

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:)	
)	
)	
ELECTRONIC INVESTIGATION OF THE)	CASE NO. 2022-00105
PROPOSED POLE ATTACHMENT)	
TARIFFS OF INVESTOR OWNED)	
ELECTRIC UTILITIES)	
)	
ELECTRONIC INVESTIGATION OF THE)	CASE NO. 2022-00106
PROPOSED POLE ATTACHMENT)	
TARIFFS OF RURAL ELECTRIC)	
COOPERATIVE CORPORATIONS)	
)	
ELECTRONIC INVESTIGATION OF THE)	CASE NO. 2022-00107
PROPOSED POLE ATTACHMENT)	
TARIFFS OF RURAL ELECTRIC)	
EXCHANGE CARRIERS)	
)	
ELECTRONIC INVESTIGATION OF THE)	CASE NO. 2022-00108
PROPOSED POLE ATTACHMENT)	
TARIFFS OF INCUMBENT LOCAL)	
EXCHANGE CARRIERS)	
)	
)	REPLY BRIEF OF THE KENTUCKY
)	BROADBAND AND CABLE
)	ASSOCIATION
)	

Pursuant to the Kentucky Public Service Commission’s (“PSC’s” or “Commission’s”) September 23, 2022, Order in this matter, the Kentucky Broadband and Cable Association (“KBCA”)¹ submits this reply brief in support of its objections to the utility tariffs filed pursuant to 807 KAR 5:015 § 3(7).²

1. Past Practice. Rather than addressing KBCA’s substantive arguments and objections regarding, among other issues, pole replacements, indemnity, insurance obligations, and cost pass-throughs, many utilities justify their tariff terms on the basis that this the way they have always done in it.³ But these arguments are not relevant to the Commission’s consideration here. The Commission’s new regulations require utilities to “include terms, subject to approval by the commission, that are fair, just and reasonable,”⁴ and the utilities have the burden of proving their tariffs are in fact fair, just, and reasonable.⁵ The utilities’ tariffs are to be judged under that standard and in light of the Commission’s new regulations. As such, it does not matter that the utilities were able to push through the same or similar terms that attachers challenge now *long before* the Commission had any pole attachment regulations.

¹ The KBCA’s members are Access Cable, Armstrong, C&W Cable, Charter Communications, Comcast, Inter Mountain Cable, Lycom Communications, Mediacom, Suddenlink, and TVS Cable. Kentucky Broadband & Cable Association, Our Members, *available at* <https://www.kybroadband.org/members>.

² While KBCA’s briefing highlights the most critical issues facing the Commission, KBCA does not waive its original objections simply because they are not specifically cited in its briefing.

³ *See, e.g.*, Louisville Gas & Electric Company’s And Kentucky Utilities Company’s Initial Brief In Support Of Their Revised Pole Attachment Tariffs, at 2 (emphasizing certain terms “have long been part of the Companies’ pole attachment tariffs”); Initial Brief Of Kentucky Power Company In Support Of Revised Tariff, at 14 (arguing pole replacement provision “has remained largely untouched as compared to the Current Tariff”); Duke Energy Kentucky, Inc.’s, Brief, at 10 (justifying terms by stating Duke Energy “is not proposing any change in its current filing to the main indemnification provision in its tariff”); Initial Brief Of Cincinnati Bell Telephone Company LLC, d/b/a Altafiber, at 6 (justifying surcharge as previously approved).

⁴ 807 KAR 5:015 § 3(4).

⁵ *See, e.g.*, KRS § 278.190(3) (stating in the analogous rate context, “the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the utility”).

Indeed, the entire purpose of this very proceeding is to evaluate challenges to tariff terms in a “nuanced manner based on evidence regarding specific utilities,” not for the Commission to mindlessly bless terms contained in prior tariffs.⁶ The Commission’s review, which is intended to be meaningful and substantive, recognizes that prior to the Commission’s new regulations, attachers had very little leverage (or any detailed regulatory backstop) to guard against the imposition of unreasonable terms or to insist upon just and reasonable terms and conditions. As a result, attachers often had little choice but to accept unjust terms in order to gain access to critical infrastructure that is exclusively owned by the utilities.⁷ The value of a proceeding like this one is thus for the Commission to prevent “windfall[s]” to utilities at the expense of broadband deployment in Kentucky by evaluating utility tariff terms with fresh eyes and against detailed regulations and the competitive and operational conditions that exist today.⁸ Otherwise, if the utilities’ past practices were, *de facto*, fair, just, and reasonable, there would have been no need for the Commission to adopt these new regulations and this proceeding is just theater.

