

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	)	

ORDER

On February 28, 2022, pursuant to 807 KAR 5:015, Louisville Gas and Electric Company (LG&E), Kentucky Utilities Company (KU), Duke Energy Kentucky, Inc. (Duke Kentucky), and Kentucky Power Company (Kentucky Power), (collectively, the Companies) filed amendments to their respective pole attachment tariffs with proposed effective dates of March 31, 2022. BellSouth Telecommunications, LLC d/b/a AT&T Kentucky (AT&T Kentucky) and the Kentucky Broadband and Cable Association (KBCA) filed objections to LG&E's, KU's, and Kentucky Power's proposed tariffs.<sup>1</sup> The Commission suspended the Companies' tariffs and initiated this case to investigate the tariffs and the objections thereto. AT&T Kentucky and KBCA were made parties to this proceeding. No other requests for intervention were received. The parties filed testimony, submitted and responded to requests for information, and filed briefs. No party requested a hearing. This matter is now before the Commission for the decision on the merits.

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<sup>1</sup> They did not file an objection to Duke Kentucky's tariff specifically, but some of the objections raised to the other utilities' tariff could apply to Duke Kentucky's tariff.

## BACKGROUND

The Commission promulgated 807 KAR 5:015, which became effective February 1, 2022, to establish “specific criteria and procedures for obtaining access to utility poles within the [C]ommission’s jurisdiction.”<sup>2</sup> Among other things, 807 KAR 5:015, Section 3(7) required all pole owning utilities to file tariffs conforming to the requirements of the regulation by February 28, 2022.<sup>3</sup> The Companies each filed proposed pole attachment tariffs on February 28, 2022, to comply with 807 KAR 5:015.

KBCA made the following objections to the tariffs filed by the Companies:<sup>4</sup>

1. KBCA alleged that the manner in which LG&E and KU (collectively, LG&E/KU) and Kentucky Power allocated the cost of new pole attachments violated 807 KAR 5:015 by making a new attacher responsible for certain red tagged poles for which the Companies should have been responsible.
2. KBCA alleged that the manner in which LG&E/KU and Kentucky Power allocated the cost of non-red tagged poles was unreasonable.
3. KBCA alleged that LG&E/KU’s application review fee of \$75.00 per pole is unreasonable if the fee does not pay for the survey and that Kentucky Power’s make ready survey fee of \$275.00 is unreasonable and unsupported.
4. KBCA alleged that overlashing requirements in Section 11.a of LG&E/KU’s tariffs placed unreasonable make-ready timelines on make-ready required for overlashing, required any make ready to correct a preexisting violation of another attacher, and required new attacher to pay any costs incurred by the utility in evaluating the proposed overlashing.
5. KBCA alleged that the requirement in LG&E/KU and Kentucky Power’s tariffs that an attachers contractors and subcontractors must maintain the same insurance coverage as required of attacher was unreasonable.
6. KBCA alleged that any indemnity language in the tariffs that makes an attacher responsible for the negligence of the pole owner is unreasonable.
7. KBCA alleged that provisions in Kentucky Power’s tariff that would allow the utility to remove attachments based on a default are unreasonable.
8. KBCA alleged that Paragraph 9(j) of LG&E/KU’s tariffs imposes an unreasonable penalty on the attachment customers.

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<sup>2</sup> 807 KAR 5:015, Necessity, Function, and Conformity.

<sup>3</sup> 807 KAR 5:0015, Section 3.

<sup>4</sup> Objections of the Kentucky Broadband and Cable Association to Newly Filed Kentucky Tariffs (“KBCA’s Initial Objections”) at 20-23 (filed Mar. 27, 2022).

9. KBCA alleged that the additional timelines that LG&E/KU and Kentucky Power imposed on make ready when an attacher follows the One Touch Make Ready (OTMR) process were unreasonable.
10. KBCA alleged that Kentucky Power's charge for attachments within ducts and conduits of \$2.70 per linear foot was not supported by any cost justifications.

AT&T Kentucky made the following objections to the tariffs filed by the Companies:<sup>5</sup>

1. AT&T Kentucky alleged that provisions in LG&E/KU and Kentucky Power's tariffs that result in make-ready estimates being automatically withdrawn after 14 days were unreasonable.
2. AT&T Kentucky alleged that the definition of "Attachment" in LG&E/KY and Kentucky Power's tariffs is unreasonable, because it could be interpreted as including overlashing, which AT&T argues is not an attachment.
3. AT&T Kentucky alleged that a requirement in LG&E/KU and Kentucky Power's tariffs that untagged attachments be tagged within 180 days is unreasonable.
4. AT&T Kentucky alleged that a requirement in LG&E/KU and Kentucky Power's tariffs that required Attachers to reimburse the company for any costs incurred in evaluating the proposed overlashing was unreasonable.
5. AT&T Kentucky alleged that Kentucky Power's tariff is unreasonable, because it does not permit an attacher to refute a presumption of an unauthorized attachment that exists if the Kentucky Power does not have the attachment in its records.

Notably, neither KBCA nor AT&T Kentucky made any specific objection to Duke Kentucky's tariff. However, some of the general objections that they made to LG&E, KU, and Kentucky Power's tariffs could also apply to Duke Kentucky's tariffs, and Duke Kentucky filed testimony and briefs in response to those general objections.

