

**COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION**

**REGULATIONS REGARDING ACCESS)
AND ATTACHMENTS TO UTILITY)
POLES AND FACILITIES; 807 KAR 5:015)
)
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**COMMENTS OF THE KENTUCKY BROADBAND AND
CABLE ASSOCIATION ON THE KENTUCKY PUBLIC SERVICE COMMISSION’S
POLE ATTACHMENT REGULATIONS**

The Kentucky Broadband and Cable Association and its members (“KBCA” or “Association”) submits these comments in response to the Commission’s proposed regulations regarding access and other aspects of poles attachments to utility poles.

INTRODUCTION

The Commission’s proposal represents a significant and positive step towards creating a regulatory environment that will spur broadband deployment in rural communities throughout the Commonwealth of Kentucky and ensure “every area of the state has high-speed internet.”¹ Among other important proposed rules, the Kentucky Public Service Commission’s (“the Commission’s”) proposal seeks to establish a timeline for access to poles, adopt a one touch make ready (“OTMR”) process, take steps to ensure pole attachers are not unfairly required to pay to replace poles the owner would have had to replace anyway, and require utilities to submit timely and detailed invoices for make-ready work.

¹ Andy Beshear, Governor of the Commonwealth of Kentucky, State of the Commonwealth Address (Jan. 14, 2020), available at <https://www.usnews.com/news/best-states/kentucky/articles/2020-01-14/text-of-kentucky-gov-beshears-state-of-commonwealth-speech>.

While KBCA appreciates the Commission's current proposals, KBCA urges the Commission to further clarify and strengthen certain rules so they more effectively advance the Commission's goals to spur rural broadband deployment.² *First*, the Commission should ensure that the costs of pole replacements are appropriately shared in all cases and not only with regard to "red tagged" poles, as defined in the Commission's proposal. Unless a pole is very recently installed, its replacement always conveys a substantial benefit to the pole owner, and not solely to the new attacher. Moreover, pole owners' expectation that new attachers pay the full cost of installing new poles is a substantial driver of rural broadband deployment costs that inhibit the extension of service to unserved areas. The Commission should extend its proposed rule to require equitable sharing of pole replacement costs in all cases between utilities and attachers.

Second, the Commission should clarify its overlashing rule so that utilities do not abuse the rule in order to prohibit or thwart cable operators' long-standing reliance on overlashing, which is an extremely important, safe, and economically efficient process to upgrade and deploy broadband. Specifically, KBCA urges the Commission to formally adopt FCC rules regarding overlashing, which require an attacher to provide 15 days' advance notice of overlashing to ensure safety, but do not require permitting for overlashing of already permitted poles.

Third, the Commission should adopt a 90-day "fast track" procedure for resolving disputes related to pole access and other such disputes that could have a direct effect on timely broadband deployment. While longer timeframes are appropriate for certain other disputes, such as rate issues, requiring an attacher to wait an extended period of time for resolution of an access dispute

² KBCA has included with these comments proposed redlines to the Commission's regulations (attached as Exhibit A).

will hamper broadband deployment, particularly in Rural Digital Opportunity Fund (“RDOF”) buildout areas where attachers are subject to strict schedules and timelines.

Fourth, and finally, the Commission should ensure utilities cannot easily circumvent its regulations and policies by unilaterally imposing pole attachment terms and conditions outside of approved and negotiated tariffs. To prevent this occurrence, the Commission should expressly prohibit utilities from making unilateral rule changes through *ad hoc* documents falling outside of the Commission’s tariff and rulemaking process or negotiated pole attachment agreements. The Commission should also require utilities to provide 60-day advance written notice prior to any pole attachment rate increases or tariff filings so that attachers have an opportunity to verify that any increases are consistent with the Kentucky rate formula.

I. THE COMMISSION’S RULES MUST ENSURE THAT ATTACHERS ARE NOT REQUIRED TO INCUR POLE REPLACEMENT COSTS THAT ARE PROPERLY BORNE BY POLE OWNERS.

The Commission’s proposed regulations would appropriately prevent a pole owner from forcing an attacher to pay to replace “red tagged” poles. The Commission defines “red tagged” poles as poles a utility “designated for replacement based on the pole’s non-compliance with an applicable safety standard” or otherwise “would have needed to replace at the time of replacement even if a new attachment were not made.” 807 KAR 5:015, Sections 1(10) & 4(6)(b). The proposal further defines “red tagged” poles to include poles “designated for replacement within two (2) years of the date of [their] actual replacement for any reason unrelated to a new attacher’s request for attachment.” *Id.* As the Commission correctly recognized, requiring attachers to pay to replace red tagged poles would generate a windfall for utilities because attachers would be

required to pay costs the utilities would have had to incur regardless of the attacher. This requirement is consistent with the sound cost-causation principles recognized by the FCC.³

