

**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)	

**INITIAL BRIEF OF KENTUCKY POWER COMPANY
IN SUPPORT OF REVISED TARIFF**

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Dated: October 11, 2022

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Pursuant to the Kentucky Public Service Commission’s September 23, 2022, Order, Kentucky Power Company (“Kentucky Power”) respectfully submits this initial brief in support of its revised Tariff P.A. (“Revised Tariff”).

I. INTRODUCTION

Section 3(7) of the Commission’s recently adopted pole attachment regulation required pole owners to file amended pole attachment tariffs that conform with the regulation. 807 KAR 5:015, Section 3(7). Kentucky Power filed its Revised Tariff on February 28, 2022. The Revised Tariff not only conformed to the Commission’s pole attachment regulation, but also included other additions and revisions that will bring greater clarity, certainty, and predictability to the relationship between Kentucky Power and the entities who take service under the Revised Tariff. The Revised Tariff includes new sections that (a) define key terms, (b) identify attachment tagging requirements, (c) establish processes for overlashing, self-help, one-touch make-ready, transfers, and attachment inventories, and (d) provide additional protections to Kentucky Power and its ratepayers in the form of limitations of liability and performance assurance requirements.

The Kentucky Broadband and Cable Association (“KBCA”) initially raised objections to seven provisions of the Revised Tariff: (1) the scope of cost recovery for make-ready pole replacements; (2) the conduit rate; (3) the make-ready survey fee estimate; (4) the indemnity provision; (5) the limitation of liability provision; (6) the timeline for completing one-touch make-ready (“OTMR”); and (7) the provision allowing for removal of attachments after an uncured default. KBCA submitted testimony to support some of its initial objections but submitted no testimony to support its objections to the conduit rate or the timeline for completing OTMR. AT&T Kentucky (“AT&T”) raised initial objections to three provisions of the Revised Tariff: (1) the timeline on tagging existing, untagged attachments; (2) the “deemed withdrawn” provision for make-ready estimates; and (3) the unauthorized attachment provision (to the extent the provision

does not allow an attacher to rebut the presumption that an attachment is unauthorized). In testimony, AT&T also subsequently raised an objection to the definition of “Attachment” within the Revised Tariff.

None of KBCA’s or AT&T’s objections are based on an alleged conflict with the Commission’s new pole attachment regulation. Instead, all of the objections are based upon the claim that the provisions are somehow “unjust or unreasonable.” As explained below, these objections are unfounded. The terms and conditions of the Revised Tariff—the existing provisions, the revised provisions and the new provisions—are fair, just, and reasonable. The Commission should accept the Revised Tariff as submitted by Kentucky Power. Because the Revised Tariff is a substantial re-write of the Kentucky Power Company Tariff C.A.T.V., P.S.C. NO. KY. 12 ORIGINAL SHEET NO. 16-1, AVAILABILITY OF SERVICE (effective Jan. 1, 2021) (the “Current Tariff”), Kentucky Power offers the following section-by-section explanation of (and support for) the Revised Tariff, with emphasis on those sections that have drawn objection from the intervenors.

II. PROVISIONS OF REVISED TARIFF

1. Section 1 – Availability of Service

Kentucky Power’s Current Tariff limits its availability to “operators of cable television systems.” Section 2(1) of the Commission’s new pole attachment regulation expands the category of entities entitled to take service under the tariff to include telecommunications carriers, broadband internet service providers and governmental units. *See* 807 KAR 5:015, Section 2(1). In accordance with the Commission’s new regulation, the Revised Tariff clarifies that “broadband internet providers,” “governmental units” and “telecommunications carriers” are eligible to take service under the Tariff. As no party has presented evidence demonstrating this provision is unjust or unreasonable, this section should be approved as filed.

2. Section 2 – Definitions

This is an entirely new section in Kentucky Power’s tariff, the purpose of which is to bring clarity and specificity to the Revised Tariff. Though no party submitted initial objections to any portion of this section, AT&T raised concerns with the definition of “Attachment” in the June 9, 2022, Testimony of Daniel P. Rhinehart. AT&T’s concern is that “a distinction should be made as to whether certain attachments, when made in conjunction with another attachment, are chargeable.” Direct Testimony of Daniel P. Rhinehart on Behalf of AT&T at 7 (filed Jun. 9, 2022). Ms. Pamela F. Ellis, Director of Energy Delivery Engineering Services for American Electric Power Service Corporation, addressed this issue in her July 11, 2022, Rebuttal Testimony:

Q. IS THE CONCERN EXPRESSED BY MR. RHINEHART VALID?

A. No. This definition of “Attachment” exists for purposes of the broader use of the term within the proposed tariff. The billing issue is specifically addressed in Section 3 of the proposed tariff where it identifies the “Charge for a Wireline Facility.” If Mr. Rhinehart was concerned about the billing implications arising out of the definition for “Attachment,” then it seems like Mr. Rhinehart would have also raised some sort of issues with the definition of the term “Wireline Facility.” But that is not the case.

Rebuttal Testimony of Pamela F. Ellis on Behalf of Kentucky Power at 18 (filed Jul. 11, 2022).

3. Section 3 – Rate

This is a revised section which incorporates fixed rates for (a) Attachments within conduit, (b) Wireless Facilities at the pole top, and (c) Wireless Facilities within the Communications Space. KBCA filed an initial objection to the conduit rate on the grounds that “[Kentucky Power] has not provided any cost justification for this new fee.” Objections of KBCA to Newly Filed Kentucky Tariffs (“KBCA’s Objections”) at 20 (filed Mar. 17, 2022). Kentucky Power explained in response to KBCA’s initial objection:

Kentucky Power calculated the Conduit Rate using the formula set forth by the Commission in The Adoption of a Standard Methodology for Establishing Rates for Conduit Usage, Order, Administrative Case No. 304, 1987 Ky. PUC LEXIS 12

(May 4, 1987) (the “Conduit Rate Order”). The only variation from this formula is that Kentucky Power calculated the Conduit Rate using a “net book value” methodology rather than a “gross book value” methodology. As the Commission noted in the Conduit Rate Order, though, “both methodologies produce the same result.” *Id.* at 9. The year-end 12/31/2020 cost and other data that Kentucky Power used to calculate the Conduit Rate is set forth in Exhibit A hereto.

Response of Kentucky Power to the Objections of AT&T and KBCA to Revised Tariff P.A. (“Response to Objections”) at 6 (filed Apr. 14, 2022). Though KBCA did not follow-up on its initial objection with any request for information, the Commission sought, and Kentucky Power provided, a detailed explanation and cost data to support the conduit Attachment rate in the Revised Tariff. *See* KPCO_R_KPSC_1_02.a. For example, Kentucky Power explained that it utilized the Commission’s formula to calculate the conduit Attachment rate:

Kentucky Power calculated the \$2.70/linear foot conduit rate (“Conduit Rate”) using the formula set forth by the Commission in *The Adoption of a Standard Methodology for Establishing Rates for Conduit Usage*, Order, Administrative Case No. 304, 1987 Ky. PUC LEXIS 12 (May 4, 1987) (the “Conduit Rate Order”). The only variation from this formula is that Kentucky Power calculated the Conduit Rate using a “net book value” methodology rather than a “gross book value” methodology. As the Commission noted in the Conduit Rate Order, though, “both methodologies produce the same result.”