#### LEGAL STANDARD

KRS 278.030(2) allows a utility to "establish reasonable rules governing the conduct of its business and the conditions under which it shall be required to render

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<sup>5</sup> Comments of AT&T Kentucky in Response to March 2, 2022 Commission Order (AT&T's Initial Objections) at 18-21 (filed Mar. 17, 2022).

service.”<sup>6</sup> The burden of establishing the reasonableness of a proposed rate change is on the utility proposing the change.<sup>7</sup> Conversely, the party challenging existing tariff provisions bears the burden of establishing that the provisions are unreasonable or unlawful.<sup>8</sup>

## DISCUSSION

### Allocation of Costs for Red Tagged Poles

KBCA alleged that the manner in which LG&E and KU (collectively, LG&E/KU) and Kentucky Power allocated the cost of new pole attachments violated 807 KAR 5:015 by making a new attacher responsible for the cost of replacing certain red tagged poles for which the utilities should have been responsible. Specifically, Section 7(f) of both LG&E and KU’s tariffs state:

[i]f an existing Structure is replaced or a new Structure is erected solely to provide adequate capacity for Attachment Customer’s proposed Attachments, Attachment Customer shall pay a sum equal to the actual material and labor cost of the new Structure, as well as any replaced appurtenances, plus the cost of removal of the existing Structure minus its salvage value, within thirty (30) days of receipt of an invoice.<sup>9</sup>

Section 10 of Kentucky Power’s tariff similarly states:

[w]here in Company’s judgment a new pole must be erected to replace an existing pole solely to adequately provide for

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<sup>6</sup> See also 807 KAR 5:015, Section 3(4) (“The tariff may include terms, subject to approval by the commission, that are fair, just and reasonable and consistent with the requirements of this administrative regulation and KRS Chapter 278, such as certain limitations on liability, indemnification and insurance requirements, and restrictions on access to utility poles for reasons of lack of capacity, safety, reliability, or generally applicable engineering standards”).

<sup>7</sup> See Case No. 2007-00461, *Hardin County Water District No. 1* (Ky. PSC Aug. 14, 2008), Order at 3; see also KRS 278.190(3).

<sup>8</sup> See Case No. 2005-00322, *East Clark Water District v. City of Winchester, Kentucky* (Ky. PSC Apr. 3, 2006), Order at 1.

<sup>9</sup> LG&E’s P.S.C. Electric No. 13, Original Sheet No. 40.8; KU’s P.S.C. Electric No. 13, Original Sheet No. 40.8.

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.<sup>10</sup>

KBCA argued that those provisions are inconsistent with the provisions in 807 KAR 5:015 governing the allocation of costs for red tagged poles.<sup>11</sup>

LG&E/KU and Kentucky Power argued that the language in their tariffs specifically conformed to the Commission's "red tagged" pole framework, which they stated is designed to ensure that attaching entities do not bear the cost of replacing poles that have already been identified for replacement by the utility.<sup>12</sup> LG&E/KU also noted that they "already absorb the cost of replacing 'red-tagged' poles—even if the replacement schedule for those poles is accelerated by a new attachment request."<sup>13</sup> LG&E/KU and Kentucky Power asserted that KBCA's argument is without merit to the extent that KBCA is arguing that their proposed tariffs would pass on the cost of replacing "red-tagged" poles to new attachers.<sup>14</sup>

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<sup>10</sup> Kentucky Power's P.S.C. KY. NO. 12, 1st REVISED SHEET NO. 16-5, Section 10.

<sup>11</sup> KBCA's Initial Objections at 21-23.

<sup>12</sup> LG&E/KU's Combined Response to Kentucky Broadband and Cable Association's and AT&T Kentucky's Objections to Amended Pole Attachment Tariffs (LG&E/KU's Response to Initial Objections) (filed Apr. 14, 2022) at 5; Response of Kentucky Power Company to the Objections of AT&T and Kentucky Broadband & Cable Association to Revised Tariff P.A. (Kentucky Power's Response to Initial Objections) at 9.

<sup>13</sup> LG&E/KU's Response to Initial Objections at 6.

<sup>14</sup> LG&E/KU's Response to Initial Objections at 6; Kentucky Power's Response to Initial Objections at 9.

Red tagged poles are defined in the regulation as any pole that “is designated for replacement based on the pole’s non-compliance with an applicable safety standard;” “is designated for replacement within two (2) years of the date of its actual replacement for any reason unrelated to a new attacher’s request for attachment,” and “would have needed to be replaced at the time of replacement even if the new attachment were not made.”<sup>15</sup> The regulation assigns the cost of red tagged pole replacements to the utility unless the attacher requests a larger pole in which case the attacher would only be responsible for the difference in the cost of the pole the utility would have installed and the cost of the larger pole.<sup>16</sup>

The Commission understands KBCA’s concern regarding Section 7(f) of LG&E/KU’s proposed tariffs and Section 10 of Kentucky Power’s proposed tariff, because the language does not exactly match the language of the 807 KAR 5:015 or explicitly state that an attacher will not be responsible for the cost of a red tagged pole, so the terms could potentially be interpreted different than the regulation. However, LG&E/KU and Kentucky Power’s tariffs state that the attacher is only responsible for the cost of the pole if it is erected “solely” for the new attacher. The Commission believes the replacement of a red-tagged pole would not be “solely” for the new attacher such that the most reasonable interpretation of that the Companies tariffs would not improperly make the new attacher responsible for the cost of replacing a red-tagged pole. The Companies also recognized that in the event that the provisions conflicted that the regulation would control over their tariffs. Thus, the Commission does not believe that Paragraph 7(f) of

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<sup>15</sup> 807 KAR 5:015, Section 1.

