

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

In the Matter of:

ELECTRONIC INVESTIGATION OF THE)
PROPOSED POLE ATTACHMENT)
TARIFFS OF INCUMBENT LOCAL)
EXCHANGE CARRIERS)

Case No.
2022-00108

DIRECT TESTIMONY

OF

JERRY AVERY

Submitted on

Behalf of

The Kentucky Broadband and Cable Association

June 9, 2022

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I. INTRODUCTION AND QUALIFICATIONS.

Q: Please state your name, business address, and occupation?

A: My name is Jerry Avery. I am the Area Vice President for Charter Communications (“Charter”) in the Kentucky management area, which includes Indiana, Kentucky, and parts of Ohio and Tennessee. My business address is 4701 Commerce Crossings Dr., Louisville, Kentucky, 40229.

Q: Please summarize your professional background.

A: I have worked in the cable industry for 25 years. Before working at Charter, I worked at Time Warner Cable (“TWC”) as a General Manager. In that role, I managed outside plant teams, including in Kentucky, and worked daily on pole attachment issues. The sales, field operations, and dispatch teams reported to me. Later, TWC promoted me to Director of Field Operations. As Director of Field Operations, my sole responsibility was field operations, including outside plant management, construction, and maintenance. I was also responsible for managing the relationships with pole owners and franchise entities, in coordination with TWC’s government affairs team.

When Charter acquired TWC in 2016, I became the Area Vice President for the above-mentioned areas. I have held that position for the last six years. As Area Vice President, I lead Charter’s field operations and construction teams. To carry out these responsibilities, I regularly interface with pole owners and Charter’s outside plant contractors, in addition to my internal teams. I also help resolve day-to-day issues between Charter and pole owners, as well as more formal disputes. I am well-acquainted with the requirements of the National Electric Code (“NEC”), National Electric Safety Code (“NESC”),

Occupational Safety and Health Administration (“OSHA”), and Kentucky’s pole attachment regulations. I am also familiar with Charter’s contracts with its outside plant contractors.

Q: Have you previously testified before this Commission?

A: No.

Q: On whose behalf are you testifying?

A: I was asked to provide testimony for the Kentucky Broadband and Cable Association (“KBCA”) because Charter is the largest cable broadband provider in Kentucky and a leading member of the KBCA. Charter has more pole attachments and customers in Kentucky than any other member of the KBCA. Charter’s experiences with regard to pole attachments in Kentucky are representative of the other KBCA members.

Q: Please summarize your testimony.

A: My testimony addresses several factual issues raised by some terms in the proposed tariffs submitted by the pole owners in this proceeding—specifically terms related to the removal of an attacher’s plant, contractor insurance requirements, and pole owner negligence.¹ For the reasons stated below, the proposed terms are, in my experience, unjust and unreasonable. If these provisions are maintained in the tariffs, they will make it much more difficult and costly for Charter and other KBCA members to deploy broadband in Kentucky, including in rural areas. Specifically, I will testify about:

¹ I do not address legal issues raised by the terms in the proposed tariffs. I understand the parties will address those issues later in the proceeding.

- **Unreasonable Removal of Attacher’s Plant.** Certain of the proposed tariffs allow pole owners to remove an attacher’s plant in as little as 30 days if the attacher allegedly fails to comply, in the pole owner’s discretion, with any term in a tariff, even if the attacher disagrees with a pole owner’s assertion and whether or not the attacher is working to cure.² In my experience, because pole owners have absolute control over access to poles, 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 by the attacher or when 30 days is an unreasonable timeframe to cure. Such a requirement would give far too much leverage to the pole owner, including in disputes over compliance. Indeed, it is not uncommon for attachers and utilities to have disputes over billing or other compliance issues (for example, whether a certain attachment complies with the NESC). If pole owners were allowed to remove attachments after 30 days, including in a dispute, the parties would never be able to resolve any issue without bringing a case to the Commission. Having a unilateral, discretionary right to remove an attacher’s entire network for any issue that can be resolved in a longer period makes no sense and gives pole owners an unfair advantage in any good faith dispute, and such discretion is far outside industry norms. In my experience, attachers and pole owners often work in good

² See Ballard Rural Telephone Cooperative Corp., Brandenburg Telephone Co., Logan Telephone Cooperative, Inc., South Central Rural Telecommunications Cooperative, Inc., and Thacker-Grigsby Telephone Co., Inc., Tariffs (all incorporating Duo County Telephone Cooperative, Inc. Access Tariff), Original Page 18-10, Section 18.11; Kentucky Power Company Tariff, Sheet No. 16-11, ¶ 26 (stating Company may remove attachments if Operator fails to cure non-compliance in 60 days); Duke Energy Kentucky, Inc., Tariff, Page 9, Terms & Conditions, ¶ 29 (stating Company may remove attachments if Attachee fails to cure non-compliance in 60 days).

faith to resolve disputes. However, even mere threats of potential disconnection can cause disruption in an attacher's business and unnecessary risk to its customers.

