COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

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

TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 2

I. IT IS UNJUST AND UNREASONABLE FOR UTILITIES TO INCREASE BROADBAND DEPLOYMENT COSTS BY UNFAIRLY SHIFTING POLE REPLACEMENT COSTS TO ATTACHERS. 2

II. THE COMMISSION SHOULD NOT ALLOW RURAL ELECTRIC COOPERATIVE CORPORATIONS TO IMPOSE OVERLASHING REQUIREMENTS THAT CONFLICT WITH THE NEW REGULATIONS AND FRUSTRATE EFFICIENT OVERLASHING. 7

III. THE COMMISSION'S REGULATIONS ALLOW POLE OWNERS TO CHARGE THE ACTUAL COSTS ASSOCIATED WITH POLE ATTACHMENTS AND UNREASONABLE AND UNSUPPORTED FEES MUST BE REJECTED. 10

A. Pre-Construction Survey Fees Must Be Based On Actual Cost Data. 10

B. The Commission Should Prohibit Cincinnati Bell From Imposing A Ten Percent Surcharge On All Work It Performs For An Attacher. 11

IV. THE UTILITIES SHOULD BE PROHIBITED FROM IMPOSING UNJUST AND UNREASONABLE CONTRACT TERMS. 12

A. It Is Unreasonable For Utilities To Remove An Attacher's Facilities During A Good Faith Dispute Or With Less Than 60 Days' Notice. 12

B. It Is Not Possible For An Attacher To Require Its Contractors To Carry The Same Insurance That The Pole Owner Requires Of The Attacher. 14

C. The Commission Should Forbid Pole Owners From Holding Attachers Liable For A Pole Owner's Own Negligence. 15

D. The Commission Should Require AT&T To Define Vague Tariff Terms That Would Result In Unjustified Attacher Penalties And Reject Its Unreasonable Two-Year Limitations Period. 16

V. IT IS UNLAWFUL FOR A POLE OWNER TO DENY POLE ACCESS FOR ANY REASON OTHER THAN THOSE SET FORTH IN 807 KAR 5:015 § 2(1). 18

CONCLUSION 19

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] respectfully submits this brief in support of its objections to the conforming utility tariffs filed pursuant to 807 KAR 5:015 § 3(7).

INTRODUCTION

When the Commission's comprehensive pole attachment regulations took effect on February 1, 2022, 807 KAR 5:015, utilities were required to file conforming tariffs.[2] But in critical respects, certain utilities have proposed tariff terms and conditions that directly conflict with the Commission's regulations or are otherwise unjust and unreasonable.[3]

KBCA requests the Commission to strike those non-conforming and unlawful provisions and require the impacted utilities to revise their tariffs consistent with the new pole attachment regulations, including in the following respects:

- **Pole Replacement Costs.** Pole owners should be obligated to calculate make ready pole replacement costs for non-red-tagged poles using the net book value approach so that attachers are not unfairly required to pay 100% of these costs.
- **Overlashing.** Pole owners, including the rural electric cooperative corporations ("RECCs"), should be prohibited from: requiring more than the requisite advance notice of overlashing, *i.e.*, processes tantamount to permitting; charging overlashing attachers for engineering, survey, or inspection costs; and applying unauthorized attachment fees to overlashing.
- **Reservation of Space.** Pole owners should be prohibited from reserving space on their poles for undefined future use, as opposed to actual potential needs for the space.

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[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] 807 KAR 5:015 § 3(7).

[3] *See id.* § 3(4) (stating tariffs must include terms that are "fair, just, and reasonable"); K.R.S. § 278.030 (generally requiring all rates to be "fair, just, and reasonable").

- **Just And Reasonable Fees And Costs.** Pole owner survey estimates and fees must be based on actual costs.

- **Just And Reasonable Contract Terms.** Pole owners should not be permitted to: remove an attacher's facilities during good faith disputes and/or with less than 60 days' notice; require attachers' own contractors to maintain the same insurance as the attacher, because the attacher already requires its contractors to have certain insurance and the attacher is ultimately responsible to the pole owner; or hold an attacher responsible for harms it did not cause.

ARGUMENT

I. IT IS UNJUST AND UNREASONABLE FOR UTILITIES TO INCREASE BROADBAND DEPLOYMENT COSTS BY UNFAIRLY SHIFTING POLE REPLACEMENT COSTS TO ATTACHERS.

While the Commission adopted a regulation addressing cost recovery for red-tagged poles, it declined to adopt a regulation addressing cost recovery of prematurely-replaced non-red-tagged poles at the same time.[4] Thus, under the Commission's regulations, a utility may not charge an attacher to replace a red-tagged pole – that is, a pole the utility "designated for replacement based on the poles' non-compliance with an applicable safety standard; 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; or would have needed to replace at the time of replacement even if the new attachment were not made."[5] But the Commission expressly declined to adopt a regulation addressing cost recovery for prematurely replaced *non*-red-tagged poles.[6] Instead, the Commission deferred action on that question, explaining that such costs were more appropriately evaluated with the benefit of a full record in this proceeding.[7]

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[4] *See* 807 KAR 5:015 § 4(6)(b)(4).
[5] *Id.* § 1(10).
[6] *See id.* § 4(6)(b)(4) (stating the make ready cost for any non-red-tagged pole "shall be charged in accordance with the utility's tariff").
[7] Kentucky Public Service Commission, Statement of Consideration Relating to 807 KAR 5:015, at 47.

