

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

REBUTTAL TESTIMONY OF
JEREMY B. GIBSON
ON BEHALF OF
DUKE ENERGY KENTUCKY, INC.

July 11, 2022

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I. INTRODUCTION AND PURPOSE

1 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

2 A. My name is Jeremy B. Gibson. My business address is 1262 Cox Road, Erlanger,
3 Kentucky 41082.

4 **Q. BY WHOM ARE YOU EMPLOYED AND IN WHAT CAPACITY?**

5 A. I am employed by Duke Energy Business Services LLC (DEBS) as Supervisor Joint
6 Use for Duke Energy Kentucky, Inc., (Duke Energy Kentucky or the Company)
7 and affiliated natural gas utilities. DEBS provides various administrative and other
8 services to Duke Energy Kentucky and other affiliated companies of Duke Energy
9 Corporation (Duke Energy).

10 **Q. PLEASE BRIEFLY DESCRIBE YOUR EDUCATIONAL BACKGROUND**
11 **AND PROFESSIONAL EXPERIENCE.**

12 A. I hold an Associate of Applied Business degree in Computer Science from Southern
13 Ohio College, and an Associate of Applied Science degree in Electronics
14 Engineering Technology from Cincinnati State Technical and Community College.
15 Since 1998, I have been employed by companies under what is now Duke Energy
16 in various positions. In 2006, I took the position of Gas Corrosion Technician,
17 where my job duties included oversight and maintenance of all steel coated
18 protected gas lines in KY/OH. In 2009, I took a Distribution Design Technician
19 position, where one of my main duties included engineering Duke-owned poles for
20 new joint use attachments. Other duties involved with this role included designing
21 for replacement of deteriorated (“red-tagged”) poles, beautification projects for
22 municipalities, and road improvements. In 2013, I moved to the Joint Use Facilities

1 Specialist role where my job duties included managing Indiana and, subsequently,
2 also Kentucky and Ohio, with regard to all of the agreements with current attachers
3 and negotiating any new attachment agreements as requested, working with Duke
4 Energy's engineering teams to make sure that all new attachment request are
5 completed and returned to the customer on time while meeting Federal
6 Communications Commission (FCC), state and other local governing rules that are
7 tied to new attachment request, verifying that all attachers are attaching in
8 accordance to Duke Energy's standards and meeting National Electric Safety Code
9 (NESC) clearances after attaching, making sure that all pole rentals and engineering
10 costs are invoiced and paid on time, and working with any pole attacher to resolve
11 any conflicts that may arise. In 2016, I was promoted to Senior Joint Use Specialist.
12 At this time, I was covering Indiana, and transitioning to Kentucky and Ohio as
13 well.

14 **Q. PLEASE SUMMARIZE YOUR RESPONSIBILITIES AS SUPERVISOR**
15 **JOINT USE.**

16 A. In 2018, I was promoted to the Supervisor of Joint Use for Duke Energy Midwest
17 (DMW) and Duke Energy Progress (DEP) where I oversee five different states
18 including Indiana, Ohio, Kentucky, N. Carolina, and S. Carolina, and supervise four
19 Joint Use Facilities Specialists, one Sr. Joint Use Facilities Specialist, one
20 Technical Associate, and one Contingent Worker. I work with each Specialist to
21 make sure that either the state or FCC rules are followed regarding new attachment
22 requests. I also work to address any escalations or complaints that may arise from
23 an attaching customer.

1 **Q. HAVE YOU PREVIOUSLY TESTIFIED BEFORE THE KENTUCKY**
2 **PUBLIC SERVICE COMMISSION?**

3 A. No.

4 **Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY IN THIS**
5 **PROCEEDING?**

6 A. The purpose of my rebuttal testimony is to respond to direct testimony submitted
7 by Mr. Jerry Avery and Ms. Patricia D. Kravtin on behalf Kentucky Broadband and
8 Cable Association (KBCA). With regard to Mr. Avery's direct testimony, I will be
9 responding to explain the reasonableness and importance of three types of tariff
10 provisions in the Company's proposed tariff: (1) provisions authorizing utilities to
11 remove attachments for non-compliance or default after a set notice period; (2)
12 provisions setting insurance requirements for attachers' contractors and
13 subcontractors; and (3) provisions indemnifying utilities and holding them
14 harmless for consequences of negligence in relation to pole attachments. With
15 regard to Ms. Kravtin's direct testimony, I will be responding to explain why it is
16 fair and reasonable, as well as economically sound, to allocate the cost of a non-
17 red-tagged pole replacement to the attacher whose attachment(s) require the
18 replacement to occur.

