

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

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**DUKE ENERGY KENTUCKY, INC.’S REPLY BRIEF**

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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 in reply:

**I. Introduction**

For the sake of brevity, Duke Energy Kentucky refers back to its initial brief for the history and procedural posture of this proceeding.<sup>1</sup> In this reply brief, the Company will focus on certain specific arguments raised in the initial brief of the Kentucky Broadband and Cable Association (KBCA),<sup>2</sup> some of which—but not all—could be construed to directly or indirectly bear on Duke Energy Kentucky’s revised tariff.<sup>3</sup> Among other things, Duke Energy Kentucky submits that, for the reasons given in its initial brief and herein, its revised tariff should be found just and reasonable.

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<sup>1</sup> Case No. 2022-00105, *Electronic Investigation of the Proposed Pole Attachment Tariffs of Investor Owned Electric Utilities* (Ky. PSC Oct. 11, 2022), Duke Energy Kentucky, Inc.’s Brief, pg. 1-3.

<sup>2</sup> Case No. 2022-00105, *Electronic Investigation of the Proposed Pole Attachment Tariffs of Investor Owned Electric Utilities* (Ky. PSC Oct. 11, 2022), Brief of the Kentucky Broadband and Cable Association.

<sup>3</sup> The Company’s silence on a particular issue raised by KBCA regarding the tariff of another utility, should not be interpreted as agreement with KBCA’s position.

## II. Discussion

### A. KBCA's Proposed Net Book Value Method For Non-Red-Tagged Pole Replacements Is Unjust And Unreasonable Because It Violates Basic Cost Allocation Principles And Requires Ratepayers To Subsidize Attachers.

In arguing that utilities seek to “exploit [a] regulatory gap” by continuing to allocate the cost of non-red tagged pole replacement to the attachers whose request causes the replacement, KBCA misrepresents the posture of this proceeding.<sup>4</sup> In seeking to retain the pole replacement tariff provision that has been in its tariff for years and therefore is presumed to be reasonable,<sup>5</sup> Duke Energy Kentucky is not “exploit[ing]” any “gap.” The Company’s tariff only allocates the entire cost of a pole replacement to an attacher in cases where the replacement “is necessary . . . because of the necessity . . . to accommodate the attachments of attachee,”<sup>6</sup> which is entirely in line with cost allocation principles. And insofar as there may be any uncertainty at the time of pole replacement as to the total costs that will ultimately be borne by the pole owner, it should be the party demanding immediate replacement—and thereby creating the uncertainty—that bears the cost of that uncertainty.

KBCA admits that “attachers may cause a pole to be replaced sooner,” but its claim that “attachers only affect the timing (not the fact) of a pole replacement” is false.<sup>7</sup> The “fact” of pole replacement is not inevitable at all. As Witness Tierney explained, “[I]t is speculative to assume existing poles will ever need to be replaced given the pace of technological change, as well as storm hardening and other undergrounding efforts.”<sup>8</sup>

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<sup>4</sup> Case No. 2022-00105, *Electronic Investigation of the Proposed Pole Attachment Tariffs of Investor Owned Electric Utilities* (Ky. PSC Oct. 11, 2022), Brief of the Kentucky Broadband and Cable Association, pg. 3.

<sup>5</sup> Case No. 2022-00105, *Electronic Investigation of the Proposed Pole Attachment Tariffs of Investor Owned Electric Utilities* (Ky. PSC Oct. 11, 2022), Duke Energy Kentucky, Inc.’s Brief, pg. 3-4, 6-7.

<sup>6</sup> 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).

<sup>7</sup> Case No. 2022-00105, *Electronic Investigation of the Proposed Pole Attachment Tariffs of Investor Owned Electric Utilities* (Ky. PSC Oct. 11, 2022), Brief of the Kentucky Broadband and Cable Association, pg. 3.

<sup>8</sup> Rebuttal Testimony of Christopher F. Tierney, pg. 5-6 & n.3.

Furthermore, KBCA fails to consider that the replacement pole required to meet the attacher's present day needs might be very different from the replacement pole that a pole owner would install in the future and "in the absence of any third-party attachers."<sup>9</sup>

Witness Tierney explains why this is an important distinction:

It is also speculative to assume that if a replacement is needed in the future, that the make-ready replacement pole would meet the utility's (*i.e.*, its customers) future needs. A reasonable utility would make the capital expense decision of what type of pole (height, class, composition), if any, is required at the time of the future replacement when the utility could better assess its needs. The utility no longer has that option when a make-ready replacement is made sooner, in order to accommodate a third-party attachment request.<sup>10</sup>

When an attacher requires a pole to be prematurely replaced for its own present-day needs, it robs the utility of the ability to make an optimal replacement choice for customers' needs in, say, 20 years (or however many years of actual life might have remained for the existing pole).

