COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of*:*

ELECTRONIC INVESTIGATION OF THE	**)**	
PROPOSED POLE ATTACHMENT TARIFFS OF	**)**	**CASE NO. 2022-00107**
RURAL LOCAL EXCHANGE CARRIERS	**)**	

RESPONSE BRIEF
OF THE RURAL LOCAL EXCHANGE CARRIERS

Ballard Rural Telephone Cooperative Corporation; Brandenburg Telephone Company Inc.; Duo County Telephone Cooperative Corporation, Inc.; Foothills Rural Telephone Cooperative Corporation, Inc.; Gearheart Communications Company, Inc.; Highland Telephone Cooperative, Inc.; Logan Telephone Cooperative, Inc. dba LTC Connect; Mountain Rural Telephone Cooperative Corporation; North Central Telephone Cooperative, Inc.; Peoples Rural Telephone Cooperative Corporation, Inc.; South Central Rural Telecommunications Cooperative, Inc.; Thacker-Grigsby Telephone Company, Incorporated; and West Kentucky Rural Telephone Cooperative Corporation, Inc. (collectively, the "RLECs"), by counsel and pursuant to the Commission's Order entered September 23, 2022, in the above-captioned matter, hereby respectfully submit this Response Brief.

I. KBCA Has No Factual Support for Its Hypothetical Fears.

After specifically requesting the opportunity to file a legal brief, resulting in delay of a final order in this proceeding, KBCA filed a "Brief" that essentially just reiterates its previously-filed testimony and rehashes the same arguments it has presented to the Commission for over two years (many of which the Commission has consistently refused to adopt). Indeed, to the extent KBCA's brief includes any legal argument, it is predicated entirely upon inapplicable FCC rules or decisions.

KBCA again uses this proceeding as a vehicle to scare the Commission into overturning years of precedent by forcing as many costs as possible onto pole owners. KBCA does this with no promise of a resulting reduction in rates to the Kentucky citizens receiving service from KBCA's members, even though extraordinary taxpayer-funded subsidies have been made available to fund the very costs of which KBCA complains, a fact KBCA continues to ignore. However, KBCA has failed to provide any real-world evidence that KBCA's concerns are actual or legitimate, even when specifically requested by the RLECs. *See generally* KBCA's Responses to the RLECs' Requests for Information.

Indeed, in many requests specifically referencing testimony from a Charter witness, KBCA refused to provide any evidence in response, and the sponsoring witness was identified as KBCA's Jason Keller, not the Charter witness providing the referenced testimony. Despite refusing to make the witness available for written discovery or otherwise providing any responsive information, KBCA has relied upon that same testimony in its Initial Brief. For example, KBCA claims that a pole owner should not be authorized to exercise remedies for failure to remedy a pole condition after 30 days' written notice because compliance with such a provision is allegedly frequently prevented by "local permitting issues or the need to coordinate work with other attachers." KBCA Initial Brief, at 14. In its Requests for Information, the RLECs asked for information related to disputes where compliance repairs were delayed due to local permitting issues or other attachers, specifically directing KBCA to Mr. Avery's testimony.

Mr. Avery did not sponsor KBCA's Response. Instead, Jason Keller sponsored the following:

ANSWER: KBCA objects to this request as unduly burdensome and disproportionate to the needs of this case to the extent it asks for documentation of all disputes where a RLEC party made certain demands. KBCA states it does not have information in its possession, custody, or control that is responsive to this Request.

WITNESS: Jason Keller

KBCA's Response to Request for Information, No. 8.

KBCA cannot be allowed to (1) claim that evidence related to instances where it could not remedy a safety code violation due to local permitting issues is "unduly burdensome and disproportionate to the needs of the case"; and (2) that KBCA has no evidence of any such instances actually occurring, only to then argue to the Commission that the RLECs tariffs are unreasonable because "local permitting issues" keep attachers from making necessary repairs within 30 days. In fact, it is unclear how KBCA can present testimony that these events have occurred while simultaneously claiming it has no responsive information in its "control." Both were sworn testimony, but both sworn statements cannot be true. Indeed, Mr. Avery *was* the sponsoring witness for *other* Responses – so clearly his knowledge was within KBCA's "control."

