

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

DUKE ENERGY KENTUCKY, INC.'S BRIEF

Comes now Duke Energy Kentucky, Inc. (Duke Energy Kentucky or the Company), by counsel, pursuant to the Commission's September 23, 2022, Order setting a schedule for the filing of briefs in the above-styled case and other applicable law, does hereby respectfully state as follows:

I. Introduction

The Commission amended its pole attachment regulation, 807 KAR 5:015, effective February 1, 2022, which necessitated that pole attachment tariffs be updated. On February 28, 2022, LG&E, KU, Duke Energy Kentucky, and Kentucky Power (collectively, the IOUs) filed amendments to their respective pole attachment tariffs pursuant to 807 KAR 5:015, with proposed effective dates of March 31, 2022. Duke Energy Kentucky's proposed pole attachment tariff amendment did not seek to alter existing pole attachment charges. Among other things, the proposed amendment added a charge for conduit occupancy of \$0.27 per linear foot and updated for compliance with the most recent updates to 807 KAR 5:015. AT&T Kentucky and KBCA (collectively Objecting Parties) filed objections to certain utilities' proposed pole attachment tariffs, but not to Duke Energy Kentucky's tariff. The Commission suspended the effective date of the proposed

tariffs for five months, up to and including August 31, 2022, to permit investigation of the proposed tariffs.¹

In the initial objections, the Objecting Parties primarily took issue with the following terms and conditions in the proposed tariffs of LG&E, KU, and Kentucky Power:² 1) make-ready estimates; 2) pole replacement cost allocation; 3) miscellaneous charges (e.g., for application review, conduit occupancy, inspection penalties, penalties for unauthorized attachments, survey fees, etc.); 4) indemnity; 5) default; and 6) contractor insurance requirements. The changes sought by the Objecting Parties would unfairly impose on utilities—and thereby on ratepayers—additional costs, lengthy burdensome processes, and unreasonable levels of risk in order to subsidize attachers. As discussed in more detail below, Objecting Parties do not limit themselves to challenging newly proposed terms, but also appear to question the reasonableness of longstanding tariff provisions. Consistent with its statement during rulemaking that it “generally attempts to ensure that costs are assigned to the party responsible for causing the utility to incur the cost,”³ the Commission should reject these attempts to redirect the regulatory scheme towards subsidizing attachers at the expense of ratepayers.

¹ Case No. 2022-00105, *Electronic Investigation of the Proposed Pole Attachment Tariffs of Investor Owned Electric Utilities* (Ky. PSC Mar. 30, 2022), Order.

² While many of the items identified by the Objecting Parties are not, in Duke Energy Kentucky’s opinion, issues that directly affect the Company’s proposed pole attachment tariff, the Company believes a response is warranted for those that may be pertinent to the Company and its policies, notwithstanding the fact that neither of the objecting parties directly raised these issues against Duke Energy Kentucky.

³ Amendments after Comments and Statement of Consideration for 807 KAR 5:015 at pg. 47 (filed Sept. 15, 2021)

II. Background and Procedural History

On March 30, 2022,⁴ the Commission consolidated the investigations of the IOUs' proposed tariffs and made them parties to this proceeding (March 30 Order).⁵ The Commission incorporated the respective comments of AT&T Kentucky and KBCA by reference into the record of this proceeding and directed the IOUs to respond.⁶

On April 14, 2022, the IOUs filed comments responding to the objections of AT&T Kentucky and KBCA. Although neither AT&T Kentucky nor KBCA raised a specific objection to Duke Energy Kentucky's proposed tariff in their initial objections, nonetheless, Duke Energy Kentucky filed its comments to address objections which could be construed to directly or indirectly bear on Duke Energy Kentucky's pending tariff.⁷ After the IOUs' comments, testimonies were filed by the parties and discovery was conducted. On September 23, 2022, the Commission issued an Order setting a schedule for the filing of briefs and reply briefs.

III. Discussion

A. Under The Filed Rate Doctrine, Previously Approved Tariff Provisions Are Presumptively Reasonable And The Burden Of Proof Lies On The Party Seeking To Establish Their Unreasonableness.

As the Commission has previously explained, a filed rate "is presumed reasonable."⁸ The party who challenges such reasonableness is the party who bears the

⁴ Case No. 2022-00064, *Electronic Review of Pole Attachment Tariffs Filed Pursuant to 807 KAR 5:015, Section 3* (Ky. PSC Mar. 3, 2022).