Witness Tierney's calculations show that KBCA's recommendation for the Commission to adopt "a net book value approach"<sup>11</sup> to pole replacements necessitated by an attacher's request would unfairly and unreasonably require ratepayers to immediately pay approximately 95% of the cost of a pole that they do not need and might not ever need for electric service.<sup>12</sup> As detailed in Witness Tierney's testimony, the remaining net book value of a pole fails to capture at least three major cost categories: (1) the as-yet

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<sup>9</sup> Case No. 2022-00105, *Electronic Investigation of the Proposed Pole Attachment Tariffs of Investor Owned Electric Utilities* (Ky. PSC Oct. 11, 2022), Brief of the Kentucky Broadband and Cable Association, pg. 3.

<sup>10</sup> Rebuttal Testimony of Christopher F. Tierney, pg. 5-6.

<sup>11</sup> Case No. 2022-00105, *Electronic Investigation of the Proposed Pole Attachment Tariffs of Investor Owned Electric Utilities* (Ky. PSC Oct. 11, 2022), Brief of the Kentucky Broadband and Cable Association, pg. 1, 3-4.

<sup>12</sup> See Rebuttal Testimony of Christopher F. Tierney, pg. 8 (explaining that, under KBCA Witness Kravtin's proposal, "[f]or Kentucky Power and Duke Energy Kentucky, the attacher would pay only approximately 5 percent of the total cost of an average make-ready pole replacement").

undepreciated non-recurring costs of pole-replacement, (2) the current economic cost of premature pole replacement; and (3) the additional actual useful life of typical poles over and above the accounting depreciation life.<sup>13</sup> To the extent that there is any uncertainty in quantifying those cost categories due to the prematurity of replacement and the difficulty of predicting the future, it would be unfair and unreasonable to give the benefit of the doubt to the party demanding premature replacement in the first place.

Witness Tierney's calculations show that, even with both of the extremely favorable assumptions that the existing pole would eventually require replacement *and* that the present-day replacement pole would serve the utility's future needs, the net book value approach recommended by KBCA would result in a significant per-pole loss to Duke Energy Kentucky: (\$5,730) per pole in 2022.<sup>14</sup> Thus, KBCA's argument that depreciation eliminates any negative budget impact from premature pole replacement<sup>15</sup> is simply incorrect.

KBCA also fails to substantiate its bold assertion that allocating non-red tagged pole replacement costs to the attacher whose request necessitates the replacement will lead or has led utilities to underreport red-tagged poles.<sup>16</sup> As Witness Tierney explains, waiting to replace poles past the point where it is prudent to do so—*i.e.* delaying red-tagging—is contrary to a regulated utility's economic interest. From the utility's standpoint, leaving a

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<sup>13</sup> Rebuttal Testimony of Christopher F. Tierney, pg. 6-8.

<sup>14</sup> Rebuttal Testimony of Christopher F. Tierney, pg. 9.

<sup>15</sup> See Case No. 2022-00105, *Electronic Investigation of the Proposed Pole Attachment Tariffs of Investor Owned Electric Utilities* (Ky. PSC Oct. 11, 2022), Brief of the Kentucky Broadband and Cable Association, pg. 6-7.

<sup>16</sup> Case No. 2022-00105, *Electronic Investigation of the Proposed Pole Attachment Tariffs of Investor Owned Electric Utilities* (Ky. PSC Oct. 11, 2022), Brief of the Kentucky Broadband and Cable Association, pg. 4.

pole in place which could be red-tagged and replaced results in lost opportunity to earn return on the capital invested in the replacement.<sup>17</sup>

Trying to support its broad assertion that “utilities are as a matter of course currently red-tagging a much smaller population of poles than they intend to replace,” KBCA purports to compare the number of one utility’s red-tagged poles to an artificially and erroneously derived “pole replacement rate” based on average service life for purposes of depreciation.<sup>18</sup> This attempted analysis is misguided for at least two reasons. First, the actual useful life of an individual pole is distinct from the average service life used for depreciation purposes.<sup>19</sup> Poles are replaced based on the former, not based on the latter. Second, the red-tag rate only captures poles identified for replacement or reinforcement through inspections and does not include all of the poles a utility actually replaces each year, such as those for electric service, storm restoration, or other reasons.<sup>20</sup>

Not only does KBCA fail to appreciate the costs that utilities experience from premature pole replacement, but it fails to substantiate the claimed benefits of premature replacement. The “many benefits” of premature pole replacement that KBCA lists are exaggerated, speculative, and tenuous.<sup>21</sup> Neither KBCA nor its Witness Kravtin even attempt to quantify any of them.<sup>22</sup> Such speculation should not be the basis for reallocating present-day actual costs.

