28, 2022), Order at 5.

⁵⁶ Windstream's Response to the KBCA's Initial Requests for Information (KBCA's Initial Requests) (filed Mar. 5, 2022), Response to Item 1-11.c.

⁵⁷ Case No. 2022-00108, *Electronic Investigation of the Proposed Pole Attachment Tariffs of Incumbent Local Exchange Carriers* (Ky. PSC Dec. 28, 2022) Order at 5.

Unauthorized Attachments

KBCA objects to Windstream's proposed definition for "Unauthorized Attachment" arguing that the definition is unreasonable and overbroad.⁵⁸ KBCA objects to the following specific definitions in Windstream's proposed tariff:

An Unauthorized Attachment shall include, but not limited to:

1. an Attachment to Poles which is not identified in any License issued in accordance with this Agreement;
2. an Attachment that occupies more space than that allocated to Licensee by Licensor in a License;
3. an Attachment that is not placed in accordance with the provisions of this Agreement or the appropriate License issued pursuant to this Agreement, unless Licensee can demonstrate to Licensor's reasonable satisfaction that said misplacement is not due to any act or omission of Licensee or Licensee's agents;
4. an addition or modification by Licensee to its pre-existing Attachment(s) that impairs the structural integrity of the involved Licensor Poles;
5. an Attachment that consists of facilities owned or controlled by, and for the use of a party other than Licensee that is overlashed to Licensee Attachments without approval by Licensor as required under this Agreement.⁵⁹

KBCA argues that an unauthorized attachment is one that simply does not have a permit.⁶⁰

KBCA also objects to the requirement in Windstream's tariff that KBCA submit an application for unauthorized attachments within ten days of receiving notice of an unauthorized attachment. KBCA argues that it must have at least 60 days from the date of the notice in order to verify or contest the validity of the inventory. KBCA further argues

⁵⁸ KBCA's Objections to Proposed Tariffs at 9.

⁵⁹ Windstream's Proposed Tariff, P.S.C. KY. No 11, Original Page 33, S1.18.18(e).

⁶⁰ KBCA's Objections to Proposed Tariffs at 9.

that Windstream should provide the pole number on which any alleged unauthorized attachments are located.⁶¹

Windstream asserts that the definitions of unauthorized attachments are not overbroad and does not conflict with 807 KAR 5:015 because there are no specific requirements addressing unauthorized attachments.⁶² Windstream did not respond to KBCA's objection regarding the time in which to respond to a notice of an unauthorized attachment.

The Commission finds that the definitions of unauthorized attachments are overbroad and unreasonable. A survey of the other pole attachment tariffs on file shows no definition for "unauthorized attachment," as it is widely understood that an "unauthorized attachment" is an attachment for which the attacher did not receive authorization. Windstream's definitions are overly broad because a technical problem with an authorized attachment could make the attachment considered "unauthorized," subjecting the attacher to possible unauthorized attachment penalties and requiring an application for the attachment, even though one has already been submitted and approved.

Further, most of the utilities' pole attachment tariffs provide for at least 60 days for an attacher to submit an application for the unauthorized attachment after receiving notice of the attachment. The Commission, therefore, finds that Windstream's ten days provision should be rejected, and that Windstream should file a tariff provision providing

⁶¹ KBCA's Objections to Proposed Tariffs at 9.

⁶² Windstream's Responses to KBCA's Objection at 4.

for at least 60 days in which an attacher may file an application of an unauthorized pole attachment.

Contractor Insurance Obligations

KBCA raises the same objections to Windstream's contractor insurance requirements that it raised to the pole attachment tariffs of other utilities. KBCA objects to the provision that states, "Licensee represents and warrants that all Licensee Contractors shall maintain the same insurance coverage and limits as are required of Licensee under this Agreement, and if not, Licensee's insurance will provide such coverage."⁶³

KBCA, addressing this issue across all utilities, argued that the requirements in tariffs that an attachers' agents and contractors have insurance are unreasonable, because the attacher, "which is ultimately liable to the pole owner, has existing contracts with its contractors, which may contain different requirements."⁶⁴ Notably, KBCA does not object to the requirement that the attacher have insurance, but rather, seems to argue that it would be unnecessary for its contractors to have insurance, because KBCA would ultimately be liable. KBCA also notes that many attachers have long standing contracts with contractors with insurance requirements but that it would be difficult to renegotiate and match the insurance provisions in those contracts to meet insurance requirements of all pole owners on which they have attachments.⁶⁵

KBCA claimed that it would not be possible to comply with utilities' insurance requirements, because they negotiate comprehensive contracts with their contractors that

⁶³ Windstream's Proposed Tariff, P.S.C. KY. No 11, Original Page 37, S1.18.20(E).