While the regulations expressly address cost-allocation principles for the replacement of red-tagged poles, the Commission failed to address cost allocation for poles that are prematurely retired beyond noting that such costs “shall be charged in accordance with the utility’s tariff or a special contract.” 807 KAR 5:015, Section 4(6)(b)(4). The lack of guidance on this issue could create unnecessary disputes and delays, as well as inequitable cost allocation to attachers, and is likely to be construed by pole owners as implicitly authorizing the unfair practice of requiring attachers to pay the entire cost to replace aging poles – that mostly benefit the utility – as a condition of attachment. As Patricia Kravtin, an expert in pole related matters, explains, “no good purpose is served by the current practice of make-ready charges for replacement poles well in excess of efficient levels.”⁴ Pole owners enjoy operational, strategic, revenue-enhancing, capital cost saving, and tax saving benefits in connection with pole replacements.⁵ New attachers, on the other hand, face real barriers to market entry where they must pay to replace partially depreciated poles, which only “results in fewer or delayed broadband infrastructure investments, reduced

³ See, e.g., *In the Matter of Accelerating Wireline Broadband Deployment By Removing Barriers to Infrastructure Development*, WC Dkt. No. 17-84, Declaratory Ruling, ¶¶ 6–8 (Jan. 19, 2021) (holding “utilities may not require requesting attachers to pay the entire cost of pole replacements that are not necessitated solely by the new attacher and, thus, may not avoid responsibility for pole replacement costs by postponing replacements until new attachment requests are submitted”); 47 C.F.R. § 1.1408 (stating “the cost of modifying a facility shall be borne by all parties that obtain access to the facility as a result of the modification and by all parties that directly benefit from the modification”).

⁴ Patricia Kravtin, *Pole Policy & the Public Interest: Cost Effective Policy Measures for Achieving Full Broadband Access in the Commonwealth of Kentucky*, at 13 (July 22, 2021) (attached as Exhibit B).

⁵ *Supra* note 3, at 11–12.

service availability, and ultimately higher broadband prices in unserved areas of the Commonwealth.”⁶

To avoid these disputes, delays, and inequities, and consistent with the cost-causation principle reflected in its red-tagged pole proposal, the Commission should go further and expressly prohibit a pole owner from requiring an attacher to pay the full replacement cost of a pole that is prematurely retired pursuant to an access request.⁷ Even when a pole is not red tagged, the utility derives a significant economic benefit from the pole’s replacement.⁸ Under the Commission’s current regulations, there is a risk that utilities may seek to unreasonably avoid their responsibility for replacing these non-red tagged poles by deferring their own designation of such poles for replacement until a new attacher submits an attachment application that would require a new pole.

KBCA’s approach that an attacher be responsible only for the remaining un-depreciated value of a prematurely retired pole is particularly fair and reasonable given that the utility, not the attacher, will become the owner of the new pole, and the attacher must and will continue to pay rent to attach to the new pole. Requiring new attachers to pay the full cost of replacement poles except when the poles are red tagged will impose substantial and unreasonable costs – costs that the utility should incur given it is the main beneficiary – on attachers at the expense of broadband deployment in rural Kentucky. The Commission should recognize the economic benefit a new

⁶ *Supra* note 3, at 13.

⁷ *Supra* note 3, at 8 (explaining “from a true economic cost causative perspective only those costs relating to the intrinsic nature of the avoidable costs causally linked to the attacher, *i.e.*, the temporal costs of shifting forward the inevitable retirement/replacement of the existing pole that otherwise would have ensued in the normal course of utility operations, are appropriately allocated to the attacher”).

⁸ *Supra* note 3, at 11–12. Economic benefits to the utility include: the operational benefits of the replacement pole (*e.g.*, additional height, strength, and resiliency); strategic benefits, such as the added ability for a utility to offer additional services; revenue-enhancing benefits, including enhanced rental opportunities derived from increased pole capacity; and capital, operational, and tax cost savings.

pole provides to the utility, even when the pole is not red-tagged, by clarifying that an attacher is only required to pay the remaining un-depreciated value of the replaced pole.

II. THE COMMISSION SHOULD STRENGTHEN ITS OVERLASHING RULE TO ENSURE THIS WIDESPREAD, EFFICIENT, AND COST-EFFECTIVE CONSTRUCTION PRACTICE IS NOT UNREASONABLY BURDENED.

