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	)	

LOUISVILLE GAS & ELECTRIC COMPANY'S AND KENTUCKY UTILITIES COMPANY'S RESPONSE BRIEF IN SUPPORT OF THEIR REVISED POLE ATTACHMENT TARIFFS

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Louisville Gas & Electric Company ("LG&E") and Kentucky Utilities Company ("KU") (collectively, "the Companies") respectfully submit this response brief in support of the Companies' revised pole attachment tariffs ("Proposed Rate PSAs").

I. INTRODUCTION

The Kentucky Broadband and Cable Association ("KBCA") was the only intervenor in this proceeding to file an initial brief. KBCA filed the same initial brief in each of the four separate dockets established to evaluate the pole attachment tariffs filed by various pole owners. In contrast with the Companies' detailed support of the Proposed Rate PSA's, KBCA's brief is exceedingly high-level and emphasizes policy points over objections to specific tariff provisions—which is surprising given that KBCA was the only party to request briefing in this proceeding. Indeed, the generic nature of many of KBCA's arguments makes it difficult to ascertain the specific tariff provisions KBCA is actually challenging. Where it is light on details, KBCA's brief is heavy on introspection, focusing almost exclusively on its own testimony and ignoring relevant record evidence submitted by other parties. KBCA's brief does not even address the rebuttal testimony submitted by the Companies (or the other electric utility pole owners for that matter). The fact that KBCA's brief gives such a wide berth to the Companies' rebuttal testimony—testimony that directly refutes the premises upon which KBCA relies—speaks volumes.

II. RESPONSE TO KBCA'S ARGUMENTS

A. The Record Evidence Supports the Commission's Long-Standing Policy of Allocating the Cost of Make-Ready Pole Replacements to Attachment Customers.

KBCA continues to assert that it is not just and reasonable for Attachment Customers to bear the entire cost of make-ready pole replacements (*i.e.*, pole replacements performed solely to accommodate additional communications attachments on a pole) and that Attachment Customers should only be charged for the "remaining net book value" of the pole that is being prematurely

replaced ("Cost Allocation Proposal").[1] While the Companies offered testimony specifically refuting KBCA's arguments and "evidence" in support of their Cost Allocation Proposal, KBCA's brief does not even mention the rebuttal testimony submitted by the Companies or any other electric utilities. As if the Companies' rebuttal testimony does not exist in the record, KBCA merely reiterates in summary fashion the testimony of its own witness (Patricia D. Kravtin). As explained in the Companies' initial brief, KBCA bears the burden of demonstrating that the cost recovery provision in the Companies' Proposed Rate PSAs (Section 7.f.), which requires Attachment Customers to bear the entire cost of a make-ready pole replacement, is unjust and unreasonable.[2] By failing to even attempt to refute the substantial, contrary record evidence in this proceeding, KBCA has failed to carry that burden.

For example, relying solely on the testimony of Ms. Kravtin, KBCA argues that the "many benefits" pole owners purportedly receive from make-ready pole replacements justify the Cost Allocation Proposal.[3] However, the Companies' rebuttal testimony (and other evidence in the record) directly refutes this claim:

> The benefits alleged by Ms. Kravtin overlook an important operational fact: unless a make-ready pole replacement coincides with the Companies' internal infrastructure improvement plan, the make-ready pole replacement will virtually never benefit the Companies or their electric ratepayers. There is no way for the Companies to know at the time of a make-ready pole replacement what type of pole their core electric service needs would require at the time the existing pole would have otherwise been replaced in the normal course…. As a result, if five (5) years down the road the Companies' core electric service needs would require an even

[1] *See* Brief of the Kentucky Broadband and Cable Association ("KBCA's Brief") at 2-7 (filed Oct. 11, 2022).

[2] *See* LG&E's and KU's Initial Brief in Support of Their Revised Pole Attachment Tariff's ("Companies' Initial Brief") at 17-18 & n.33 (filed Oct. 11, 2022) ("[T]he cost recovery provision for make-ready pole replacements has been a part of the Companies' pole attachment tariffs since 2015 and has been approved by the Commission in at least four rate cases."). Section 7.f. is identical to the cost recovery language in the Companies' Current Rate PSAs and is, therefore, presumptively fair, just and reasonable.

[3] KBCA's Brief at 5-6.

