

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC INVESTIGATION OF THE)
PROPOSED POLE ATTACHMENT TARIFFS OF) Case No. 2022-00108
INCUMBENT LOCAL EXCHANGE CARRIERS)

AT&T'S RESPONSES TO
THE KENTUCKY BROADBAND AND CABLE ASSOCIATION'S (KBCA)
INITIAL REQUEST FOR INFORMATION

FILED: May 5, 2022

AT&T Responses to Kentucky Broadband and Cable Association's Requests for Information

Responding Witness: Daniel Rhinehart

General Objections:

AT&T objects to each request to the extent it purports to require the release of information which is protected by the attorney-client privilege, the attorney work product doctrine, is prepared in anticipation of litigation or trial, or is otherwise protected by any other discovery privilege recognized under the Federal Rules of Civil Procedure or the laws of the Commonwealth of Kentucky. AT&T objects to compiling information or producing documents not maintained in the ordinary course of business; any request to the extent it requires AT&T to provide information that may be obtained by KBCA from another source that is more convenient, less expensive or less burdensome. AT&T objects to each request to the extent that it is vague, ambiguous, overly broad, unduly burdensome, oppressive or impossible to answer fully. AT&T objects to each requests to the extent that it seeks information which is not relevant to the subject matter involved in the pending action and is not reasonably calculated to lead to the discovery of admissible information.

Subject to and without waiving these objections, AT&T responds to the individually enumerated requests as follows:

1-1. Explain the cost basis for Your \$100 penalty for unauthorized attachments when a party with unauthorized attachments declines to participate in an inventory survey.

AT&T Response: As explained in AT&T'S April 14, 2022, Response To Objections of the Kentucky Broadband and Cable Association (KBCA) to AT&T's proposed pole attachment tariff, AT&T's tariff does not impose a penalty for declining to participate in an inventory survey. The sanction is not for declining to participate in an inventory survey. Rather, it is a sanction for declining to participate in an inventory survey, *and* having an unauthorized attachment.

The tariff language is consistent with well-established precedent of the Kentucky Public Service Commission and the Federal Communications Commission (FCC) regarding this issue. Over a decade ago, in April 2011, the FCC determined it would consider contract-based penalties for unauthorized attachments to be presumptively reasonable if they do not exceed those implemented by the Oregon Public Utilities Commission ("Oregon PUC"), including but not limited to: (a) an unauthorized attachment fee of five times the current annual rental fee per pole if the pole occupant does not have a permit and the violation is self-reported or discovered through a joint inspection; and (b) an additional sanction of \$100 per pole if the violation is found by the pole owner in an inspection in which the pole occupant has declined to participate. (*See In the Matter of Implementation of Section 224 of the Act, A National Broadband Plan for our Future*, Report and Order and Order on Reconsideration, WC Docket Number 07-245, GN Docket No. 09-51, FCC Rcd, Volume 26, No 7, pages 5291-5292 at ¶115 (April 7, 2011).) The FCC made no reference to a cost basis for the level of the penalty, nor should it have as it found the Oregon system of fines had been effective in reducing the incidence of unauthorized attachments.

1-1.a. Explain and provide data concerning all costs you incur as a result of unauthorized attachments.

AT&T Response: Objection. The request is vague, ambiguous, and overly-broad. Subject to and without waiving objection, the sanction for unauthorized attachments should be seen as a fine, penalty or punishment and is not necessarily cost-based. It is instead designed to dissuade Attaching Parties from attaching facilities without conducting engineering analyses and receiving approval from the pole owner, and to avoid unsafe loads on poles resulting in injury, death, or significant property damage. The FCC has found this solution, along with the means provided in the tariff for avoiding payment, to be reasonable and in the public interest. In fact, the FCC did not alter its position on unauthorized attachments in subsequent orders issued in recent pole attachment-related rulemakings.

1-1.b. Explain how those costs are not recovered in the unauthorized attachment fee set forth in Section 18.2.1 of Your Proposed Tariff.

AT&T Response: The fee is not cost-based, but, like a traffic citation, is a fine/penalty—punitive by design in an effort to shape appropriate behavior. The unauthorized attachment fee, as stated in Section 18.2.1, is for back rent. Sanctions are not rent. Rent is not a sanction.

1-1.c. Explain whether you would consider a third party attacher to have participated in an inventory survey if it cooperates with AT&T during the audit process, but does not actually go into the field with the auditors.

AT&T Response: Objection. The request is vague, ambiguous and calls for speculation. Subject to and without waiving these objections, AT&T's tariff does not require actual field work with auditors. Section 18.2.2 gives an example of "participation" in an Inventory Survey as identification of the locations of the party's attachments. Section 18.2.3 also clearly indicates that an attacher may avoid the unauthorized attachment penalty through submission of an Application and correction of safety violations within the times specified. Neither of the identified activities of the Attaching Party are field work.

1-2. Explain and provide data concerning why AT&T should only be liable for its gross negligence or willful misconduct, and not its negligence.

AT&T Response: AT&T's Structure (poles, ducts, and conduit) are deployed throughout its service territory, and it is impractical for any owner of poles or conduit systems, including AT&T, to know the exact condition of all of its Structure on an ongoing, comprehensive and instantaneous basis because the Structure can be subjected to natural and man-made environmental factors which result in immediate changes. As such, it is incumbent on Attaching Parties, who may be working aloft on AT&T poles or entering AT&T manholes to take all ordinary safety precautions relative to the use of AT&T Structure – including informing AT&T of safety issues the Attaching Party found as part of its safety-check pre-work activities. As such, it is possible for Attaching Parties to avoid or mitigate dangers inherent in work with AT&T Structure, and, therefore, Attaching Parties should assume responsibility for all but AT&T's gross negligence or willful misconduct.


Notably, AT&T's tariff provides a reciprocal protection for Attaching Parties in that AT&T assumes the same liability on itself to the benefit of the Attaching Party relative to work in, on, or in the vicinity of its Structure.

1-2.a. Explain why third party attachers should be liable for Your negligence.

AT&T Response: Objection. The request is ambiguous and requires assumption of facts not in evidence. Subject to and without waiving these objections, Attaching Parties accessing AT&T's Structure may avoid injuries by following proper safety protocols and reporting unsafe conditions to AT&T. Should an attacher proceed to work on AT&T Structure with known safety issues, and sustain injury or loss, the attacher should assume responsibility for their own negligence in attempting work in unsafe conditions.

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2022, I electronically filed the foregoing document using the Kentucky Public Service Commission's electronic system for filing, which sent notice of filing to counsel of record.



John T. Tyler