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<sup>17</sup> Rebuttal Testimony of Christopher F. Tierney, pg. 10.

<sup>18</sup> Case No. 2022-00105, *Electronic Investigation of the Proposed Pole Attachment Tariffs of Investor Owned Electric Utilities* (Ky. PSC Oct. 11, 2022), Brief of the Kentucky Broadband and Cable Association, pg. 4-5.

<sup>19</sup> See Rebuttal Testimony of Pamela F. Ellis, pg. 12-13; Rebuttal Testimony of Christopher F. Tierney, pg. 7-8.

<sup>20</sup> Rebuttal Testimony of Pamela F. Ellis, pg. 13.

<sup>21</sup> See Case No. 2022-00105, *Electronic Investigation of the Proposed Pole Attachment Tariffs of Investor Owned Electric Utilities* (Ky. PSC Oct. 11, 2022), Brief of the Kentucky Broadband and Cable Association, pg. 5-6.

<sup>22</sup> See Direct Testimony of Patricia D. Kravtin, pg. 40.

For all of the above reasons, the Commission should conclude that it is reasonable to assign the costs of a non-red-tagged pole replacement to the attacher whose attachments necessitate such replacement, and that Duke Energy Kentucky's revised tariff is reasonable.

**B. The Commission Should Reject KBCA's Attempts To Add Unprecedented And Burdensome Requirements To The 60-Day Notification Period Required By The Regulation For Removal Of Attachments Due To Noncompliance.**

KBCA acknowledges that 807 KAR 5:015, Section 6, (1) sets a minimum of 60 days' written notice before removing attacher facilities,<sup>23</sup> but seeks to add burdensome and unreasonable requirements into the regulation for which there is no basis.

First, KBCA seeks to impose a safe harbor from removal for non-compliances "disputed in good faith by the attacher," for which it proposes no finite time limit. This has no basis in the rule, which clearly contemplates a transparent and known period of time for resolving any non-compliance. KBCA's suggestion to require such a safe harbor, which could allow attachers to avoid removal indefinitely, should be rejected. Provisions like Duke Energy Kentucky's, which permit removal after the regulation-required 60 days' written notice, are reasonable and should be approved.

Second, KBCA appears to request that the Commission make some sort of distinction between non-compliances, in stating that removal for "any non-compliance" is unreasonable,<sup>24</sup> but KBCA does not make any recommendation for which non-compliances should warrant removal and which should not. There is no basis for such

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<sup>23</sup> See Case No. 2022-00105, *Electronic Investigation of the Proposed Pole Attachment Tariffs of Investor Owned Electric Utilities* (Ky. PSC Oct. 11, 2022), Brief of the Kentucky Broadband and Cable Association, pg. 12.

<sup>24</sup> See Case No. 2022-00105, *Electronic Investigation of the Proposed Pole Attachment Tariffs of Investor Owned Electric Utilities* (Ky. PSC Oct. 11, 2022), Brief of the Kentucky Broadband and Cable Association, pg. 14.

distinction in the regulation, and the longstanding Duke Energy Kentucky provision should be permitted to remain.

C. Tariff Insurance Requirements For Attachers' Contractors Are Reasonable And Should Be Permitted.

The Commission should reject KBCA's conclusory argument that it is "not possible" to comply with insurance requirements for contractors and subcontractors because doing so would require rewriting every contract and subcontract "to satisfy each utility's unique preferences."<sup>25</sup> As Witness Gibson explains, "[a]s long as the tariff provisions in question impose minimum insurance requirements, an attacher can comply with all tariff provisions by complying with the highest of the required minimums."<sup>26</sup>

KBCA also contend that such insurance requirements are unnecessary because "attachers are ultimately on the hook if their own contractor's insurance is inadequate."<sup>27</sup> Not only is this a legal conclusion that Witness Avery is unqualified to make, but even if the conclusion was correct, it ignores—as much of KBCA's brief does—the reality of immediate costs and burdens imposed on the utility. As Witness Gibson explains, "[i]n the event that a contractor or subcontractor causes damage, there is significant incentive on the part of the attacher to disclaim responsibility for the contractor's actions," and "[e]ven in instances where the attacher is 'ultimately' held responsible, the legal wrangling over such 'ultimate responsibility' would take time."<sup>28</sup> Thus, provisions that impose insurance requirements for contractors and subcontractors are reasonable.