2. Pole Replacement. The utilities’ briefs show they are inflating the costs associated with replacing non-red-tagged poles while downplaying the benefits they receive from earlier-than-planned pole replacements. As an initial matter, the fact that utilities depreciate poles faster than they intend to replace them only means they have *already collected* the funds from their ratepayers

⁶ Amendments after Comments and Statement of Consideration for 807 KAR 5:015, at 47.

⁷ *See So. Co. v. FCC*, 293 F.3d 1338, 1341 (11th Cir. 2002) (“As a practical matter, cable companies have had little choice but to” attach “their distribution cables to utility poles owned and maintained by power and telephone companies.”); *Ga. Power Co. v. Teleport Commc’ns Atlanta, Inc.*, 346 F.3d 1033, 1036 (11th Cir. 2003) (noting “lack of alternatives to these existing poles”); *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1362 (11th Cir. 2002), *cert. denied*, 540 U.S. 937 (2003) (explaining utilities are “the owner of . . . ‘essential’ facilities” for cable operators).

⁸ Amendments after Comments and Statement of Consideration for 807 KAR 5:015, at 47, fn. 1.

to replace their poles.⁹ Thus, the utilities' assertion they would "lose" money on any given pole as a result of an early change out does not account for the depreciated amount they have collected from customers to pay to replace that very pole.¹⁰

Importantly, the utilities also choose to ignore the benefits they receive from early pole replacement. The utilities have offered no testimony or evidence specifically disputing the benefits identified by KBCA, instead relying on blanket assertions that they do not benefit from an earlier than scheduled pole replacement.¹¹ This is not factually accurate. Utilities consistently receive substantial benefits from new attachers who cover (at a minimum) the undepreciated cost of replacing a pole the utilities would need to replace anyway. The utility also derives a range of benefits from a new pole that include: (1) owning the new pole; (2) charging rent to the attacher; (3) having more space on the pole either to expand its own service or to charge additional attachers rent; and (4) facing fewer maintenance costs on the newer pole.¹² The utilities have offered neither argument nor evidence disputing any of these obvious and important benefits.

As Kentucky Power tacitly acknowledges, its real concern regarding cost allocation for non-red-tagged poles is not that rate payers will be forced to bear pole replacement costs – the utility already passes on those costs to them. Rather, it is that the utility will not receive a *windfall profit* from attachers on the pole in the form of replacement costs they have already recovered from

⁹ Direct Testimony of Patricia D. Kravtin at 8-9 (filed in this matter on June 9, 2022) (hereinafter "Kravtin Testimony") (explaining "[p]ursuant to utility group depreciation accounting practices applied to poles, rates paid by the utility's electric customers and attachers already provide the utility capital recovery through depreciation accruals and/or adjustments to the utility's accumulated depreciation reserve for poles sufficient to replace the utility's entire inventory of poles over a period matching the designated useful life of poles applied by the utility for depreciation purposes – including prematurely retired poles").

¹⁰ See Initial Brief of Kentucky Power Company In Support Of Revised Tariff, at 17-18.

¹¹ See, e.g., Initial Brief of Kentucky Power Company In Support Of Revised Tariff, at 16-17 (failing to analyze any benefit of early pole replacement to the pole owner).

¹² Kravtin Testimony at 40.

their rate payers.¹³ It is important to underscore, however, that their windfall profit comes at the expense of cost-effective broadband deployment, and is unjust and unreasonable.

3. *Overlashing.* The RECCs do not address overlashing in their Initial Brief, and the Commission should find that requiring a pole loading analysis prior to notice of overlashing is contrary to the text and spirit of the Commission’s regulations by requiring more than “advance notice” of overlashing.¹⁴ In effect, that requirement would subvert the benefits of overlashing by driving up the time and expense to perform it.

Similarly, LG&E’s and KU’s tariffs fail to comport with the Commission’s overlashing rules and are not fair, just, or reasonable.¹⁵ LG&E’s and KU’s tariffs broadly contemplate “make-ready” timelines for overlashing.¹⁶ But while the utility can provide “specific documentation” of “a capacity, safety, reliability, or engineering issue” to the attacher within its 30-day overlashing notice period, the Commission’s regulations do not address the timeframe in which “the party seeking to overlash must address any identified issues before continuing with the overlash, either by modifying its proposal or by explaining why, in the party’s view, a modification is

¹³ See Initial Brief of Kentucky Power Company In Support Of Revised Tariff, at 19 (stating “utilities are allowed to earn a return (profit) on prudently invested capital”). Utilities maximize their profit by allowing poles to remain in service long past their stated useful lives so they can continue to collect rent and rates on assets the ratepayers long ago paid to replace.