⁶⁴ KBCA's Objections to Proposed Tariffs at 9-10.

⁶⁵ KBCA's Initial Brief at 14-15.

include specific insurance requirements, and all 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 its contractors, KBCA claims 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."⁶⁶

Windstream states that it requires anyone working on or near its network to carry additional insured status, waiver of subrogation, and their insurance to be primary and non-contributory.⁶⁷

The Commission takes notice that other utilities argued when they filed their pole attachment tariffs that requiring the attachers' contractors to meet the insurance requirements is necessary to ensure that there is coverage for losses arising from the contractors' action, because the attachers may attempt to disclaim liability for the actions of independent contractors. For example, LG&E/KU stated the insurance requirements to which KBCA objects are in its current tariff such that it should not have to renegotiate any terms with contractors that work on LG&E/KU's poles. LG&E also stated that the requirement that attacher's contractors and subcontractors maintain insurance ensures there is coverage if an attacher disputes liability for the actions of the third-party

⁶⁶ KBCA's Initial Brief at 14-15; Direct Testimony of Jerry Avery (Avery Testimony) (filed June 9, 2022) at 10.

⁶⁷ Windstream's Response to the KBCA's Initial Requests, Response to Item 1-12.

contractor.⁶⁸ Duke Kentucky and Kentucky Power both argued that their insurance requirements are reasonable means to mitigate risk that liability arising from the actions of third parties will result in a loss.⁶⁹

The Commission approved similar contractor insurance requirements in the proposed tariffs of several electric utilities, finding that:

Based on the indemnity language in the Companies' 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 Companies' insurance requirements are fair, just and reasonable.⁷⁰

The Commission, based upon its approval of similar provisions in Case No. 2022-00105, finds that Windstream's proposed contractor insurance requirements are reasonable and should be approved.

⁶⁸ LG&E/KU's Initial Brief at 30-32.

⁶⁹ Duke Kentucky's Brief (filed Oct. 11, 2022) at 10; Initial Brief of Kentucky Power Company in Support of Revised Tariff (Kentucky Power's Initial Brief) (filed Oct. 11, 2022) at 30.

⁷⁰ Case No. 2022-00105, *Electronic Investigation of the Proposed Pole Attachment Tariffs of Investor Owned Electric Utilities* (Ky. PSC Dec. 28, 2022) Order at 26-27.

Indemnity and Liability for Utility Negligence

KBCA objects to any standard that would hold an attacher responsible for the negligence of the pole owner, or that would allow a pole owner to escape liability for its own negligence.⁷¹

KBCA objects to the provision of Section 5(b) that states:

[I]f Licensee surrenders its License but fails to remove its Attachments from Licensor's Poles, Licensor shall have the right but not the obligation to remove Licensee's Attachments at Licensee's expense without any liability on the part of Licensor for damage or injury to Licensee's Attachments or interruption to Services.⁷²

KBCA argues that Windstream must be liable for its own negligence.⁷³

KBCA objects to the provision of Section 14(c) that states:

Without limiting any other indemnification or hold harmless provisions of this Agreement, Licensee agrees that any decision by Licensor regarding access to its Attachments, or any action or failure to act by Licensor, under this section shall not be the basis for any claim by Licensee against Licensor for any damage to Licensee's Attachments or disruption of Licensee's Service, or any other direct or indirect damages of any kind whatsoever incurred by Licensee.⁷⁴

KBCA argues that this provision is overbroad, and Windstream must be liable for its own negligence.⁷⁵

KBCA objects to the provision of Section 19(b) that states, "Licensee is solely responsible for all alleged damages claimed by third parties accessing or working on or

⁷¹ KBCA's Objections to Proposed Tariffs at 10 – 11.