Overlashing is a long-standing practice that enhances a cable operator’s ability to deploy, expand, and upgrade its services in a safe, efficient, and expedited manner. As the FCC has long-recognized, “[c]able companies have, through overlashing been able for decades to replace deteriorated cables or expand the capacity of existing communications facilities, by tying communications conductors to existing, supportive strands of cables on poles.”⁹ Many pole owners have recognized these benefits as well; in the proceeding in which the FCC developed its current overlashing rules, several pole owners noted their support for the practice.¹⁰ Yet as Ms. Kravtin notes, overlashing is “often singled out by pole owners and subject to additional charges, without economic justification.”¹¹ That is why the FCC has always had a policy that forbids pole

⁹ *In the Matter of Amendment of Rules and Policies Governing Pole Attachments & In the Matter of Implementation of Section 703(e) of The Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, CS. Dkts. 97-98 & 97-151, FCC 01-170, ¶ 73 (May 25, 2001).

¹⁰ *See, e.g., In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Comments of Xcel Energy Services, Inc. at 4, WC Dkt. No. 17-84 (Jan. 17, 2018) (“Xcel Energy has substantial experience with overlashing throughout its service area and appreciates the value of overlashing as a means to maximize the usable space on utility poles and facilitate the deployment of new communications services.”); *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Comments of the Edison Electric Institute at 2, WC Dkt. No. 17-84 (Jan. 17, 2018) (“EEI and its members generally support ‘the use of overlashing to maximize the useable space on utility poles’ when the overlashing neither compromises the safety or engineering of the pole nor the utility’s core mission of electrical generation and transmission.”); *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Reply Comments of the Electric Utilities on Overlashing at iii, WC Dkt. No. 17-84 (Feb. 16, 2018) (explaining advance notice of overlashing “is a necessary first step toward facilitating a discussion about processes that fairly balance the safety and reliability of the infrastructure with the benefits afforded to incumbents through efficient overlashing processes.”).

¹¹ *Supra* note 3, at 14.

owners from obtaining additional approval for the overlashed cable on a previously permitted mainline attachment.¹² In its most recent pronouncement on overlashing, the FCC observed that overlashing “often marks the difference between being able to serve a customer’s broadband needs within weeks versus six or more months when delivery of service is dependent on a new attachment.”¹³ For this and other policy reasons, the FCC in 2018 codified its rule that attachers need only notify pole owners when overlashing to allow the pole owner to ensure safety.¹⁴

KBCA’s members have extensively relied on overlashing to extend service across the Commonwealth, and hope the Commission will strengthen its support of this vital, safe, and cost-effective practice. For example, Charter performs more overlashing than any other type of construction technique or attachment work in the Commonwealth. In 2020 alone, overlashing helped Charter more quickly and efficiently extend broadband services to hospitals, surgery centers, places of worship, and hundreds of other businesses across the Commonwealth. In particular, Charter’s use of overlashing helped it quickly expand broadband to serve a VA housing facility in Lexington and a new Amazon facility in Shepherdsville. Overlashing was fundamental to all KBCA members’ ability to serve customers during the pandemic.¹⁵

While it is helpful that the Commission seeks to ensure that utility tariffs “shall not prohibit overlashing except if doing so is justified by lack of capacity, safety or reliability concerns, or

¹² *Supra* note 8, ¶ 75.

¹³ *Accelerating Wireline Broadband Deployment By Removing Barriers To Infrastructure Investment*, Third Report & Order & Declaratory Ruling, 33 FCC Rcd. 7705, 7761–62 ¶ 115 (Aug. 3, 2018).

¹⁴ *Id.*

¹⁵ *Supra* note 3, at 14 (recognizing “from a service deployment perspective, the practice of overlashing greatly facilitates the ability of providers to efficiently and cost effectively expand their service capacity and roll out service to new customers. From a resource utilization perspective, the practice of overlashing helps optimize use of capacity on existing utility poles by eliminating the need for entirely new wired attachments, thereby minimizing any additional capacity burdens on the pole”).

applicable engineering standards,” 807 KAR 5:015, Section 3(5), KBCA urges the Commission to formally adopt the FCC’s overlashing rules to ensure that utilities do not use Section 3(5) to cut back or limit existing overlash rights under current tariffs, which are more expansive than the proposed rule.¹⁶ Following the FCC’s lead, many other states have either adopted or proposed to adopt pole attachment legislation or regulation that tracks the FCC approach to overlashing.¹⁷

KBCA is concerned that the Commission’s current proposal may encourage utilities to adopt overlashing protocols that are less favorable than attachers have been able to negotiate in the absence of any regulation. To guard against that outcome, the Commission, like other certified states, should adopt the FCC’s overlash rules, or at least adopt regulations consistent with those existing in the market today, to ensure that cable operators can deploy broadband quickly and efficiently.¹⁸

III. THE COMMISSION SHOULD FAST-TRACK TIME-SENSITIVE ACCESS DISPUTES.

KBCA is concerned that the timelines the Commission adopted for its dispute resolution process do not appropriately reflect market realities for disputes involving access denials or other such disputes that directly impact timely broadband deployment. *See* 807 KAR 5:015, Section 7

¹⁶ Rather than promoting the efficient use of overlashing, the Commission’s current rules provide less protection than the tariffs attachers have negotiated with Kentucky utilities. For example, LG&E’s and KU’s existing tariffs do not require any advance notice where an initial overlash does not exceed certain parameters. *See* LG&E and KU Tariffs, P.S.C. Electric No. 12, Pole and Structure Attachment Charges at ¶ 10.