KPCO_R_KPSC_1_02.a (internal citations omitted). Furthermore, Kentucky Power provided detailed calculations of the conduit Attachment rate using both “net book value” and “gross book value” methodologies, and these calculations revealed a *de minimis* (\$0.06/linear foot) difference between the two methodologies. *See* KPCO_R_KPSC_2_01 & Attachment 1. In addition, Kentucky Power explained why it utilized the “net book value” methodology to calculate the conduit Attachment rate and made clear that it did not object to using the “gross book value” methodology instead:

Kentucky Power chose the “net” methodology for calculating the conduit rate for two reasons. First, Kentucky Power already maintains a spreadsheet with net calculations for annual pole costs, which allowed Kentucky Power to input the proper underground capital and maintenance accounts into the formula without

building an entirely new spreadsheet. Similarly, the approved rate of return is a **net** rate of return, so utilizing the “net” methodology allowed Kentucky Power to avoid the need to convert the approved rate of return from a “net” rate into a “gross” rate of return. Second, the Commission noted in its Conduit Rate Order that the “net” and “gross” methodologies produce virtually identical conduit rates. *See The Adoption of a Standard Methodology for Establishing Rates for Conduit Usage*, Order, Administrative Case No. 304, 1987 Ky. PUC LEXIS 12, at *11 (May 4, 1987) (the “Conduit Rate Order”) (stating that while “the Commission has chosen the gross book methodology instead of the net book method,” “**both methodologies produce the same result**”) (emphasis added). This holds true with respect to Kentucky Power’s conduit rate, as there is only a \$0.06 difference between a rate calculated under the “net” methodology (\$2.70) and a rate calculated under the “gross” methodology (\$2.64). Nevertheless, given that both methodologies produce virtually the same conduit rate, Kentucky Power will not object to using the “gross” methodology if that is, indeed, the Commission’s preference.

KPCO_R_KPSC_3_01; *see also id.* (explaining that Kentucky Power has never included a conduit rate within its pole attachment tariff because there is currently no excess capacity in Kentucky Power’s ducts and conduit).

Though no party, at any time, has raised an objection to the Wireless Facility rates set forth in the Revised Tariff, the Commission sought, and Kentucky Power provided, explanations and information to support the rates in the Revised Tariff. For example, with respect to the rate charged for pole-top Wireless Facilities, Kentucky Power explained:

The \$150 rate accounts for the quantitatively different way in which wireless pole-top attachments burden Kentucky Power’s poles. First, wireless pole-top attachments occupy significantly more space than traditional wireline attachments due to the nature of the facilities and the additional clearances required by those facilities. Wireline attachments within the communications space typically occupy about one (1) foot of space, whereas wireless pole-top attachments often occupy between five (5) to ten (10) feet of space. Second, unlike traditional wireline attachments, wireless pole-top attachments are installed in the supply space—i.e., in close proximity to Kentucky Power’s electric lines and equipment. This makes it more expensive for Kentucky Power to perform maintenance on its own facilities. Third, wireless pole top attachments almost always require a pole replacement to create additional height and strength. The newer, taller, stronger poles necessary to accommodate wireless pole top attachments have a higher annual carrying cost than the average pole in Kentucky Power’s system. Fourth, because of the variability in wireless pole top antenna installations, a precise cost-based approach would require negotiations (and invite disputes) with respect to each new configuration or array.

The \$150 price point fairly accounts for a wide range of circumstances, provides predictability to attaching entities and allows Kentucky Power to identify a specific price point within its tariff.

KPCO_R_KPSC_1_02.b; *see also* KPCO_R_KPSC_2_02. Kentucky Power also explained the different rate applicable to Wireless Facilities installed within the communications space:

\$75/pole is the rate charged by Kentucky Power’s affiliates in other jurisdictions for wireless antenna attachments within the communication space. Wireless antenna attachments within the communications space occupy less space and present fewer operational challenges than wireless pole top attachments. For this reason, Kentucky Power believes such attachments warrant a lower rate than wireless pole top attachments. The \$75 rate, though, still accounts for the quantitatively different way in which wireless facilities occupy space on Kentucky Power’s poles as compared to traditional wireline attachments. While traditional wireline attachments occupy—on average—approximately one (1) foot of space, wireless facilities often occupy multiple feet of space within the communications space. Furthermore, wireless facilities are comprised of antennas and ancillary equipment that emit radiofrequency (“RF”) radiation. RF radiation poses a threat to the safety of personnel working on or near Kentucky Power’s poles. To mitigate against these risks, Kentucky Power must devote additional resources to monitoring wireless facilities.

KPCO_R_KPSC_1_02.c.; *see also* KPCO_R_KPSC_2_03.

4. Section 4 – Company Facilities Subject to Attachment

This is a new section that: (a) outlines Operator’s mandatory right of access under Section 2(1) of the Commission’s pole attachment regulation; (2) sets forth the grounds upon which Company can deny access under Section 2(1)(a); and (3) makes clear that the rights of an Operator to Company Facilities are limited to that of a licensee. As no party has presented evidence demonstrating this provision is unjust or unreasonable, this section should be approved as filed.

5. Section 5 – Company’s Pole Attachment Policy Handbook

This is a new section that expressly requires Operators to follow the Kentucky Power’s Pole Attachment Policy Handbook. This section has drawn no objections, likely because Operators are already required to install and maintain their attachments in accordance with the Pole Attachment Policy Handbook. The new provision merely states this requirement in the

Revised Tariff and affirms that the provisions of the Pole Attachment Policy Handbook are subordinate to the terms and conditions of the Revised Tariff and the Commission's new regulation. As no party has presented evidence demonstrating this provision is unjust or unreasonable, this section should be approved as filed.

6. Section 6 - Applications

This is a heavily revised section that sets forth the application and permitting process for attachments to Kentucky Power's poles. The revisions, among other things: (1) incorporate the Commission's new timelines for reviewing pole attachment applications and completing make-ready surveys; (2) provide a per pole estimate of the costs Kentucky Power incurs in performing make-ready surveys; (3) outline Kentucky Power's notice obligations under the new rules; and (4) set forth Kentucky Power's obligations with respect to make-ready estimates. Section 6 of the Revised Tariff has drawn two narrow objections: one pertaining to the per pole estimate for make-ready survey costs (KBCA) and the other pertaining to the provision deeming make-ready estimates withdrawn if not paid within fourteen (14) days (AT&T).

- a. The \$275/Pole Estimate for Make-Ready Surveys Is Based on Actual Costs and Consistent with the Fees Charged by Kentucky Power's Former Affiliates.

Under the Commission's pole attachment regulation, pole owners are required to include a per pole estimate of make-ready survey costs within their tariffs if they intend to require prepayment of such costs. 807 KAR 5:015, Section 4(2)(b)6.b. Kentucky Power included its \$275 per pole estimate in the Revised Tariff to preserve its right under the regulation to require prepayment. Revised Tariff, P.S.C. KY. NO. 12 1st REVISED SHEET NO. 16-3, Section 6. In its objections, KBCA argued that the \$275/pole estimate (the "Survey Estimate") is "unreasonable and unsupported." KBCA's Objections at 20. In response, Kentucky Power explained that the Survey Estimate is derived from the average "unit" costs that Kentucky Power's third-party

contractors charge for this type of work, plus a 15% surcharge to cover the annual maintenance costs of the Joint Use Portal. *See* Response to Objections at 6-8. Kentucky Power even provided the formula it utilized to generate the Survey Estimate. *See id.* at 7. Nevertheless, KBCA continues to insist that the Survey Estimate is “excessive,” not based on “actual costs,” and should fall “into the \$30-50 range.” *See* Direct Testimony of Richard Bast on Behalf of KBCA at 10-12 (filed Jun. 9, 2022).¹

In response to KBCA’s first set of data requests, Kentucky Power provided an in-depth explanation of the Survey Estimate, including a breakdown of the unit costs that were relied upon in calculating the Survey Estimate. *See, e.g.,* KPCO_R_KBCA_1_01 (setting forth the range of unit costs used to generate the Survey Estimate); KPCO_R_KBCA_1_01.a. (explaining the types of work each unit cost covers); KPCO_R_KBCA_1_01.b. (explaining how the unit costs vary based on the condition of the pole being surveyed); KPCO_R_KBCA_1_02 (explaining the basis for the 15% surcharge). This information demonstrates that the Survey Estimate is designed to capture the actual costs of a make-ready survey, as charged by Kentucky Power’s third-party contractors. Kentucky Power provided the foregoing information in response to KBCA’s first set of data requests, yet *none* of KBCA’s witnesses addressed it—let alone refuted it—in their testimony.