Instead, if there is a bona fide dispute between the parties, the parties should have an opportunity to resolve the dispute informally, prior to seeking the Commission's involvement—removal should never be an option for the pole owner, except in an event of actual default. And, if an attacher is actively working to remedy any issues, it should be provided a reasonable opportunity to do so.

- **Contractor Insurance Requirements.** Certain of the proposed tariffs require KBCA's members' contractors, who work with pole attachments, to comply with the same insurance requirements as KBCA members.³ This is not possible. Cable companies have numerous contractor relationships and spend a great deal of company resources entering into large contracts with their contractors, which include robust insurance requirements. KBCA members cannot change each of these contracts based on each pole owner's insurance requirements for KBCA members. KBCA members are required in every tariff to indemnify the pole owner for negligent work performed by the member or its contractors.⁴ Therefore, if the insurance in the member's contractor contract is inadequate, the member is ultimately responsible to the pole owner, in any case. KBCA members simply cannot renegotiate all of their contractor contracts at the whim of each

³ See, e.g., Clark Energy Cooperative Tariff at Original Page 118.10, Article VI(E) (tariff representative of the RECC tariffs); Louisville Gas & Electric Company Tariff at Original Sheet 40.25, ¶ 23(b); Kentucky Utilities Company Tariff at Original Sheet 40.25, ¶ 23(b).

⁴ 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); Kentucky Power Company, Sheet No. 16-8, ¶ 18; BellSouth Telecommunications Kentucky, Original Page 69-70, Section 22; Duke Energy Kentucky, Inc. Tariff, Page 7, Terms & Conditions, ¶ 19.

pole owner; and the pole owners have provided no basis for such an extreme and inefficient requirement.

- **Pole Owner Negligence.** Certain of the proposed tariffs seek to hold an attacher responsible for the pole owner’s own negligence.⁵ This requirement is unjust and unreasonable as well. No party should ever bear the responsibility for the negligence of another party, including negligence caused by a pole owner. Such a requirement is nonsensical and deeply unfair.

II. IT IS UNREASONABLE FOR POLE OWNERS TO HAVE UNFETTERED DISCRETION TO REMOVE ATTACHMENTS.

Q: Do some of the proposed tariffs allow a utility to remove attachments under any circumstances?

A: Yes, they do.

Q. Under what circumstances do the proposed tariffs allow a utility to remove an attacher’s attachments?

Certain proposed tariffs state the 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’s equipment at the Attacher’s sole risk and expense” if “the Attacher shall fail to comply

⁵ See, e.g., Ballard Rural Telephone Cooperative Corp., Brandenburg Telephone Co., Logan Telephone Cooperative, Inc., South Central Rural Telecommunications Cooperative, Inc., and Thacker-Grigsby Telephone Co., Inc., Tariffs (all incorporating Duo County Telephone Cooperative, Inc. Access Tariff), at Original Page 18-7, Section 18.8; Clark Energy Cooperative Tariff at Original Page 118.20-118.22, Art. XVIII (tariff representative of the RECC tariffs); Kentucky Power Company, Sheet No. 16-8, ¶¶ 18 & 19; Louisville Gas & Electric Company Tariff at Original Sheet 40.21, ¶ 18; Kentucky Utilities Company Tariff at Original Sheet 40.21, ¶ 18; BellSouth Telecommunications Kentucky Tariff, Original Page 69-70, Section 22; Duke Energy Kentucky, Inc. Tariff, Page 7, Terms & Conditions, ¶ 19.

with any of the provisions of this tariff” and fail to cure such non-compliance in as little as 30 days after written notice.⁶

Q: Is this requirement reasonable?

A: No, it is not.

Q: Why not?

