

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

AT&T's REPLY BRIEF

October 18, 2022

Pursuant to the Kentucky Public Service Commission’s (“Commission’s”) September 23, 2022 Order in this matter, AT&T¹ respectfully submits this Reply Brief in support of its tariff filed pursuant to 807 KAR 5:015 § 3(7) on February 28, 2022.²

I. INTRODUCTION

Pursuant to Commission order in Case Numbers 2022-00064, AT&T received limited objections to its tariff on March 17, 2022 from only one party – the Kentucky Broadband and Cable Association (“KBCA”). AT&T filed its response to the KBCA objections on April 14, 2022. Subsequently, the Commission opened Case Number 2022-00108 to receive discovery, testimony, briefs, and other filings. KBCA filed its testimony on June 9, 2022, and AT&T filed its responsive testimony on July 11, 2022.

II. AT&T-Specific Issues that KBCA Raised

KBCA raised only three specific issues with respect to AT&T’s proposed tariff. The issues related to: (a) concerns about sanctions for declining to participate in inventory surveys; (b) limitations of claims to 24 months from the date of occurrence; and (c) the requirement in the tariff that an Attaching Party indemnify AT&T in certain circumstances.³

(a) AT&T’s Inventories and Sanctions Language is Reasonable

As AT&T explained in its April 14, 2022, response to KBCA’s objections and its July 11 testimony, AT&T’s view of “participation” in the inventory process is quite permissive, and the focus of tariff Section 18.2 is on unauthorized attachments. AT&T’s tariff language and sanction structure are consistent with longstanding FCC precedent pertaining to unauthorized attachments.

¹ BellSouth Telecommunications, LLC d/b/a AT&T Kentucky (AT&T)

² AT&T agreed to a small number of minor changes to the as-filed tariff in discovery and/or in prefiled testimony. AT&T reiterates its willingness to make the agreed-to changes.

³ KBCA’s March 17, 2022 Objections at p. 3.

AT&T explained, Attaching Parties have reasonable ways of avoiding any sanction by either establishing that AT&T has already provided them with permission to attach to the specific pole or by promptly seeking such permission. Given AT&T's explanation and the fact that the Commission has previously approved interconnection agreements ("ICAs") with the same language, the Commission should approve AT&T's tariff as filed.⁴

(b) AT&T's Claims Limitation is Reasonable

KBCA states that it objects to AT&T's tariff term that requires any claims under the tariff to be brought no more than 24 months from the date of the occurrence which gives rise to a dispute.⁵ KBCA offered no alternative language as part of its objection or in prefiled testimony.

The Commission has previously approved ICAs with structure access attachments that include similar language, and approval of AT&T's tariff will ensure that all Attaching Parties are treated the same regardless of whether they have an ICA, a Stand-Alone Structure Access Agreement, or are attached to AT&T's Structure pursuant to AT&T's tariff. AT&T's language is reasonable, and because it is reciprocal, both parties are equally protected.⁶ The Commission should approve AT&T's tariff as filed.

(c) AT&T's Indemnity Provision is Reasonable

KBCA "objects to any standard that would hold an attacher responsible for the negligence of a pole owner." KBCA's testimony of Mr. Jerry Avery is similarly terse claiming "[t]his requirement is unjust and unreasonable" and that "[n]o party should ever bear the responsibility of

⁴ Rebuttal Testimony of Daniel Rhinehart on Behalf of AT&T, July 11, 2022 ("Rhinehart Rebuttal"), pp. 3 to 3, Exhibit DPR-2, pp. 1 to 6.

⁵ KBCA's March 17, 2022 Objections at p. 3.

⁶ Rhinehart Rebuttal, p. 4. See Exhibit DPR-2, pp. 6 to 8 for the full text of AT&T's response to KBCA on this topic.

the negligence of another party...” Mr. Avery concludes his five lines of testimony by calling indemnity provisions “nonsensical and deeply unfair.”⁷

The indemnity provision that KBCA complains about is related to an **Attaching Party’s** work (emphasis added) in, on, or in the vicinity of AT&T’s Structure (e.g., poles, ducts, and conduit) and/or Attaching Party’s access to or use of AT&T’s Structure.⁸ As described in more detail by AT&T witness Rhinehart, Attaching Parties have an obligation to themselves, their employees, and to the public, among others, to operate safely, both aloft and underground. This includes a reasonable expectation that an Attaching Party will carefully examine a pole or conduit and its environment for safety issues before working on, in, or near AT&T’s Structure. Attaching Parties who fail to operate safely or cause unsafe conditions because of their operations must reasonably be expected to assume potential liability. This makes common sense, especially in a litigious society where every possible person or entity that might in any way be found culpable can and often will be sued.