<sup>16</sup> 807 KAR 5:015, Section 4(6)(b).

LG&E/KU's proposed tariffs and Paragraph 10 of Kentucky Power's proposed tariff conflict with the provisions of 807 KAR 5:015 allocating the cost of red-tagged pole replacements and finds that they are reasonable.

#### Allocation of Costs for Non-Red Tagged Poles

KBCA also argued that Paragraph 7(f) of LG&E/KU's proposed tariffs and Paragraph 10 of Kentucky Power's proposed tariff unreasonably imposed the entire cost of replacing non-red tagged poles on the third party attachers (KBCA did not object specifically to Duke Kentucky's tariff but it similarly allocates costs for the replacement of non-red tagged poles to the new attachers).<sup>17</sup> Dr. Patricia Kravtin, who was KBCA's primary witness in support of its proposed methodology, argued that the utilities are the primary beneficiary of non-red tagged pole replacements, because the utilities get a new pole with a longer remaining service to provide their core service.<sup>18</sup> She also stated that utilities will receive additional benefits from the non-red tagged pole replacements, including:

- Operational benefits of the replacement pole such as additional strength, height, and resilience and lower operational costs;
- Strategic benefits such as the ability to provide additional services and network enhancements;
- Revenue-enhancing benefits such as additional space for more attachments; and
- Additional tax savings arising from accelerated depreciation.<sup>19</sup>

Dr. Kravtin asserted that the utilities will be required to replace the non-red tagged pole eventually, and therefore, that the make-ready pole replacement to accommodate a new

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<sup>17</sup> KBCA's Initial Objections at 21-23; Brief of the Kentucky Broadband and Cable Association (KBCA's Initial Brief) at 3.

<sup>18</sup> Direct Testimony of Patricia D. Kravtin (Kravtin Testimony) at 8, 13.

<sup>19</sup> Kravtin Testimony at 40.

attacher only shifts the timing of the replacement.<sup>20</sup> Thus, Dr. Kravtin and KBCA argued that if third party attacher pays the undepreciated cost of the existing pole, i.e. the net book value of the pole, that the third party attacher will have covered the cost of replacing the pole early caused by the new attachment request.<sup>21</sup> Dr. Kravtin and KBCA also argued that the net book value of a pole should be calculated by taking the net book value of the poles recorded in each account and using the number of poles to calculate an average, unless a utility or a new attacher can present evidence that something other than the average should be used.<sup>22</sup>

The Companies and their witnesses argued the third party attacher is the cause of the cost to replace a non-red tagged pole and the primary and potentially only beneficiary.<sup>23</sup> They asserted that the potential benefits that they and their electric customers, who will ultimately be responsible for any cost not allocated to a third party attacher, receive from the early replacement of poles to accommodate a new attachment are speculative or non-existent. They generally acknowledged that the replacement of a pole to accommodate an attachment could extend the life of the pole, but given the long lives of utility poles, they argued that the pole either may not be needed when it reaches the end of its useful life or that a larger or different type of pole may be needed such that the utility will get no additional useful life from the make-ready pole replacement made to

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<sup>20</sup> Kravtin Testimony at 16-17.

<sup>21</sup> See Kravtin Testimony at 17; KBCA's Initial Brief at 3.

<sup>22</sup> See Kravtin Testimony at 18; KBCA's Initial Brief at 3-4.

<sup>23</sup> LG&E/KU's Initial Brief at 17-19; Kentucky Power's Initial Brief at 16-17; Duke Kentucky's Initial Brief at 5-7; see *also* Rebuttal Testimony of Jeremy B. Gibson (Gibson Rebuttal Testimony) (filed Jul. 11, 2022) at 9.



accommodate a new attachment.<sup>24</sup> The Companies also argued that there is no operational benefit for replacing a pole that does not need to be replaced, that a pole that is not needed will not provide necessary strategic benefits, and that the revenue from potential additional attachments is de minimis and speculative.<sup>25</sup> For instance, LG&E/KU's witness stated that:

[U]nless 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. Due to this inability to forecast future service needs, the Companies—when performing make-ready pole replacements—only install poles that are incrementally tall and/or strong enough to accommodate the additional attachment. As a result, if five (5) years down the road the Companies' core electric service needs would require an even 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.<sup>26</sup>

Duke Kentucky and Kentucky Power's witness, Christopher Tierney, also argued that electric utilities would not be made whole using Dr. Kravtin's method, because they do not capitalize all labor costs associated with pole replacements in FERC Account 364 ("Poles, towers, and fixtures"), which would generally be used to calculate the average

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<sup>24</sup> See LG&E/KU's Initial Brief at 17-19; Kentucky Power's Initial Brief at 16-17; Duke Kentucky's Initial Brief at 5-7; see also Rebuttal Testimony of Michael E. Hornung on Behalf of the Companies (Hornung Rebuttal Testimony) (filed Jul. 11, 2022) at 5-6; Rebuttal Testimony of Pamela F. Ellis (Ellis Rebuttal Testimony) (filed Jul. 11, 2022) at 10-11; Gibson Rebuttal Testimony at 9.

<sup>25</sup> See Hornung Rebuttal Testimony at 5-6; Tierney Rebuttal Testimony at 10-11 (discussing the limited evidence in support of the benefits alleged by Dr. Kravtin).