> 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. Yet, under Ms. Kravtin's cost allocation proposal, the Companies would: (1) lose the value and utility of the remaining useful life of the existing pole; (2) be forced to incur the vast majority of the cost for the make-ready replacement pole; and (3) also bear the entire cost of replacing the make-ready replacement pole with one that actually supports the Companies' core electric service needs. Even under the best of circumstances, this would require current electric ratepayers to fund infrastructure that is not currently needed (and will not be needed in the near future) to provide electric service.[4]

KBCA also argues, again based on Ms. Kravtin's testimony, that pole owners are underreporting the number of "red tagged poles" in their distribution networks as part of a scheme to shift the entire cost of replacing its infrastructure to third-party attachers.[5] In fact, KBCA argues that allowing pole owners to recover the entire cost of a make-ready pole replacement actually incentivizes this type of misbehavior.[6] But the evidence submitted by the Companies and other electric utility pole owners directly refutes these far-fetched claims. For example, Michael E. Hornung, Manager, Pricing and Tariffs for the Companies, explained:

> The Companies do not under-report red-tagged poles. In fact, Ms. Kravtin, in her response to the Commission's request for information, acknowledged that there is no direct evidence of this. Instead, she doubled-down on the idea that expected life-cycle pole replacement rates and red-tag rates tell the whole story. This is incorrect for at least two reasons. First, for purposes of determining the "expected

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[4] Rebuttal Testimony of Michael E. Hornung, Manger, Pricing/Tariffs, on Behalf of the Companies at 5-6 (filed Jul. 11, 2022); *see also* Rebuttal Testimony of Pamela F. Ellis, Director of Energy Delivery Engineering Services, American Electric Power Service Corporation, on Behalf of Kentucky Power Company at 10-11 (filed Jul. 11, 2022); Rebuttal Testimony of Christopher F. Tierney, HKA Global, on Behalf of Kentucky Power Company and Duke Energy Kentucky Inc. at 8-9 (filed July 11, 2022) (explaining that, even assuming *arguendo* that pole owners benefit from make-ready pole replacements, pole owners would still incur significant net losses under the Cost Allocation Proposal); Rebuttal Testimony of Jeremy B. Gibson, , on Behalf of Duke Energy Kentucky Inc. at 10 (filed Jul. 11, 2022) ("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 uncertain.").

[5] KBCA's Brief at 4-5.

[6] *See id.* at 4.

> life-cycle pole replacement rates," Ms. Kravtin uses the asset life (or average service life) underlying the depreciation rates approved by the Commission. These service life figures, though, may be outdated or may be the result of a settlement. In any event, the life of a pole for depreciation purposes does not equate to the actual useful life of an individual pole—or even the average actual useful life of poles. Second, the "red-tag rate," which Ms. Kravtin derives by dividing the number of red-tagged poles each year with the total number of poles, is the wrong comparative value because it only captures poles identified for reinforcement or replacement through cyclical inspections. A more representative value would be the total number of poles actually replaced each year.
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> […]
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> The asset life for KU distribution poles, as set forth in the 2015 Depreciation Study underlying the depreciation rates currently approved by the Commission, is 50 years. Under Ms. Kravtin's rationale, this would equate to an expected life-cycle pole replacement rate of 2% annually. KU, based on historical data, anticipates red-tagging 1,738 distribution poles per year. This would equate to a red-tag rate of 1.3%. However, between 2019-2021, KU replaced 5,564 poles per year on average, which would equate to a replacement rate of 4.0%. In other words, KU is actually replacing 4.0% of its pole inventory each year, which doubles Ms. Kravtin's "expected life-cycle pole replacement rate." These replacements for reasons other than deterioration have the effect of reducing the number of red-tagged poles identified through cyclical inspections.[7]

Further, Christopher F. Tierney, a third-party expert retained by Kentucky Power Company and Duke Energy Kentucky Inc., explained that it would be "contrary to an electric utility's economic interests" to underreport "red tagged poles" and shift the replacement costs to third-party attachers:

> As regulated businesses, utilities are allowed to earn a return (profit) on prudently invested capital. Thus, when a utility determines that a pole replacement is prudent and reasonable to ensure continued safe and reliable service, it knows it will recover a reasonable return on its investment and that there will be no detriment to shareholders. Not only is a utility economically incentivized to install poles at its own cost when it is prudent to do so, it is disincentivized to wait for a third-party to do so when it makes sense (i.e., lost opportunity to earn a return on the invested capital).[8]

KBCA has simply glossed over all of the record evidence cited above. KBCA's brief does not *mention*, let alone address, any of the testimony submitted by the electric utility pole owners

[7] Rebuttal Testimony of Michael E. Hornung at 9-10, 10.