Kentucky Power also offered extensive testimony regarding the Survey Estimate. For instance, Ms. Ellis provided additional context regarding the “actual per unit prices” utilized by Kentucky Power’s third-party contractors:

[T]he Company has taken the actual per unit prices from our engineering contractors to provide a per pole estimate for make-ready engineering (aka pole owner survey fees). This fee includes all charges by our engineering contractors,

¹ While KBCA claims that the per pole cost of a make-ready survey should fall within the “\$30-\$50 range,” KBCA has not provided any empirical data to support this range.

which are in the form of unit pricing. The proposal admin fee is a per proposal charge for the vendor to accept and work the request to attach (proposal). The field data collection fee is a per pole charge to collect field measurements and other data required to do the engineering analysis. The “OK to attach” fee is a per pole charge when there is no make-ready construction required to allow access by the attacher. The Rearrangement fee is a per pole charge when there is simple make-ready required to allow access. This is usually in the form of rearrangement by the utility or other existing attachers. The Work Order Remedy fee is a per pole charge that applies when the utility has to perform construction to make room for another attacher. This is typically a pole change out. The “OK to attach”, Rearrangement, and Work Order Remedy charges are only applied to the poles on the proposal where they are applicable. The Post Construction Inspection fee is charged by the vendor for the trip back to the field after the attacher has made its attachment to validate that it is attached as instructed. The 15% surcharge is the only portion of the fee that is not a complete passthrough from the engineering contractor. This surcharge goes towards covering the JUA Portal and internal Company resources involved in the proposal process.

Rebuttal Testimony of Pamela F. Ellis at 5-6. In addition, Ms. Ellis addressed the significant disparity between the Survey Estimate and the range that KBCA argues is reasonable (i.e., “\$30-50 range”) and chalked up the disparity to differing interpretations of what a “make-ready survey fee” entails:

Mr. Bast states that, “Charter estimates the preconstruction survey cost per pole in Kentucky to be roughly \$25 per pole and considers anywhere from \$30-\$50 to be within the reasonable estimate range.” Unless we are defining “make-ready survey fee” differently, I cannot explain the disparity. Just the field data collection alone averages \$65.50 per pole from our vendors. Additionally, Mr. Bast suggests that it takes 15 minutes to survey one pole. It takes more than 15 minutes to collect field data, analyze the strength and loading of the pole, determine a remedy if there is any failure of the existing pole in that analysis, and write a work order if work is required. Without a true breakdown of the services included in the \$30-\$50 estimate Mr. Bast suggests to be within a “reasonable estimate range”, I cannot explain this discrepancy any further. That said, my best judgment is that the parties are defining “make-ready survey fee” differently because there is no way the data collection, analysis, work order preparation and post-inspection can be competently performed in the \$30-\$50 range.

Id. at 6-7.

In sum, the evidentiary record makes clear that the Survey Estimate is cost-based and designed to pass-through the actual costs charged by Kentucky Power’s third-party contractors for

performing make-ready surveys and post-attachment inspections. The evidentiary record also provides Attachment Customers with a detailed overview of the cost inputs used in generating the Survey Estimate. Kentucky Power’s evidence stands in stark contrast to the brief and subjective testimony submitted by KBCA, which provides no empirical basis for KBCA’s preferred “\$30-\$50 range” or even an overview of the types of work that cost range would entail. Accordingly, the evidentiary record demonstrates that the Survey Estimate is fair, just and reasonable.

b. The “Deemed Withdrawn” Provision Comports with the Letter and the Spirit of the Commission’s New Pole Attachment Rules.

Under Section 6 of the Revised Tariff, make-ready estimates are deemed withdrawn if the new attacher does not submit payment within fourteen (14) days of receipt of the estimate. Revised Tariff, P.S.C. KY. NO. 12 1st REVISED SHEET NO. 16-3, Section 6 (“If payment is not received by Company within fourteen (14) days, then Company’s make-ready cost statement shall be deemed withdrawn.”). AT&T originally objected to the “deemed withdrawn” provision on grounds that it “does not comport with the spirit of the rule” and argued that “simple acceptance and later payment of the make-ready estimate should be sufficient.” Comments of AT&T Kentucky in Response to March 2, 2022 Commission Order (“AT&T’s Objections”) at 18 (filed Mar. 17, 2022). Although AT&T subsequently conceded that the “deemed withdrawn” provision does not conflict with the Commission’s rules, AT&T maintains its objection and claims that the “deemed withdrawn” provision may result in increased engineering work, administrative burdens, and deployment costs. *See* Direct Testimony of Daniel P. Rhinehart at 4.

As Kentucky Power previously explained, though, the purpose of the “deemed withdrawn” provision is to eliminate the risks and burdens associated with stale make-ready estimates. *See* Response to Objections at 3. Specifically, stale make-ready invoices may not reflect the actual

cost of make-ready at the time of acceptance, which can lead to costly disputes. As Kentucky Power explained:

Make-ready estimates are subject to rapid time-decay because the cost of the labor and material inputs used to generate a make-ready estimate fluctuates over very short periods of time.... The automatic withdrawal provision protects Kentucky Power and attachers alike from stale make-ready invoices, which might significantly overstate or understate the actual cost of make-ready at the time of acceptance.

Id. Furthermore, especially in times of high-volume deployment, monitoring pending make-ready estimates for staleness imposes a taxing administrative burden on Kentucky Power. Ms. Ellis explained:

It is the Company's experience that some attachers will not respond to estimates for months at a time, then make the payment and expect work to progress immediately. By the time the attacher has paid, another attacher may have proposed and paid for make-ready on the same poles, and new engineering or make-ready may be required to provide capacity for the initial applicant. Additionally, the Company does not have crews standing at the ready waiting for work. As we plan our resources, not knowing when make-ready work will be released to construction (i.e., paid for), we are unable to timely devote crews. Having to continually check whether payments has been received for outstanding estimates would impose a significant administrative burden on the Company.

Rebuttal Testimony of Pamela F. Ellis at 15. Finally, the "deemed withdrawn" provision will not result in "unnecessary resubmissions" by attachers that are actively working towards, but cannot meet, the fourteen (14) day timeline. *See* Direct Testimony of Daniel P. Rhinehart at 4. As explained by Ms. Ellis, "notification within the 14 days that the attacher accepts the estimate and intends to pay can 'reset' the expiration date at the discretion of Kentucky Power." Rebuttal Testimony of Pamela F. Ellis at 17.

In sum, the evidentiary record makes clear that the "deemed withdrawn" provision will reduce costs by avoiding costly disputes and delays in broadband deployment, as well reduce the administrative burden associated with tracking and withdrawing "stale" make-ready invoices. For

these reasons, the evidentiary record demonstrates that the “deemed withdrawn” provision is fair, just and reasonable, and merits approval by the Commission.

7. Section 7 – Standards for Installation

This is a revised section that requires Operators to complete installation of attachments within thirty (30) days from the date their applications are approved by Kentucky Power, or in the event make-ready is required, the date of completion of such make-ready. The revisions also establish a post-construction inspection process, along with a process for remediation of any violations discovered through the inspection. As no party has presented evidence demonstrating this provision is unjust or unreasonable, this section should be approved as filed.

8. Section 8 – Tagging Requirement

Section 8 of the Revised Tariff requires that all untagged existing attachments on Kentucky Power’s poles be tagged within 180 days of the effective date of the Revised Tariff. Revised Tariff, P.S.C. KY. NO. 12 1st REVISED SHEET NO. 16-4, Section 8 (emphasis added). In its initial objections, AT&T argued that the 180-day tagging timeline would be “completely impractical and prohibitively expensive” and that “[t]here could literally be tens of thousands of untagged attachments.” AT&T’s Objections at 18. AT&T has seemingly walked back the basis of its objection but maintains that the 180-day timeline “simply is not practical.” Direct Testimony of Daniel P. Rhinehart at 4. Instead of a hard backstop, AT&T argues that attachers should be required to tag existing untagged attachments as they come upon them in the normal course of maintenance. *See id.* At 4-5.

The change in the tone of AT&T’s objection is likely due to the *de minimis* number of attachments AT&T attachments that will be implicated by the new tagging requirement. *See* Response to Objections at 4 (“The Revised Tariff would apply only to AT&T’s attachments on Kentucky Power poles located outside of AT&T’s ILEC service territory. According to Kentucky

Power’s records, there are less than 400 such attachments.”). Unless AT&T has made thousands of unauthorized attachments to Kentucky Power’s poles, the new tagging requirement should only implicate a fraction of AT&T’s attachments. It strains credulity to think that this would impose an “impractical” burden on AT&T.