<sup>26</sup> Hornung Rebuttal Testimony at 5-6; see also Ellis Rebuttal Testimony at 10-11.

net book value of the poles under KBCA's proposed method.<sup>27</sup> He also noted that pole costs are recorded based on their original cost and, due to inflation, the cost of the replacement poles is significantly higher than the undepreciated cost of the existing pole—for example, he noted that the average pole replacement cost is \$11,394 and \$9,159 for Duke Kentucky and Kentucky Power, respectively, but the average remaining net book value of those companies' poles is \$557 and \$490.<sup>28</sup> As an illustration, Mr. Tierney performed net present value calculations to assess the present value benefit of a premature pole replacement for Duke Kentucky and Kentucky Power, based on an average pole, and found that would be \$5,107 and \$2,325, respectfully, whereas Ms. Kravtin's method would require those utilities to pay about \$10,837 and \$8,669 of the costs respectively.<sup>29</sup> However, Mr. Tierney's net present value analysis assumes the pole would have been needed at the end of the useful life of the existing pole.<sup>30</sup> Mr. Tierney also argued that it would be economically inefficient to allow attachers to make decisions regarding the build out of their systems without requiring them to pay, and therefore account for pole replacement costs.<sup>31</sup> Mr. Tierney also stated that Dr. Kravtin "makes no reference to (let alone an attempt to quantify and contrast) the benefits received by the

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<sup>27</sup> Rebuttal Testimony of Christopher F. Tierney (Tierney Rebuttal Testimony) (filed July 11, 2022) at 6-8.

<sup>28</sup> Tierney Rebuttal Testimony at 8-9.

<sup>29</sup> Tierney Rebuttal Testimony at 9-10.

<sup>30</sup> See Tierney Rebuttal Testimony at 9-10.

<sup>31</sup> Tierney Rebuttal Testimony at 11-12.

attaching entity's shareholders or its customers as a result of gaining access to the utilities' pole infrastructure."<sup>32</sup>

As an initial matter, the Commission notes that the dispute regarding the allocation of costs for non-red tagged pole replacements is not a dispute about whether the utility or a new attacher should be responsible for the cost, but rather, is about whether the new attacher or other utility customers should be responsible for the cost, because a utility is entitled to an opportunity to recover any cost reasonably incurred from its customers. When determining how a utility's costs should be allocated among customers, the Commission has long stated that the basic tenant of rate-making is that costs should be allocated to the cost-causer.<sup>33</sup> This generally means that "the consumers whose service demand causes [the utility] to incur additional investment expenditures and expenses should pay these costs."<sup>34</sup>

Here, a non-red tag pole replacement, by definition, would not be taking place at the time of the replacement if the replacement was not necessary to accommodate the new attacher, and therefore, the new attacher would be the "but for" and proximate cause of the pole replacement. The other utility customers may eventually benefit from the installation of the new pole installed to accommodate a new attacher as alleged by KBCA.

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<sup>32</sup> Tierney Rebuttal Testimony at 12.

<sup>33</sup> Case No. 2002-00169, *Application of Kentucky Power Company d/b/a American Electric Power for Approval of an Amended Compliance Plan for Purposes of Recovering the Costs of New and Additional Pollution Control Facilities and to Amend its Environmental Cost Recovery Surcharge Tariff* (Ky. PSC Mar. 31, 2003), Order.

<sup>34</sup> Case Nos. 8847, 8879, *In Re: South Central Bell Telephone Company* (Ky. PSC Jan. 18, 1984), Order.

However, those benefits are much more limited than alleged by KBCA and they are speculative.

For instance, Dr. Kravtin asserted that utilities would obtain operational benefits from the non-red tagged pole replacements such as additional strength, height, and resilience, which she argued would reduce operating and maintenance costs.<sup>35</sup> However, again, such replacements are, by definition, not needed, and therefore, not necessary to provide adequate service to a utility's other customers.<sup>36</sup> Absent the request by a new attacher a utility would be prohibited from constructing the new pole and recovering the cost from its customers.<sup>37</sup> Further, Dr. Kravtin provided no evidence that new poles that are not otherwise needed would tangibly reduce a utility's operation and maintenance expense.<sup>38</sup>

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<sup>35</sup> See KBCA's Response to Commission Staff's First Request for Information (KBCA's Response to Staff's First Request), Item 12.

<sup>36</sup> The Commission notes that Dr. Kravtin also provided testimony that purported to show that utilities are failing to make-pole replacements at rates that correspond to their depreciation rates, which KBCA has alleged establishes that utilities are sitting on necessary pole replacements and will ultimately require attachers to pay for those attachments. Based on the depreciation rates for many of the utilities poles, which were occasionally based on useful lives of less than 30 years, a major explanation for the discrepancy between depreciation and replacement rates, is likely that many of the depreciation rates, which are often the result of settlements, are based on useful lives that are too short. LG&E/KU also alleged that Dr. Kravtin's analysis did not account for all of its pole replacements and stated that it was actually replacing poles at a rate faster than its depreciation rate. However, even if Dr. Kravtin's testimony established that utilities were sitting on necessary pole replacements, it would not justify requiring other customers to cover the cost of non-red tagged poles, but rather, would be evidence that could be used to establish that a utility is seeking to improperly charge it for red-tagged pole replacements.

