

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC INVESTIGATION OF THE)	CASE NO.
PROPOSED POLE ATTACHMENT TARIFFS OF)	2022-00105
INVESTOR OWNED ELECTRIC UTILITIES)	

ORDER

This matter was initiated to investigate proposed amendments to the pole attachment tariffs of Louisville Gas and Electric Company (LG&E), Kentucky Utilities Company (KU), Duke Energy Kentucky, Inc. (Duke Kentucky), and Kentucky Power Company (Kentucky Power) filed pursuant to 807 KAR 5:015. On June 9, 2022, Kentucky Broadband and Cable Association (KBCA) filed testimony pursuant to the procedural schedule, including the testimony of Patricia Kravtin discussing how the Commission should allocate the cost of make-ready to replace non-red tagged poles. On June 20, 2022, Kentucky Power filed a motion to strike the testimony of Ms. Kravtin based on the argument that the positions that she advocates in her testimony were fully litigated and rejected by the Commission “in the rule making proceeding” when it promulgated 807 KAR 5:015. On June 21, 2022, LG&E, KU, and Duke Kentucky filed brief responses indicating that they agreed with Kentucky Power’s motion. On June 27, 2022, KBCA filed a response arguing that Kentucky Power’s motion should be denied, because the regulation and the Commission explicitly indicated that the issue would be addressed through the tariff filing process. Having reviewed the motion and being otherwise sufficiently advised, the Commission finds that Kentucky Power’s motion is denied.

Kentucky Power's argument that the Commission fully litigated the issues raised in Ms. Kravtin's testimony in the "rule making proceeding" is not based on the language of the regulation, but rather, is based on language in the Statement of Consideration filed in response to comments that:

The amendment proposed by KBCA could result in electric rates that are not fair, just and reasonable. When reviewing utility rates and charges to determine if they are fair, just and reasonable and otherwise comply with statutory requirements imposed by KRS Chapter 278, the Commission generally attempts to ensure that costs are assigned to the party responsible for causing the utility to incur the cost. If a utility must replace a pole that does not need to be replaced with a larger pole or a pole of a different type to accommodate a new attachment, then the cost to replace that pole is caused by the new attacher.¹

Specifically, Kentucky Power relies on the final sentence in that paragraph in support of its argument that the Commission already resolved the issue.² However, as noted by KBCA, Kentucky Power's reading of that sentence ignores the context and is inconsistent with the plain language of the regulation.

Section 4(6)(b)2 and Section 4(6)(b)3 of 807 KAR 5:015, as initially proposed and as ultimately adopted, state specifically how the cost of red tagged poles, as defined in the regulation, would be allocated.³ Section 4(6)(b)4, as initially proposed and ultimately adopted, then states that:

The make ready cost, if any, for a pole that is not a red tagged pole to be replaced with a new utility pole to accommodate the new attacher's attachment shall be charged in accordance

¹ Kentucky Power's Motion to Strike at 2-3.

² Kentucky Power's Motion to Strike at 3.

³ 807 KAR 5:015, Section 4(6)(b); *see also* Amendments after Comments and Statement of Consideration for 807 KAR 5:015 at 13-14 (filed Sept. 15, 2021) (showing no amendments to Section 4(6)(b)).

with the utility's tariff or a special contract regarding pole attachments between the utility and the new attacher.⁴

The regulation also states that “[t]he tariff may include terms, subject to approval by the commission, that are fair, just and reasonable and consistent with the requirements of this administrative regulation and KRS Chapter 278.”⁵ Thus, the plain language of the regulation, which controls,⁶ clearly indicates that the pole owners would be permitted to propose tariff provisions governing the cost allocation for non-red tagged poles but that those provisions would be subject to review by the Commission to determine whether they are fair, just and reasonable and otherwise comply with KRS Chapter 278 like any other rate or service standard included in a utility tariff.

KBCA’s position that the Commission did not fully address the allocation of non-red tagged pole costs and intended to address the allocation through the review of tariff filings is also supported by the Statement of Consideration. The sentence immediately following the sentence relied on by Kentucky Power notes that other utility customers might benefit from non-red tagged pole replacements,⁷ consistent with Ms. Kravtin’s argument in support of her cost allocation methodology,⁸ and portions of the next

⁴ 807 KAR 5:015, Section 4(6)(b); see also Amendments after Comments and Statement of Consideration for 807 KAR 5:015 at 13-14 (filed Sept. 15, 2021) (showing no amendments to Section 4(6)(b)).