[8] Rebuttal Testimony of Christopher F. Tierney at 10.

on this point. Moreover, as noted in the Companies' initial brief, this proceeding is narrow in scope and does not sufficiently take into account the impact that KBCA's Cost Allocation Proposal would have on the Companies' electric rate payers—rate payers who are conspicuously absent from this proceeding.[9] The Commission should again reject KBCA's Cost Allocation Proposal.

B. KBCA's Argument that Pole Owners Cannot Recover the Cost of Evaluating Proposed Overlashing Conflicts with the Commission's Pole Attachment Regulation.

KBCA argues that the overlashing provisions in the rural electric cooperative corporation ("RECC") proposed tariffs are not just and reasonable. Specifically, the RECC tariffs allow the RECCs to recover the cost of pole loading studies performed on proposed overlashes.[10] But KBCA argues that Attachment Customers should only be required to bear the cost of a pole loading study if the study reveals a potential loading issue.[11] The RECC tariffs also require Attachment Customers to reimburse the RECCs for "any inspection costs related to overlashing."[12] But KBCA argues that the RECCs should not be able to recover the costs of inspections performed on proposed overlashing because it "is unnecessary and will undermine the benefits of overlashing by unnecessarily increasing the expense to perform [overlashing]."[13] Although framed as an objection to the RECC's tariffs, KBCA's arguments implicate and undermine the overlashing provisions in the Companies' Proposed Rate PSAs.[14]

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[9] *See* Companies' Initial Brief at 22 & n.46.

[10] *See* Rebuttal Testimony of Christopher F. Tierney at 8-9.

[11] *See id.*

[12] *See id.* at 9.

[13] *See id.*

[14] *See* Proposed LG&E Rate PSA, Section 11.a. ("Attachment Customer shall reimburse Company for any costs incurred in evaluating the proposed overlashing."); *accord* Proposed KU Rate PSA, Section 11.a.

KBCA's arguments directly conflict with the Commission's pole attachment regulation. The first iteration of the Commission's proposed pole attachment regulation did not specifically address overlashing. At KBCA's prompting, the Commission incorporated an overlashing rule into the second iteration of its proposed pole attachment regulation. The provision was largely based on language proposed by KBCA, but the Commission specifically stated:

> The Commission will also remove the prohibition on charging a fee to overlashers. Reviewing potential overlashing, like new attachments, will result in costs and there may be instances where an overlash evaluation requires a more complicated review, such as an engineering study, and this is a cost that the overlasher, and not the utility's customers, should bear.[15]

In other words, the Commission explicitly rejected KBCA's arguments in the underlying rulemaking proceeding, and it should do so again here.

C. The Commission's Regulation Provides Attachment Customers with an Adequate Safeguard Against Unreasonable Removals.

KBCA argues that the default and removal provision in the tariffs proposed by the rural local exchange carriers and incumbent local exchange carriers (collectively, "telephone companies") is not just and reasonable. In particular, KBCA takes issues with the removal provision, which would allow the telephone companies to remove an Attachment Customer's attachments from their poles if the Attachment Customer fails to cure a material default within the cure period.[16] KBCA argues, *inter alia*, that:

> Given utilities' ownership and control over essential pole facilities, it is neither reasonable nor appropriate for pole owners to have unfettered discretion to remove (or even threaten to remove) all of an attacher's plant for *any* non-compliance with a tariff's terms, particularly when the non-compliance is disputed in good faith by the attacher. Pole owners should not be allowed to exercise their leverage to put

[15] Statement of Consideration Relating to 807 KAR 5:015 ("Statement of Consideration) at 52 (filed Sep. 15, 2021).

[16] KBCA's Brief at 12-13.