Based on the Commission's deferral of that issue, utilities with their conforming tariffs have sought to exploit that regulatory gap by imposing the entire cost of replacing non-red-tagged poles on third party attachers. As a result, the Commission needs to address the issue it left open and rule now – based on the record evidence – that it is not just and reasonable to require attachers to pay 100% of pole replacement costs for non-red-tagged poles. The fact of the matter is that third-party communications attachers do not *cause* pole replacements.[8] Even without any attachers, a pole owner must eventually replace every single one of the poles in its distribution network.[9] In other words, in the absence of any third-party attachers, pole owners would incur the costs to replace their poles when necessary. As such, pole owners factor depreciation of these long-lived assets into the rates they charge their customers.

While attachers may cause a pole to be replaced sooner than the pole owner may otherwise replace it, attachers only affect the timing (not the fact) of a pole replacement. Therefore, attachers should only be responsible for paying the cost associated with that early replacement – not the costs associated with the entire replacement of the pole. To measure these costs, the Commission should require pole owners to adopt a cost-causation approach, such as a net book value approach, which is a simple method of calculating the costs caused by an early pole replacement.[10] Under that approach, the remaining net book value of a pole is calculated "on an average historic booked basis," meaning "the total gross booked investment in Account 364 pole plant less total

[8] *See* Direct Testimony of Patricia D. Kravtin at 15-16 (filed in this matter on June 9, 2022) (hereinafter "Kravtin Testimony") (explaining "[p]ole replacements are a long-term fact of life for utilities, and the inevitable need for the replacement of any given pole is a 'but for' consequence of the *pole owner's core utility service* and *not* of a new attacher's request to attach to any given pole") (emphasis in original).

[9] *Id.*

[10] *Id.* at 18-22 (explaining that the net book value approach "relies on the same data used to calculate the recurring pole rental rate either under the widely used FCC formula or the Kentucky specific variation of the federal formula").

accumulated depreciation divided by total corresponding number of poles."[11] Except in limited cases where the additional cost component could be fully supported and well documented (and therefore paid by the attacher), the utility would be "made whole by make ready charges that simply recover the average net book value of the earlier retired replaced pole remaining on its books."[12] And because the net book value approach "reflects the same depreciation assumptions . . . incorporated in the utility's depreciation allowances," "there should not be any dispute in the calculation itself."[13]

If the Commission declines to adopt a methodology for non-red-tagged poles based on cost-causation principles, the record evidence shows that utilities would be incentivized to underreport the number of red-tagged poles they intend to replace each year in order to improperly shift replacement costs to attachers. The data submitted by utilities in response to the Commission's and KBCA's Requests for Information reveals that utilities are as a matter of course currently red-tagging a much smaller population of poles than they intend to replace in the normal course of business.[14] For example, in Table 4 below,[15] Kentucky Power applies a useful life assumption for poles of 28 years, producing an annual pole replacement rate of 3.571%.[16] At the same time, however, in response to KBCA's Request for Information, Kentucky Power stated it only "has 301 'red-tagged' poles" out of 218,310 poles in its system.[17] Thus, based on Kentucky Power's depreciation and red-tagged replacement rates, it is intending to red-tag .105% of the poles

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[11] *Id.* at 18-19.
[12] *Id.* at 18.
[13] *Id.* at 22-23.
[14] *Id.* at 29-32.
[15] *Id.* at 31.
[16] Kentucky Power Company, Response to Commission's Initial Request For Information 1-9.
[17] Kentucky Power Company, Response to KBCA's Initial Request For Information 1-3; Kentucky Power Company, Response to Commission's Initial Request For Information 1-10.

in its system, but replace 3.571% of its poles. That incongruity is telling and makes clear that, under the new regulations as currently framed, Kentucky Power has an incentive to exploit the gap for non-red-tagged poles by passing along to attachers the cost of replacing 3.433% of its poles, even though Kentucky Power had already *fully depreciated those poles*.

Table 4
Comparisons of Expected Normal Life-Cycle Pole Replacement Rates and Percentage of Reported Red-Tagged Poles for Illustrative Utilities (Annual Basis)

Utility	Total Poles	Annual Utility Replacement Rate (100/Useful life)	Current Red-Tag Percentage	Difference Between Utility's Replacement Rate and Red-Tag Pct.	Projected Red Tag Percentage (Annual Basis)
Investor Owned Utilities					
Kentucky Power Company	218,310	3.571%	.138%	(3.433%)	.105%

If that were allowed, it would result in an unjustified and unreasonable windfall to the pole owner, to the detriment of cost-effective broadband deployment in Kentucky, especially in rural areas.[18] This is particularly unjust where pole owners receive many benefits from pole replacements that third-party attachers do not, including:

- Operational benefits of the replacement pole (*e.g.*, additional height, strength, and resiliency) that can enhance the productive capacity of the plant to meet service quality and other regulatory mandates and utility objectives to harden its pole network for greater resiliency and reliability;
- Strategic benefits, including the ability to provide additional service offerings and enhancements of its own network (*e.g.*, smart grid applications) as well as broadband in competition with the attacher;
- Revenue-enhancing benefits, including enhanced rental opportunities from the increased capacity on the new replacement pole;

[18] *See* Kravtin Testimony at 13 (noting broadband deployment is more difficult in rural areas, "where the economic conditions for broadband deployment (e.g., lower population densities resulting in higher construction costs per capita) are the most unfavorable and there is generally a higher number of poles required per-customer").

- Capital cost savings associated with future planned plant upgrades and cyclical replacement programs;
- Operational cost savings in the form of lower maintenance and operating expenses inherent to features of the new, upgraded/higher-class replacement pole, or as a result of the earlier time shift of the removal and installation of the new pole, given the generally rising costs of labor and material over time as measured by published industry cost indices; and
- Enjoyment of additional tax savings or cash flow opportunities from the accelerated depreciation of a new capital asset which reverses as the asset ages.[19]

While pole owners argue that early pole replacement negatively impacts their budgets, that is false.[20] Pole owners depreciate the cost of their poles over their average service lives, accumulating the expenses on their books as the poles approach the end of their useful lives.[21] That depreciation rate factors into the Commission-approved rates that utilities charge their customers for their services.[22] As a result, utilities, through the rates they charge their customers, collect all of the funds they need to replace a particular pole over the average useful life of that pole.[23] At the end of the pole's useful life, the utility should therefore have collected and saved the funds it needs to replace the pole irrespective of any contribution from third party attachers. Given that pole owners are already recovering pole replacement costs, it is therefore simply not accurate for utilities to suggest that early pole replacements to accommodate third party attachments have any material impact on their budgets. They do not. To the contrary, it is wholly

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[19] *Id.* at 40.

[20] *See, e.g.*, Clark Energy Cooperative, Response to KBCA's Initial Request For Information 1-9.

[21] *See* Kravtin Testimony at 8-9 & 35-37 (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").

[22] *Id.*

[23] *Id.* at 16-17 (noting utilities recover "depreciation allowances . . . from customers through distribution rates").

unfair and inappropriate to allow pole owners to shift the entire cost of replacing poles to attachers when utilities are already recovering amounts to fund the replacement of those very poles. That inequitable approach results in a windfall subsidy flowing from attachers to the pole owners.

II. THE COMMISSION SHOULD NOT ALLOW RURAL ELECTRIC COOPERATIVE CORPORATIONS TO IMPOSE OVERLASHING REQUIREMENTS THAT CONFLICT WITH THE NEW REGULATIONS AND FRUSTRATE EFFICIENT OVERLASHING.

The Commission should not permit the RECCs to require attachers to submit a costly and unnecessary pole loading analysis certified by a professional engineer, in addition to their notice of overlashing, or to charge new attachers overlashing inspection costs.[24] In its new regulations, the Commission largely adopted FCC overlashing rules,[25] but gave pole owners an extra 15 days to review any proposed overlashing.[26] Thus, under 807 KAR 5:015 § 3(5)(c), "[a] utility may require no more than 30 days' advance notice of planned overlashing." But in their tariffs, the RECCs propose several additional requirements that conflict with the text and spirit of the Commission's rules and are unjust and unreasonable.

First, utilities purport to require new attachers to submit a "pole loading analysis certified by a professional engineer licensed in Kentucky" in addition to a notice of planned overlashing.[27] But that requirement directly conflicts with the Commission's regulations, which state, "[a] utility may require no more than 30 days' advance notice of planned overlashing."[28] Requiring an attacher to obtain a certified pole loading analysis along with the overlash notice is tantamount to

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[24] *See, e.g.*, Blue Grass Energy Cooperative Corp. Tariff at Original Sheet Nos. 199-200, Article IV (D)(1) (representative of the RECC tariffs).
[25] Kentucky Public Service Commission, Statement of Consideration Relating to 807 KAR 5:015, at 48 & 51 (adopting "the FCC rules pertaining to overlashing" with only "minor modifications").
[26] *Compare* 807 KAR 5:015 § 3(5)(c) (allowing for 30 days' advance notice of overlashing), *and* 47 C.F.R. § 1.1415(c) (allowing for 15 days' advance notice of overlashing).
[27] *See, e.g.*, Blue Grass Energy Cooperative Corp. Tariff at Original Sheet Nos. 199-200, Article IV (D)(1) (tariff representative of the RECC tariffs).
[28] 807 KAR 5:015 § 3(5).

a permit requirement and will unnecessarily increase the time and costs of overlashing. As the FCC emphasized in rejecting pole owner efforts to require these same types of studies prior to overlashing, "utilities may not use advanced notice requirements to impose quasi-application or quasi-pre-approval requirements, such as requiring engineering studies."[29] The Commission should not tolerate an excessive requirement that is contrary to the plain text of its rule and undermines the Commission's clear intent to ensure that, consistent with federal rules and policy, overlashing may be accomplished in an efficient, cost-effective manner.[30]