⁵ 807 KAR 5:015, Section 3(4).

⁶ See *Stephenson v. Woodward*, 182 S.W.3d 162, 169-70 (Ky. 2005) (quoting *Gateway Construction Company v. Wallbaum*, 356 S.W.2d 247, 249 (Ky. 1962)) (“The most logical and effective manner by which to determine the intent of the legislature is simply to analyze the plain meaning of the statutory language: ‘[r]esort must be had first to the words, which are decisive if they are clear.’”); see also *Marksberry v. Chandler*, 126 S.W.3d 747, 753 (Ky. App. 2003) (stating that the same rules of construction or interpretation that apply to statutes also apply to administrative regulations).

⁷ Amendments after Comments and Statement of Consideration for 807 KAR 5:015 at 47.

⁸ See Direct Testimony of Patricia D. Kravtin at 7–8 (filed June 9, 2022).

paragraph explain how other customers might benefit.⁹ The Statement of Consideration also explicitly explains that the regulation is written to allow the allocation non-red tagged pole replacement costs to be addressed through tariff filings on a utility specific basis, stating:

Section 4(6)(b)4, with which KBCA now takes issue, then indicates that the replacement costs for non-red tagged poles that must be replaced to accommodate a new attachment will be charged in accordance with each utility's tariff or an applicable special contract.

...

The regulation, as written, allows for the cost of replacement poles install to accommodate a new attachers equipment to be addressed through each utilities tariff, which is the same manner in which the Commission allocates most utility costs among various classes of utility customers. As argued by Chris Perry on behalf of KAEC, addressing the cost of replacement poles that are necessary to accommodate a new attacher in that manner is the best way to allocate such costs at this time, because it will allow the Commission to address the issue in a more nuanced manner based on evidence regarding specific utilities, including information regarding the age of each utility's poles and the level of specificity with which they track depreciation expense for utility poles.¹⁰

Given those statements, the sentence referred to by Kentucky Power could not reasonably be said to have fully litigated or resolved the issue,¹¹ and certainly could not be read to contradict the plain language of the regulation. Thus, Kentucky Power failed

⁹ Amendments after Comments and Statement of Consideration for 807 KAR 5:015 at 47.

¹⁰ Amendments after Comments and Statement of Consideration for 807 KAR 5:015 at 46–47 (footnote omitted).

¹¹ In fact, even the sentence referred to by Kentucky Power read in isolation could not really be read as resolving the issue, because there could be more than one cause requiring a pole replacement.

to support the premise for its motion to strike, and therefore, the Commission finds that Kentucky Power's motion to strike should be denied.

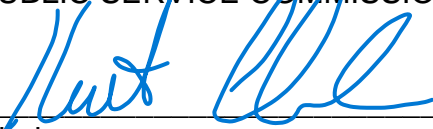
However, even if Kentucky Power had established that the Commission fully addressed the allocation non-red tagged pole replacement, it would not justify Kentucky Power's motion to strike. Kentucky Power's position is essentially that the evidence presented by KBCA is irrelevant, because the issue was previously addressed by the Commission. While the Commission has granted motions to strike when a party files evidence after the record is closed pursuant to 807 KAR 5:001, Section 11(4),¹² the Commission has rejected motions to strike based on the claim that evidence is irrelevant based, in part, on the premise that the Commission "is the final arbiter of the relevancy of information in the record and will afford the evidence whatever weight to which it is entitled."¹³ Narrowing the evidence available for the Commission's consideration unnecessarily constrains its ability to uphold its statutory obligations. Thus, again, the Commission finds that Kentucky Power's motion to strike should be denied.

IT IS THEREFORE ORDERED that Kentucky Power's motion to strike is denied.

¹² See Case No. 2013-00237, *Application of Water Service Corporation of Kentucky for an Adjustment of Rates* (Ky. PSC July 11, 2014), Order; Case No. 2012-00470, *Application of Jessamine-South Elkhorn Water District for a Certificate of Public Convenience and Necessity to Construct and Finance a Waterworks Improvements Project Pursuant to KRS 278.020 and 278.300* (Ky. PSC Jan. 3, 2014), Order.

¹³ See Case No. 2015-00283, *Application of Windstream Communications, Inc. for a Declaratory Order Affirming that the Interconnection Regimes under KRS 278.530 and 47 U.S.C. § 251 are Technology Neutral* (Ky. PSC Aug. 6, 2018), Order.

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