

**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

**ELECTRONIC INVESTIGATION OF THE)
PROPOSED POLE ATTACHMENT TARIFFS OF) CASE NO. 2022-00106
RURAL ELECTRIC COOPERATIVE CORPORATIONS)**

**RESPONSE BRIEF
OF THE RURAL ELECTRIC COOPERATIVE CORPORATIONS**

Big Rivers Electric Corporation, Big Sandy R.E.C.C., Blue Grass Energy Cooperative Corp., Clark Energy Cooperative, Inc., Cumberland Valley Electric, Inc., Farmers R.E.C.C., Fleming-Mason Energy Cooperative, Inc., Grayson R.E.C.C., Inter-County Energy Cooperative Corporation, Jackson Energy Cooperative Corporation, Jackson Purchase Energy Corporation, Kenegy Corp., Licking Valley R.E.C.C., Meade County R.E.C.C., Nolin R.E.C.C., Owen Electric Cooperative, Inc., Salt River Electric Cooperative Corp., Shelby Energy Cooperative, Inc., South Kentucky R.E.C.C., and Taylor County R.E.C.C. (collectively, the “Kentucky Electric Cooperatives”), by counsel, pursuant to the Commission’s Order entered September 23, 2022, and in response to the Initial Brief filed herein by the Kentucky Broadband and Cable Association (“KBCA”), hereby respectfully submit this Response Brief.

I. Introduction.

After specifically requesting the opportunity to file a legal brief to address “a number of important issues, including a number that are of a legal (rather than factual) nature[,]”¹ KBCA filed a “Brief” that makes no legal argument. Instead, KBCA simply reiterates testimony and rehashes the positions it has been espousing for the past two years, many of which the Commission has consistently refused to adopt. Indeed, to the extent KBCA’s brief includes any legal argument,

¹ See KBCA’s Request for Briefing, at 1 (filed July 18, 2022).

it is predicated entirely upon FCC precedent, which does not control in this Commonwealth and has never applied to any rural electric cooperative anywhere.²

The Kentucky Electric Cooperatives appear before this Commission with proposed tariffs that fully comply with KRS Chapter 278 and 807 KAR 5:015, that are consistent with enduring practice and precedent, and that reflect the realities of pole ownership in rural Kentucky. These tariffs are more than a mere consequence of regulatory mandate; rather, each tariff is built upon a genuine desire to finally welcome broadband and related services to Kentucky territories too often left behind. To that end, the cooperatives made considerable effort to specifically design the tariffs to provide an adequate, efficient, and reasonable framework by which third-parties may safely and responsibly make use of utility assets, all without jeopardizing the integrity of the underlying not-for-profit utility or its statutory responsibilities to its member-owners.

Conversely—and there can be no mistake about this—KBCA’s positions regarding pole attachments are rooted squarely in the fundamental motive of profit. KBCA’s members have their own obligations (generally to shareholders), and it is quite apparent that no amount of government subsidy or dedicated taxpayer-funded pole replacement fund³ will foster an appreciation in them of the longstanding, Commission-adopted maxim that the “cost causer pays.”⁴ Particularly problematic here, moreover, is that KBCA and its constituencies have made little effort in this case to actually legitimize their positions with real-world facts or substance, and have outright refused

² Cooperatives were specifically exempted from the federal Pole Attachment Act when it became law in 1978 and have remained exempt from the ensuing 42 years of regulation that has developed at the federal level. This long-term exemption is not by happenstance, but rather is based on the substantially different circumstances facing investor-owned utilities and not-for-profit cooperatives, particularly as it relates to pole attachments.

³ See Kentucky HB 315 (RS 2022).

⁴ Kentucky Public Service Commission, Statement of Consideration Relating to 807 KAR 5:015, at 47 (“The amendment proposed by KBCA could result in electric rates that are not fair, just and reasonable. When reviewing utility rates and charges to determine if they are fair, just and reasonable and otherwise comply with statutory requirements imposed by KRS Chapter 278, the Commission generally attempts to ensure that costs are assigned to the party responsible for causing the utility to incur the cost.”).

to provide any examples in support of their concerns when specifically sought by the Kentucky Electric Cooperatives.⁵ Now, often relying on the very same testimony (on the very same topics) about which it refused to answer questions in written discovery,⁶ KBCA's Brief is little more than a restatement of the terms by which it would ideally choose to enjoy the use and occupancy of utility-owned assets. Fortunately for Kentucky Electric Cooperatives, the tariff review process is not a suggestion box, but rather involves the Commission's considered determination of proposed terms of service under applicable legal precedent and an overarching legal standard of reasonableness.⁷ KBCA falls woefully short of demonstrating any legal inadequacy with respect to the tariffs proposed by the Kentucky Electric Cooperatives, and its proposed revisions should be rejected.