⁵ The Objecting Parties had previously filed objections to certain utilities' proposed pole attachment tariffs, but neither had raised a specific objection to Duke Energy Kentucky's proposed pole attachment tariff.

⁶ Case No. 2022-00105, *Electronic Investigation of the Proposed Pole Attachment Tariffs of Investor Owned Electric Utilities* (Ky. PSC Mar. 30, 2022), Order.

⁷ Case No. 2022-00105, *Electronic Investigation of the Proposed Pole Attachment Tariffs of Investor Owned Electric Utilities* (Ky. PSC Apr. 14, 2022), Duke Energy Kentucky, Inc.'s Response to AT&T Kentucky's and the Kentucky Broadband and Cable Association's Objections.

⁸ Case No. 2005-00322, *In the Matter of East Clark County Water District* (Ky. PSC Apr. 3, 2006), Order, at pg. 2.

burden of proof.⁹ This principle applies here to Duke Energy Kentucky’s existing tariff provisions, in instances where the Company is not proposing a change and the recent rule updates do not *require* (as opposed to merely permit) a change.

B. It Is Fair And Reasonable For A Utility To Retain The Ability To Withdraw Make-Ready Estimates After A Period Of Non-Payment, As Long As The Policy Is Transparent And Consistently Applied.

807 KAR 5, Section 4(3)(c) provides “[a] utility may withdraw an outstanding estimate of charges to perform make-ready beginning fourteen (14) days after the estimate is presented.”¹⁰ This portion of the regulation was *not* amended in the most recent update. Duke Energy Kentucky’s proposed tariff states, using nearly *verbatim* language, that the Company “may withdraw an outstanding estimate of charges beginning fourteen (14) days after the estimate is presented.”¹¹ The proposed Duke Energy Kentucky tariff is therefore unquestionably consistent with the regulation.

Although Duke Energy Kentucky has not proposed to include an automatic withdrawal provision in its tariff, such a provision would also be consistent with the regulation, as long as at least 14 days passed before the estimate was automatically withdrawn and the provision clearly stated the time frame for withdrawal. It is reasonable for a utility to require payment for acceptance. Otherwise, the utility could find itself forced to complete unpaid make-ready work, which would put ratepayers into the role of subsidizing the attacher.

⁹ *See, Id.*

¹⁰ 807 KAR 5, Section 4(3)(c).

¹¹ Duke Energy Kentucky Tariff Filing, K.Y.P.S.C. Electric No. 2, Fifth Revised Sheet No. 92, pg. 4 of 10.

- C. It Is Reasonable And Fair To Require A New Attacher To Pay The Full Costs Of Any Replacement Pole(s) Necessitated By Their Attachment(s).

In 807 KAR 5:015 Section 4, (6)(b)(4) provides (emphasis added):

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

The regulation prohibits utilities from charging attachers for the replacement of red tagged poles, but does not restrict the utilities' ability to charge attachers for the full replacement cost of non-red-tagged poles.

In promulgating this regulation, the Commission explained:

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.**¹²

The Commission noted that, even if the new pole had a longer useful life than the remaining useful life of the replaced pole, any future benefit to ratepayers was uncertain, illustrating with an example:

For instance, if a new pole has a 50-year life and the pole that was replaced had a 30 year remaining useful life, then other customers may get the benefit of 20 additional years of life that were paid for by the new attacher. However, **in 30 years, the relevant pole may not be necessary such that other customers would not receive any benefit from the**

¹² Amendments after Comments and Statement of Consideration for 807 KAR 5:015 at pg. 47 (filed Sept. 15, 2021) (emphasis added).

*new pole installed to accommodate the new attacher's equipment.*¹³

LG&E and KU witness Hornung provides a similar illustration:

Due to this inability to forecast future service needs, the Companies—when performing make-ready pole replacements—only install poles that are incrementally tall and/or strong enough to accommodate the additional attachment. As a result, if five (5) years down the road the Companies' core electric service needs would require an even taller or stronger pole than what was previously installed pursuant to an Attachment Customer's make-ready pole replacement request, then the previously installed make-ready replacement pole would be of no use or benefit to the Companies.¹⁴

Benefits projected to accrue after the passage of decades are inherently speculative in the pole replacement context, while the costs of a new pole are a certainty. Forcing ratepayers to share the costs of an investment that benefits only the attacher at the time the expense is incurred is unfair and unreasonable.