<sup>37</sup> See KRS 278.020 (requiring a utility to obtain a certificate of public convenience (CPCN) and necessity before beginning the construction of any plant, equipment, property, or facility for furnishing to the public any utility, including water and sewer service, except for extensions in the ordinary course of business); see also *Kentucky Utilities Co. v. Pub. Serv. Comm'n.*, 252 S.W.2d 885 (Ky. 1952) (noting that to obtain a CPCN that a utility must establish a need for the plant and the absence of wasteful duplication, and defining wasteful duplication, in part, as "an excess of capacity over need"); 807 KAR 5:001, Section 15(3) (noting that an extension in the ordinary course of business may not result in wasteful duplication of plant, equipment, property, or facilities).

<sup>38</sup> See KBCA's Response to Staff's First Request, Item 12(d).

Dr. Kravtin also argued that utilities will see tax benefits from the non-red tagged pole replacements in the form of accelerated tax depreciation of the capital expenditure that can be used to offset tax expense. However, for the most part, utilities are prohibited by federal law from passing along the direct benefits of accelerated tax depreciation on to customers.<sup>39</sup> Further, even if utilities could pass those benefits on to customers, the Commission fails to see how a comparatively small accelerated tax decrease would be a net benefit to other customers that would justify requiring them to pay the bulk of the cost for the new pole, through depreciation expense and carrying costs, that is not needed to provide them service.<sup>40</sup> Utilities will also not recover twice for the same pole, as alleged by KBCA, because the Commission does and will require that the costs covered by a new attacher be accounted for and removed from the calculation of other rates, which is a common practice.

The Commission acknowledges that non-red tagged pole replacements may ultimately benefit other utility customers by extending the useful lives of the poles replaced, but the Commission agrees with the utilities that the benefit is speculative, because it will only accrue if the pole at issue is needed beyond the year at which the original pole would have reached the end of its useful life. Conversely, the benefit of a non-red tagged pole replacement to a new attacher is immediate and obvious, because the replacement is being made to specifically accommodate the new attacher and to allow the new attacher to build out its system. Further, given Mr. Tierney's time value of money

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<sup>39</sup> See 26 U.S.C.A. § 168(f)(2) (stating that accelerated depreciation may not be used for "public utility property" if the "taxpayer does not use a normalization method of accounting").

<sup>40</sup> See Tierney Rebuttal Testimony at 10-11 (discussing the limited evidence in support of the benefits alleged by Dr. Kravtin).

analysis and the carrying costs associated with the early replacement of poles, the Commission believes the cost assigned to utilities under KBCA's method exceeds the benefits the utility would receive from the pole replacement even assuming that every replaced pole would be needed beyond the useful life of the original pole. Thus, the Commission finds that the Companies' tariffs reasonably allocate the costs of non-red tagged pole replacements.<sup>41</sup>

However, as noted above, the reasonableness of allocating the cost of make-ready replacements of non-red tagged poles to new attachers is based on the assumption that the poles actually are non-red tagged poles. To help ensure that utilities are not passing the cost of replacing red tagged poles on to new attachers, the Commission promulgated 807 KAR 5:015, Section 7(7)(b), which created a rebuttable presumption that a pole replaced to accommodate a new attachment was a red tagged pole in the event of a dispute if:

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.<sup>42</sup>

While this provision is an evidentiary provision on its face, it was intended to place the initial burden to establish the condition of a pole on the party with access to that information to ensure that costs are allocated in a reasonable manner. Absent the

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<sup>41</sup> Cf. *Old Dominion Elec. Co-Op., Inc. v. F.E.R.C.*, 518 F.3d 43, 51 (D.C. Cir. 2008)(in which the D.C. Circuit affirmed FERC's order allocating 100 percent of the costs of transmission upgrades required for the generation owner to interconnect to the transmission system to the generation owner, despite ancillary benefits to the system, because the transmission upgrades would not have been needed "but for" the generation owners need to interconnect).

<sup>42</sup> 807 KAR 5:015, Section 7(7)(b)2.

presumption in 807 KAR 5:015, Section 7(7)(b), the Commission would question the reasonableness of allocating the cost of non-red tagged pole replacements to new attachers, because it would place the new attachers in the position of having to establish that poles should be classified as red tagged poles with limited access to information about the poles.

LG&E/KU and Kentucky Power included provisions in their tariffs that attempt to specify circumstances in which the presumption in 807 KAR 5:015, Section 7(7)(b) could be satisfied. Specifically, Section 14.c. of LG&E/KU's proposed tariffs states that:

In accordance with 807 KAR 5:006, Company inspects all Distribution Poles on a circuit-by-circuit basis every two (2) years for deterioration and damage. Company identifies, by pole number, any deficient Distribution Pole and the corrective action taken (or prescribed) with respect to such Distribution Pole in a PSC Regulatory Inspection Form. If a dispute arises with Attachment Customer regarding the condition of a Distribution Pole, 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 circuit inspection, and (2) the absence of a PSC Regulatory Inspection Form showing that the Distribution Pole in dispute is deficient and in need of replacement.<sup>43</sup>

Section 13 of Kentucky Power's tariff states, in relevant part, that:

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

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<sup>43</sup> LG&E/KU's P.S.C. Electric No. 13, First Revision of Original Sheet No. 40.18, Section 14.c.

records showing that the Distribution Pole in dispute is deficient and in need of replacement.<sup>44</sup>