As noted above, AT&T argues that the 180-day timeline should be replaced by a requirement that attachers tag their untagged attachments within the normal course of their inspection and maintenance operations. *See* Direct Testimony of Daniel P. Rhinehart at 4-5. However, AT&T all but admitted that it does not perform routine maintenance and inspections on its attachments. *See* AT&T_R_KPCO_1_04 (filed Jul. 7, 2022). In addition, AT&T stated that it does not know how many of its attachments on Kentucky Power’s poles would be governed by the Revised Tariff, let alone how many of these attachments are currently untagged. *See id.* at Responses 2-3. Finally, AT&T could not even provide an estimate of how long it would take to tag all of its existing untagged attachments. *See* AT&T_R_KPSC_1_01.d. Based on these disturbing revelations, Kentucky Power fears that—in the absence of an actual backstop—AT&T will never get around to tagging its existing untagged attachments.

9. Section 9 – Overlashing

This is a new section that conforms with Section 3(5) of the Commission’s pole attachment regulation. The new section requires Operators to (a) provide Company with at least thirty (30) days’ advance notice before overlashing (or allowing a third party to overlash) their existing wireline facilities, and (b) notify Kentucky Power within fifteen (15) days of completion of an overlash. The new section also allows Kentucky Power to inspect the overlash (at Operator’s expense) within ninety (90) days of notice of completion in order to determine whether the overlash has caused any code violations or property damage. In the event an overlash has caused property damage or a code violation, the new section establishes a process for remediation similar

to Section 7 of the Revised Tariff (described above). As no party has presented evidence demonstrating this provision is unjust or unreasonable, this section should be approved as filed.

10. Section 10 – Pole Installations or Replacement; Rearranging; Guying

This is a lightly revised section that is virtually identical to the Current Tariff. In fact, the only substantive revision that has been made to Section 10 is the incorporation of the Commission’s new advance notice requirement applicable to modifications and replacements of poles. *See* 807 KAR 5:015, Section 6(1)(b) (requiring pole owner to provide “60 days prior written notice prior to...[a]ny modification of facilities by the utility other than make-ready pursuant to Section 4 of this administrative regulation, routine maintenance, or modifications in response to emergencies.”).

Section 10 includes the following provision, which has remained largely untouched as compared to the Current Tariff:

Where in Company’s judgment a new pole must be erected to replace an existing pole solely to adequately provide for Operator’s proposed Attachments, Operator agrees to pay Company for the entire cost of the new pole necessary to accommodate the existing facilities on the pole and Operator’s proposed Attachments, plus the cost of removal of the in-place pole, minus the salvage value, if any, of the removed pole. Operator shall also pay to Company and to any other owner of existing attachments on the pole the cost of transferring each of their respective facilities or attachments to the newly-installed pole.

Revised Tariff, P.S.C. KY. NO. 12 1st REVISED SHEET NO. 16-5, Section 10. KBCA originally objected to this provision on grounds that it “conflicts with the Commission’s red-tagged pole framework.” KBCA’s Objections at 20. However, KBCA has pivoted and is now attempting to revive an issue that has been thoroughly briefed, argued, considered and rejected in the underlying rulemaking proceeding—i.e., whether pole owners should be forced to bear the vast majority of make-ready pole replacement costs. KBCA attempts to bolster its revised objection with testimony from Patricia D. Kravtin, who alleges, *inter alia*, that: (1) pole owners should share in the cost of

make-ready pole replacements—even for non-red tagged poles—because they are the “primary” and “direct” beneficiaries of such replacements; and (2) electric utilities are shifting pole replacement costs to Attachment Customers by “strategically under-identifying” red-tagged poles.

As a preliminary matter, the make-ready pole replacement cost allocation provision has been a part of Kentucky Power’s pole attachment tariff since at least 2006. *See* Kentucky Power Company Tariff C.A.T.V., P.S.C. ELECTRIC NO. 8, Original Sheet No. 16-2, POLE INSTALLATION OR REPLACEMENT; REARRANGEMENTS; GUYING (effective Mar. 30, 2006) (“When in Company’s judgment a new pole must be erected to replace an existing pole solely to adequately provide for Operator’s proposed attachments, Operator agrees to pay Company for the entire cost of the new pole necessary to accommodate the existing facilities on the pole and Operator’s proposed attachments, plus the cost of removal of the in-place pole, minus salvage value, if any, of the removed pole.... Operator shall also pay to Company and to any other owner of existing attachments on the pole the cost of removing each of their respective facilities or attachments from the existing pole and reestablishing the same or like facilities or attachments on the newly-installed pole.”). This means that the cost allocation provision has survived Commission scrutiny in at least five separate rate cases over the past sixteen years.

But history is not the only lodestar. The Commission recently reaffirmed that pole owners are entitled to recover the entire cost of a make-ready pole replacement from the attacher who necessitated the pole replacement. The Commission did so in the course of rejecting KBCA’s make-ready pole replacement cost allocation proposal—i.e., the very same proposal that is being advanced by Ms. Kravtin in her direct testimony—and explaining:

The amendment proposed by KBCA could result in electric rates that are not fair, just and reasonable. 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.

Statement of Consideration Relating to 807 KAR 5:015 (“Statement of Consideration”) at 47 (filed Sep. 15, 2021).

a. Kentucky Power Is Not the “Primary” or “Direct” Beneficiary of Make-Ready Pole Replacements.

The premises cited by Ms. Kravtin as supporting KBCA’s cost allocation proposal are simply not valid. As noted above, Ms. Kravtin claims that pole owners are the “primary” and “direct” beneficiaries of make-ready pole replacements. *See* Direct Testimony of Patricia D. Kravtin on Behalf of KBCA ta 8 (filed Jun. 9, 2022). The record evidence in this proceeding begs to differ. For example, Kentucky Power has explained that make-ready pole replacements are not performed to support core electric service and would only provide an incidental benefit to Kentucky Power in those rare situations when they coincide with Kentucky Power’s infrastructure improvement plan. Ms. Ellis testified:

[M]ake-ready pole replacements are not performed to support Kentucky Power’s core electric service needs. These types of pole replacements are performed solely to expand capacity on Kentucky Power’s poles to host additional communications attachments. In other words, “but for” a request by an attacher to install an additional attachment on a pole that is already at full capacity, there would be no pole replacement. Therefore, the attacher that requests a make-ready pole replacement is both the “cost causer” and the “primary” and “direct” beneficiary of the replacement pole, not Kentucky Power....

The purported benefits cited [by Ms. Kravtin] ignore the following fundamental fact: unless the make-ready pole replacement happens to coincide with Kentucky Power’s plans for infrastructure improvement, then the make-ready pole replacement will in almost every case provide no benefit to Kentucky Power or its electric ratepayers. The reason for this is that it is impossible for Kentucky Power to know at the time of a make-ready pole replacement what type of pole its core electric service needs would require at the time the existing pole would have otherwise been replaced pursuant to Kentucky Power’s infrastructure improvement plans. Because of this uncertainty, when performing make-ready pole replacements, Kentucky Power only installs poles that are incrementally taller

and/or stronger to accommodate the additional attachment. Therefore, if five (5) years down the road Kentucky Power's core electric service needs would require an even taller or stronger pole than the previously installed make-ready replacement pole, the previously installed make-ready replacement pole would be of no use or benefit to Kentucky Power. Yet under Ms. Kravtin's cost allocation proposal, Kentucky Power would lose the value inherent in the remaining useful life of the existing pole, bear the vast majority of the cost for the make-ready replacement pole, and also bear the entire cost of replacing the make-ready replacement pole with one that would actually meet Kentucky Power's core electric service needs.