Likewise, KBCA's Brief relies upon the testimony of Mr. Avery to argue that "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." The RLECs' Request for Information No. 9 specifically referred to the testimony of Mr. Avery and asked for evidence of every situation where an RLEC had "used their leverage to remove attachments." Yet again, Mr. Avery did not respond to this request; Mr. Keller did. And yet again, KBCA first objected to the request, and then claimed it had no evidence to show that Mr. Avery's testimony was actually true. *See* KBCA's Responses to RLECs' Requests for Information, No. 9.

KBCA must be bound by its own actions in this proceeding. KBCA requested the right to be a party to this proceeding, which required KBCA to respond to Requests for Information in good faith. KBCA cannot claim that issues are allegedly "disproportionate to the needs of this case" and that KBCA allegedly has no information that is responsive to those issues, only to then claim in a "legal brief" that those same issues are somehow unfair.

Absent KBCA's ability (or in light of its refusal) to provide any evidence that its fears are legitimate, there is no reason to abandon the Commission's forty years of practice and precedent to satisfy imagined concerns. Instead, the logical course of action is for the Commission to approve the RLECs' tariffs as fair, just, and reasonable, warn against abusive practices or interpretations of those tariffs, and deal with actual, fact-based disputes – if any – through the Commission's dispute process.

II. KBCA Continues to Ignore Government Subsidies for Pole Replacement Costs.

KBCA's "legal argument" that the Commission should abandon its long-standing principle that the party causing the cost is responsible to pay that cost is not credible. KBCA again fails to acknowledge or account for the extraordinary government subsidies available to KBCA's members for pole replacement costs. In fact, on August 31, 2022, Governor Beshear announced that another $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 those funds already placed in the "pole replacement fund," as described in the Rebuttal Testimony of Keith Gabbard.[1]

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.

[1] Rebuttal Testimony of Keith Gabbard, at 10.

Moreover, KBCA's argument that costs would "unfairly" be shifted to attachers due to practices surrounding non-red-tagged poles is entirely predicated upon argument and evidence from other utilities. To be clear, Section I of KBCA's Brief does not quote or rely upon any evidence related to even a single RLEC. Seeking to have the Commission reject or modify RLECs tariffs based upon evidence provided by different utilities in a different proceeding should not be countenanced by the Commission.

As KBCA noted, the Commission's decision on this issue is best served "with the benefit of a full record." The Commission now has a full record, and KBCA has provided no evidence that there is any need to change the RLECs tarrifs to alter the long-standing principle that the party causing the costs bears those costs. This is especially true given that KBCA refused to provide any evidence regarding: (1) its members' attachments on RLEC poles; or (2) its members' plans to seek to attach to RLEC poles in the future. *See* KBCA's Responses to the RLECs Requests for Information Nos. 1, 2, 17, 27.

Accordingly, based upon the evidence of record, there is no basis to revise the RLECs tariffs to reverse the Commission's long-standing the precedent that the party causing the costs bears those costs.

III. The RLECs' Tariffs are Fair, Just, and Reasonable.

The RLECs have shown that their proposed tariffs are fair, just, and reasonable. KBCA's arguments to the contrary are not supported by evidence, and KBCA was unable to support any of its claims in response to the RLECs' Requests for Information. Accordingly, the Commission should approve the RLECs tariffs as proposed.

A. The RLECs Pre-Payment Survey Costs are Fair, Just, and Reasonable.

KBCA objects to the pre-payment survey costs proposed by several RLECs. However, KBCA's Initial Brief acknowledges that the pre-payment survey costs are subject to a "final true up 120 days after make ready work is completed." *See* KBCA Initial Brief, at 10 (citing 807 KAR 5:015 §§ 4(2)(b)(6)(b), 4(6)(a). Accordingly, KBCA's objection is not about the cost that will be owed – as all parties, including the RLECs, agree that only "actual costs" are owed – KBCA's objection is solely about who gets to hold the money and which party would be put in the predicament of deciding whether to file an administrative action or legal action to collect amounts owed.