While the Commission understands that records of regularly conducted activity, including the absence of a record, are sometimes considered credible evidence that something did or did not happen,<sup>45</sup> LG&E/KU and Kentucky Power's tariffs go beyond that and would seek to establish as a matter of law, based on application of the filed rate doctrine, that evidence that an inspection took place and the absence of a record indicating a deficiency would rebut the presumption in 807 KAR 5:015, Section 7(7)(b). The Commission also believes that those tariff provisions would limit the Commission's sole discretion as the fact-finder to judge the credibility of evidence in matters before the Commission and that they are inconsistent with 807 KAR 5:015, Section 7(7)(b) in that they seek to establish that the absence of a record as proof that there was no deficiency on the pole. Most importantly, the Commission believes that by significantly limiting the presumption in 807 KAR 5:015, Section 7(7)(b) that LG&E/KU and Kentucky Power's tariffs raise questions about the reasonableness of the cost allocation method for make ready pole replacements approved herein. Thus, the Commission finds that Section 14.c. of LG&E/KU's tariffs and Section 13 of Kentucky Power's tariff are unreasonable and inconsistent with 807 KAR 5:015, Section 7(7)(b), and therefore, are not approved for inclusion in the tariffs.

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<sup>44</sup> Kentucky Power's P.S.C. KY. NO. 12 ORIGINAL SHEET NO. 16-7, Section 13.

<sup>45</sup> See, e.g. Ky. R. Evid. 803(6) ("A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.").



## LG&E's Application Review Fee

LG&E/KU proposed an application review fee per pole of \$75 for wireline attachments and \$200 for wireless attachments. The application review fees were based on an average of the actual cost per pole from 2018 through 2021, which came out to \$80.16 per pole for wireline attachments and \$940.82 per pole for wireless attachments.<sup>46</sup> LG&E/KU are not proposing to require prepayment of more than \$200 per pole for wireless attachments since they have the right to recover the difference between the prepayment and actual cost after the work has been performed. LG&E/KU indicate that the application review fees recover the costs of the following: (1) Initial review of the application for completeness and accuracy; (2) Field visit to the affected poles; (3) Review of proposed new attachment relevant to existing facilities and pole loading; (4) Evaluation of proposed make-ready solutions; (5) Creation of work order for construction; (6) Communications with the new attacher; and (7) Post-construction inspection.<sup>47</sup>

LG&E/KU's proposed tariffs state that should the actual cost for application review exceed the Attachment Customer's prepayment, the Attachment Customer would be required to reimburse LG&E/KU for the difference upon presentation of an invoice. However, the proposed tariffs do not address what will happen if the actual cost for application review is less than the Attachment Customer's prepayment. LG&E/KU stated that, in that instance, they would refund the difference if the actual cost was less than the

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<sup>46</sup> LG&E/KU's Response to Commission Staff's First Request for Information (filed May 5, 2022), Item 11.

<sup>47</sup> LG&E/KU Response to Commission Staff's Second Request for Information (filed June 2, 2022), Item 1.

Attachment Customer's prepayment, but that given the unlikelihood of that happening, they did not explicitly include refund language in the tariff.<sup>48</sup>

While KBCA raised an objection to LG&E/KU's \$75 wireline attachment application review fee in its initial comments on this tariff filing, the LG&E/KU survey fees were not specifically mentioned in KBCA's testimony filed in this proceeding. However, KBCA did generally state that it believed that the preconstruction survey cost per pole in Kentucky should be \$30 to \$50.<sup>49</sup> No support was given for this range other than the experience of KBCA's witness.

LG&E/KU argue that their application review fees are a reasonable estimate of the costs they incur in reviewing pole attachment applications.<sup>50</sup> In addition, LG&E/KU state that the \$75 per pole application review fee has been in place for over a year and that prior to that, they charged a \$65 application review fee dating back to 2017. LG&E/KU claim that no attacher has questioned such fees in the past.<sup>51</sup>

As LG&E/KU did provide support for their application review fees, the Commission is inclined to find the fees to be reasonable given the fact that the fees will be trued up upon completion of the work. In regards to the true up, in an effort to be fully transparent, the Commission finds that LG&E/KU should add refund language to their tariffs for those situations in which the amount of the prepayment of application review fees exceeds the actual costs of the work performed by LG&E/KU.

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<sup>48</sup> LG&E/KU Response to Commission Staff's Third Request for Information (filed July 7, 2022), Item 1.

<sup>49</sup> Direct Testimony of Richard Bast, page 10.

<sup>50</sup> Rebuttal Testimony of Jason Jones, page 5, line 11–20.

<sup>51</sup> LG&E/KU Response to Initial Objection of AT&T and KBCA (filed April 14, 2022) at 4.

### Kentucky Power's Make Ready Survey Fee of \$275.00

Kentucky Power proposed a make-ready survey per pole estimate fee of \$275. Kentucky Power indicates that it uses third party contractors to perform make ready surveys and that the fee is designed to recover the average pass-through cost of such work on a per pole basis, plus a 15 percent surcharge to offset administrative costs. Kentucky Power calculated the fee using the unit costs for the following: (1) administrative processing costs; (2) field data collection costs; (3) engineering costs; and (4) post-construction inspection costs. In addition, Kentucky Power stated that the unit cost for engineering varies based on the following conditions of the pole: (1) a pole that requires no make-ready or other work; (2) a pole that requires rearrangement of existing attachments; and (3) a pole that requires additional work beyond rearrangement. Kentucky Power averaged the per pole make-ready survey cost for each pole type based on a 50-pole proposal.<sup>52</sup>

The proposed tariff states that Kentucky Power may, in its sole discretion, require prepayment for a make-ready survey. Kentucky Power indicated that, while it will not require prepayment for all make-ready surveys, it reserves the right to do so when it received attachment requests (1) pertaining to a large buildout, (2) from attaching entities with a history of non-payment, or (3) from new attaching entities for which Kentucky Power has no credit history or evidence of ability to pay.<sup>53</sup>

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<sup>52</sup> Kentucky Power's Response to Commission Staff's First Request for Information (filed May 4, 2022), Item 6(a).