II. DEFAULT, INSURANCE, AND INDEMNIFICATION
TARIFF PROVISIONS

1 **Q. PLEASE SUMMARIZE MR. AVERY’S POSITION ON TARIFF**
2 **PROVISIONS PERMITTING POLE OWNERS TO TERMINATE THE**
3 **ATTACHER RELATIONSHIP FOR NON-COMPLIANCE WITH THE**
4 **TARIFF.**

5 A. Mr. Avery opposes as unreasonable tariff provisions which permit a pole owner to
6 remove an attachment belonging to a non-compliant attacher after notification and
7 failure to timely cure. Mr. Avery repeatedly describes such provisions as granting
8 pole owners “unfettered discretion”¹ and states that pole owners do not “really
9 need[] the ‘teeth’ of removing attachments.”² Mr. Avery states that such provisions
10 are “far outside industry norms.”³ He specifically cites the default provision in
11 Duke Energy Kentucky’s tariff as an example of such an unreasonable provision.⁴

12 **Q. DO YOU AGREE WITH MR. AVERY THAT DUKE ENERGY**
13 **KENTUCKY’S DEFAULT PROVISION PROVIDES DUKE ENERGY**
14 **KENTUCKY WITH “UNFETTERED DISCRETION” TO REMOVE**
15 **ATTACHMENTS?**

16 A. No, that is simply incorrect. The relevant provision is as follows:

17 *If attachee fails to comply with any of the provisions herein*
18 *contained or defaults in the performance of any of its obligations*
19 *herein contained and fails within 60 days after written notice from*
20 *the Company to correct such default or non-compliance, the*
21 *Company may, at its option, forthwith terminate the specific permit*

¹ Avery Direct Testimony, at pg. 3.

² *Id.*, at pgs. 7-8.

³ *Id.*, at pg. 3.

⁴ *Id.*, at pg. 3, n. 2 (citing Duke Energy Kentucky, Inc., Tariff, Page 9, Terms & Conditions, ¶ 29).

1 *or permits covering the poles and attachee's attachments to which*
2 *such default or non-compliance is applicable and any or all other*
3 *permits of attachee, and remove attachments of attachee at*
4 *attachee's expense, and no liability therefor shall be incurred by the*
5 *Company because of such action except damages to facilities caused*
6 *by the sole negligence of Company.*⁵

7 The Company does not have unfettered discretion to remove attachments. It must
8 demonstrate (1) either non-compliance or default in performance; (2) provide
9 written notice of the non-compliance or default; and (3) wait 60 days before
10 terminating any permits and removing any attachments. Because these
11 requirements are part of a Commission-approved tariff, the Company knows that it
12 will be subject to the Commission's jurisdiction in the event of any challenges to
13 how it administers its tariff. An attacher's ability to file a complaint with the
14 Commission serves as a constraint on the pole owner and a disincentive to
15 unreasonably or unjustifiably remove attachments.

16 **Q. WHY IS IT REASONABLE TO PERMIT POLE OWNERS TO**
17 **TERMINATE THE ATTACHER RELATIONSHIP AND REMOVE**
18 **ATTACHMENTS FOR NON-COMPLIANCE OR DEFAULT AFTER A**
19 **SUITABLE NOTIFICATION PERIOD?**

20 A. It is necessary for utilities to have a form of meaningful and timely redress against
21 attachers who habitually fail to comply with regulations and tariff obligations,
22 including but not limited to payment terms. Mr. Avery states that "30 days is an
23 unreasonable timeframe to cure," and appears to also consider 60 days

⁵ Duke Energy Kentucky, Inc., Tariff, Page 9, Terms & Conditions, ¶ 29. (emphasis added).

1 unreasonable,⁶ but he does not specify any concrete timeframe which he would
2 consider reasonable. It is not fair or reasonable for a non-compliant or non-paying
3 attacher to continue to enjoy all the commercial benefits of attachment indefinitely
4 without payment merely by alleging a dispute or claiming to be working on
5 resolving the non-compliance in question. Contrary to Mr. Avery's assertions,
6 provisions permitting a pole owner to remove attachments after written notice and
7 failure to cure non-compliance or default are well within industry standards. Indeed,
8 the Company's above provision is unchanged in the most recent proposed tariff and
9 has been past of the Company's Commission-approved tariff for years.