Rebuttal Testimony of Pamela F. Ellis at 10-11; *see also* Rebuttal Testimony of Christopher F. Tierney on Behalf of Kentucky Power Company and Duke Energy Kentucky, Inc. at 4 (filed Jul. 11, 2022) ("Though the utility may realize a time value of money benefit from a make-ready pole replacement when the life of the replacement pole exceeds the remaining life of the existing pole, this would be true only when: (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."); KPCO_R_KBCA_1_06 (filed May 4, 2022); KPCO_R_KPSC_1_13 (filed May 4, 2022); Kentucky Power Company's Comments Regarding Proposed Chapter 807 KAR 5:015, Access and Attachments to Utility Poles and Facilities ("Kentucky Power's July 30, 2021 Comments") at 11 (filed July 30, 2021); Kentucky Power Company's Reply Comments regarding Proposed Chapter 807 KAR 5:0XX, Access and Attachments to Utility Poles and Facilities at 9-10 (filed Oct. 19, 2020).

But even if a make-ready pole replacement *does* coincide with Kentucky Power's infrastructure improvement plan (i.e., the make-ready replacement pole actually meets Kentucky Power's future service needs), Kentucky Power would nevertheless incur a **significant net loss** from the premature replacement of the pole. Mr. Christopher F. Tierney, a third-party expert in electric utility accounting and finance, testified:

[U]nder Ms. Kravtin’s proposed approach, wherein utilities would pay for the total cost of a pole replacement, adjusted only for the remaining net book value of the existing pole, the utilities would be incurring significant losses with each make-ready pole replacement. The table below summarizes the net make-ready pole replacement costs and the time value of money benefit resulting from the deferral of an otherwise necessary average pole replacement at the end of its useful life. Again, this illustration assumes (1) that the existing pole would otherwise need to be replaced eventually and (2) that the replacement pole will accommodate the utilities’ electric service needs in the future.

[...]

	[A]	[B]	[C = B - A]
Utility	Average Current Pole Replacement Cost Net Of Remaining Book Value (2022 \$)	Present Value Benefit To Utility Of Deferred Pole Replacement (2022 \$)	Net Loss To Utility (2022)
Duke Energy Kentucky	\$ 10,837	\$ 5,107	\$ (5,730)
Kentucky Power	8,669	2,325	(6,344)

Rebuttal Testimony of Christopher F. Tierney at 8-9. Thus, even in the best-case scenario (i.e., where the make-ready replacement pole is compatible with Kentucky Power’s future service needs), Mr. Tierney’s quantitative analysis reveals that Kentucky Power would incur a net loss of \$6,344 for every make-ready pole replacement it performs. Based on this finding, Mr. Tierney concluded that “any reliance on the remaining book value of poles (i.e., KBCA’s cost allocation proposal) would be deeply flawed and grossly undercompensate utilities.” *See id.* at 8.

Mr. Tierney’s analysis also revealed that KBCA’s cost allocation proposal would result in Kentucky Power bearing nearly 95% of the cost of a make-ready pole replacement.² Reallocating

² KBCA’s cost allocation represents a staggering reallocation of make-ready pole replacement costs. KBCA’s cost allocation proposal basically implies that 95% of the benefits of a make-ready pole replacement accrue to Kentucky Power, while only 5% accrue to the new attacher that necessitated the pole replacement. This is unfounded, especially since KBCA’s “benefits” analysis completely avoids the other side of the equation. *See* Rebuttal Testimony of Christopher F. Tierney at 12 (“It is noteworthy that Ms. Kravtin makes no reference to (let alone an attempt to quantify and contrast) the benefits received by the attaching entity’s shareholders or its customers

the costs of make-ready pole replacements from one party to another not only fails to address the underlying problem (i.e., the high cost of pole replacements), but it might actually exacerbate the problem. According to Mr. Tierney, artificially reducing the cost new attachers incur for make-ready pole replacements would lead to less efficient buildouts:

[I]f new attachers were allowed to make broadband deployment decisions with little regard for their actual costs (net of any identified benefits), the build-out of pole infrastructure would be economically less efficient. For example, if an attacher can deploy on poles for 10% of the actual cost (with the utility subsidizing the balance) it would reasonably do so every time if that 10% charge was less than the alternative. This would be true even if the alternative were significantly less expensive than the combined total cost (utility and attacher) of deploying on poles (which is more likely to be the case if the existing poles are insufficient to accommodate the attacher and therefore need to be replaced).

See id. at 8.

b. Kentucky Power Is Not “Strategically Under-Identifying” Red-Tagged Poles.

Ms. Kravtin also contends that electric utilities are “strategically under-identifying” red-tagged poles so that they can shift the cost of replacing red-tagged poles to new attachers (i.e., through make-ready pole replacements). *See* Direct Testimony of Patricia D. Kravtin at 29-32. As a preliminary matter, this tactic makes no sense and would be contrary to Kentucky Power’s economic interests. Mr. Tierney explained:

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).

as a result of gaining access to the utilities’ pole infrastructure. In other words, the justification for her make-ready pole replacement cost allocation proposal is premised upon the alleged economic benefit to pole owners, but there is no mention or analysis of the economic benefit to attaching entities through access to pole networks.”).

Rebuttal Testimony of Christopher F. Tierney at 10. Furthermore, Ms. Kravtin’s contention is based on a comparison of “expected normal life-cycle pole replacement rates based on the utility’s own depreciation parameters with the utility’s red-tag rate.” Direct Testimony of Patricia D. Kravtin at 30. However, Kentucky Power has explained that Ms. Kravtin’s methodology relies on flawed datapoints:

Kentucky Power does not under-report red-tagged poles. Ms. Kravtin’s response (on behalf of KBCA) to the Commission’s request for information seemed to acknowledge that there is no direct evidence of this.³ Instead, Ms. Kravtin says that the difference between expected life-cycle pole replacement rates and red-tag rates means Kentucky Power must be under-reporting red-tag poles. This reasoning is incorrect for at least two reasons. First, for purposes of determining the “expected life-cycle pole replacement rates,” Ms. Kravtin uses the average service life underlying the depreciation rates approved by the Commission. This average service life figure, though, 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 comparison because the number of red-tagged poles only captures poles identified for reinforcement or replacement through cyclical inspections.

Rebuttal Testimony of Pamela F. Ellis at 12-13. Kentucky Power further explained that Ms. Kravtin should have used the “total number of poles actually replaced each year” to calculate the “red-tag rate.” *See id.* at 13 (stating that the “total number of poles actually replaced” is a more representative value because “it accounts for all pole replacements,” including replacements for “core electric service, storm restoration or any other reason **[that] has the effect of eliminating a red-tag designation as a result of an inspection**”) (emphasis added). Utilizing this input would likely result in a “red-tag rate” for Kentucky Power that is much closer to 2%, which approximates the actual useful life of a pole (i.e., 50 years). *See id.* (“The average service life for Kentucky Power distribution poles, upon which the depreciation rate is currently based, is 28 years.... In

³ *See* KBCA_R_KPSC_1_06 (filed Jul. 7, 2022).

reality, though, the actual useful life of a pole is more like 50 years, which would indicate an expected life-cycle pole replacement rate of 2% annually.”); *id.* at 14 (“The number of poles replaced by Kentucky Power each year is much closer to 2% than the number of poles red-tagged by Kentucky Power each year.”). In sum, there is no evidence that Kentucky Power is “strategically under-identifying” red-tagged poles, and Ms. Kravtin’s claim to the contrary is nothing more than a spurious imputation cloaked in a mathematical equation.