¹⁷ *See, e.g.*, Proposed Ohio Admin. Code § 4901:1-3-03(D) (requiring an overlashing party and public utility to comply with “overlashing rules established pursuant to 47 C.F.R. 1.1415”) (attached to Exhibit C); Me. Admin. Code § 65-407 Ch. 880 § 2(A)(1)(b) (stating joint use entity “need not submit a request to overlash to existing facilities, so long as the joint-use entity provides written notice of the overlash within 10 calendar days after making it”).

¹⁸ *See, e.g.*, LG&E and KU Tariff, P.S.C. Electric No. 12, Pole and Structure Attachment Charges at ¶ 10 (establishing overlashing guidelines for a Kentucky tariff); Proposed Ohio Admin. Code § 4901:1-3-03(D) (establishing overlashing rules in Ohio); 47 C.F.R. 1.1415 (establishing federal overlashing rules).

(setting a 180-day window for the Commission to make a final action on a dispute, though the Commission may extend the window to one year for “good cause”). Six months to a year for resolving access disputes is not commercially viable given cable operators’ need to roll out service on a predictable and timely basis in order to meet contractual commitments to customers. These disputes are “especially onerous in connection with the replacement of poles, thereby further compounding the direct cost-related impediments to broadband deployment associated with excess pole replacement costs.”¹⁹ Under the current timeframes, an attacher would likely lose its customer(s) while the dispute was being resolved. KBCA’s concern with such access delays is further heightened given the existing timelines necessary to meet RDOF build-out requirements, and how a single dispute along a series of poles can hold up deployment to all other areas downstream from the pole.

To ensure that cable operators do not miss contract deadlines, or lose customers or government funding over an access dispute, the Commission should adopt a 90-day fast track process for any dispute over pole access or other similarly time-sensitive issues. Other issues – such as rate disputes – are appropriate for the Commission’s existing regulations. 807 KAR 5:015, Section 7(8).

In addition, as KBCA noted earlier this year, the Commission should also require utilities to provide 60-day advance written notice before any pole attachment rate increases. *See, e.g.* Proposed Ohio Admin. Code § 4901:1-3-04(A); Letter from James W. Gardner to Kentucky Public Service Commission (Apr. 27, 2021) (attached as Exhibit C). This notice requirement is critical for attachers to ensure pole attachment rates, terms, and conditions are just and reasonable, and to have a fair and full opportunity to challenge a proposed rate or term change. Indeed, recently, a

¹⁹ *Supra* note 3, at 15.

pole owner in Kentucky raised its pole attachment rate significantly without notice to the affected attachers, effectively prohibiting them from challenging the increase and ensuring a lawful rate. The Commission can avoid such situations by requiring utilities to provide timely prior notice of pole attachment rate increases or tariff filings.

IV. THE COMMISSION SHOULD ENSURE ITS RULES ARE NOT EASILY CIRCUMVENTED THROUGH UNILATERAL UTILITY POLICIES.

The Commission has taken important steps to promulgate regulations that are fair and reasonable and aimed to spur broadband deployment. To make sure that utilities cannot unilaterally side step them through informal policies and standards, the Commission should, as KBCA had earlier recommended, *expressly prohibit* utilities from imposing terms and policies beyond those specified in their negotiated and/or approved agreements and tariffs, or any final Commission rules. KBCA Comments at 23–24. It should further make clear that any utility construction standard that deviates from the National Electric Safety Code (“NESC”) must be reasonably necessary to achieve specific, and demonstrable safety objectives, and must be applied on a non-discriminatory, prospective basis. Moreover, any changes to a utility’s construction standards should be negotiated between the parties or submitted to the Commission for approval. These guardrails are necessary and appropriate given KBCA’s members’ experiences with utilities that frequently use un-negotiated handbooks and other manuals to undermine or revise tariffs and previously-agreed to terms. *Id.*

CONCLUSION

KBCA appreciates this opportunity to provide comments to the Commission regarding the new regulations and looks forward to providing any additional information or insight the Commission may require as it considers these important policy issues.

Dated: July 22, 2021

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