A sounder approach – and one consistent with the Commission's and FCC's rules – is for KBCA members to provide pole owners with information related to the cable or fiber type, weight per foot, and diameter of the proposed overlashing, as well as the pole number and any existing safety issues.[31] Once the notice is provided, a pole owner has 30 days to review and address that information.[32] If a pole owner reasonably believes that a pole loading analysis is necessary, once it receives a notice, it should complete the pole loading analysis within that existing 30-day notice period *at its own cost*.[33] If any such analysis reveals an issue, the utility can require the attacher

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[29] *Accelerating Wireline Broadband Deployment*, 33 FCC Rcd. 7705, 7762 ¶ 119 (2018).

[30] Kentucky Public Service Commission, Statement of Consideration Relating to 807 KAR 5:015, at 50 ("Overlashing is an important element of broadband rollout and clarifying the rules surrounding overlashing should reduce confusion and complaints regarding overlashing and expedite broadband rollout.").

[31] *See* Direct Testimony of Richard Bast at 3 (filed in this matter on June 9, 2022) (hereinafter "Bast Testimony") ("Similar to the FCC's overlash rules and consistent with the Commission's new rules, an overlasher should provide an overlashing notice comprised of the cable or fiber type, weight per foot, and diameter, as well as the affected pole number and any obvious safety issues existing/arising on the relevant poles.").

[32] 807 KAR 5:015 § 3(5)(c).

[33] *See, e.g.*, *Accelerating Wireline Broadband Deployment*, 33 FCC Rcd. 7705, 7762 ¶ 119 n.444 (2018) ("To the extent a pole owner wishes to perform an engineering analysis of its own either within the 15-day advance notice period or after completion of the overlash, the pole owner bears the cost of such an analysis"); *City of Portland v. United States*, 969 F.3d 1020, 1050 (9th Cir. 2020) (affirming FCC overlashing rule that "prohibits a utility from requiring overlashers to

to pay the reasonable and actual costs of that analysis. But because it is typically unnecessary for any load study to be performed prior to overlashing, if a pole owner wishes to do so, the pole owner should be obligated to incur that cost in the first instance.[34] This approach promotes timely and cost-effective broadband deployment by preventing pole owners from forcing attachers to incur the expense of needless loading studies.

Second, and similarly, the Commission should reject the RECCs' proposals to require overlashers to pay the pole owner for any inspection costs related to overlashing. Like the RECCs' professional engineering certification requirement, this requirement is unnecessary and will undermine the benefits of overlashing by unnecessarily increasing the expense to perform it. As the FCC recognized in adopting its overlash rules, which the Commission largely accepted, "[a] utility may not charge a fee to the party seeking to overlash for the utility's review of the proposed overlash"[35] and "[t]o the extent that the pole owner wishes to perform an engineering analysis . . . after completion of the overlash, the pole owner bears the cost of such an analysis."[36] The Commission should mandate the same sound approach here.

Third, the Commission should not allow RECCs to penalize attachers for so-called "unauthorized" overlashing. Such penalties are outside the industry norm, make little sense, and have been squarely rejected by the FCC.[37] Overlashing is not a "new" attachment; it is on top of

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conduct pre-overlashing engineering studies or to pay the utility's cost of conducting such studies").

[34] *Id.*

[35] 47 C.F.R. § 1.1415; *see also Accelerating Wireline Broadband Deployment*, 33 FCC Rcd. 7705, 7762 ¶ 116 (2018) ("A utility may not charge a fee to the party seeking to overlash for the utility's review of the proposed overlash").

[36] *Accelerating Wireline Broadband Deployment*, 33 FCC Rcd. 7705, 7762 ¶ 119 n.444 (2018).

[37] *Id.* ¶ 116 n.423 (2018) (stating "[w]e decline Southern Company's proposal to impose a 'reasonable penalty' where an overlasher fails to comply with an electric utility's advance notice requirements").

an existing, authorized attachment. As such, an overlashing is not a free-standing attachment that can be "unauthorized." Instead, as both the FCC and this Commission made clear, overlashing is subject only to a notice requirement, and any disputes that may arise about any given overlashing can be adequately addressed by the parties during the timeframe set forth in the regulation for the review of the overlashing.[38] Penalties for overlashing are ripe for abuse and will inevitably deter and increase the cost of deploying broadband timely and efficiently.

III. THE COMMISSION'S REGULATIONS ALLOW POLE OWNERS TO CHARGE THE ACTUAL COSTS ASSOCIATED WITH POLE ATTACHMENTS AND UNREASONABLE AND UNSUPPORTED FEES MUST BE REJECTED.