II. KBCA's Demand for Pole Replacement Costs Overreaches and Ignores the Regulation.

Section 4, subsection (6) of the Commission's pole attachment regulation, 807 KAR 5:015, deals with make-ready costs in connection with the replacement of poles. The regulation is clear: if a pole that requires replacement in order to accommodate an attachment is a "red tagged pole" (as defined),⁸ the attacher is responsible only for the difference in cost between the pole installed and the pole which would have been required "in the absence of the new attachment."⁹ This but-for framework is consistent with the longstanding cost causation principle that rates for service reflect the costs imposed by customers of that service—a principle at the core of utility ratemaking

⁵ See generally KBCA's Responses to the Kentucky Electric Cooperative's Requests for Information (filed July 7, 2022).

⁶ See, e.g., KBCA's Response to the Kentucky Electric Cooperative's Requests for Information, Item 8 (which, in responding to a question seeking the factual underpinning of Mr. Avery's testimony concerning attacher-compliance delays allegedly caused by "local permitting issues," KBCA neither provided any substantive response or even offered Mr. Avery as the sponsoring witness); see also KBCA's Response to the Kentucky Electric Cooperative's Requests for Information, Item 9 (similar).

⁷ KRS 278.030 requires utilities to provide adequate, efficient, and reasonable service at fair, just and reasonable rates.

⁸ See 807 KAR 5:015, Section 1(10).

⁹ See 807 KAR 5:015, Section 4(6)(b)(3).

in Kentucky, designed to avoid subsidization and ensure the fair recovery of costs from appropriate ratepayers. It is further noteworthy that the definition of “red tagged pole” recognizes that when a pole owner is already planning to replace a pole (anytime within the following two (2) years) for reasons unrelated to a new attachment, it is fair to expect that pole owner to be flexible in incurring the cost of replacement in order to accommodate an attacher’s request to attach.

Likewise, the regulation is clear that if a pole that requires replacement in order to accommodate an attachment is “not a red tagged pole...[then] the new attacher’s attachment shall be charged in accordance with the utility’s tariff[.]” Surely the Commission would have made mention in its carefully crafted regulation if there was an expectation regarding the treatment of make ready costs associated with non-red tagged pole replacement, particularly if that expectation were to impose a striking departure from the status quo, as KBCA suggests. It is also incredible to suggest that KBCA’s plan respects the autonomy of the cooperatives, when common sense and expert testimony explain that requiring pole owners to replace their own poles at their own cost on somebody else’s schedule most certainly would impact the Kentucky Electric Cooperatives’ ability to develop and budget for their pole maintenance programs.¹⁰ KBCA now attempts to convince the Commission to revisit not just its recent administrative regulation, but also to “overturn[] the century-old precedent that the ‘cost causer pays’ and misalign[] the costs and incentives of broadband deployment.”¹¹ Such efforts by KBCA should be rejected.

Perhaps most unreasonable about KBCA’s continued campaign to require the Kentucky Electric Cooperatives to finance attacher-caused pole replacements is that KBCA again fails to acknowledge or account for the large government subsidies available to KBCA’s members for pole replacement costs. In fact, on August 31, 2022, Governor Beshear announced that another

¹⁰ Rebuttal Testimony of Sean Knowles, at 12-13.

¹¹ *Id.*, at 14.

\$20 million in funds had been made available to internet service providers for pole replacement costs in underserved areas. This funding is in addition to the massive federal and state subsidies already available to attachers as described in the Rebuttal Testimony of Sean Knowles.¹² KBCA's arguments do not account for, include, or even acknowledge that government subsidies for pole replacement costs in underserved areas have been provided in the Commonwealth. The Commission should weigh the credibility of these arguments accordingly.

