

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 RESPONSE TO
AT&T KENTUCKY’S AND THE KENTUCKY BROADBAND
AND CABLE ASSOCIATION’S OBJECTIONS**

I. Introduction

In response to the Commission’s directive in its March 30, 2022 Order in Case No. 2022-00105 (Order), Duke Energy Kentucky, Inc., (Duke Energy Kentucky or the Company) hereby submits this filing addressing the comments and objections of BellSouth Telecommunications, LLC d/b/a AT&T Kentucky (AT&T Kentucky) and the Kentucky Broadband and Cable Association (KBCA) (collectively, “the Objecting Parties”) to Louisville Gas & Electric Company’s (LG&E), Kentucky Utilities Company’s (KU); and Kentucky Power Company’s (Kentucky Power) proposed tariffs.

II. Background

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. The IOUs’ proposed an effective date of March 31, 2022, for each of their tariffs. Having reviewed the proposed tariffs, the Commission found that an investigation was necessary to determine the reasonableness of the proposed tariffs and that such investigation could not be completed by March 31, 2022. Therefore, the

Commission suspended the effective date of the proposed tariffs for five months, up to and including August 31, 2022.¹

On March 30, 2022,² for the sake of administrative efficiency, the Commission consolidated the investigations of the IOUs' proposed tariffs and made AT&T Kentucky and KBCA parties to this proceeding (March 30 Order). AT&T Kentucky and KBCA had previously filed objections to a number of utilities' proposed pole attachment tariffs, including those of numerous electric cooperatives, telephone companies, LG&E, KU, and Kentucky Power. Neither of the Objecting Parties raised a specific objection to Duke Energy Kentucky's proposed pole attachment tariff. The March 30 Order also established a procedure to receive comments and objections concerning the IOUs' proposed individual tariffs. 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.³

Although neither AT&T Kentucky nor KBCA raised a specific objection to Duke Energy Kentucky's proposed tariff, nonetheless, several of their objections to the KU, LG&E, and Ky Power tariffs merit a response by Duke Energy Kentucky insofar as said objections could be construed to directly or indirectly bear on Duke Energy Kentucky's pending tariff. As the Commission has only consolidated the issues raised by the Objecting Parties regarding the IOUs respective tariffs, Duke Energy Kentucky is only responding to those issues through these comments. To the extent additional objections or

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

³ Case No. 2022-00105, *Electronic Investigation of the Proposed Pole Attachment Tariffs of Investor Owned Electric Utilities* (Ky. PSC Mar. 30, 2022), Order.

issues may arise during the pendency of the Commission's review of Duke Energy Kentucky's tariff, the Company respectfully reserves the right to supplement this response. The Company's silence on a particular issue raised by an Objecting Party as it relates to an issue identified on the pole attachment tariff of another utility, should not be interpreted as an agreement or acquiescence to an Objecting Party's position.

III. Discussion

A. Summary of Objections Raised

The significant objections raised by AT&T Kentucky and KBCA related to the tariffs of LG&E, KU, and Ky Power appear to fall into several distinct categories, including: 1) Make Ready Estimates; 2) Pole Replacement Responsibility; 3) Misc. Charges (Application Reviews, Conduit Occupancy, Inspection Penalties/Unauthorized Attachments, Survey Fees, etc.); 4) Indemnities; 5) Default; and 6) Contractor Insurance Obligations. The Objecting Parties seek to unfairly tip the delicate balance the Commission's Pole Attachment regulation struck whereby the interest in providing fair access for attachers was balanced with the interest in ratepayers not subsidizing these attachments and utilities bearing unreasonable risks and additional costs and implementing unreasonably burdensome processes to cater to these attachers.

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.

B. Duke Energy Kentucky's Comments

1. Make-Ready Estimates

In its comments to the tariffs of Kentucky Power, LG&E and KU, AT&T Kentucky is critical of an automatic withdrawal process for make-ready work estimates if the estimate is not paid within fourteen days.⁴ AT&T argues that there should be a grace period for paying the estimate within 45 calendar days.⁵ First, it should be noted that Duke Energy Kentucky's own proposed tariff contains language that the Company "may withdraw an outstanding estimate of charges beginning fourteen (14) days after the estimate is presented." Accordingly, Duke Energy Kentucky's ability to withdraw the make-ready estimate after 14 days is discretionary and wholly consistent with the Commission's regulations.