¹⁴ 807 KAR 5:015 § 3(5); see generally, Initial Brief of the Rural Electric Cooperative Corporations; see also Brief of the Kentucky Broadband And Cable Association at 7-10 (citing FCC and 9th Circuit decisions stating utilities are prohibited from requiring overlashers to conduct pre-overlashing engineering studies or to pay the utility’s cost of conducting such studies).

¹⁵ 807 KAR 5:015 §§ 3(4) & (5).

¹⁶ Louisville Gas & Electric Company, Proposed Tariff, Original Sheet No. 40.13, ¶ 11(a) (stating “[i]f Company determines that make-ready work is necessary to accommodate the proposed Overlashing, Company will notify Attachment Customer of the need for any such make-ready work and the parties shall follow the process set forth in Section 7(e) above”); Kentucky Utilities Company, Proposed Tariff, Original Sheet No. 40.16, ¶ 11(a) (same).

unnecessary.”¹⁷ It is unjust and unreasonable to impose a full make ready timeline on attachers for overlashing where an attacher’s contractor could resolve the issue far more quickly prior to overlashing (and the utility could inspect the work in accordance with the new regulations).¹⁸

Additionally, under the new regulations, pole owners should not be responsible for “any costs incurred in evaluating the proposed overlashing,” as proposed by LG&E and KU.¹⁹ Instead, as KBCA explained in its opening brief, consistent with the new rules, which are based on FCC rules, attachers should only be responsible for the cost of inspections that reveal a problem with their overlashing.²⁰ Without correction, these tariffs will undermine the Commission’s new rules for overlashing, which are intended to ensure that attachers can deploy broadband quickly and safely, without unnecessary delays or cost expenditures.

4. Negligence. While several utilities argue that a new attacher should indemnify the pole owner against its own negligence, it is against public policy and unreasonable for any party to force another to be liable for damages that it did not cause.²¹ It is irrelevant, as some utilities

¹⁷ 807 KAR 5:015 § 3(5) (noting also “[a] utility may not prevent an attacher from overlashing because another existing attacher has not fixed a preexisting violation, unless failing to fix the preexisting violation would create a capacity, safety, reliability, or engineering issue”); Louisville Gas & Electric Company’s And Kentucky Utilities Company’s Initial Brief In Support Of Their Revised Pole Attachment Tariffs, at 8 (noting gap in Commission regulations).

¹⁸ *See, e.g.*, 47 C.F.R. § 1.1415(c) (declining to impose make-ready timelines on issues that must be fixed prior to overlashing).

¹⁹ Louisville Gas & Electric Company, Proposed Tariff, Original Sheet No. 40.13, ¶ 11(a) (stating “Attachment Customer shall reimburse Company for any costs incurred in evaluating the proposed Overlashing”); Kentucky Utilities Company, Proposed Tariff, Original Sheet No. 40.16, ¶ 11(a) (same); *see* Amendments after Comments and Statement of Consideration for 807 KAR 5:015, at 52 (discussing overlashing costs).

²⁰ Brief of the Kentucky Broadband And Cable Association at 7-10.

²¹ *See* Louisville Gas & Electric Company’s And Kentucky Utilities Company’s Brief In Support Of Their Revised Pole Attachment Tariffs, at 27-30; Duke Energy Kentucky, Inc.’s, Brief, at 10-11; Initial Brief Of Kentucky Power Company In Support Of Revised Tariff, at 27-28.

continue to argue, that attachers were forced to agree to such unreasonable provisions in the past.²² Indeed, prior to regulation and as explained above, these agreements resulted from the unequal bargaining power between pole owners and attachers. Nor can it reasonably be argued that an attacher's mere presence on a pole is enough to require that attacher to be responsible for the pole owner's negligent actions.²³ All parties on a pole, including the pole owner itself, must be responsible for their own actions.

5. Cost-Based Fees. The Commission should prohibit pole owners from imposing unreasonable and non-cost based fees on attachers. Otherwise, pole owners will feel free to pass any cost on to an attacher, whether justified or not, unnecessarily increasing the cost of broadband deployment and undermining the purpose of this proceeding. In their briefing, the RLECs and Kentucky Power do not explain how their high survey fees are cost-based.²⁴ The RLECs do not even attempt to provide a rationale for their fees at all, and their responses²⁵ to KBCA's Requests For Information clearly illustrate those fees are either unsupported or based on the improper assumption that poles are surveyed individually, rather than in batches.²⁶

²² See, e.g., Louisville Gas & Electric Company's And Kentucky Utilities Company's Brief In Support Of Their Revised Pole Attachment Tariffs, at 28-29.