Allowing a utility unfettered discretion to remove all or any of an attacher’s attachments for so-called “non-compliance” is overbroad and manifestly unjust and unreasonable for multiple reasons. As discussed above, there are often disputes between pole owners and attachers regarding compliance, and allowing a pole owner to remove an attacher’s entire communications network if the attacher does not accede to any pole owner demands is not only unreasonable but would lead to more disputes at the Commission. Indeed, I have been involved with disputes over mundane issues like billing (*e.g.*, what is the reasonable amount owed) and technical NESC compliance issues (*e.g.*, did the attacher cause an issue or did the pole owner), and these disputes can take time to resolve informally—certainly more than 30 days. Indeed, allowing a utility to threaten or exercise that authority gives attachers the choice of either accepting the pole owner’s position, even if incorrect or mistaken, or incur irreparable harm to their business and customers. This concern is real, not theoretical. Charter has faced situations where a pole owner has threatened to remove its attachments during a billing dispute. In one case, a pole owner publicly threatened to remove Charter’s attachments over a billing dispute, which caused widespread concern and

⁶ See Ballard Rural Telephone Cooperative Corp., Brandenburg Telephone Co., Logan Telephone Cooperative, Inc., South Central Rural Telecommunications Cooperative, Inc., and Thacker-Grigsby Telephone Co., Inc., Tariffs (all incorporating Duo County Telephone Cooperative, Inc. Access Tariff), Original Page 18-10, Section 18.11.

confusion among its customers. Charter faced an onslaught of calls from customers worried their service would be disconnected. There is simply no reason a utility should have the unilateral authority to threaten disconnection – triggering irreparable harms – whenever the parties have a good faith dispute over compliance with a tariff term.

Moreover, it is unreasonable for a utility to have a right to disconnect attachments within 30 days where an attacher is actively working to remedy the situation. For a variety of reasons, including local permitting issues or the need to coordinate work with other attachers (including the pole owner) compliance repairs can often take longer than 30 days to fix an issue. When an attacher is working in good faith to fix an issue identified by a pole owner that cannot be repaired in a short timeframe, a pole owner should be prohibited from threatening removal of an attacher’s attachments or entire communications network.

Q: Are you aware that certain utilities have asserted that, without a right to remove attachments, attachers are not incentivized to comply with tariff terms?⁷

A: Yes.

Q: Do you think that is a legitimate concern?

A: No.

Q: Why not?

A: Attachers have every incentive in the world to work in good faith to resolve any legitimate compliance issues. Just like electric facilities, a communications network must be properly and safely installed and maintained to ensure reliable service to its customers. Instead of

⁷ See, e.g., Brandenburg Telephone Co.’s Response to KBCA Request for Information 1-6(a) (Response representative of the RLECs).

really needing the “teeth” of removing attachments, in my experience, pole owners instead often use their leverage to remove attachments in billing and other disputes that have nothing to do with ensuring safe pole conditions and reliable service. And if attachers do make a mistake, the tariffs already provide for other, less drastic remedies.⁸ These less extreme provisions are and should be the industry norm.

Q: Are you aware of certain utilities’ assertions that if a tariff rate has been approved by the Commission there can be “no dispute” regarding payment?⁹

A: Yes.

Q: Do you think this is a fair or accurate statement?

A: No.

Q: Why not?

A: The notion that there cannot be any good faith billing dispute after a tariff is approved is seriously mistaken. *First*, there may be disputes about whether an invoiced rate was properly calculated by the pole owner. *Second*, even if there is no dispute over the rate

⁸ For example, the proposed tariffs provide for unauthorized attachment penalties, contractor requirements, inspections, a bond, and indemnity provisions to incentivize attachers to comply with the terms of the agreement, and protect pole owners from any noncompliance. *See, e.g.*, Duo County Telephone Cooperative, Inc. Tariff at §§ 18.8 (indemnities and insurance), 18.9 (surety), 18.14 (unauthorized attachments), 18.15 (overlapping inspection), and 18.23 (contractor requirements); Clark Energy Cooperative Tariff at Articles VI (approved contractors), VII (audits and inspections), IX (unauthorized attachments), XXI(A)(1)-(5) (insurance), and XXI(A)(6) (bond); Louisville Gas & Electric and Kentucky Utilities Company Tariffs at ¶¶ 14 (inspections and audits), 18 (indemnities), 19 (unauthorized attachments); 23 (insurance); and 24 (performance assurance).

⁹ *See, e.g.*, Brandenburg Telephone Co.’s Response to KBCA Request for Information 1-6(b) (Response representative of the RLECs).

itself, there may be disputes over the number of attachments to which it applies. Both of these kinds of issues have given rise to good faith disputes in my experience.

III. IT IS UNREASONABLE FOR POLE OWNERS TO REQUIRE ATTACHERS TO RENEGOTIATE CONTRACTS WITH THEIR CONTRACTORS FOR INSURANCE PURPOSES.