10 **Q. PLEASE SUMMARIZE MR. AVERY'S POSITION ON CONTRACTOR**
11 **INSURANCE REQUIREMENTS IN POLE ATTACHMENT TARIFFS.**

12 A. Mr. Avery believes it is inherently unjust and unreasonable to include tariff
13 provisions which require attachers' contractors to comply with the same insurance
14 obligations that the tariff imposes on attachers themselves. Mr. Avery states that
15 such provisions are unreasonable because the number of contractors and pole
16 owners makes it "virtually impossible to comply." Also, Mr. Avery appears to view
17 these provisions as redundant and "unnecessary" because "attachers are ultimately
18 responsible" for the actions of their contractors.⁷

⁶ Avery Direct Testimony, at pg. 3.

⁷ *Id.*, at pgs. 9-10.

1 **Q. DO YOU AGREE WITH MR. AVERY THAT CONTRACTOR**
2 **INSURANCE REQUIREMENTS ARE UNREASONABLE?**

3 A. No, I do not. As Mr. Avery himself appears to acknowledge, attachers frequently
4 rely on contractors.⁸ In the event that a contractor or subcontractor causes damage,
5 there is significant incentive on the part of the attacher to disclaim responsibility
6 for the contractor's actions. Even in instances where the attacher is "ultimately"
7 held responsible, the legal wrangling over such "ultimate responsibility" would
8 take time. Thus, it is reasonable, for the protection of the pole owner and other
9 attachers, to impose the same insurance requirements on contractors or
10 subcontractors doing work on behalf of the attacher. I also disagree with Mr.
11 Avery's claim that it is "virtually impossible to comply" with such requirements.
12 As long as the tariff provisions in question impose *minimum* insurance
13 requirements, an attacher can comply with all tariff provisions by complying with
14 the highest of the required minimums.

15 **Q. PLEASE SUMMARIZE MR. AVERY'S POSITION ON**
16 **INDEMNIFICATION PROVISIONS IN POLE ATTACHMENT TARIFFS.**

17 A. Mr. Avery identifies indemnification provisions in a number of pole attachment
18 tariffs as unreasonably "seek[ing] to hold an attacher responsible for the pole
19 owner's own negligence."⁹ One of the provisions he cites as doing so is the
20 indemnification provision in Duke Energy Kentucky's tariff,¹⁰ which has been in

⁸ Avery Direct Testimony, at pg. 10.

⁹ *Id.*, at pg. 5.

¹⁰ *Id.*, n. 5.

1 the Company's tariff for some time and is not proposed to be changed in the
2 pending filing:

3 *Attachee agrees to indemnify and save harmless Company from and*
4 *against any and all liability, loss, damage, costs, attorney fees, or*
5 *expense, of whatsoever nature or character, arising out of or*
6 *occasioned by any claims or any suit for damages, injunction or*
7 *other relief, on account of injury to or death of any person, or*
8 *damage to any property including the loss of use thereof, or on*
9 *account of interruption of attachee's service to its subscribers or*
10 *others, or for public charges and penalties for failure to comply with*
11 *federal, state or local laws or regulations, **growing out of or in***
12 ***connection with any actual or alleged negligent act or omission,***
13 *whether said negligence is **sole, joint or concurrent, of attachee or***
14 ***its servants, agents or subcontractors,** whether or not due **in part to***
15 *any act, omission or negligence of Company or any of its*
16 *representatives or employees. Company may require attachee to*
17 *defend any suits concerning the foregoing, whether such suits are*
18 *justified or not.*¹¹

19 **Q. DO YOU AGREE WITH MR. AVERY THAT THE ABOVE PROVISION IN**
20 **DUKE ENERGY KENTUCKY'S TARIFF HOLDS AN ATTACHER**
21 **RESPONSIBLE FOR THE POLE OWNER'S NEGLIGENCE AND IS**
22 **UNREASONABLE?**

23 A. No. The Duke Energy Kentucky provision reasonably requires an attacher to
24 indemnify the Company when negligence is the attacher's "sole, joint or
25 concurrent" negligence (or that of its servants, agents, or subcontractors). This
26 language has been previously approved by the Commission and has always been in

¹¹ Duke Energy Kentucky Tariff, Page 7, Terms & Conditions, ¶ 19. (emphasis added).

1 the Company's tariff without question by the Commission or any previous
2 challenge by attachers. It holds attachers responsible in instances of "sole, joint or
3 concurrent" negligence, which is reasonable and appropriate.