The evidence presented in this proceeding is that "Charter has not previously attempted to obtain true-ups from a RLEC party. . . ." KBCA Response to RLEC Request for Information No. 20. Conversely, there are numerous examples of a pole owner being forced to institute legal action to collect monies owed from KBCA's members.

For example, the case of *Time Warner Cable Midwest LLC v. Pennyrile Rural Elec. Coop. Corp.*, Case No. 5:15-cv-45-TBR, 2015 U.S. Dist. LEXIS 34917, at *3, *7-9, *13 (W.D. Ky. Mar. 20, 2015) exhibits KBCA and at least one member institution's propensity to engage in self-help remedies as it relates to pole attachment issues.

> Pennyrile has regularly sent Time Warner invoices for the growing difference between Pennyrile's charged rate of approximately $30 and Time Warner's paid rate of $7.50. This difference has grown to approximately $150,000. . . . For over a year, Pennyrile has sent Time Warner invoices showing an overdue amount, several of which are marked "Final Notice." . . . Time Warner was clearly aware of the rate dispute and arguably aware that it was in default of the Joint Use Agreement for not paying $30 per pole. . . . Time Warner interprets the first sentence as requiring Pennyrile to provide thirty days' notice of default and the second sentence as requiring Pennyrile to give an additional thirty days' notice before removing Time Warner's equipment. . . . [I]t does appear that a plain reading on the termination clause supports Pennyrile's interpretation. . . . [T]he

> Court finds that Time Warner has not demonstrated a strong likelihood of success.
> . . .

2015 U.S. Dist. LEXIS 34917, at *3, *7-9, *13 (W.D. Ky. Mar. 20, 2015).

In addition, the RLECs are aware that a pole owner has been forced to sue Comcast alleging that Comcast "failed to correct several safety violations attributable to [Comcast], despite having an express duty to do so. . . . [Pole owner] consequently performed the necessary repairs . . . and now seeks reimbursement from [Comcast] for that work." *Duke Energy Ind., Inc. v. Comcast of Indianapolis, L.P.*, No. 1:14-cv-02041-RLY-MJD, 2015 U.S. Dist. LEXIS 126004, at *1-2 (S.D. Ind. Sept. 21, 2015).

KBCA was expressly asked to provide any example of a situation where any RLEC had wrongfully withheld any true-up amounts; KBCA provided none. KBCA's arguments of an "administrative headache," seek only to force that "administrative headache" onto pole owners, so that it is the pole owners who must make a decision whether to give up their right to payment from an attacher or institute legal action. As shown above, history shows that forcing pole owners into this "administrative nightmare" is the exact form of gamesmanship KBCA's members have used against pole owners in the past.

All parties agree that pre-payment survey costs are subject to true-up so that an attacher must pay actual costs incurred. As was explained in the testimony of Keith Gabbard, the RLECs rarely receive attachment requests, have worked in good faith to arrive at a pre-payment survey costs, and are committed to truing up the actual costs consistent with the Commission's regulations. *See* Rebuttal Testimony of Keith Gabbard, at 15-16.

On the substantial evidence presented, the RLECs' proposed survey fees are fair, just, and reasonable.

B. The RLECs Must Have Adequate Mechanisms to Ensure Compliance.

KBCA's objections to the remedies available to the RLECs upon attacher default are unfounded. The objections are entirely predicated upon imagined examples of what an RLEC might do in the event KBCA failed to comply with the terms of the tariff. As an initial matter, neither KBCA nor its members should be overly concerned with these remedies; presumably, KBCA's members will safely maintain their attachments and timely pay all amounts owed, as they suggest in the context of other concerns they voice with various pole attachment tariffs.

In its Requests for Information, the RLECs specifically asked KBCA to identify any examples of an RLEC entity engaging in the type of behavior of which KBCA complains. KBCA either outright refused to provide that information or admitted that it had no evidence an RLEC party had ever engaged in such behavior. *See* KBCA's Responses to Requests for Information, at Nos. 5, 6, 7, 8, 9, 10, 12. As noted above, the proper avenue to deal with KBCA's unproven and entirely hypothetical claims of wrongdoing is through the complaint process, not elimination of all remedies available to an RLEC in the event an attacher engages in wrongful behavior.