Lastly, to the extent the Commission is reconsidering KBCA’s previously rejected cost allocation proposal, it would be inappropriate to do so in this proceeding. Undisputed record evidence indicates that KBCA’s proposal would result in Kentucky Power and its electric customers bearing nearly 95% of the cost of a make-ready pole replacement. *See* Rebuttal Testimony of Christopher F. Tierney at 8, Table 2. This proceeding is necessarily narrow in scope (i.e., limited to whether the terms and conditions of the Revised Tariff are fair, just and reasonable to attachers) and does not sufficiently take into account the impact KBCA’s cost allocation proposal would have on Kentucky Power’s electric customers.⁴

11. Section 11 – Self-Help Remedy

This is a new section that incorporates the Commission’s new self-help remedy. *See* 807 KAR 5:015, Section 4(9) (outlining the new self-help remedy). This section expressly acknowledges that attachers have the right to perform self-help surveys and make-ready when either Kentucky Power or an existing attacher fails to perform such work within the applicable

⁴ The absence of certain entities in this proceeding underscores this point. During the Kentucky Power’s last rate case, numerous entities intervened on behalf of the Companies’ electric ratepayers, including, *inter alia*, the Office of the Attorney General, the Kentucky Industrial Utility Consumers, and Walmart Inc. These entities are highly sensitive to rate increases—which would result from any kind of reallocation of make-ready pole replacement costs—yet none of them are participating in this proceeding.

timelines. Section 11 also makes clear that self-help must be performed through the use of an approved contractor and that, consistent with the Commission's rules, self-help is not available for pole replacements. As no party has objected or presented evidence demonstrating this provision is unjust or unreasonable, this section should be approved as filed.

12. Section 12 – One-Touch Make-Ready

This is a new section that incorporates the Commission's new OTMR rule. *See* 807 KAR 5:015, Section 4(10). Consistent with the Commission's OTMR rule, Section 12 limits OTMR to new attachments that require only "simple" make-ready and requires that such make-ready be performed by an "approved contractor." The Commission's OTMR rule does not impose any timelines within which OTMR must be completed. To fill this regulatory gap, Section 12 applies the Commission's standard timelines for other make-ready in the communications space to OTMR. *See* Revised Tariff, P.S.C. KY NO. 12 ORIGINAL SHEET NO. 16-6, Section 12 ("Operator shall complete all make-ready within thirty (30) days of the date on which Company approved Operator's OTMR application (or within forty-five (45) days in the case of a Larger Order), or Operator's OTMR application will be deemed closed.").

In its initial objections, KBCA argued that the timelines for completing OTMR are "unreasonable" and should mirror "the utilities deadlines to complete make-ready." KBCA's Objections at 21. However, KBCA neither sought discovery on the OTMR timelines nor provided any testimony in support of its objection. There are no sound policy justifications for applying a longer timeline to OTMR than would otherwise apply during the standard make-ready process. As Kentucky Power previously explained, OTMR is limited to "simple" make-ready within the communications space, which is the simplest and most expedient form of make-ready. *See* Response to Objections at 10-11. The standard make-ready timelines apply to both "simple" and "complex" make-ready within the communications space. It would defy logic to give attachers

more time to perform “simple” OTMR than the rules provide existing attachers to complete *complex* make-ready work. *See id.* Finally, the purpose of OTMR is to expedite the deployment process; applying timelines that are even longer than those applicable to the standard make-ready process would thus “thwart the intent of the Commission’s new OTMR rule.” *See id.* at 11.

13. Section 13 – Pole Inspections

This is a revised section that outlines Kentucky Power’s right to perform periodic inspections, as well as post-attachment inspections on newly installed attachments. The revisions to this section also provide:

Pursuant to 807 KAR 5:006, Company inspects all of its Distribution Poles, on a circuit-by-circuit basis, every two (2) years for signs of damage or deterioration. If a Distribution Pole exhibits signs of damage or deterioration, Company flags the Distribution Pole for corrective action. If a dispute arises with Operator regarding the condition of a particular Distribution Pole within an application, the following shall be sufficient to overcome the negative presumption in Section 7(7)(b) of 807 KAR 5:015: (1) records indicating that the Distribution Pole in dispute was inspected as part of a Company circuit inspection; and (2) the absence of Company records showing that the Distribution Pole in dispute is deficient and in need of replacement.

Revised Tariff, P.S.C. KY. NO. 12 ORIGINAL SHEET NO. 16-7, Section 13. Kentucky Power included this language to mitigate against potential disputes involving the interpretation of Rule 7(7)(b)2 of the Commission’s new pole attachment rules, which provides:

The commission may presume that a pole replaced to accommodate a new attachment was red tagged if:

There is a dispute regarding the condition of the pole at the time it was replaced;
and

The utility failed to document and maintain records that inspections were conducted pursuant to 807 KAR 5:006 and that no deficiencies were found on the pole or poles at issue, or if inspections of poles are not required pursuant to 807 KAR 5:006, the utility failed to periodically inspect and document the condition of its poles.

807 KAR 5:015, Section 7(7)(b)2 (emphasis added). As previously explained, Kentucky Power is concerned that attachers will argue that Rule 7(7)(b)2 “require[s] electric utilities to produce a

‘clean bill of health’ for a particular pole in dispute to overcome the ‘red tagged’ pole presumption.” Kentucky Power’s July 30, 2021 Comments at 11-12; *see also id.* at 12 (“Kentucky Power is also concerned that attachers will seize upon the ambiguity in Subsection (7)(b) in future complaint proceedings in an attempt to shift deployment costs onto electric utilities.”). Kentucky Power does not maintain documentation on the condition of each pole within its distribution network, nor is Kentucky Power required to do so under 807 KAR 5:006. The additional language in Section 13 provides additional clarity to the presumption in Rule 7(7)(b)2 and will result in fewer disputes involving the condition of Kentucky Power’s poles. As no party has objected or presented evidence demonstrating this provision is unjust or unreasonable, this section should be approved as filed.

14. Section 14 – Transfer of Attachments to New Poles

This is a new section that conforms to Section 6(3) of the Commission’s pole attachment regulation. *See* 807 KAR 5:015, Section 6(3). Section 14 of the Revised Tariff requires Operators to transfer their attachments within sixty (60) days of receiving written notice from Kentucky Power. Where an Operator fails to transfer its attachments within the foregoing transfer period, or if a transfer must be expedited for safety or reliability reasons, the new section, consistent with Section 6(3)(c) & (d) of the Commission’s pole attachment regulation, provides Kentucky Power with the right to complete the transfer at the Operator’s sole risk and expense. As no party has objected or presented evidence demonstrating this provision is unjust or unreasonable, this section should be approved as filed.

15. Section 15 – Attachment Inventory

This is a new section that outlines the process for attachment inventories. Though Section 15 is a new provision (i.e., the Current Tariff does not specifically address attachment inventories),

“several of the core elements of the new Section 15 are actually reflected in the Current Tariff.” KPCO_R_KPSC_1_01. For example, the Current Tariff provides that Kentucky Power “may make periodic inspections, as conditions may warrant, for the purpose of determining compliance with the provisions of this Tariff.” Current Tariff, P.S.C. KY. NO. 12 ORIGINAL SHEET NO. 16-3, POLE INSPECTION. The Current Tariff also provides:

Operator shall make no attachment to or other use of any pole of Company or any facilities of Company thereon, except as authorized. The company reserves the right to make periodic inspections. Should such unauthorized attachment or use be made, Operator shall pay to the Company on demand two times the charges and fees....

Id.

Section 15 has drawn a single, narrow objection from AT&T. In its initial objections, AT&T objected to Section 15 because it “[d]oes not allow an attacher to refute the presumption of an unauthorized attachment.” AT&T’s Objections at 8; *see also* Direct Testimony of Daniel P. Rhinehart at 5 (“The fundamental issue is that an attacher should be given an opportunity to dispute, or at least discuss, the reasons why it believes some of the alleged unauthorized attachments are not in fact authorized.”). AT&T continues to gloss over the fact that Section 15, by its plain language, creates only a *presumption* that excess attachments are unauthorized:

If a field inventory reveals that the number of Operator’s Attachments exceeds the number of Attachments shown in Company’s existing records, the excess number of Attachments shall be **presumed** to be unauthorized attachments and handled in accordance with Section 16.

Revised Tariff, P.S.C. KY. NO. 12 ORIGINAL SHEET NO. 16-7, Section 15 (emphasis added). Because it is a *presumption*, Section 15 necessarily opens the door for attachers to rebut unauthorized attachment designations. *See* Rebuttal Testimony of Pamela F. Ellis at 19 (“[T]he presumption expressly states that the excess number of attachments is ‘*presumed* to be unauthorized attachments.’ The fact that this is a presumption—rather than a conclusive

contractual fact—necessarily means there is an opportunity to rebut the presumption.”) (emphasis in original).