III. NON-RED-TAGGED POLE REPLACEMENT COSTS

4 **Q. PLEASE SUMMARIZE MS. KRAVTIN'S POSITION ON COST**
5 **ALLOCATION WHEN AN ATTACHER REQUIRES A NON-RED**
6 **TAGGED POLE TO BE REPLACED.**

7 A. Ms. Kravtin believes that it is unfair to require attachers to bear the cost of a non-
8 red-tagged pole replacement when such replacement is necessary as part of the
9 make-ready process. Ms. Kravtin believes that "when a new attacher replaces a
10 pole, the *primary direct benefit* is to the utility."¹² Ms. Kravtin states that, in such
11 instances, utilities should only be able to "recover costs based on the remaining net
12 book value of the replaced pole."¹³

13 **Q. DO YOU AGREE WITH MS. KRAVTIN THAT THE "PRIMARY**
14 **BENEFIT" OF A MAKE-READY NON-RED-TAGGED POLE**
15 **REPLACEMENT IS TO THE UTILITY?**

16 A. No. The primary benefit is to the attacher, who would not be able to attach at all
17 without such pole replacement. It is the attacher whose desired attachments require
18 the existing pole to be replaced with an upgraded one and also require existing
19 attachments to be transferred to the new pole. The premature replacement of a non-
20 red-tagged pole with an upgraded pole is done solely to enable the attacher to add
21 its attachment(s).

¹² Kravtin Direct Testimony, at pgs. 7-8.

¹³ *Id.*, at pg. 9.

1 The utility, on the other hand, does not need to replace a non-red-tagged pole. Any
2 potential future benefits to a utility from prematurely replacing a perfectly suitable
3 pole that is sufficient to provide safe and reliable utility service with an upgraded
4 pole are remote, tenuous, incidental, and conditional, while the cost of the pole is
5 immediate and certain. Insofar as a portion of the cost is to upgrade the capacity of
6 the pole, such upgraded capacity is of no use to the utility and the costs of moving
7 existing attachments to the new pole do not benefit the utility either.

8 **Q. DO YOU AGREE WITH MS. KRAVTIN THAT “THE RATIONALE**
9 **UNDERLYING THE COMMISSION’S COST ALLOCATION**
10 **REGULATION FOR RED-TAGGED POLES . . . APPLIES EQUALLY TO**
11 **NON-RED-TAGGED POLES”?**¹⁴

12 A. No. A red-tagged pole is a one that is already out of compliance or has been
13 identified for replacement.¹⁵ Therefore, the replacement of the red-tagged pole is
14 not being caused by the attacher, but rather by a pre-existing need of the utility.
15 The same is not true of the non-red-tagged pole, which the utility has no need to
16 replace. This is a crucial distinction between the red-tagged pole and the non-red-
17 tagged pole because cost causation is a key principle in regulated utility cost
18 allocation.

¹⁴ Kravtin Direct Testimony, at pg. 7.

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

1 **Q. DO YOU AGREE WITH MS. KRAVTIN THAT “REQUIRING NEW**
2 **ATTACHERS TO PAY THE ENTIRE COST OF REPLACING A NON-RED**
3 **TAGGED POLE IS UNFAIR”?**

4 A. No. As described above, it is the attacher who is causing the pole owner to incur
5 the cost of replacing the pole at the time of the request. Thus, the attacher is causing
6 all of the cost of replacement to be incurred. Furthermore, Ms. Kravtin’s proposal
7 that the attacher be charged the pole’s net book value does not adequately
8 compensate ratepayers for the pole’s actual potential years of remaining service
9 which at that point is unknown and might have been longer than the assumed useful
10 life for depreciation purposes. Fundamentally, Ms. Kravtin’s approach seeks to
11 make electric ratepayers accelerate investments in unnecessary infrastructure for
12 the benefit of attachers, even though many or most of the electric ratepayers may
13 not even be customers of the attacher’s broadband service. This approach would be
14 unfair. However, requiring attachers to bear the costs of the pole replacements
15 occasioned solely by their need to attach is fair and reasonable.

IV. CONCLUSION

16 **Q. DOES THIS CONCLUDE YOUR PRE-FILED REBUTTAL TESTIMONY?**

17 A. Yes.

VERIFICATION


STATE OF OHIO)
) SS:
COUNTY OF HAMILTON)

The undersigned, Jeremy B. Gibson, Supervisor Joint Use, being duly sworn, deposes and says that he has personal knowledge of the matters set forth in the foregoing testimony, and that it is true and correct to the best of his knowledge, information, and belief.



Jeremy B. Gibson, Affiant

Subscribed and sworn to before me by Jeremy B. Gibson on this 11th day of July, 2022.



NOTARY PUBLIC

My Commission Expires: July 8, 2027



EMILIE SUNDERMAN
Notary Public
State of Ohio
My Comm. Expires
July 8, 2027