Simply put, pole-owners like the RLECs need tariff remedies as a disincentive to lengthy and protracted litigation or delays in compliance, not so that the RLECs can unreasonably apply the tariffs – an unfounded fear that (if it were to ever occur) – can quickly be dealt with through the Commission's new complaint procedures. The case of *City of Athens v. Charter Commun's Holding Co.*, No. 5:03-cv-2430-VEH, 2005 U.S. Dist. LEXIS 58299 (N.D. Ala. July 7, 2005) highlights this need.

In that case, the City of Athens was forced to file a declaratory judgment action requesting that the Court make a legal conclusion as simple as, "Charter is obligated to comply

with all relevant safety standards including the National Electric Safety Code ("NESC") and the National Electric Code ("NEC")." *Id.* at *2. The factual background recited by the Court included the following facts:

> The City Council authorized Monroe to conduct a reinspection of the cable system to confirm Charter's ongoing compliance with its safety obligations under the Pole Attachment Agreement and 1998 Franchise. . . . The December, 2001, reinspection found that "most of the clearance violations in this system that were found to exist in August of 1999 have not been corrected. Bogie concluded that over fifty percent of the 192 items originally cited in the September, 1999, report had not, in fact, been corrected, including those not requiring any "make-ready" work by third parties. Further, the December, 2001, reinspection identified an additional 102 violations not previously identified in the first inspection. . . . In correspondence dated January 22, 2002, Charter noted that "35% of our cable plant in Athens has been cleaned up . . . at a cost of $86,543. Of the 101 violations noted in the December 2001 reinspection report, Charter acknowledged that only sixteen required make-ready work from other utilities before they could be corrected. Charter represented that it had since corrected 58 of the noted violations, and that material was on order to correct another twenty-five violations. In an internal e-mail correspondence in November, 2001, Charter representative Mike Atkins noted that "it will probably take 4-6 months to complete" the required corrections. In response, Charter representative Ron Johnson noted, "four to six months is too long. We need to put the rush on this. We have had over two years and have not gotten the job done yet."

Id. at *17-19 (emphasis added).

Without a detailed recitation of the legal arguments, the RLECs note that, upon this factual background, the court denied Charter's Motion for Summary Judgment on all eight of its counterclaims and granted summary judgment to the pole owner on six of its claims (as well as granting in part and denying in part a seventh claim). *Id.* at *65.

As the RLECs have maintained throughout this proceeding, there must be remedies available to the RLECs in the event of breach of the tariff by an attacher; not so that the RLECs can put forth an entirely hypothetical, unreasonable interpretation of the tariff as alleged by KBCA, but to ensure the RLECs' telecommunications systems are not rendered unsafe by attachers for years at a time.

Accordingly, the Commission should approve the RLECs tariffs as proposed.

C. Attachers' Contractors Must be Required to Carry Adequate Insurance.

The RLECs proposed tariff provisions requiring contractors working on the RLECs' property to maintain a minimum amount of insurance is fair, just, and reasonable. Contractors can and do cause damage to RLEC property (sometimes further resulting in personal injury), leading to alleged claims against the pole owner. The RLECs are entitled to assurances that minimum amounts of insurance will be maintained to protect against such potential liabilities.

The RLECs do not seek to supertintend any relationship between contractor and an attacher. To the contrary, it is KBCA that seeks to tell the RLECs how they must manage their assets, including who may work on those assets, and how much insurance those accessing RLEC property will carry. It is fair, just, and reasonable for the RLECs to ensure contractors working on RLEC property are adequately insured in the event of an accident.

In fact, KBCA argues that "KBCA 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. The RLECs' tariffs are intended to adequately protect the RLEC and its property; not a KBCA member. Moreover, like with all other information requested by the RLECs, 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 this proceeding." KBCA Response to Request for Information, No. 4. As a result, there is absolutely no evidence upon which the Commission could conclude that the RLECs are protected by KBCA's insurance requirements with contractors because KBCA once again refused to provide such information in this proceeding.