Mr. Rhinehart also observed that similar indemnity provisions are in ICAs that the Commission previously approved and that the indemnity provisions in AT&T’s tariff are reciprocal – AT&T will indemnify Attaching Parties pursuant to its tariff’s terms if AT&T’s work on, in, or in the vicinity of AT&T’s Structure leads Attaching Party to be named in a lawsuit. Thus, the Commission should find the indemnity provisions of AT&T’s tariff reasonable and should approve AT&T’s tariff as written.

III. Allocation of Costs for Replacement of Non-Red-Tagged Poles

KBCA asserts that the Commission should abandon long-standing economically rational cost causation rules in favor of shifting its potential pole replacement costs of non-red-tagged poles

⁷ Testimony of KBCA witness Jerry Avery at p. 5.

⁸ Rhinehart Rebuttal, pp. 4 to 6 and Exhibit DPR-2 at pp. 8 to 11. PSC KY. Tariff 2A, A5.13.4 section 22.2.

onto the backs of captive power company ratepayers and competitive broadband provider pole owners. KBCA takes this position despite the Commission’s implicit rejection of KBCA’s advocacy for the identical outcome in the extended lead-up to the Commission’s published pole attachment rules. In support of its flawed proposals, KBCA witness Kravtin makes many statements that are not founded in fact and reflect broad misunderstandings of accounting and ratemaking principles. Indeed, many of Ms. Kravtin’s so-called arguments are developed in an echo chamber of citations to “a growing body of economic literature” for which she is the principle or at least a contributing author.⁹ However, Ms. Kravtin’s positions have recently attracted opposition economic analyses from Dr. Timothy Tardiff and from Kenneth P. Metcalfe, et al..¹⁰

Ms. Kravtin cavalierly waves away the fact that a non-red-tagged pole is simply a pole that would not be replaced under normal circumstance “but for” an attacher’s request for a new attachment. The requestor is the “cost causer” as the pole owner would not be incurring new, unforeseen, unplanned costs absent the attachment request. The “cost-causer pays” regime involves an equitable trade-off, whereby the pole owner provides access to an existing pole and the attacher, for make-ready costs and a nominal rental rate, deploys its facilities on the provided pole without having to bear the costs to build its own infrastructure.

AT&T witness Rhinehart points out numerous flaws in Ms. Kravtin’s analysis.¹¹ First, Ms. Kravtin ignores a critical legal issue. Faced with increased costs not recovered from the cost causer, pole owners will be incented to exercise their 807 KAR 5:015 Section 2.a. right to deny

⁹ Kravtin Testimony, p. 11.

¹⁰ See: Dr. Timothy Tardiff prepared a “Report Addressing Economic Analyses Submitted in Response to the Federal Communications Commission’s March 2022 Second Further Notice of Proposed Rulemaking. <https://www.ustelecom.org/wp-content/uploads/2022/10/Tardiff-Poles-Economic-Report-.pdf> See also Report of Kenneth P. Metcalfe, Christopher F. Tierney, and Tyler S. Blum of HKA Global, Inc. attached to Comments of Southern Company, et al., WC Docket No. 17-84 (June 27, 2022) (“Metcalfe Report”).