As Duke Energy Kentucky witness Gibson explains:

The primary benefit is to the attacher, who would not be able to attach at all without such pole replacement. It is the attacher whose desired attachments require the existing pole to be replaced with an upgraded one and also require existing attachments to be transferred to the new pole. The premature replacement of a non-red-tagged pole with an upgraded pole is done solely to enable the attacher to add its attachment(s).¹⁵

The provision in Duke Energy Kentucky's existing tariff requiring attachers to pay the full cost of pole replacements necessitated by their attachments¹⁶ is consistent with the

¹³ *Id.*

¹⁴ Rebuttal Testimony of Michael E. Hornung, pg. 5.

¹⁵ Rebuttal Testimony of Jeremy B. Gibson, pg. 9.

¹⁶ Duke Energy Kentucky Tariff Filing, K.Y.P.S.C. Electric No. 2, Fifth Revised Sheet No. 92, pg. 3 of 10 (Terms and Conditions, Paragraph 5).

regulation as written and is presumed reasonable under the filed rate doctrine. The burden of proof to establish this provision unreasonable lies on any challengers.

Not only is the Company's tariff consistent with the regulation on this point and presumed reasonable, but it is also consistent with cost causation principles. As Company witness Gibson explains:

Any potential future benefits to a utility from prematurely replacing a perfectly suitable pole that is sufficient to provide safe and reliable utility service with an upgraded pole are remote, tenuous, incidental, and conditional, while the cost of the pole is immediate and certain. Insofar as a portion of the cost is to upgrade the capacity of the pole, such upgraded capacity is of no use to the utility and the costs of moving existing attachments to the new pole do not benefit the utility either.¹⁷

And Duke Energy Kentucky and Kentucky Power witness Christopher Tierney further explains that utilities do not receive any "concrete economic benefit" at the time a make-ready pole replacement is executed and that any future financial benefit would only occur if both of the following conditions are met: "(a) the replacement pole is of the height/class needed to accommodate the electric utility's then-unknown future needs at the time the pole would otherwise have been replaced, and (b) the existing poles would ultimately have required replacement at some future point (rather than becoming technologically obsolete)."¹⁸ Even so, utilities would still wind up "in a net loss,"¹⁹ which means, in turn, that ratepayers would be at a loss.

¹⁷ Rebuttal Testimony of Jeremy B. Gibson, pg. 10.

¹⁸ Rebuttal Testimony of Christopher F. Tierney, pg. 4.

¹⁹ *Id.*, pg. 5.

For these reasons, requiring attachers to pay the full cost of any non-red-tagged pole replacements that their attachments necessitate is reasonable and consistent with the regulation.

- D. To Avoid Unfair And Unreasonable Ratepayer Subsidies Of Pole Attachers, And In Order To Facilitate Attachers' Compliance With Pole Attachment Tariffs, Utilities Must Be Able To Impose Monetary Consequences And To Remove Attachments Upon Default.
 - a. Utilities Should Be Permitted To Charge Reasonable Fees And Penalties For Noncompliance With Tariff Provisions, Such As The Installation Of Unauthorized Attachments.

The updated 807 KAR 5:015 does not restrict utilities from including reasonable consequences in their tariffs for attachers who fail to comply with tariff requirements put in place to ensure safety, reliability, and fair cost allocation. The Company's proposed tariff is reasonable on this point.²⁰ Unauthorized attachments threaten all three principles at once and utilities should be permitted to impose a monetary consequence to ensure that the installation of unauthorized attachments becomes an economically irrational choice for attachers.

If the only action upon discovery of unauthorized attachments is to collect the regular charges for the period of unauthorized attaching, then installing unauthorized attachments becomes an economically attractive proposition. An attacher who installs attachments without authorization benefits from the time value of money—since even upon discovery the payment is delayed—and has the potential to enjoy some entirely unpaid attachment time, as the period of unauthorized attachment may not be easily discernible. This is obviously unfair from a cost-allocation standpoint, but also threatens safety and reliability as no technical review is being performed in such instances of unauthorized

²⁰ Duke Energy Kentucky Tariff Filing, K.Y.P.S.C. Electric No. 2, Fifth Revised Sheet No. 92, pg. 6 of 10 (Terms and Conditions, Paragraph 16).

attachment by the utility before installation. Utilities must be empowered to impose financial consequences when such unauthorized attachments are discovered to prevent—or at least minimize—such instances from occurring.

b. Removal Of Attachments After Appropriate Notification Of Default Is Reasonable And Consistent With The Regulations.