> attachers to the impossible choice of capitulating to their demands or suffering irreparable harm from having their facilities removed.[17]

In essence, KBCA is arguing that no pole owner should be permitted to remove an Attachment Customer's attachments, even if the Attachment Customer is in default and has failed to cure its default within the stated cure period, so long as the Attachment Customer is disputing the default. Although directed at the telephone companies, and even though KBCA has raised no objection to the default provision in the Companies' Proposed Rate PSAs, KBCA's argument, if accepted by the Commission, could impact the Companies' Proposed Rate PSAs.[18]

There are at least three problems with KBCA's argument. First, the Commission's pole attachment regulation expressly contemplates that a tariff will allow a pole owner to remove (or require Attachment Customer to remove) attachments for non-compliance, and requires sixty (60) days' advance written notice of such removal.[19] Second, the carve-out proposed by KBCA is superfluous. The pole attachment regulation already provides Attachment Customers with a remedy against a pole owner's "unfettered discretion."[20] That is, if the default (and notice of removal) is disputed in good faith by an Attachment Customer, the Attachment Customer can seek relief (in the form of a stay) from the Commission:

> An existing attacher may request a stay of the action contained in a notice received pursuant to subsection (1) [*i.e.*, notices pertaining to "removal of facilities or termination of any service"] of this section by filing a motion pursuant to 807 KAR 5:001, Section 4 within fifteen (15) days of the receipt of the first notice provided pursuant to subsection (1) of this section.[21]

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[17] *Id*. at 13.

[18] *See* Proposed LG&E Rate PSA, Section 20 (providing that, if an Attachment Customer fails to correct a default within sixty (60) days, LG&E has the right to remove, at Attachment Customer's expense, the Attachments to which the default relates); *accord* Proposed KU Rate PSA, Section 20.

[19] *See* 807 KAR 5:015, Section 6(1)(a).

[20] *See* 807 KAR 5:015, Section 6(2).

[21] 807 KAR 5:015, Section 6(2)(a).

In fact, KBCA has already agreed that this provision would allow a KBCA member to request a stay of a notice of removal upon provision of written notice that a KBCA member must remove its facilities due to a default under a pole attachment tariff.[22] Finally, if the Commission were to accept KBCA's argument, the right of a pole owner to remove non-compliant attachments would effectively be nullified—*i.e.*, KBCA's "dispute" exception would consume the rule.

D. KBCA's Objection to the Contractor Insurance Requirement Is Both Unfounded and Revealing.

The Companies' Proposed Rate PSAs impose the following insurance requirement: "Attachment Customer shall require its Contractors and subcontractors to provide and maintain the same insurance coverage as required of Attachment Customer."[23] This provision has been a part of the Companies' Rate PSAs since 2017.[24] In its initial objections, KBCA argued that the Contractor Insurance Requirement would impose an unnecessary burden on Attachment Customers:

> KBCA, which is ultimately liable to the pole owner, has existing contracts with its contractors, which may contain different requirements.[25]

The argument raised in KBCA's initial objections is baffling.

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[22] *See* KBCA's Responses to Kentucky Power Company's First Request for Information, Item 9 (filed Jul. 7, 2022).

[23] Proposed LG&E Rate PSA, Section 23.b.; Proposed KU Rate PSA, Section 23.b. ("Contractor Insurance Requirement").

[24] *See* Louisville Gas and Electric Company Pole and Structure Attachment Charges, P.S.C. Electric No. 11, Original Sheet No. 40.18, Section 23.b. (effective Jul. 1, 2017); Kentucky Utilities Company Pole and Structure Attachment Charges, P.S.C. Electric No. 18, Original Sheet No. 40.18, Section 23.b. (effective Jul. 1, 2017).

[25] Objections of the Kentucky Broadband and Cable Association to Newly Filed Kentucky Tariffs at 22, 23 (filed Mar. 17, 2022).

As noted above, the Contractor Insurance Requirement has been part of the Companies' Rate PSAs since 2017, which means that it has been approved by the Commission in three (3) separate rate cases. But that is only half of the story. KBCA (through its predecessor KCTA) intervened in the Companies' 2017 rate cases (*i.e.*, the rate cases in which the Contractor Insurance Requirement was originally adopted) and, following the negotiation of certain terms and conditions within the proposed Rate PSAs, stipulated that:

> [A]s revised, the terms and conditions set forth in the proposed PSA Rate Schedule are fair, just, and reasonable, will promote public safety, enhance the reliability of electric service, and ensure fair and uniform treatment of Attachment Customers as well as promote the deployment and adoption of advanced communications services.[26]