Moreover, Section 15 imposes a requirement on Kentucky Power to provide attachers with a “summary report of the field inventory,” which will provide attachers with the means to identify and challenge particular unauthorized attachment designations. Revised Tariff, P.S.C. KY. NO. 12 ORIGINAL SHEET NO. 16-7, Section 15. AT&T also overlooks another key aspect of Section 15—it provides attachers with the right to participate in field inventories. *See id.* (“Company shall provide Operator with at least thirty (30) days’ prior notice of a field inventory, and Operator shall advise Company whether Operator desires to participate in the field inventory not less than fifteen (15) days prior to the scheduled date of such inventory.”). In other words, Section 15 provides attachers with the right to “refute—in real time—any potential ‘unauthorized attachment’ designations.” Rebuttal Testimony of Pamela F. Ellis at 18.

16. Section 16 – Unauthorized Attachments

This is a re-written section that defines what constitutes an “unauthorized attachment” and establishes a rebuttable presumption that—for purposes of calculating outstanding pole attachment rental—an unauthorized attachment has existed on a Kentucky Power pole for two years. This language is generally consistent with the Current Tariff. *Compare* Revised Tariff, P.S.C. KY. NO. 12 ORIGINAL SHEET NO. 16-8, Section 16 *with* Current Tariff, P.S.C. KY. NO. 12 ORIGINAL SHEET NO. 16-3, UNAUTHORIZED ATTACHMENTS. In addition, Kentucky Power has revised Section 16 to impose new penalties on different types of unauthorized attachments, the amount of which varies depending on the severity of the risks posed by the unauthorized attachment: (a) \$25 for each unauthorized attachment within the communications space on a distribution pole; (b) \$500 for each unauthorized attachment above the communications space on a distribution pole; and (c) \$500 for each unauthorized attachment within a duct. *See* Revised

Tariff, P.S.C. KY. NO. 12 ORIGINAL SHEET NO. 16-8, Section 16. As previously explained by Kentucky Power, the overarching purpose of the unauthorized attachment penalties is to incentivize compliance with Kentucky Power's permitting process:

The penalty provision is intended to make non-compliance with Kentucky Power's permitting requirements more costly than compliance. The permitting process (the process by which an attaching entity obtains authorization to make an attachment) exists to protect the safety and reliability of Kentucky Power's electric distribution facilities. It does so by ensuring that the new burdens on the distribution facilities are properly engineered and installed.

KPCO_R_KPSC_1_03. Though no party objected to any aspect of this section, the Commission sought, and Kentucky Power, provided detailed explanations to support the penalties set forth in the Revised Tariff. *See generally, id.*; KPCO_R_KPSC_2_04. As no party has objected or presented evidence demonstrating this provision is unjust or unreasonable, this section should be approved as filed.

17. Section 17 – Abandonment by Operator

This is a revised section. The revisions provide that, if an Operator gives notice that an Attachment has been removed (and thus culled from the records for billing purposes) but is later discovered to have not been removed, then the Attachment is treated as an unauthorized attachment. The purpose of these revisions is to prevent an Operator from artificially lowering its pole attachment rental invoices by providing inaccurate notices of removal. As no party has objected or presented evidence demonstrating this provision is unjust or unreasonable, this section should be approved as filed.

18. Section 18 – Indemnity

This is a revised section which largely tracks the language of the indemnity provision in the Current Tariff. The substantive revision to this section clarifies the scope of the indemnity owed by Operators to ensure that any loss arising out of an Operator's Attachments is indemnified,

whereas the Current Tariff defines the scope of the indemnity provision to losses arising out of “any act, omission or negligence of Operator.” *Compare* Revised Tariff, P.S.C. KY. NO. 12 ORIGINAL SHEET NO. 16-8, Section 18 *with* Current Tariff, P.S.C. KY. NO. 12 ORIGINAL SHEET NO. 16-3, INDEMNITY. KBCA’s initial objection stated that it objected “to any standard that makes an attacher responsible for the negligence of the pole owner.” KBCA’s Objections at 20. KBCA witness Mr. Jerry Avery subsequently opined: “In sum, just as it would be unreasonable for a pole owner to be responsible for any KBCA member negligence, it would be unfair and inappropriate for any KBCA member to be responsible for a pole owner’s negligence.” Direct Testimony of Jerry Avery on Behalf of KBCA at 11 (filed Jun. 9, 2022). However, as Ms. Ellis explained in her testimony in support of Kentucky Power’s Revised Tariff:

Q. WHAT IS YOUR RESPONSE TO MR. AVERY’S CONCERNS?

A. First, the indemnity provision only applies to damages or claims “arising out of or in any manner connected with the attachment, operation and maintenance of Attachments and other facilities of Operator on the Facilities of Company under this Tariff, or to any such act or omission of Operator’s respective representatives, employees, agents or contractors.” In other words, the indemnity provision only applies to stuff that wouldn’t have happened but for the fact that the Operator was there. In this way, the indemnity provision is specifically tied to damages or claims caused by the Operator. Second, though it is true that the indemnity provision would apply even where Kentucky Power is negligent, the claim or damages must still meet the causation test described above. Not only are such provisions customary in commercial contracts, but the provision also helps mitigate against risk (which would otherwise be borne by electric ratepayers) associated with the presence of attaching entities.

Rebuttal Testimony of Pamela F. Ellis at 9. Further, Mr. Avery’s testimony presumes some sort of reciprocal risk as between Kentucky Power and attaching entities, which could not be further from the truth. KBCA members have a mandatory right of access to Kentucky Power’s poles; Kentucky Power is not at liberty to deny access in order to mitigate the risk associated with third

party attachments. The only way to ensure that Kentucky Power and its ratepayers are protected against this forced-placed risk is through robust indemnity and limitation of liability provisions.

19. Section 19 – Limitation of Liability

This is a new section. Though it is new to Kentucky Power’s tariff, the language closely tracks the limitation of liability provisions in the existing pole attachment tariffs of Louisville Gas and Electric Company and Kentucky Utilities Company. *See* Louisville Gas and Electric Company Pole and Structure Attachment Charges, P.S.C. Electric No. 13, Original Sheet No. 40-25, Section 29 (effective Jul. 1, 2021); Kentucky Utilities Company Pole and Structure Attachment Charges P.S.C. No. 20, Original Sheet No. 40.25, Section 29 (effective Jul. 1, 2021). KBCA’s initial objection to this provision was identical to the objection raised in connection with the indemnity provision: “KBCA objects to any standard that makes an attacher responsible for the negligence of a pole owner.” KBCA’s Objections at 20. This was an odd objection given that the limitation of liability provision does not “make[] an attacher responsible” for anything—it merely limits Kentucky Power’s liability to an Operator.

Though KBCA never refined its objection through testimony or otherwise, its initial requests for information revealed that KBCA’s primary complaint seemed to be that the carve-out to the limitation of liability applied only Kentucky Power’s gross negligence or willful misconduct. *See* KBCA DR 1_07. However, as Kentucky Power explained in response to this request for information:

By law, Kentucky Power is required to accommodate third party attachments on its poles. The purpose of Section 19 is to limit Kentucky Power’s exposure to liability arising from these attachments. Because this liability would not exist but for the presence attaching entities on its poles, it is a direct, incremental cost of providing pole attachments. It would be unjust and unreasonable to require Kentucky Power’s ratepayers to bear this liability because: (1) it has nothing to do with the provision of electric service, (2) and it would not exist but for the legal obligation to accommodate third-party attachments. The limitation of liability applies only to liability “arising out of, or relating to, or in connection with this tariff.” The

language regarding gross negligence and willful misconduct is, in essence, a carve-out from the limitation of liability—a concession (and perhaps an overly generous one) that the limitation of liability will not apply where Kentucky Power is grossly negligent or engages in willful misconduct, even if such liability arises out of or is related to the tariff.

KPCO_R_KBCA_1_07.

20. Section 20 – Insurance

This is a revised section. The only substantive revisions to this section are to increase the required bodily injury and property damage liability insurance requirements from \$1,000,000 per occurrence to \$5,000,000 per occurrence. The increase in liability insurance requirements conforms to the risk management strategy of Kentucky Power and its affiliates and protects electric ratepayers from bearing costs caused by Operators. As no party has objected or presented evidence demonstrating this provision is unjust or unreasonable, this section should be approved as filed.