A. Pre-Construction Survey Fees Must Be Based On Actual Cost Data.

The Commission's regulations allow utilities to require an attacher to pre-pay survey costs up front based on "a per pole estimate of costs in the utility's tariff," subject to a final true up 120 days after make ready work is completed.[39] In line with that requirement, most of the proposed tariffs provide a flat, up-front, per pole pre-construction survey fee estimate between $20-$40 per pole, which is consistent with the actual survey costs KBCA members pay.[40]

However, some utilities have proposed survey fee estimates that are many multiples of those numbers.[41] These inflated charges appear to be based on a mistaken assumption that each pole is surveyed individually, rather than in batches. For example, while most tariffs estimated a

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[38] *See* 807 KAR 5:015 § 3(5)(e) (setting for the timeline for any post-overlashing inspection); *Accelerating Wireline Broadband Deployment*, 33 FCC Rcd. 7705, 7762 ¶ 116 n.423 (2018) (stating "[t]he informal complaint process is available to utilities that wish to allege a violation of the [overlashing] notice rule").

[39] 807 KAR 5:015 §§ 4(2)(b)(6)(b) & 4(6)(a).

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

[41] *Id.* (explaining that Brandenburg Telephone Company, Kentucky Power Company, South Central Rural Telecommunications Cooperative, Inc., and Thacker-Grigsby Telephone Co., Inc., have proposed survey fee estimates ranging from $119 to $275).

survey duration of approximately ten to thirty minutes per pole,[42] Brandenburg and South Central appear to assume that surveying each and every pole will take two hours or more.[43] This unreasonable and aberrant approach generates excessive survey fee estimates that are not based on actual costs.

The Commission should prohibit pole owners from assessing any such inflated and unreasonable fees. Allowing utilities to "[d]riv[e] up the cost of attachments in this fashion will only delay and deter investment in broadband expansion."[44] In addition, while the regulations require pole owners to true-up any overages after the make ready work is complete, it is often difficult for attachers to collect any refunds they are due.[45] Accordingly, the Commission should require utilities to provide a reasonable and supported per pole estimate of their survey fees based on actual cost data in the first instances.

B. The Commission Should Prohibit Cincinnati Bell From Imposing A Ten Percent Surcharge On All Work It Performs For An Attacher.

As discussed above, the Commission's rules allow a pole owner to charge just and reasonable fees based on actual costs. Yet, Cincinnati Bell seeks to impose the "full cost, plus (10%)" of any work it performs for third-party communications attachers, including the "prelicense survey, make ready work, [and] inspection and removal of attachee's communications

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[42] *See, e.g.*, Kenergy Tariff at Fifth Revised Sheet No. 76, Page 45, Appendix E (estimating 15 minutes per pole); Salt River Electric Cooperative Corp. Response to KBCA Request For Information 2-3 (estimating 6 minutes per pole); South Kentucky Rural Electric Cooperative Corp. Response to KBCA Request For Information 2-3 (estimating 10 poles surveyed per hour).
[43] 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).
[44] Bast Testimony at 12.
[45] *Id.* at 4 (stating, "in my work with Charter over many years, I have never seen the company reimbursed for any true-up and it would be an administrative nightmare to reconcile these up-front and then reimbursed (if any) fees").

facilities."[46] While this surcharge was approved by the Commission 40 years ago, and related only to "make-ready and rearrangement activity," it is unjust and unreasonable and should be disallowed now.[47] Cincinnati Bell has not identified or articulated any basis for these surcharges applying to all work performed by the telephone company, nor is there any basis for allowing it to continue to charge such surcharges for make ready.[48] Importantly, Cincinnati Bell is now a direct competitor to KBCA members. As such, the Commission should not allow it to charge competitors more than the actual cost of attachment. Otherwise, it can impose anticompetitive surcharges that raise its competitors' costs. The Commission should not sanction such an unjust competitive advantage by making the cost of broadband deployment more expensive for third party attachers.

IV. THE UTILITIES SHOULD BE PROHIBITED FROM IMPOSING UNJUST AND UNREASONABLE CONTRACT TERMS.

A. It Is Unreasonable For Utilities To Remove An Attacher's Facilities During A Good Faith Dispute Or With Less Than 60 Days' Notice.

Pursuant to 807 KAR 5:015 § 6(1), utilities must provide *at least* 60 days' written notice prior to the removal of an attacher's facilities. Yet, several of the utilities' proposed tariffs provide that a utility may "terminate the Attacher's right to continue any or all use of poles provided under this tariff and may act to remove the Attacher equipment at the Attacher's sole risk and expense" if "the Attacher shall fail to comply with any of the provisions of this tariff, including . . . timely payment of any amounts due, and shall fail for thirty (30) days after written notice from the Company to correct such non-compliance."[49] Such provisions should not be permitted to stand.

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[46] Cincinnati Bell Telephone Company LLC, d/b/a Altafiber Tariff at Third Revised Page 41, Section 3.2.1.; Bast Testimony at 13.

[47] Kentucky Public Service Commission, *The CATV Pole Attachment Tariff of Cincinnati Bell, Inc.*, Order, Case No. 251-4, ¶ 5 (June 1, 1983), *available at* 19000251_06011983_2.pdf (ky.gov).