As it relates to the tariffs of LG&E, KU, and Ky Power, their decision to make such an election upfront, and through incorporation into their respective tariffs is wholly consistent with the Commission's regulation. Specifically, 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."⁶ This provision makes it clear that the ability to withdraw an estimate is wholly within the utility's discretion after fourteen calendar days. The regulation does not require a specific notice or condition the utility's withdrawal in any way, as long as the withdrawal occurs 14 days after the estimate is presented. There is nothing in this provision that restricts the utility from making this discretionary election to withdraw upfront and apply to every

⁴ Comments of AT&T, pg. 18.

⁵ *Id.*

⁶ 807 KAR 5, Section 4(3)(c)

circumstance. While Duke Energy Kentucky takes no position and has no knowledge of the operational needs and constraints of LG&E, KU and Ky Power as it relates to deciding to make such an election upfront, but doing so is clearly consistent with the regulation. As long as a utility's withdrawal policy is transparent and applied in a consistent manner to all attachers, it is not unreasonable. Likewise, requiring payment as a condition of acceptance is not unreasonable. Otherwise, the utility is in the untenable position to attempt to comply with timelines to complete the make-ready work without obtaining payment and then forced into a collection position after the fact. The pole owner—and, indirectly, ratepayers—should not be placed in a position to unfairly subsidize an attacher or to pursue collections, enter into long-term arrangements and pursue breach and damage actions against an attacher who fails to make timely payments at the outset.

2. Pole Replacement Responsibility

KBCA is critical of pole attachment tariff provisions that require a new attacher to pay the costs of a new structure and replacement of any facilities, including costs of removal (less any salvage value) if the structure requires upgrading to accommodate the attacher's equipment. KBCA argues that such a policy is a violation of 807 KAR 5:015. KBCA is incorrect in its assertion. Moreover, KBCA's position is contrary to current industry practice, whereby the attacher whose attachment request causes the existing facilities to either fall short of NESC standards or is insufficient to accommodate the attachment request as-is, pays the costs of upgrading that facility.

Specifically, 807 KAR 5:015 Section 4, (6)(b)(4) provides that “[t]he 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." Clearly the regulation does not prohibit the attacher, whose attachment necessitates an upgrade to the utility's pole, from bearing responsibility for the costs of such an upgrade. In fact, the only limitations on what cannot be charged to the attacher with respect to pole replacements is with respect to a pole that is already out of compliance or identified for replacement as a "red tagged" pole.⁷ If the Commission had intended an attacher to not be responsible for upgrades necessary to accommodate their attachments, the Commission's newly promulgated regulation would have stated such. Rather, the policy whereby a new attacher must bear responsibility of any upgrades necessary to accommodate its desired attachments (except for correcting existing non-compliance or red-tagged poles) is consistent with the Commission's recognized interest in applying the principle of cost causation in regulated utility rate making proceedings. But for the attacher's desire to attach to the utility's facility, the existing equipment would be sufficient to provide service. Accordingly, the new attacher should pay the actual costs to upgrade and relocate existing facilities of other attachers that are caused by the new attachment.

The requirement that the new attacher cover the full, actual costs of necessary upgrades to accommodate the attacher's equipment is nothing new and is consistent with industry practice. Indeed, Duke Energy Kentucky's pole attachment tariff has maintained similar language, without objection by any party, for decades. The Commission should not change this policy.

⁷ See 807 KAR 807 5:15 Section 4(6)(b)

3. Misc. Charges

a. Fees and Penalties

The Objecting Parties provide comments/objections regarding various fees proposed by LG&E, KU, and KY Power that are merely intended to recover costs incurred or to facilitate compliance with tariffs by would-be attachers. Duke Energy Kentucky supports pole-owners' ability to recover the costs incurred to review applications. Such review is essential to ensure that the proposed attachments will not interfere with the safe and reliable provision of electricity. This interest in ensuring the electric delivery system remains safe as a consequence of third party pole attachments should not be in debate. Such interest necessitates careful reviews of applications, surveys and loading studies, and ongoing inspections to determine whether the attachment application is complete, accurate, and the requested attachment is, and will continue to be, safe. Whether the pole-owner uses internal resources or outside contractors to handle the attachment application and procedures, Attachers should pay the reasonable costs, even if the utility establishes a flat fee.