III. Overlashing Should Not Be a Gateway to Unsafe, Unreliable Networks.

If an attacher seeks to overlash existing wires spanning poles of the Kentucky Electric Cooperatives, it would seem a natural and inevitable question of the pole owner to ask of the prospective overlasher: "Can you please explain how your planned activities are expected to impact our poles?" And, if reasonable costs are incurred by a Kentucky Electric Cooperative in connection with an overlash, is it fair or just that those costs be shouldered by the not-for-profit's owner-members, rather than the overlashing party that caused them? These seemingly straightforward propositions appear to draw the ire of KBCA, which again is driven by speed and thrift, which assuredly place safety and grid reliability in a secondary position.

Requiring the submission of a pole-loading analysis¹³ as a part of an overlash notification is not a departure from the regulation, nor is it a quasi-permitting process. Instead, it is a sensible, effective and objective means for the pole owner to ensure continued delivery of retail electric power via safe poles. It adds no additional timeline to the overlash process. The very real threats

¹² *Id.*, at 13.

¹³ The proposed tariffs of the Kentucky Electric Cooperatives require the involvement of a professional engineer in the submission of pole loading analyses, in an effort to promote consistency and reliability of information. Of course, the Commission likewise recognizes the value of P.E.-stamped materials, *see, e.g.*, 807 KAR 5:063 (in connection with telecommunications antennae towers), 807 KAR 5:066 (water facilities). That said, assuming cooperatives are not discouraged from conducting overlash inspections because they must bear the costs, it is likely the Kentucky Electric Cooperatives could work to maintain the safety and reliability of their systems without requiring an overlasher's pole loading analysis to be certified by a professional engineer.

to safety and reliability that can result from overloading (evidenced by the demonstrative photographic evidence submitted with Mr. Knowles’s testimony) are exacerbated when issues are not effectively addressed on the front-end by a competent pole loading analysis.

Certainly, the relevant regulation contemplates that the pole owner will undertake some review of the contemplated overlash—after all, this is how the pole owner will be able to “determine[] that an overlash would create a capacity, safety, reliability, or engineering issue” following the overlash notification.¹⁴ Likewise, the regulation contemplates the pole owner will “inspect the overlash” within a specified period and notify the overlasher of issues “after completion of its inspection[.]”¹⁵ KBCA claims these efforts must be undertaken by the pole owner at its expense, in what would again be a departure from the principal of “cost causer pays.”

It should be reiterated here that KBCA’s unwavering reliance on FCC precedent for guidance on overloading is misplaced. Again, rural electric cooperatives are not subject to federal rules, and the input of rural electric cooperatives has not helped shape FCC jurisprudence over the past four (4) decades because those rules are not applicable to smaller, non-profit entities like electric cooperatives. The long-term exemption afforded rural electric cooperatives is not by happenstance, but rather is based on the substantially different circumstances they face, particularly as it relates to pole attachments. Indeed, rural electric linemen may necessarily travel an hour or more, each way, to ensure an overlash is properly made on utility infrastructure.¹⁶ These are not expenses that should be borne by the not-for-profit cooperative, especially considering the cooperative will receive no additional annual rental fees in connection with the overlash and the additional burden it places on the pole.

¹⁴ See 807 KAR 5:015, Section 3(5)(c)(3).

¹⁵ See 807 KAR 5:015, Section 3(5)(e)(2) and (3).

¹⁶ See, e.g., Cumberland Valley Electric, Inc.’s Response to Commission Staff’s First Request for Information, Item No. 16 (filed May 5, 2022).

The Commission should reject KBCA's attempts to undermine the safety and reliability of the electric grid in pursuit of expediency and corporate profit; pole loading analyses, recouping of inspection expenses, and imposition of unauthorized overlashing fees are common-sense implementations of the relevant regulation and should be approved as proposed.

III. The Cooperatives' Proposed Tariffs are Fair, Just, and Reasonable.

The Kentucky Electric Cooperatives have demonstrated that their proposed tariffs are fair, just, and reasonable. KBCA's remaining objections to the Kentucky Electric Cooperatives' proposed tariffs generally reflect a lack of familiarity with common commercial contract terms and/or a complete disregard of the relationship of the parties vis-à-vis the poles at issue. These remaining issues are addressed below.