Duke Energy Kentucky’s tariff previously permitted the Company to remove attachments of a defaulting attacher, after written notice and a period of opportunity to correct any identified issues,²¹ and the Company is not proposing any changes to this provision. As Company witness Gibson testified, the Company’s provision on this point “has been pa[r]t of the Company’s Commission-approved tariff for years.”²² The updates to 807 KAR 5:015 did not restrict utilities’ ability to include reasonable default provisions providing for the remedy of removing attachments at attacher expense, after reasonable notice.

In fact, 807 KAR 5:015 Section 6, (1), which was not updated and requires that “a utility shall provide an existing attacher no less than sixty (60) days written notice prior to . . . [r]emoval of facilities or termination of any service to those facilities if that removal or termination arises out of a rate, term, or condition of the utility’s pole attachment tariff,” clearly contemplates removals upon default and considers 60 days a reasonable notice period. In the event that an attacher believes such a period to be unreasonable for its circumstances, the regulation provides a process for requesting a stay in 807 KAR 5:015 Section 6, (2).

²¹ Duke Energy Kentucky Tariff Filing, K.Y.P.S.C. Electric No. 2, Fifth Revised Sheet No. 92, pg. 10 of 10 (Terms and Conditions, Paragraph 29).

²² Rebuttal Testimony of Jeremy B. Gibson, pg. 6.

As explained by Duke Energy Kentucky witness Gibson, utilities need “to have a form of meaningful and timely redress against attachers who habitually fail to comply with regulations and tariff obligations, including but not limited to payment terms.”²³ Furthermore, “provisions permitting a pole owner to remove attachments after written notice and failure to cure non-compliance or default are well within industry standards.”²⁴ Thus, the Company’s default provision is both consistent with regulations and reasonable.

E. Utilities Should Be Permitted To Impose Fair And Reasonable Conduit Occupancy Charges.

807 KAR 5:15 does not restrict a utility from establishing a conduit occupancy charge. Utilities should be permitted to assess a conduit occupancy charge that the Commission determines to be fair, just, and reasonable.

F. At Minimum, Utilities Should Be Able To Require Indemnification By Attachers For Damages Attachers Cause And/Or To Which They Contribute.

807 KAR 5:15 Section 3, (4) explicitly permits pole attachment tariffs to include, among other types of terms “certain limitations on liability [and] indemnification,” subject to the usual just-and-reasonable review. Duke Energy Kentucky is not proposing any change in its current filing to the main indemnification provision in its tariff and therefore the existing provision is presumed reasonable under the filed rate doctrine. This provision requires an attacher to indemnify the Company when negligence is the attacher’s “sole, joint or concurrent” negligence (or that of its servants, agents, or subcontractors),²⁵ which is eminently reasonable. Attachers should not be able to escape responsibility for their sole,

²³ *Id.*, pg. 5.

²⁴ *Id.*, pg. 6.

²⁵ Duke Energy Kentucky Tariff, KY.P.S.C. Electric No. 2, Fifth Revised Sheet No. 92, pg. 7; Rebuttal Testimony of Jeremy B. Gibson, pg. 8.

joint, or concurrent negligence simply because a plaintiff arbitrarily elects to pursue reimbursement from the utility.

G. It Is Fair And Reasonable For Utilities To Impose Insurance Requirements On Contractors Or Subcontractors Of Attachers.

807 KAR 5:15 Section 3(4) also permits pole attachment tariffs to include, among other types of terms, “insurance requirements.” The purpose of insurance requirements is to ensure that the utility is adequately protected for any damages caused by attachers. Since many attachers rely on contractors or subcontractors, in whole or in part, to perform attachment-related work on the attachers’ behalf, it is fair and reasonable for utilities to apply the same insurance requirement to those contractors and subcontractors.

IV. Conclusion

Duke Energy Kentucky appreciates the opportunity to offer this brief. The Company supports the Commission’s investigation and is confident that the Commission will fairly account for all utilities’ issues and concerns.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing electronic filing is a true and accurate copy of the document being filed in paper medium; that the electronic filing was transmitted to the Commission on October 11th, 2022; and that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding.

/s/ Larisa M. Vaysman _____
Larisa M. Vaysman