[48] Cincinnati Bell Telephone Company LLC, d/b/a Altafiber Response to KBCA Request for Information 1-4 (refusing to articulate any legitimate, cost basis for its 10% surcharge).

[49] *See* Ballard Rural Telephone Cooperative Corp., Brandenburg Telephone Co., Logan Telephone Cooperative, Inc., South Central Rural Telecommunications Cooperative, Inc., and Thacker-

Given utilities' ownership and control over essential pole facilities, it is neither reasonable nor appropriate for pole owners to have unfettered discretion to remove (or even threaten to remove) all of an attacher's plant for *any* non-compliance with a tariff's terms, particularly when the non-compliance is disputed in good faith by the attacher.[50] Pole owners should not be allowed to exercise their leverage to put attachers to the impossible choice of capitulating to their demands or suffering irreparable harm from having their facilities removed.[51]

While the rural local exchange carriers ("RLECs") assert that an attacher will not be incentivized to comply with the terms of the tariff if there are not more "teeth,"[52] they are mistaken. Attachers have every incentive to ensure their communications networks are properly and safely installed and maintained in compliance with tariff requirements so their customers receive reliable service.[53] Moreover, the proposed tariffs already include more than sufficient remedies for utilities to ensure (and address any non-compliance issues) compliance in any event.[54]

Grigsby Telephone Co., Inc., Tariffs (all incorporating Duo County Telephone Cooperative, Inc. Access Tariff), Original Page 18-10, Section 18.11; *see also* Bellsouth Communications Kentucky Tariff at Original Page 77, Section 28 (allowing for termination of attachment if attacher does not pay charges within 15 days of notice of unpaid charges); Cincinnati Bell Telephone Company Tariff at 3rd Revised Page 12, Section 2.2.4 (allowing for termination of attachment 30 days after notice of issue).

[50] *See* Direct Testimony of Jerry Avery at 3 (filed in this matter on June 9, 2022) (hereinafter "Avery Testimony"); *see also* Bellsouth Communications Kentucky Tariff at Original Page 77, Section 28; Cincinnati Bell Telephone Company Tariff at 3rd Revised Page 12 , Section 2.2.4.

[51] *See* Avery Testimony at 6 (explaining disputes over mundane issues like billing and technical NESC compliance often take more than 30 days to resolve).

[52] *See, e.g.*, Brandenburg Telephone Co.'s Response to KBCA Request for Information 1-6(a) (Response representative of the RLECs).

[53] Avery Testimony at 7-8 (explaining "a communications network must be properly and safely installed and maintained to ensure reliable service to its customers").

[54] For example, the proposed tariffs provide for unauthorized attachment penalties, contractor requirements, inspections, a bond, and indemnity provisions. *See, e.g.*, Duo County Telephone Cooperative, Inc. Tariff at §§ 18.8 (indemnities and insurance), 18.9 (surety), 18.14 (unauthorized attachments), 18.15 (overlashing inspection), and 18.23 (contractor requirements).

Relatedly, if an attacher is working in good faith to address a pole condition or other issue identified by a pole owner that cannot be cured within 30 days (*e.g.*, a billing or technical NESC compliance issue), the pole owner should not be allowed to threaten an attacher with removal of its facilities – let alone remove an attacher's facilities. It often takes an attacher more than 30 days to resolve an issue for a variety of reasons, including "local permitting issues or the need to coordinate work with other attachers."[55] Such circumstances may be beyond the control of the attacher, and it is unjust for a pole owner to threaten removal of (or remove) an attacher's system if the attacher is working in good faith to resolve the issue.

B. It Is Not Possible For An Attacher To Require Its Contractors To Carry The Same Insurance That The Pole Owner Requires Of The Attacher.

KBCA members negotiate comprehensive contracts with their contractors. Within those contracts, KBCA members require a certain level of insurance from their contractors that the member believes will protect it. At the same time, pole owners impose many different insurance requirements on their attachers, to which the attacher must adhere in order to attach.

While KBCA members have no issue adhering to the pole owner insurance requirements themselves, certain pole owners in this case are purporting to require attachers to require their contractors to adhere to the same requirements. For example, these proposed tariffs mandate, "Licensee shall require its agents, contractors and subcontractors to comply with the specifications required under this Schedule…(including but not limited to the insurance and indemnification obligations under this Schedule)."[56] This is impractical, unreasonable, and unjust.

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[55] Avery Testimony at 6-7.

[56] *See, e.g.*, Clark Energy Cooperative Tariff at Original Page 118.10, Article VI(E) (tariff representative of the RECC tariffs); *see also* Louisville Gas & Electric Company Tariff at Original Sheet 40.25, ¶ 23(b); Kentucky Utilities Company Tariff at Original Sheet 40.25, ¶ 23(b).

As an initial matter, it is not possible for attachers to comply with this requirement. All contractor agreements must be negotiated, and attachers cannot simply re-negotiate and rewrite each contract with each agent, contractor, or subcontractor to satisfy each utility's unique insurance preferences. Even if they theoretically could, such an undertaking is not necessary because attachers are ultimately on the hook if their own contractor's insurance is inadequate.[57] The utilities' efforts to superintend the relationships between attachers and their own contractors is an unjust, unreasonable, and unnecessary overreach.