⁷² Windstream's Proposed Tariff, P.S.C. KY. No 11, Original Page 19, S1.18.5(B).

⁷³ KBCA's Objections to Proposed Tariffs at 10.

⁷⁴ Windstream's Proposed Tariff, P.S.C. KY. No 11, Original Page 31, S1.18.14(c).

⁷⁵ KBCA's Objections to Proposed Tariffs at 10.

near Licensor's poles."⁷⁶ KBCA argues that this provision is overbroad and KBCA will only entertain liability for damages it causes. KBCA states that it will not accept liability where the pole owner, third-party, or other entity was negligent or otherwise at fault.⁷⁷

KBCA objects to the provision of Section 22(a) that states:

Licensee shall compensate Licensor for the full actual loss, damage, or destruction of Licensor's property that in any way arises from or is related to this Agreement or activities undertaken pursuant to this Agreement (including, without limitation, the installation, construction, operation, or maintenance of Licensee's Attachments).⁷⁸

KBCA argues that the provision is overbroad and objects to any liability for any losses or damages that KBCA did not cause.⁷⁹

KBCA objects to the provisions of 22(b)-(d), to the extent they carve out liability for losses "caused solely by the negligence or willful misconduct of Licensor."⁸⁰ KBCA argues that Windstream must be liable for any contributory negligence.⁸¹

Generally, KBCA objects to any standard that would hold an attacher responsible for the negligence of the pole owner. 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.⁸²

⁷⁶ Windstream's Proposed Tariff, P.S.C. KY. No 11, Original Page 36, S1.18.19(b).

⁷⁷ KBCA's Objections to Proposed Tariffs at 11.

⁷⁸ Windstream's Proposed Tariff, P.S.C. KY. No 11, Original Page 40, S1.18.22(a).

⁷⁹ KBCA's Objections to Proposed Tariffs at 11.

⁸⁰ Windstream's Proposed Tariff, P.S.C. KY. No 11, Original Page 40, S1.18.22(a)

⁸¹ KBCA's Objections to Proposed Tariffs at 11.

⁸² Direct Testimony of Jerry Avery (Avery Testimony) at 11.

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.⁸³

Windstream argues that this is standard liability and indemnification language that is reasonable and routinely used.⁸⁴ Windstream asserts that third party attachers will not be liable for Windstream's negligence, citing to its Proposed Tariff, P.S.C. KY. No 11, Original Page 40, S1.18.22(b) and (c) which Windstream asserts exclude Windstream's negligence from indemnification and liability.⁸⁵

Commission regulation 807 KAR 5:015 permits "certain limitations on liability, indemnification, and insurance requirements" that are fair, just, and reasonable and the Commission finds that Windstream's indemnity language is reasonable. While the Commission believes that there are arguments for and against allowing the provisions the Commission has already approved similar indemnity provisions in this and other pole attachment proceedings. The reasoning used, such as in the order approving the Rural Electric Cooperative Corporation's (RECCs) tariffs, stated:

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,

⁸³ Avery Testimony at 12.

⁸⁴ Windstream's Responses to KBCA's Objection at 4.

⁸⁵ Windstream's Response to KBCA's Initial Requests, Item 1-14.

and therefore, strictly construe them against the parties relying upon them. The Commission also has concerns about allowing such provisions in conditions for pole attachment tariffs for 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.⁸⁶

Windstream's proposed tariff is not materially different than similar tariff provisions the Commission approved for the RECCs. The Commission finds the same reasoning should be applied in this case and that Windstream's proposed tariff provision regarding indemnity is reasonable and should be approved.

Insurance Requirements

KBCA objects to two specific insurance requirements. The first section relates to requiring insurance for contractors that Windstream has approved. The relevant provision provides that:

In addition to the insurance coverage required by this Agreement, the General Aggregate coverage provided by

⁸⁶ Case No. 2022-00106, *Electronic Investigation of the Proposed Pole Attachment Tariffs of Rural Electric Cooperative Corporations* (Ky. PSC Dec. 28, 2022) Order at 22-23.

Licensee will be increased to \$4,000,000 per policy period if work is performed by an Approved Contractor pursuant to Section 9 of this Agreement.⁸⁷

KBCA argues that it is unreasonable for Windstream to require doubling the general aggregate limit if work is provided by contractors that Windstream has approved.