¹¹ For the sake of brevity, AT&T herein identifies only some of the conceptual flaws in Ms. Kravtin’s testimony that Mr. Rhinehart identified. AT&T is not waiving or recanting positions not cited herein.

pole access due to insufficient capacity forcing new attachers to utilize more costly alternatives to the deployment of broadband facilities – just the opposite of one of KBCA’s desired outcome.¹² Second, Ms. Kravtin ignores this Commission’s statements that strongly suggest that extra pole costs caused by the new attacher but shifted to the pole owner would not be recoverable in a general rate case.¹³ Third, Ms. Kravtin mistakenly asserts that the depreciation of existing poles creates a piggy bank of cash sufficient to replace the entire inventory of poles over time. Depreciation only recovers historic sunk cost, not the substantially inflated current cost of pole replacements.¹⁴ Fourth, Ms. Kravtin implies that any pole that equals or exceeds its average account depreciable life should be replaced. This is akin to suggesting that because a car has reached its 5-year depreciation limit, it ought to be scrapped. Average accounting lives do not translate to automatic red-tag status or mandatory replacement at a date certain. Further, net book value does not reflect either the true value of a still viable pole that “but for” the attachment request, would have many more years of useful life, or the costs that premature pole replacement imposes on the pole owner.¹⁵ Fifth, Ms. Kravtin lists a number of supposed “operational” and “strategic” benefits of premature pole replacements supposedly accruing to pole owners. The claimed benefits of lower costs, higher revenues, are simply too speculative or illusory to be considered valid. The claim of “tax savings” is nearly completely illusory as taxes are only deferred and not forgiven.¹⁶

Respondents to KBCA’s proposals in this and related Commission cases agree. After extensive citations to its witness testimony and the Commission’s legislative explanation for its adoption of the current rule, Duke concludes: “requiring attachers to pay the full cost of any non-

¹² Rhinehart Rebuttal, p. 8.

¹³ Rules, description, and justification of the Commission’s proposed pole attachment regulations filed with the Legislative Review Committee, September 15, 2021. p. 47. See also Rhinehart Rebuttal, p. 8.

¹⁴ Rhinehart Rebuttal, pp. 9 to 10.

¹⁵ Rhinehart Reply, p. 13.

¹⁶ Rhinehart Reply, pp. 15 to 16.

red-tagged pole replacements that their attachments necessitate is reasonable and consistent with the regulation.”¹⁷ LG&E and KU make similar points¹⁸ and further argue that the current cost-causer-pays paradigm has been a part of its pole attachment tariff since at least 2015, and it has survived through four rate cases.¹⁹ LG&E and KU assert that because KBCA’s cost allocation proposal would shift significant cost to electric utilities and their ratepayers, the proposal should be considered, if at all, during the Companies’ rate cases.²⁰ Kentucky Power argues that KBCA’s proposal would shift 95% of non-red-tagged pole replacement costs onto the utility and its ratepayers.²¹ altafiber weighs in against KBCA’s proposal as well.²²

IV. Conclusion

KBCA’s three specific criticisms of AT&T’s proposed tariff are unfounded, and AT&T has fully and adequately justified its proposed language. Therefore, AT&T requests the Commission reject KBCA’s objections to AT&T’s Proposed Pole Attachment Tariff, and approve the Tariff that AT&T submitted to the Commission on February 28, 2022, with minor agreed-to changes, because AT&T’s tariff is adequate, efficient, just, and reasonable.

KBCA’s repeated attempts to shift costs it legitimately incurs as a cost causer of pole replacements onto pole owners and utility and competitor customers should be soundly rejected. The Commission should hold the line and expressly reaffirm its long-standing “cost causer pays” paradigm and approve implementing language in AT&T’s Proposed Pole Attachment Tariff.

¹⁷ Case Number 2022-00105, Duke Energy Kentucky, Inc.’s Brief (October 11, 2022). Argument at pp. 5 to 8, Conclusion at p. 8.

¹⁸ Case Number 2022-00105, Louisville Gas & Electric Company’s and Kentucky Utilities Company’s Initial Brief In Support of Their Revised Pole Attachment Tariffs (October 11, 2022). Argument at pp. 16 to 22.

¹⁹ Id., pp. 17 to 18.

²⁰ Id., p. 22.

²¹ Case Number 2022-00105, Initial Brief of Kentucky Power Company in Support of Revised Tariff (October 11, 2022). Argument at pp. 14 to 18, 95% claim at pp. 18 and 21.

²² Case Number 2022-00108, Initial Brief of Cincinnati Bell Telephone Company LLC d/b/a altafiber (October 11, 2022). Argument at pp. 2 to 5.

Respectfully Submitted



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