To be abundantly clear, it bears repeating that these poles are not just a part of the Kentucky Electric Cooperatives' business—they are the business.¹⁷ Although the Kentucky Electric Cooperatives fully support the proliferation of broadband and other services, they must also protect their valued utility assets (and the ability to offer the lowest possible rates) from degradation by self-interested third parties.

The law has already afforded KBCA's members and other attachers unmatched access to utility property on rather specific, rather favorable terms; it has also left to pole owners the ability to include other terms of service for attachers (addressing things like "limitations on liability, indemnification and insurance requirements"), so long as those terms are fair, just, and reasonable

¹⁷ See Rebuttal Testimony of Sean Knowles, at 3 ("Driven by purpose, not profit, the RECCs have worked around-the-clock, decade after decade to construct and maintain a useful network of poles, ducts, conduits, and rights-of-way, all in service of the electric needs of their member-owners. With roughly 100,000 miles of conductor supported by hundreds of thousands of wooden poles and similar structures essential to the provision of electric service to over 1.5 million Kentuckians, the RECCs and their members have a substantial amount to lose if concessions are made to attachers in pursuit of cost-savings or expediency. It is against this backdrop that the RECCs approach the use of utility assets by public and private third parties.").

and consistent with the requirements of the Pole Attachment Regulation and KRS Chapter 278.¹⁸ Accordingly, the Commission should approve the tariffs as proposed.

A. Attachers' Contractors Must be Required to Carry Appropriate Insurance.

The Kentucky Electric Cooperatives' proposed tariffs require that contractors working on cooperative property maintain a minimum level of insurance. A contractor can cause damage to cooperative property, or worse, cause personal injury, leading to allegations against the pole owner. The Kentucky Electric Cooperatives are entitled to assurances that minimum amounts of insurance will be maintained to cover such damages.

Of course, it is not unusual for one or more terms of a "prime" contract—such as those dealing with insurance—to flow through to agreements involving subcontractors or other vendors. In construction and related areas, an appropriate certificate of insurance is often a prerequisite to appearing on the jobsite, and there is certainly nothing "impossible" about requiring subcontractors to obtain minimum levels of insurance—it is almost invariably a question of cost. Again, the Kentucky Electric Cooperatives should not be subject to increased risk simply to further the profit motives of attachers.

Notably, KBCA argues that its "members require a certain level of insurance from their contractors that the member believes will protect it." KBCA's Initial Brief, at 14 (emphasis added). That is exactly the issue. Each Kentucky Electric Cooperative tariff is intended to adequately protect the cooperative and its property; not a KBCA member. Moreover, like with all other information requested by the Kentucky Electric Cooperatives, KBCA refused to provide any information related to the insurance requirements in its members' contracts. In fact, KBCA went so far as to claim "the contracts between its members and their subcontractors are not at issue in

¹⁸ 807 KAR 5:015, Section 3(4).

this proceeding.”¹⁹ As a result, there is absolutely no evidence upon which the Commission could conclude that the proposed tariffs of the Kentucky Electric Cooperatives are unreasonable because KBCA once again refused to participate meaningfully in this proceeding.

Finally, requiring all parties to maintain a minimum amount of insurance is necessary. For example, in *Commonwealth Edison Co. v. Ace Am. Ins. Co.*, 459 F. Supp. 3d 1035 (N.D. Ill. 2020), a pole owner was forced to file a declaratory judgment action seeking to be defended under an insurance policy that was supposed to be maintained by KBCA member, Comcast, pursuant to the contractual requirements of a pole attachment agreement. The Northern District of Illinois found that the insurance company had no duty to defend the pole owner under the insurance policy obtained by Comcast, stating as follows: “ComEd argues that if the ACE policy does not cover its defense, then Comcast has breached the Pole Attachment Agreement. . . . That may be so, and ComEd is free to seek relief from Comcast under that agreement. But here, the insurance at issue unambiguously does not apply to defense, investigation, settlement or legal expenses” *Id.* at 1041.