KBCA also notes that contractors are already insured.⁸⁸

KBCA also objects to the proposed insurance provision which provides:

Licensee will furnish to Licensor, a certificate evidencing insurance coverage under sub-paragraphs 23(a) and (d). Such certificate or Licensee shall provide for a thirty (30) day prior notice to the Licensor of any cancellation or material changes in coverage and shall be signed by a legal representative of the issuing insurance company.⁸⁹

KBCA argues that insurers do not give notice of material change.⁹⁰

Windstream states that requiring increased insurance for approved contractors is Windstream's standard practice and is required in all construction related agreements.⁹¹

On its face it appears unreasonable that an approved contractor must carry twice the amount of insurance coverage than that which an attacher must carry, especially because contractors must maintain the same level of insurance coverage that an attacher maintains. Windstream has provided no evidence or justification to support the increased level of insurance. Furthermore, a review of the pole attachment tariffs for the other ILECs does not show a similar provision requiring additional insurance. The Commission finds

⁸⁷ Windstream's Proposed Tariff, P.S.C. KY. No 11, Original Page 42, S1.18.23(a).

⁸⁸ KBCA's Objections to Proposed Tariffs at 11.

⁸⁹ Windstream's Proposed Tariff, P.S.C. KY. No 11, Original Page 42, S1.18.23(h).

⁹⁰ KBCA's Objections to Proposed Tariffs at 11.

⁹¹ Windstream's Response to KBCA's Initial Requests, Item 1-13.

that this provision requiring a contractor to carry twice the amount of insurance that an attacher must carry is unreasonable and should be rejected. The Commission also finds that the requirement that the certificate of insurance require notice of material change from the insurance provider is unreasonable and should be rejected.

Assignment

KBCA objects to any limitation to its right to assign, transfer, sublease etc., its facilities attached to Windstream's poles without obtaining Windstream's prior written consent. KBCA specifically objects to the following language:

Licensee shall not assign; transfer or sublet the privileges hereby granted, or sell, lease or otherwise permit the use of its facilities on or any part thereof (all of the foregoing being "Transfers"), without prior consent in writing of Licensor. No such consent granted by Licensor shall be effective until Licensee's assignee, sublessee or other transferee has agreed, on an enforceable separate document signed and delivered to Licensor, to assume all obligations and liabilities of Licensee under this Agreement.⁹²

KBCA asserts that, for example, KBCA's members may need to assign or transfer licenses to subsidiaries or other related entities.⁹³

Windstream asserts that the limitations are reasonable, and that Windstream needs to know which entities are attached to its poles. Windstream further asserts that Commission rules require Windstream to know the entities attached to its poles in order to be able to provide required notifications.⁹⁴

⁹² Windstream's Proposed Tariff, P.S.C. KY. No 11, Original Page 46, S1.18.31.

⁹³ KBCA's Objections to Proposed Tariffs at 11-12.

⁹⁴ Windstream's Responses to KBCA's Objection at 4.

It appears to the Commission that the assignment provision is reasonable. The other ILECs have similar assignment restrictions in their approved tariffs, and all require utility written approval before an attachment is transferred, sublet etc.⁹⁵ Windstream is also correct that a utility will need to know the entity responsible for an attachment in order to be able to provide necessary notices. For example, pursuant to 807 KAR 5:015, Section 4(4), a utility must provide notice to existing attachers of make ready work that will affect the existing attachers. Windstream would have no means to know to whom to provide notice if it did not require written approval of a transfer or assignment of rights of the attachment. The Commission, therefore, finds that this proposed tariff provisions is reasonable and should be approved.

Waiver of Jury Trial

KBCA objects to the tariff provision waiving the right to request a jury trial⁹⁶ which provides that, "Licensor and Licensee each expressly waive its right to a jury trial."⁹⁷

Windstream states that this is standard language in contracts and is not unreasonable for sophisticated parties such as Windstream and its attachers.⁹⁸

The proposed waiver of a jury trial appears to be unreasonable. Although rates and services for pole attachments fall under the Commission's jurisdiction, there could be issues related to pole attachments, such as damages or injuries, that fall outside of the Commission's jurisdiction. Windstream, arguably, could use the tariff provision to prohibit

⁹⁵ See Tariff of Cincinnati Bell Telephone Company, PSCK No. 1, 2nd Revised Page 14, see also Tariff of BellSouth Telecommunications Kentucky, PSC KY Tariff 2A, Original Page 81.