21. Section 21 – Performance Assurance

This is a new section that requires Operators to provide a letter of credit or surety bond to guarantee payment of any sums which may become due under the Revised Tariff or pursuant to a pole attachment license agreement. If an attacher's performance assurance lapses or is terminated for any reason and the attacher lacks the performance assurance required under the new section, Kentucky Power may require the attacher to remove its attachments from Kentucky Power's facilities within sixty (60) days of such lapse or termination. Though no party has raised an objection to this new section, the Commission sought, and Kentucky Power provided, explanations and information to support the new requirement. *See* KPCO_R_1_04; KPCO_R_KPSC_2_05. As no party has objected or presented evidence demonstrating this provision is unjust or unreasonable, this section should be approved as filed.

22. Section 22 – Easements

This section is identical to the corresponding section in the Current Tariff, which requires Operators to secure their own underlying property rights necessary to make attachment to Kentucky Power's poles. The Commission has already found this identical provision to be just and reasonable. As no party has objected or presented evidence demonstrating this provision is unjust or unreasonable, this section should be approved as filed.

23. Section 23 – Charges and Fees

This section is virtually identical to the corresponding section in the Current Tariff. The only revisions account for changes in references and terminology. The Commission has already found a virtually identical provision to be just and reasonable. As no party has objected or presented evidence demonstrating this provision is unjust or unreasonable, this section should be approved as filed.

24. Section 24 – Fees for Additional Attachments

This is a revised section. The revisions provide that “Company will not reimburse Operator for, or otherwise prorate Operators’ next bill for, any Attachments removed from Company Facilities between billing dates.” These revisions will promote administrative efficiency (and save costs to electric ratepayers) by avoiding the need to issue a credit if an attacher removes an attachment during the billing year (rental invoices are issued at the beginning of each billing year). As no party has objected or presented evidence demonstrating this provision is unjust or unreasonable, this section should be approved as filed.

25. Section 25 – Payment

Only two substantive revisions have been made to this section. First, the Current Tariff imposes a 5% charge on late payments. Current Tariff, P.S.C. KY. NO. 12 ORIGINAL SHEET NO. 16-4, ADVANCE BILLING. Kentucky Power has replaced the late payment charge with the following accrued interest provision: “All amounts not so paid shall accrue interest at a monthly

simple interest rate of 1.5%.” Revised Tariff, P.S.C. KY. NO. 12 ORIGINAL SHEET NO. 16-11, Section 25. Second, the Current Tariff requires Kentucky Power to either invoice or refund an attacher for the difference between any prepayment amount and the actual cost of the work for which prepayment was required. Under the Revised Tariff, Kentucky Power has the discretion to issue an invoice or refund when the prepayment does not align with the actual cost of the work. The purpose of this revision is to allow Kentucky Power to forego true-up invoicing and refunds in situations where there is a *de minimis* difference between the prepayment amount and the actual cost. Though no party objected to this section, the Commission sought, and Kentucky Power provided, explanation and detail to support the revisions. *See* KPCO_R_KPSC_1_05; KPCO_R_KPSC_2_06. As no party has objected or presented evidence demonstrating this provision is unjust or unreasonable, this section should be approved as filed.

26. Section 26 – Default or Non-Compliance

This is a minimally revised section. The revisions provide attachers with a 60-day notice and cure period, rather than the 30-day notice and cure period in the Current Tariff. *Compare* Revised Tariff, P.S.C. KY. NO. 12 ORIGINAL SHEET NO. 16-11, Section 26 (applying a 60-day notice and cure period to defaults and non-compliance) *with* Current Tariff, P.S.C. KY. NO. 12 ORIGINAL SHEET NO. 16-4, DEFAULT OR NON-COMPLIANCE (applying a 30-day notice and cure period to defaults and non-compliance). This revision was made to conform Section 26 to Section 6(1)(a) of the Commission’s new pole attachment rules. *See* 807 KAR 5:015, Section 6(1)(a).

Notwithstanding the fact that the revised provision is even more generous than the existing provision, and further notwithstanding the fact that KBCA (or, rather, its predecessor KCTA) did not object to the provision in the Current Tariff, KBCA nonetheless alleges that the right to remove

Attachments due to an uncured default is “unreasonable.” KBCA’s Objections at 21. In response to requests for information from the Commission, KBCA stated:

KBCA proposes the Commission require pole owners to state they will not remove an attacher’s facilities “if the parties have a good faith dispute,” and remove any provision allowing pole owners to remove attachments if there is a good faith dispute concerning the issue on which the removal is based.

KBCA_R_KPSC_1_02. Though this proposal might work when the parties agree that the dispute is in “good faith,” it would not work where the parties disagree on this point. As Ms. Ellis testified, the right to remove attachments due to an uncured default is a right that would be sparingly utilized: “The Company would only use this right when the attacher is in default and makes no effort to remedy or when the attacher has created a dangerous situation and is not responding to requests to correct the dangerous situation.” Rebuttal Testimony of Pamela F. Ellis at 8.

Moreover, if Kentucky Power gave notice that it intended to exercise this right, and an Operator believed there was a “good faith dispute” that should prohibit Kentucky Power’s exercise of this right, the Operator has a complete administrative remedy. Section 6(2)(a) of the Commission’s pole attachment regulation allows an existing attacher to “request a stay of the action contained in a notice received pursuant to subsection (a) 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 subsection.” 807 KAR 5:015, Section 6(2)(a). KBCA even agreed, in response to a request for information from Kentucky Power, 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 from Kentucky Power poles due to a default under a pole attachment tariff.” KBCA_R_KPCO_1_09. In short, KBCA’s objection to this provision is much ado about nothing and its proposal for language revision would create more problems than it solves.

27. Section 27 – Notices

This is a new section that specifically sets forth the proper means of providing notice between the parties on matters related to the Revised Tariff. The new section also requires attachers, within thirty (30) days after the effective date of the Revised Tariff, to specifically identify the authorized representative to whom notices should be sent. This new section will improve communication between Kentucky Power and attachers. As no party has objected or presented evidence demonstrating this provision is unjust or unreasonable, this section should be approved as filed.

28. Section 28 – Prior Agreements

This section, which states that the Revised Tariff supersedes any previous agreement as of the effective date, is virtually identical to the corresponding section in the Current Tariff. The primary purpose of this section is to bring entities other than cable television attachers under the Revised Tariff. As explained in connection with Section 1 (Availability of Service) above, the Current Tariff covered only cable television attachers. The Revised Tariff, in conformance with the Commission's new pole attachment regulation, will cover telecommunications carriers, broadband internet service providers and governmental units. As no party has objected or presented evidence demonstrating this provision is unjust or unreasonable, this section should be approved as filed.

29. Sections 29, 30 and 31 – Assignment; Performance Waiver; Preservation of Remedies

These three sections are identical to the corresponding sections in the Current Tariff. These provisions are best categorized as standard terms and conditions. The Commission has already found identical provisions in the Current Tariff to be just and reasonable. As no party has objected

or presented evidence demonstrating these provisions are unjust or unreasonable, these sections should be approved as filed.

III. CONCLUSION

For the reasons set forth herein, as well as the reasons set forth in Kentucky Power's responses to requests for information, Kentucky Power's response to the initial objections filed by AT&T and KBCA, and the testimony of Mr. Christopher Tierney and Ms. Pamela Ellis, Kentucky Power respectfully requests that the Commission approve the Revised Tariff as submitted.⁵

Dated: October 11, 2022

Respectfully submitted,



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⁵ As set forth in response to Item 1 of the Commission's Third Request for Information, "Kentucky Power will not object to using the 'gross' methodology [to calculate the conduit rate] is that is, indeed, the Commission's preference." KPCO_R_KPSC_3_01.

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 11, 2022 and that there are currently no parties that the Public Service Commission has excused from participation by electronic means in this proceeding



Robert J. Patton
Counsel for Kentucky Power Company