Similarly, in *Rudesill v. Charter Commcn’s, LLC*, a Motion for Summary Judgment was filed against Charter for failure to obtain the required insurance policies under a pole attachment agreement. There, the Court stated:

Entergy also requests that the Court declare Charter to be in breach of contract for failure to obtain commercial general liability insurance. An examination of the pole attachment agreement between Entergy and Charter reveals that Charter agreed to carry comprehensive general liability insurance. . . . Entergy contends that Charter’s initial disclosures under Federal Rule of Procedure 26 indicated that it would provide information on insurance coverage, but that it has not received any such information to date. In its response in opposition, Charter neither contends that it has provided information on insurance coverage nor cites to any evidence providing information on insurance coverage. . . . [G]iven that the lawsuit has not concluded, the Court will defer resolution of [the] breach of contract claim until Entergy’s

¹⁹ KBCA’s Response to the Kentucky Electric Cooperative’s Requests for Information, Item 4.

liability is determined. Nonetheless, the Court notes that Entergy appears to have a viable breach of contract claim against Charter.

No. 18-00685-BAJ-EWD, 2019 U.S. Dist. LEXIS 218581, at *4-5 (M.D. La. Dec. 19, 2019) (emphasis added).

Simply put, it is fair, just, and reasonable for the Kentucky Electric Cooperatives to demand that any entity accessing its poles maintain minimum amounts of insurance, which will ensure that the cooperative is appropriately protected in the event of an accident relating to an attachment.

B. The Cooperatives' Indemnity Provision Should be Approved.

As the Commission is surely aware, contractual indemnity provisions are typically among those most debated provisions when negotiating an agreement. These terms can significantly impact liability, so both service providers and service seekers must carefully weigh the risk they are willing to bear to engage in a transaction. Here, the proposed indemnity provision is favorable to the Kentucky Electric Cooperatives, chiefly as a reflection of the financial risk the cooperatives believe they should be subject to as a consequence of complying with law to allow third-parties to use their assets. The indemnity provision contained in the proposed tariffs of the Kentucky Electric Cooperatives should be approved by the Commission without change.

C. KBCA Has Overreacted to the Cooperatives' Space Reservation Language.

The tariffs proposed by the Kentucky Electric Cooperatives contemplate that the utility may choose, at its own expense, to install a larger pole than circumstances presently required in anticipation of its future needs, and in such event, the additional pole space is considered part of the cooperative's "Supply Space" unless there is no documented need for it upon request of an attacher to use it.²⁰ This language was included to avoid the situation when a pole owner selects a

²⁰ See, e.g., Nolin Rural Electric Cooperative Corporation's Proposed Schedule PA – Pole Attachments, at Art. VIII(A)(v); Art. II(W) (filed March 29, 2022).

larger pole to accommodate its anticipated use, pays for it and installs it, and then soon thereafter is approached by an attacher which seeks to attach to a pole that would otherwise appear to welcome another attachment. In brief, the new attacher then claims that any additional pole or even-larger pole should be paid for and installed by the utility, which itself just recently paid for and installed a larger pole for its own purposes.

What is likely apparent is that application of this relatively-minor provision of the proposed tariffs turns on the relevant facts of a specific dispute, and that its substance is not significantly different than the plain language of 807 KAR 5:015: “A utility may deny access to any pole, duct, conduit, or right-of-way on a non-discriminatory basis if there is insufficient capacity[.]”²¹ KBCA seems to believe that if it can merely conceive of an unreasonable application of a tariff term then it should render that tariff term unacceptable now. However, it is fair to presume the reasonable application of tariffs by a utility, and KBCA’s suppositions lack merit. Instead, the logical course of action is for the Commission to approve the Kentucky Electric Cooperatives’ tariffs as fair, just, and reasonable, warn against abusive practices or interpretations of those tariffs, and deal with any actual, real world disputes through the Pole Attachment Regulation’s contemplated dispute process. There is no basis, however, to revise or reject otherwise reasonable tariff language simply on the back of unsubstantiated and hypothetical fears.

²¹ 807 KAR 5:015, Section 2(1)(a).

CONCLUSION

For the reasons set forth herein, the Commission should approve the Kentucky Electric Cooperatives' tariffs as proposed.

Respectfully submitted,

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Certification

I hereby certify that a copy of the foregoing has been served electronically on all parties of record through the use of the Commission's electronic filing system, and there are currently no parties that the Commission has excused from participation by electronic means. Pursuant to the Commission's July 22, 2021 Order in Case No. 2020-00085, a paper copy of this filing has not been transmitted to the Commission.

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