Finally, requiring all parties to maintain a minimum amount of insurance is both necessary and appropriate. 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 have been 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 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 RLECs to demand that any entity accessing its poles maintain minimum amounts of insurance, which will ensure that the RLECs are protected in the event of an accident relating to an attachment.

D. The RLECs' Indemnity Provision Should be Approved.

The RLECs proposed indemnity provision should be approved by the Commission without change. As has been noted throughout this proceeding, the indemnity provision is the exact same provision that the Commission already approved as "fair, just, and reasonable" for CATV Pole Attachments (and to which neither KBCA nor its predecessor ever objected), meaning there is already Commission precedent that the provision is fair, just, and reasonable.

Furthermore, KBCA's Initial Brief highlights exactly why the RLECs included their indemnity provision. KBCA argues that it wants to ensure each party is "held responsible for its fair share of the damages." KBCA Initial Brief, at 16. In other words, KBCA wants to be able to attempt to minimize its own liability by arguing that some event or damage was really the pole owner's fault. In fact, when specifically asked by the RLECs whether KBCA's members intended to accept full responsibility for damages caused by overlashing and, if not, to explain how it proposed liability should be apportioned, KBCA refused to respond. *See* KBCA's Response to Request for Information No. 19. This response is telling, and it underscores the need for this type of long-permissible safeguard.

Finally, in addition to the fact that the Commission has already approved of the RLECs' proposed indemnity provision in the pre-existing CATV Pole Attachment tariffs, the RLECs' proposed indemnity provision is clearly "fair, just, and reasonable" because it is practically identical to provisions that KBCA's member institutions have voluntarily accepted in pole

attachment agreements. As was described by the United States Court of Appeals for the Eleventh Circuit:

> Under the Pole Attachment Agreement, Time Warner agreed that it would indemnify Duke Power for injuries related to Time Warner's cables and Duke Power's poles unless caused by the sole negligence of Duke Power.

Cableview Communs. of Jacksonville, Inc. v. Time Warner Cable Southeast, LLC, 901 F.3d 1294, 1297 (11th Cir. 2018). Similarly, if damages were caused by the sole negligence of the RLEC, the RLECs proposed tariff would not require an attacher to indemnify.

In its Request for Information No. 18, the RLECs specifically requested that KBCA provide copies of any pole attachment agreement where a member agreed to indemnify a pole-owner unless the alleged damages were caused by the sole negligence of the pole-owner. KBCA objected to this Request and likewise claimed it had no such documents in its custody, control, or possession.

Given the *Cableview* opinion cited above, it appears that the 11th Circuit Court of Appeals and Duke Power would beg to differ. The *Cableview* opinion makes clear that attachers – including KBCA's members – have voluntarily agreed to the exact type of indemnification procedures set forth in the RLECs' tariffs.

Consequently, the Commission should approve the indemnification provision as proposed because it has already been previously-approved by the Commission, and it is the same indemnification procedure KBCA's members have accepted in voluntarily negotiated pole attachment agreements.

CONCLUSION

For the reasons set forth herein, the Commission should approve the RLECs' tariffs, as proposed, as implementing "fair, just, and reasonable" terms under 807 KAR 5:015.

Respectfully submitted,

/s/ Edward T. Depp
Edward T. Depp
R. Brooks Herrick
DINSMORE & SHOHL LLP
101 South Fifth Street, Suite 2500
Louisville, KY 40202
Tel: (502) 5430-2300
Fax: (502) 585-2207
tip.depp@dinsmore.com
brooks.herrick@dinsmore.com

and

M. Evan Buckley
DINSMORE & SHOHL LLP
100 West Main Street, Suite 900
Lexington, KY 40507
Tel: (859) 425-1000
Fax: (859) 425-1099
evan.buckley@dinsmore.com

Counsel to the RLECs

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.

/s/ Edward T. Depp
Counsel to the RLECs

26888585