Q: Do you know whether any proposed tariffs impose insurance requirements on attachers' contractors?

A: Yes. Certain tariffs contain terms requiring attachers to require their own contractors to maintain certain insurance levels.

Q: What are those requirement?

A: Certain tariffs require attachers' "agents, contractors and subcontractors" to comply with the same insurance obligations as the attacher itself.¹⁰

Q: Are such insurance requirements just and reasonable?

A: No.

Q: Why not?

A: As discussed above, cable companies have numerous contractor relationships and spend a great deal of company resources negotiating and entering into large contracts with their contractors, which include robust insurance requirements. KBCA members cannot change each of these contracts based on each pole owner's preferred insurance requirements. So, it would be highly impracticable if not virtually impossible to comply with any such

¹⁰ See, e.g., Clark Energy Cooperative Tariff at Original Page 118.10, Article VI(E) (tariff representative of the RECC tariffs); Louisville Gas & Electric Company Tariff at Original Sheet 40.25, ¶ 23(b); Kentucky Utilities Company Tariff at Original Sheet 40.25, ¶ 23(b).

requirement. In any case, 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.¹¹ The pole owners' proposed requirements reflect a serious and unnecessary overreach.

Q: Do attachers actually require their own contractors to carry insurance?

A: Yes. Every contract that Charter (and my previous company, and, as I understand, all cable companies) enters into with any outside plant contractor of course includes robust insurance requirements.

IV. IT IS UNREASONABLE TO HOLD ATTACHERS RESPONSIBLE FOR CONDITIONS THEY DID NOT CAUSE.

Q: Do some of the proposed tariffs hold attachers responsible for any harms they did not cause?

A: Yes.

Q: How so?

A: Certain utility tariffs propose to hold attachers responsible for the pole owner's own negligence.¹²

Q: Is that fair or reasonable?

A: No.

¹¹ *Supra* footnote 4.

¹² *Supra* footnote 5.

Q: Why not?

A: While each party on a pole should be responsible for any issues that it causes, no party should be responsible for issues it did not cause, especially when the damaging party is negligent. I would not expect any pole owner to be responsible for Charter's negligence. And, in the event that the attacher and the pole owner are both negligent, they should each be responsible for their fair share of the damage. In sum, 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.

Q: Are you aware whether certain utilities allege that, if a utility is responsible for its own negligence, including joint negligence, an attacher would attempt to shift blame to a utility for any pole damage?¹³

A: Yes.

Q: Do you agree with this statement?

A: No.

Q: Why not?

A: I am not aware of any situation where an attacher has sought to shift blame to a utility for damage that it caused. Nor does it make a lot of sense that, just because a pole owner is

¹³ See, e.g., Clark Energy Cooperative Response to KBCA Request For Information 1-12, at 18 (stating "If a third-party incurs damage involving a utility pole owned by the Cooperative, the owner of the pole will undoubtedly be included in any lawsuit or claim for damages. Without protection to a pole owner, an attacher would be incentivized to shift blame to a pole owner to attempt to minimize the extent of its own losses caused by the attacher's negligence") (Response representative of the RECCs); Brandenburg Telephone Co. Response to KBCA Request For Information 1-5 (Response representative of the RLECs).

responsible for its own negligence, an attacher would look to blame it for all issues, even those the utility did not cause. It is not reasonable to allow utilities to escape responsibility for their own negligence to guard against the purely theoretical risk that an attacher may try to blame them for damage they did not create.

V. CONCLUSION

Q: Does this conclude your testimony?

A: Yes, it does. Thank you for the opportunity to submit testimony in this important proceeding.

[VERIFICATION ON SEPARATE PAGE]

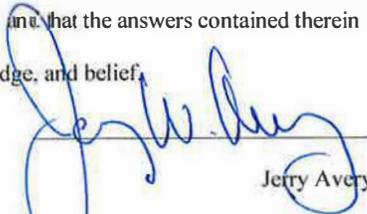
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VERIFICATION

The undersigned, Jerry Avery, being duly sworn, deposes and says that he has personal knowledge of the matters set forth in his direct testimony, and that the answers contained therein are true and correct to the best of his information, knowledge, and belief.



Jerry Avery

COMMONWEALTH OF KENTUCKY)
JEFFERSON COUNTY)

SUBSCRIBED AND SWORN TO before me by Jerry Avery on this the 8 day of June,
2022.

Notary: 
622975