⁹⁶ KBCA's Objections to Proposed Tariffs at 12.

⁹⁷ Windstream's Proposed Tariff, P.S.C. KY. No 11, Original Page 47, S1.18.33.

⁹⁸ Windstream's Responses to KBCA's Objection at 5.

an attacher for requesting a jury trial. Additionally, no other utility has a similar provision in its pole attachment tariffs. The Commission, therefore, finds that this proposed provision is unreasonable and should be rejected. Though, Staff notes that we will have to be careful in drafting this section to avoid potential issues with the Federal Arbitration Act, which preempts certain state laws that invalidate arbitration provisions in contracts.

Attachment Rates

KBCA objects to an attachment rate defined by one foot of space per attachment.⁹⁹

Although Windstream did not file a response to the objection the Commission finds that defining an attachment rate by one foot of space appears to be reasonable. Other utilities, such as AT&T Kentucky, Kentucky Power, and Duke Kentucky, have approved tariffs with similar language.¹⁰⁰ The Commission, therefore, finds that Windstream's proposed attachment rates are reasonable and should be approved.

Fees

KBCA objects to several of Windstream's proposed fees.

KBCA objects to an additional field or engineering fee of \$75 per hour, asserting that the fee is unreasonable and unsupported.

KBCA objects to the Pole License Fee of \$125 per application, alleging that it is unreasonable and unsupported. KBCA also alleges the fee is unreasonable and unsupported because of Windstream's limitation that each application is limited to 25 poles. KBCA claims this violates 807 KAR 5:015.

⁹⁹ KBCA's Objections to Proposed Tariffs at 12.

¹⁰⁰ See e.g., Tariff of BellSouth Telecommunications Kentucky, PSC KY Tariff 2A, Original Page 40.

KBCA objects to the \$400 One Time Agreement Fee. KBCA claims that Windstream may not assess a fee when attachers wish to use the provisions of the tariff to attach to Windstream's poles.

KBCA objects to a \$15 per pole removal verification fee claiming that it is unreasonable and unsupported.¹⁰¹

Windstream asserts that the proposed pricing for all its fees is market standard and is just and reasonable.¹⁰² Windstream also asserts that each of the fees is authorized by 807 KAR 5:006, Section 9(1) which allows for nonrecurring charges.¹⁰³

Windstream states that the \$400 One Time Agreement Fee is based on the average time and material costs incurred to evaluate new attachers and negotiate particular needs.¹⁰⁴

Windstream states that the \$125 Application Fee for each pole license fee is calculated based upon the average time and material costs necessary to process the application.¹⁰⁵

Windstream states that the \$15 Removal Verification Fee per pole is based on the average time and material costs necessary for the joint-use team to process each application.¹⁰⁶

¹⁰¹ KBCA's Objections to Proposed Tariffs at 12.

¹⁰² Windstream's Responses to KBCA's Objection at 5.

¹⁰³ Windstream's Response to KBCA's Initial Requests, Items 16 to 19.

¹⁰⁴ Windstream's Response to Staff's Initial Requests, Item 4.a.

¹⁰⁵ Windstream's Response to Staff's Initial Requests, Item 4.b.

¹⁰⁶ Windstream's Response to Staff's Initial Requests, Item 4.c.

Windstream states that the \$75 per hour Field or Engineering Fee is calculated based on the average time and material costs incurred for engineering filed review and work.¹⁰⁷

The Commission notes that Windstream provided cost support for each fee.¹⁰⁸ The Commission finds that the provided cost support justifies the fees proposed in Windstream's tariff and that the rates are reasonable and should be approved. Windstream, however, is reminded that any survey fee estimate must be trued up in the final make ready bill as required by 807 KAR 5:015 Section 4(6)(a).

IT IS THEREFORE ORDERED that:

1. Windstream's 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, Windstream 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 Windstream's Response to Staff's Initial Requests, Item 4.d.

¹⁰⁸ Windstream's Response to Staff's Second Requests, Item 3.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

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