C. The Commission Should Forbid Pole Owners From Holding Attachers Liable For A Pole Owner's Own Negligence.

The majority of pole owner tariffs in this proceeding include an indemnity provision with either a gross negligence standard or a sole gross negligence standard. Neither is reasonable. Each party on a pole, including the pole owner, should be liable for its own simple negligence. It is unjust and unreasonable, and contrary to public policy, to allow negligent parties to shift their liability onto a non-responsible party. These provisions allow – indeed, encourage – a pole owner to be negligent in the pole attachment context with impunity.[58]

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[57] Avery Testimony at 10 (stating "attachers are ultimately responsible for any issues their workers, including their contractors, cause, so there is no need for both the attacher and its contractor to have the same exact insurance required by every pole owner"); *see, e.g.*, Clark Energy Cooperative Tariff at Original Page 118.20-118.21, Article XVIII (describing indemnification obligations) (tariff representative of the RECC tariffs).

[58] For example, the RECC tariffs state "Licensee will not be liable under this indemnity to the extent any of the foregoing Losses are determined, in a final judgment by a court of competent jurisdiction, not subject to further appeal, to have resulted from the *sole gross negligence or willful misconduct* of any Indemnified Person" (emphasis added). *See, e.g.*, Clark Energy Cooperative Tariff at Original Page 118.20-118.22, Art. XVIII (tariff representative of the RECC tariffs); *see also* Kentucky Power Company, Sheet No. 16-8, ¶¶ 18 & 19 (Kentucky Power only liable for its "grossly negligent acts or omissions or willful misconduct"). Similarly, the RLECs require that the "Attacher shall indemni[f]y, protect, and hold harmless the Company and other joint-users of said poles from and against any and all loss, cost, claims, demands, damage. . . arising out of . . . the *joint negligence* of the Attacher and the Company and/or any joint users" (emphasis added). *See, e.g.*, Duo County Telephone Cooperative, Inc. Access Tariff, at Original Page 18-7, Section 18.8(1).

The RECCs and RLECs contend that, if a utility is responsible for its own negligence, including joint negligence, then attachers would somehow seek to shift their own liability back onto the utility.[59] This makes zero sense. The utilities themselves do not explain how such a scenario would unfold, or how an attacher could pull it off, and no party has presented any evidence to support such a far-fetched concern.

The Commission must reject pole owner efforts to shift their liability to attachers as an unjust and unreasonable term and condition of attachment. Instead, each party on a pole, including the pole owner, should be liable for any damages it causes.[60] If both the attacher and the pole owner are negligent, each should be held responsible for its fair share of the damage.

D. The Commission Should Require AT&T To Define Vague Tariff Terms That Would Result In Unjustified Attacher Penalties And Reject Its Unreasonable Two-Year Limitations Period.

Under AT&T's proposed tariff, if an attaching entity "declines to participate" in an inventory – *i.e.*, an inspection that determines the number of billable attachments and unauthorized attachments – AT&T seeks to charge the attacher an additional $100 per unauthorized attachment.[61] The Commission should require AT&T to make clear that an attacher's cooperation (*i.e.*, attending the kick-off meeting, having someone available to discuss issues, etc., versus requiring an attacher to follow AT&T's contractor around the state) in an inventory survey is "participation in the survey." Indeed, in response to KBCA's Request For Information regarding the definition of "participation" in a survey, AT&T confirmed that "AT&T's tariff does not require

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[59] *See, e.g.*, Clark Energy Cooperative Response to KBCA Request For Information 1-12 (Response representative of the RECCs); Brandenburg Telephone Co. Response to KBCA Request For Information 1-5 (Response representative of the RLECs).

[60] Avery Testimony at 10-12 (explaining that "just as it would be unreasonable for a pole owner to be responsible for any KBCA member negligence, it would be unfair and inappropriate for any KBCA member to be responsible for a pole owner's negligence").

[61] BellSouth Telecommunications Kentucky Tariff, Original Page 66, Section 18.2.2.

actual field work with auditors."[62] That makes practical sense. Requiring an attacher to physically attend an inventory survey would be a profound waste of time and resources, and would unnecessarily delay completion of the survey. Accordingly, to avoid confusion, the Commission should require AT&T to expressly define "participation" to include an attacher's cooperation with AT&T and the company conducting the survey, but not partaking in actual field work.

The Commission should also require AT&T to eliminate its unreasonable and impractical two-year limitations period for pole attachment disputes.[63] Restricting the time frame in which an attacher may bring a dispute that "should have been discovered" to 24 months is not realistic, is confusing, will discourage parties from working cooperatively to resolve disputes, and will generate potentially needless litigation. It often takes many months for parties to discover the cause of any issue and to negotiate a resolution. If parties are working under a two-year limitations period, they may have no choice but to bring lawsuit to preserve their claims given the uncertainties (and inevitable confusion and disputes) around when a dispute "should have been discovered." Because the Commission's new rules do not address the time period in which a party may bring a dispute, the Commission should establish a reasonable time between three years (which would give parties more time to work through disputes informally and cooperatively) and ten years (the applicable limitations period under Kentucky law).[64]

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[62] *See, e.g.,* AT&T's Response to KBCA's Objections to AT&T's Proposed Pole Attachment Tariff, Objection 1; BellSouth Telecommunications Kentucky, Response to KBCA Request For Information 1-1(c).