Similarly, Charter Communications (KBCA's largest member) intervened in the Companies' 2019 rate cases and, following the negotiation of certain proposed revisions to the Companies' Rate PSAs, stipulated that:

> [A]s revised, the terms and conditions set forth in the proposed PSA Rate Schedule are fair, just, and reasonable, will promote public safety, enhance the reliability of electric service, and ensure fair and uniform treatment of Attachment Customers as well as promote the deployment and adoption of advanced communications services.[27]

In other words, KBCA has (through its predecessor and through its largest member) twice stipulated to the fact that the Contractor Insurance Requirement is fair, just and reasonable—and not just an unnecessary burden.

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[26] *An Application of Kentucky Utilities Company for an Adjustment of Its Electric Rates and For Certificates of Public Convenience and Necessity; An Application of Louisville Gas and Electric Company for an Adjustment of its Electric and Gas Rates and for Certificates of Public Convenience and Necessity*, Case Nos. 2016-00370 and 2016-00371, Second Stipulation and Recommendation at 5, Section 1.4 (May 1, 2017).

[27] *Electronic Application of Kentucky Utilities Company for an Adjustment of Its Electric Rates; Electronic Application of Louisville Gas and Electric Company for an Adjustment of Its Electric and Gas Rates*, Case Nos. 2018-00294 and 2018-00295, Stipulation and Recommendation at 3, Section 1.1 (Feb. 27, 2019).

Since filing its initial objections, KBCA's argument has shifted. The Contractor Insurance Requirement is no longer an unnecessary burden for KBCA, but is now an outright impossibility:

> As an initial matter, ***it is not possible for attachers to comply with this requirement*** [*i.e.*, the Contractor Insurance Requirement]. All contractor agreements must be negotiated, and attachers cannot simply re-negotiate and rewrite each contract with each agent, contractor, or subcontractor to satisfy each utility's unique insurance preferences.[28]

By arguing that it would be ***impossible*** to comply with the Contractor Insurance Requirement, KBCA is all but admitting that its members are not—and have never been—in compliance with this provision of the tariff. If this is true, it means that KBCA's non-compliance has exposed the Companies' to potentially uninsured losses for more than five (5) years.[29] Therefore, the Commission should not only reject KBCA's objection to the presumptively reasonable Contractor Insurance Requirement, but the Commission should also take other action necessary to induce compliance with approved tariffs.

[28] KBCA's Brief at 15. In their First Request for Information, the Companies requested that KBCA "describe the requirements that each KBCA or KCTA member has required" their contractor to maintain since 2017. Instead of substantively responding to the request for information, KBCA seemingly hid behind its status as a trade association and responded as follows: "…KBCA does not have information within its possession, custody, or control that is responsive to this Request." *See* KBCA's Responses to the Companies' First Request for Information, Item 3.a. (filed Jul. 7, 2022).

[29] *See* Companies' Response to KBCA's First Request for Information, Item 6 (filed May 5, 2022) ("The purpose of [the contractor insurance requirement] is to mitigate against any potential gaps in insurance coverage based upon who is actually performing the Attachment Customer's work (*i.e.*, an Attachment Customer's employees versus a third-party contractor). For example, if an Attachment Customer utilizes a contractor to perform make-ready on the Companies' poles, and the third-party contractor either willfully or recklessly causes damage to the Companies' facilities, the Attachment Customer could potentially disclaim liability for the contractor's willful or reckless misconduct. In that case, the Companies might be forced to recover directly from the contractor. If the contractor is underinsured, the Companies might be left holding the bag.").

III. CONCLUSION

For all the reasons set forth herein, as well as the reasons set forth in the Companies' initial brief, the Companies' responses to requests for information, the Companies' response to the initial objections filed by KBCA and AT&T, and the testimony of Mr. Hornung and Mr. Jones, the Companies respectfully request that the Commission approve the Proposed Rate PSAs as submitted.

Dated: October 18, 2022 Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with 807 KAR 5:001, Section 8, and the Public Service Commission's Order of July 22, 2021 in Case No. 2020-00085, I certify that this document was transmitted to the Public Service Commission on October 18, 2022 and that there are currently no parties that the Public Service Commission has excused from participation by electronic means in this proceeding

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Sara V. Judd
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