²³ See, e.g., Louisville Gas & Electric Company's And Kentucky Utilities Company's Brief In Support Of Their Revised Pole Attachment Tariffs, at 30.

²⁴ Bast Testimony at 4 (explaining a typical survey fee estimate is \$30-\$50 per pole).

²⁵ See generally, Initial Brief Of The Rural Local Exchange Carriers; see also Brandenburg Telephone Co. Response to Commission's First Requests For Information 3(a) (requiring a two hour field survey per pole); South Central Rural Telecommunications Cooperative, Inc., Response to Commission's First Requests For Information 3(a) (requiring a two and a half hour field survey per pole); Thacker-Grigsby Telephone Co., Inc., Response to Commission's First Requests For Information 3(a) (refusing to provide per-pole support for its survey rate).

²⁶ Most pole applications seek access to several poles at a time and the costs to survey poles is based on the entire job, not on each pole. See Bast Testimony at 12 ("In my experience, utilities survey poles in groups, or even hold pole applications for a short time until they have a group of poles to survey."). As such, the incremental costs of such surveys (such as drive time) decrease as the number of surveyed poles increase.

Kentucky Power seeks to defend its survey fee estimate by pointing to costs beyond those “made to review a pole attachment application.”²⁷ Kentucky Power’s survey costs include:

- An undefined “administrative processing/proposal” fee;
- Data collection;
- A separate undefined “okay to attach” fee;
- Rearrangement and work order fees;
- Post construction inspection fees;
- Overlapping post construction inspection fees; and
- An unsupported 15% “surcharge” for “internal Company resources.”²⁸

These vague administrative fees and other assessments that are unrelated to the actual costs to “review” a pole attachment application result in excessive fees that unreasonably drive up the cost of investing in Kentucky broadband.²⁹

Similarly, Cincinnati Bell does not explain how its unjustified 10% surcharge on “all work performed by the Telephone Company or by its authorized representatives” can be just or reasonable, instead relying on the Commission’s 1983 approval of a surcharge for “make ready and rearrangement activity.”³⁰ But regardless of whether the Commission approved a limited surcharge *four decades ago*, Cincinnati Bell has an obligation to explain why the challenged terms of its new tariff are “fair, just, and reasonable” now.³¹ And an undefined and unexplained

²⁷ 807 KAR 5:015 § 4(2)(b)(6).

²⁸ Initial Brief of Kentucky Power Company In Support Of Revised Tariff at 8-9; Kentucky Power Company Response to Commission’s First Requests For Information 6(a); Kentucky Power Company Response to KBCA First Set Of Data Requests 1(a).

²⁹ Bast Testimony at 4 & 12.

³⁰ Initial Brief of Cincinnati Bell Telephone Company LLC d/b/a/ altafiber at 6; Cincinnati Bell Telephone Company LLC, d/b/a Altafiber Tariff at Third Revised Page 41, Section 3.2.1.

³¹ 807 KAR 5:015 § 3(4).

surcharge that does nothing more than raise competitors' costs plainly fails to meet the governing standard.

* * *

In short, the Commission should look critically at the challenged portions of the utilities' tariffs, recognizing that the purpose of this proceeding is to ensure fair, just, and reasonable terms and conditions of attachment rather than to mechanically rubber-stamp terms imposed long before the Commission had any pole attachment regulations. The Commission should further ensure the efficient and cost effective deployment of broadband in Kentucky by equitably assigning the costs associated with the replacement of non-red-tagged poles using the net book value approach; prohibiting utilities from requiring overloading parties to complete engineering analysis or pay for unnecessary inspections; ensuring each party on a pole is responsible for its own negligence; and requiring fees charged by pole owners to be reasonable and cost-based. The Commission should strike unjust and unreasonable terms from the proposed tariffs.

Dated: October 18, 2022

Respectfully submitted,

/s/ M. Todd Osterloh

James W. Gardner

M. Todd Osterloh

Sturgill, Turner, Barker & Moloney, PLLC

333 West Vine Street, Suite 1500

Lexington, KY 40507

Phone: (859) 255-8581

jgardner@sturgillturner.com

tosterloh@sturgillturner.com

Paul Werner (admitted *pro hac vice*)

Hannah Wigger (admitted *pro hac vice*)

Sheppard Mullin Richter & Hampton LLP

2099 Pennsylvania Avenue NW

Suite 100

Washington, DC 20006

(202) 747-1900

pwerner@sheppardmullin.com

hwigger@sheppardmullin.com

Counsel for KBCA