<sup>53</sup> Kentucky Power's Response to Commission Staff's First Request for Information (filed May 4, 2022), Item 6(a).

In instances where the actual cost of performing the make ready survey exceeds the amount of the attacher's prepayment, the section of the tariff dealing with the make-ready survey costs requires the attacher to reimburse Kentucky Power for any difference upon receipt of an invoice for such amount. However, that section does not address what will happen if the actual cost for the make-ready survey is less than the attacher's prepayment. However, there is a provision later in the tariff that indicates that Kentucky Power may refund any excess prepayment to the attacher after the current amount of such payment has been determined. Kentucky Power indicates that it only issues refunds where there is a meaningful difference between the prepayment amount and the actual cost of the make-ready survey.<sup>54</sup> However, in situations where the refund is minimal, Kentucky Power indicates that the difference will be credited to rate base, benefitting all electric customers, instead of being refunded to the attacher.<sup>55</sup>

KBCA claimed that Kentucky Power's make-ready survey was excessive, out of line with industry norm, and unreasonable and that such fees should be in the \$30 to \$50 range.<sup>56</sup> No support was given for this range other than the experience of KBCA's witness.

Kentucky Power did provide support for its make-ready survey fee. While the amount is considerably more than other utilities, the Commission finds that the fees are reasonable given the support provided and the fact that the Commission's regulations

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<sup>54</sup> Kentucky Power's Response to Commission Staff's Third Request for Information (filed July 7, 2022), Item 4.

<sup>55</sup> Kentucky Power's Response to Commission Staff's Third Request for Information (filed July 7, 2022), Item 3(b).

<sup>56</sup> Direct Testimony of Richard Bast at 10.

require that the fees be trued up upon completion of the work. In regards to refunds, the Commission finds that since its regulations require utilities to provide a detailed, itemized final invoice of the actual make ready costs to attachers, Kentucky Power should add language to its tariff indicating that it will refund any overpayment for make ready costs no matter the amount of the difference.

#### Overlapping Requirements in Section 11.a. of LG&E/KU's Tariffs

Section 11.a. of the LG&E/KU's proposed tariffs state:

Attachment Customer shall provide Company with at least thirty (30) days' advance written notice, in the form and manner prescribed by Company, before Overlapping, or allowing a third-party to overlap, Attachment Customer's existing wireline Attachments. If Company determines that make-ready work is necessary to accommodate the proposed Overlapping, Company will notify Attachment Customer of the need for any such make-ready work and the parties shall follow the process set forth in Section 7.e. above. Attachment Customer may not proceed with Overlapping until any necessary make-ready work is completed. Attachment Customer shall reimburse Company for any costs incurred in evaluating the proposed Overlapping.<sup>57</sup>

KBCA objected to that provision and argued that it improperly and unreasonably placed timelines applicable to standard attachments on make-ready required for overlapping, required make-ready to correct preexisting violations of another attacher before an overlapping could proceed, and required overlappers to pay any costs incurred by the utility in evaluating the proposed overlapping.<sup>58</sup>

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<sup>57</sup> LG&E's P.S.C. Electric No. 13, First Revision of Original Sheet No. 40.13; KU's P.S.C. Electric No. 13, First Revision of Original Sheet No. 40.13.

<sup>58</sup> KBCA's Initial Objections at 21-23; Reply Brief of the Kentucky Broadband and Cable Association (KBCA Reply Brief) (filed Oct. 18, 2022) at 4-5; Brief of the Kentucky Broadband and Cable Association (KBCA's Initial Brief) (filed Oct. 11, 2022) at 7-10.

More specifically, KBCA argued that 807 KAR 5:015 allows a utility to provide “documentation” of “a capacity, safety, reliability, or engineering issue” to the attacher within its 30-day overlashing notice period” but that the regulation does not address the timeframe in which “the party seeking to overlash must address any identified issues before continuing with the overlash, either by modifying its proposal or by explaining why, in the party’s view, a modification is unnecessary.”<sup>59</sup> KBCA argued that it was unreasonable “to impose a full make ready timeline on attachers for overlashing where an attacher’s contractor could resolve the issue far more quickly prior to overlashing (and the utility could inspect the work in accordance with the new regulations).”<sup>60</sup> KBCA also argued that it was unreasonable to charge overlashers for “any costs incurred in evaluating the proposed overlashing,” but rather, consistent with Federal Commission (FCC) jurisdictions, that overlashers should only be charged for costs incurred in evaluating the proposed overlashing if the evaluation identifies an issue with the overlashing.<sup>61</sup> AT&T Kentucky joined in KBCA’s objection with respect to overlashing costs and suggested that LG&E/KU’s tariffs be amended to prevent them from charging “for any costs incurred in evaluating the proposed overlashing,” because AT&T Kentucky argued that allowing for charges for overlashing might be a barrier to broadband deployment.<sup>62</sup>

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<sup>59</sup> KBCA Reply Brief at 4-5; *see also* KBCA’s Initial Brief at 7-10.