Likewise, it is reasonable to include terms and conditions that impose consequences for an attacher that refuses to comply with provisions that are designed to ensure safety, reliability, and fair cost allocation. Such consequences should include reasonable penalties for failing to properly register attachments, refusal to timely pay fees, and even termination provisions to hold the attacher in default. Experience shows that penalties for unauthorized attachments late-payments, and non-compliance are necessary because there are attachers that refuse to comply otherwise. Attachers are not always forthcoming with identifying new attachments. Simply correcting unregistered

attachments going forward will not encourage the attacher to comply going forward. It merely encourages them to game the system and wait to see if they get caught installing unpermitted attachments. Not only do unregistered attachments reflect a form of financial free-riding, they can also pose a hazard to safety and reliability since they are not being reviewed by the utility prior to installation. A penalty for these unpermitted attachments to back-charge is necessary to ensure compliance going forward.

b. Default

Likewise, an ability to terminate for default helps encourage compliance with the tariff. Just as a utility has the right to disconnect a customer for refusal to pay for electric or natural gas consumption, subject to certain notice requirements, so too should the utility be permitted to terminate the attachment relationship for refusal to comply with tariff provisions or pay for attachment service. Otherwise, the attacher will have no incentive to follow the terms of the tariff. As the tariff is approved by the Commission, and constitutes a service offered by the utility, the Commission will maintain jurisdiction over Attachers' challenges to the utility's administration of its tariff. However, the opposite is not true - the Commission does not have the jurisdiction to investigate the Attacher or to order all forms of appropriate redress for Attachers' noncompliance with the tariff, such as the award of damages for costs incurred due to an Attacher's non-compliance.

Absent an ability to terminate the attachment relationship for default, the utility is without meaningful redress against a habitual non-compliant attacher who refuses to abide by regulations or pay their fair share of costs. The utility would be limited to pursuing collections from the attacher, who will continue to evade payment while

retaining all the commercial benefits of having its structures mounted on the utility's poles. To avoid this one-sided scenario, it is necessary to incorporate into the tariff itself clear and concrete consequences for failure of attachers to comply.

To avoid these consequences, the attacher need only follow the tariff. It is only those attachers who refuse to comply who would be subject to such additional charges. KBCA's objections to such terms and conditions that are intended to encourage attacher compliance with what will ultimately be a Commission-approved tariff is a curious position to take.

4. Conduit Occupancy

KBCA objects to the conduit occupancy charge proposed by Ky Power. While Duke Energy Kentucky takes no position on KY Power's proposed charge, Duke Energy Kentucky submits that, to the extent KBCA is objecting to the existence of any conduit occupancy charge, the Commission should summarily reject such a position. The utility should be permitted to assess a conduit occupancy charge that the Commission determines to be fair, just and reasonable. Indeed, 807 KAR 5:15 does not preclude a utility from establishing a conduit occupancy charge by tariff.

5. Indemnities

807 KAR 5:15 Section 3(4) explicitly permits a utility's pole attachment tariff to include fair, just and reasonable terms relating to, among other things, limitations on liability, indemnification, insurance requirements, as well as restrictions on access to poles for reasons of lack of capacity, safety, reliability, and engineering standards. KBCA objects to the indemnification language submitted by LG&E, KU, and KY Power to the extent it would require an attacher to be responsible for the negligence of others. Duke

Energy Kentucky takes no position on the language submitted by LG&E, KU and KY Power. However, Duke Energy Kentucky respectfully submits that attachers should be held responsible for damages they cause or contribute to, and, at a minimum, should indemnify pole owners for the damages they, or their affiliates, agents, contractors, or subcontractors directly or indirectly cause, in part or in full. Indeed, Duke Energy Kentucky's pole attachment tariff, was previously approved by this Commission, and has always contained such an indemnification requirement. This provision has never been questioned by the Commission or by any attachers. Moreover, the Company has not proposed any changes to this term in its tariff, following the passage of the new regulation. As such, the Company submits that its current tariff language remains reasonable as is permitted under the regulation and should not be modified.

6. Contractor Insurance Obligations

KBCA objects to provisions contained in the pole attachment tariffs of LG&E and KU, that would require any attacher's contractor or subcontractor to maintain the same insurance requirements as the attacher. Duke Energy Kentucky takes no position on the insurance requirements determined by LG&E and KU to be necessary. However, the Company respectfully submits that it is reasonable and consistent with the Commission's pole attachment regulation to impose fair, just, and reasonable insurance requirements on contractors and subcontractors of an attacher.

As is the case with indemnification discussed above, the pole attachment regulation permits fair, just, and reasonable terms and conditions related to insurance requirements. In order to adequately protect the pole owner and other attachers, as well as to avoid unnecessary finger pointing on the part of an attacher who may attempt to

disavow responsibility of negligent or willful actions of its contractors and subcontractors who may damage the utility's infrastructure, it is reasonable to impose a separate insurance requirement on those third parties.

IV. Conclusion

Duke Energy Kentucky appreciates the opportunity to offer a response to AT&T Kentucky's and KBCA's objections to LG&E's, KU's, and Kentucky Power's proposed tariffs. 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 April 14th, 2022; and that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding.

/s/Rocco D'Ascenzo

Rocco D'Ascenzo