[63] BellSouth Telecommunications Kentucky Tariff, Original Page 78, Section 29.1.1.

[64] Ky. Rev. Stat. Ann. § 413.160; *In re Verizon Maryland, LLC, v. The Potomac Edison Co.*, 35 FCC Rcd. 13607, 13626, at ¶ 41 (2020) (noting, in the context of a pole attachment complaint, "federal courts adjudicating a claim under a federal statute with no applicable statute of limitations will, as a general rule, borrow the most closely analogous statute of limitations under state law . . . [w]e think a similar borrowing rule should apply in pole attachment complaint proceedings before the Commission").

V. IT IS UNLAWFUL FOR A POLE OWNER TO DENY POLE ACCESS FOR ANY REASON OTHER THAN THOSE SET FORTH IN 807 KAR 5:015 § 2(1).

A pole owner may only deny access to its poles "on a non-discriminatory basis where there is insufficient capacity or for reasons of safety, reliability, and generally applicable engineering purposes."[65] Nevertheless, the RECCs here seek to add another reason to deny access: A broad and generic reservation of space for their "sole use" "in anticipation of [their] future requirements or additions."[66] The Commission should not allow utilities to reserve space on a pole for vague and amorphous reasons unrelated to *bona fide* development plans for their core electric service.

There are multiple problems with the broad reservation the RECCs seek to claim. Tariff provisions that allow pole owners to reserve space for broad purposes are anticompetitive, discriminatory, and deter and increase the cost of broadband deployment in Kentucky. Under these provisions, a pole owner could deny a new attacher access to a pole, even if there is space available, and force the new attacher to either pay for a larger pole or abandon its efforts to attach.[67] Here, the RECCs confirmed they would require an attacher to replace a pole as part of the make ready process if there would be space to attach but for the RECCs' reservation of otherwise available usable space.[68] Such an unreasonable move is exactly why the FCC has held that "[t]he

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[65] 807 KAR 5:015 § 2(1)(a).

[66] Clark Energy Cooperative Tariff at Original Page 118.12-118.13, Art. VIII(A)(v) (tariff representative of the RECC tariffs).

[67] *See In The Matter Of Implementation Of The Local Competition Provisions In The Telecommunications Act Of 1996*, 11 FCC Rcd. 15499, at 16078, ¶ 1169 (FCC 1996) ("An electric utility may not reserve space or recover reserved space to provide telecommunications or video programming services and then force a previous attaching party to incur the cost of modifying the facility to increase capacity, even if the reservation of space were pursuant to a reasonable development plan").

[68] Clark Energy Cooperative Response to KBCA Request for Information 1-10 (response representative of the RECC tariffs) ("Yes, when there is no room for additional attachments outside the Cooperative's reasonably-anticipated need for space on its own pole, a requesting attacher would be required to pay for replacement of the pole to accommodate its request"); *see also* Jackson Energy Cooperative Corporation's Response to KBCA Request for Information 1-10

electric utility must permit use of its reserved space by cable operators and telecommunication carriers until such time as the utility has an actual need for that space."[69]

Additionally, even if the Commission were to allow RECCs to reserve space for an immediate and *specified* electric purpose, it is unjust and unreasonable for a pole owner to adopt a blanket reservation of space for unstated purposes. The FCC, for example, does not allow pole owners to reserve or reclaim a third party attacher's space *unless* "such reservation is consistent with a bona fide development plan that reasonably and specifically projects a need for that space in the provision of its core utility service."[70] A utility may not, therefore, reserve space under the pretext that an attacher "may request documentation to validate the need for future space."[71] The Commission should strike the RECCs' reservation of space provisions from the proposed tariffs.

CONCLUSION

The Commission should ensure the efficient deployment of broadband services in Kentucky by striking all unjust and unreasonable terms from the proposed tariffs.

(adding "[i]f space is reserved for the sole use of the Cooperative, then that space would be considered occupied for pole attachment purposes").

[69] *In The Matter Of Implementation Of The Local Competition Provisions In The Telecommunications Act Of 1996*, 11 FCC Rcd. 15499, at 16078, ¶ 1169 (FCC 1996). For example, Nolin Rural Electric Cooperative Corporation similarly recognizes that, "if the Cooperative does not have a 'plan' for use of the pole, the attacher would not be responsible for a pole change in that case, since there is adequate space for them to attach at the time." Nolin Rural Electric Cooperative Corporation Response to KBCA Request for Information 1-10.

[70] *Id.*

[71] Clark Energy Cooperative Tariff at Original Page 118.12-118.13, Art. VIII(A)(v) (tariff representative of the RECC tariffs).

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Respectfully submitted,

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