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<sup>25</sup> See Case No. 2022-00105, *Electronic Investigation of the Proposed Pole Attachment Tariffs of Investor Owned Electric Utilities* (Ky. PSC Oct. 11, 2022), Brief of the Kentucky Broadband and Cable Association, pg. 15.

<sup>26</sup> Rebuttal Testimony of Jeremy B. Gibson, pg. 7.

<sup>27</sup> See Case No. 2022-00105, *Electronic Investigation of the Proposed Pole Attachment Tariffs of Investor Owned Electric Utilities* (Ky. PSC Oct. 11, 2022), Brief of the Kentucky Broadband and Cable Association, pg. 15.

<sup>28</sup> Rebuttal Testimony of Jeremy B. Gibson, pg. 7.

D. It Is Reasonable For Tariff Provisions To Require Indemnification For Not Only Sole, But Also Joint Or Concurrent, Negligence.

Insofar as KBCA opposes “an indemnity provision with either a gross negligence standard or a sole gross negligence standard,”<sup>29</sup> Duke Energy Kentucky takes no position on such provisions, as it does not have such a provision in its tariff. However, KBCA goes on to say that “[e]ach party on a pole . . . should be liable for its own simple negligence,” and cites as objectionable a tariff provision requiring indemnification for losses arising from “joint negligence” of the attacher and pole owner.<sup>30</sup>

Insofar as KBCA is suggesting—which is not exactly clear—that there is something unreasonable about provisions that require indemnification for “sole, joint or concurrent” negligence of the attacher or its contractors or subcontractors, etc., such suggestion should be rejected. Whether an attacher’s negligence is sole, joint, or concurrent, it is appropriate for such negligence to be included in the scope of an indemnification clause. The existing Duke Energy Kentucky indemnification provision, which remains in the most recently filed tariff is reasonable.

E. When Utilities Choose To Install Larger-Than-Required Poles In Anticipation Of Future Requirements Or Additions, They May Reasonably Reserve The Additional Pole Space For Such Anticipated Uses.

KBCA takes issue with the following tariff provision in Clark Energy Cooperative’s tariff: “In the event Cooperative installs a pole larger than is initially required for Electric Utility’s and Licensee’s use in anticipation of Cooperative’s future requirements or additions, the additional space provided by Electric Utility shall be

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<sup>29</sup> Case No. 2022-00105, *Electronic Investigation of the Proposed Pole Attachment Tariffs of Investor Owned Electric Utilities* (Ky. PSC Oct. 11, 2022), Brief of the Kentucky Broadband and Cable Association, pg. 15.

<sup>30</sup> See Case No. 2022-00105, *Electronic Investigation of the Proposed Pole Attachment Tariffs of Investor Owned Electric Utilities* (Ky. PSC Oct. 11, 2022), Brief of the Kentucky Broadband and Cable Association, pg. 15 & n. 58.



reserved for Cooperative's sole use. Licensee may request documentation to validate the need for future space."<sup>31</sup> Insofar as KBCA appears to contend that it is inherently unreasonable for a utility to reserve the extra space that the utility itself chose to provide for its own future requirements or additions, Duke Energy Kentucky disagrees.<sup>32</sup>

First, KBCA misleadingly characterizes this as a "broad and generic reservation of space," but ignores the beginning of the provision that limits such reservation to a very specific scenario: when the *utility* installs a larger pole specifically in anticipation of such space being needed in the future. At the time the utility makes such a decision, it does not know whether future attachers will also be interested in the available space, which undermines KBCA's argument that this is some sort of nefarious strategy to force unnecessary pole replacements or to deter broadband deployment. Although Duke Energy Kentucky does not have a similar provision in its tariff, the Company believes it is reasonable for utilities to have the option to install a larger pole than necessary for existing attachers in order to have the additional space for its future planning.

### **III. Conclusion**

Duke Energy Kentucky appreciates the opportunity to offer this reply brief in support of its own filed tariff being found just and reasonable and also to aid the Commission's investigation and determination. The Company supports the Commission's investigation and is confident that the Commission will fairly account for all utilities' issues and concerns.

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<sup>31</sup> Clark Energy Cooperative Tariff Filing, K.Y.P.S.C. Electric No. 2, Original Page No. 118.13.

<sup>32</sup> Case No. 2022-00105, *Electronic Investigation of the Proposed Pole Attachment Tariffs of Investor Owned Electric Utilities* (Ky. PSC Oct. 11, 2022), Brief of the Kentucky Broadband and Cable Association, pg. 18-19 & n. 66.

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 18<sup>th</sup>, 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* \_\_\_\_\_  
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