<sup>60</sup> KBCA Reply Brief at 5.

<sup>61</sup> KBCA Reply Brief at 5.

<sup>62</sup> Testimony of Daniel Rhinehart on Behalf of AT&T (Rhinehart Testimony) (filed June 9, 2022) at 9-10.

LG&E/KU argued that Section 3(5)(b) of the pole attachment regulation specifically contemplates that a utility could require make ready for an overlashing “if failing to fix the preexisting violation would create a capacity, safety, reliability, or engineering issue.”<sup>63</sup> However, LG&E/KU noted that while the Commission allowed a utility to require make ready in certain circumstances before an overlashing can proceed that the regulation did not establish any time lines for the completion of such make ready. LG&E/KU argued that by applying the standard make-ready timelines from the regulation that they have reasonably addressed an issue that was not specifically addressed in the regulation. Lastly, LG&E/KU argued that the Commission, by partially adopting KBCA’s proposed language regarding overlashing but explicitly removing the prohibition on charging overlashers, contemplated that the regulation would permit utilities to charge overlashers for costs necessitated by a proposed overlashing.<sup>64</sup>

The Commission agrees with LG&E/KU that the pole attachment regulation contemplates that make-ready may be necessary for overlashing in some instances (KBCA also does not seem to dispute that make-ready may be necessary).<sup>65</sup> Further, while Section 5(c)3. allows a party seeking to overlash to address capacity, safety, reliability, or engineering issues raised by the utility “by modifying its proposal or by

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<sup>63</sup> LG&E/KU’s Initial Brief in Support of Their Revised Pole Attachment Tariffs (LG&E/KU’s Initial Brief) at 26 *citing* 807 KAR 5:015, Section 3(5)(b).

<sup>64</sup> LG&E/KU’s Initial Brief at 25-26.

<sup>65</sup> See 807 KAR 5:015(5)(c)3. (“If, after receiving advance notice, the utility determines that an overlash would create a capacity, safety, reliability, or engineering issue, it shall provide specific documentation of the issue to the party seeking to overlash within the thirty (30) day advance notice period and the party seeking to overlash shall address any identified issues before continuing with the overlash . . . .”); 807 KAR 5:015(5)(b)(“A utility shall not require an existing attacher that overlashes its existing wires on a pole to fix preexisting violations caused by another existing attacher, unless failing to fix the preexisting violation would create a capacity, safety, reliability, or engineering issue.”).

explaining why, in the party's view, a modification is unnecessary," it does not remove the ultimate decision, subject to review by the Commission, over whether there is a capacity, safety, reliability, or engineering issue that must be addressed before the overloading proceeds from the pole owning utility.<sup>66</sup> Finally, in the event that there is make-ready that must be completed, the Commission finds that it is reasonable to set forth a timeframe in the tariff consistent with the make-ready timeframes for new attachments, because it will alleviate confusion regarding how and when things would need to be completed.<sup>67</sup>

The Commission also agrees that the language in LG&E/KU's tariff allowing them to recover "any costs incurred in evaluating the proposed overloading" is consistent with the regulation and reasonable. As noted by LG&E/KU, the Commission did largely adopt KBCA's proposed language regarding overloading but explicitly removed the prohibition on charging overloaders, in part, to allow utilities to charge overloaders the cost of reviewing proposed overloading in the same manner that other new attachments are charged for the review and survey work associated with a utilities review of an attachment

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<sup>66</sup> See 807 KAR 5:015, Section 2(a) ("A utility may deny access to any pole, duct, conduit, or right-of-way on a non-discriminatory basis if there is insufficient capacity or for reasons of safety, reliability, or generally applicable engineering purposes."); see also 807 KAR 5:015, Section 5(4) ("A consulting representative of a utility may make final determinations, on a nondiscriminatory basis, if there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes."); see also 807 KAR 5:015(5)(b) ("A utility shall not require an existing attacher that overloads its existing wires on a pole to fix preexisting violations caused by another existing attacher, unless failing to fix the preexisting violation would create a capacity, safety, reliability, or engineering issue.").

<sup>67</sup> The Commission notes that the overloading process would still be streamlined as compared to other attachments, because it only requires notice as opposed to an application. Further, there are limits on when a utility could deny access for overloading or condition access on the completion of make-ready e.g. if there is a capacity, safety, reliability, or engineering issue arising from the overloading.



request.<sup>68</sup> The Commission also believes that the LG&E/KU tariff language, which reasonably assigns the costs to the party causing the review, is reasonable. Conversely, KBCA's proposal that overlashers should only be charged for the review of their proposed overlashing if the review finds an issue with the overlashing is illogical, because it assumes an engineering or other review of proposed construction is only justified if the review finds an issue. This is especially true given KBCA's position that attachers should and cannot be required to provide any engineering study as part of their notice of overlashing. Thus, the Commission finds that Section 11.a. of LG&E/KU's tariffs is reasonable and is consistent with 807 KAR 5:015.

#### Contractor and Subcontractor Insurance Requirements

LG&E/KU, Kentucky Power, and Duke Kentucky all included conditions in their tariffs that require pole attachment customers and their contractors and subcontractors to maintain certain insurance coverages. KBCA did not object to the requirements that attachment customers themselves maintain insurance coverage but argued that it was unreasonable to require third party attachers' contractors and subcontractors to maintain such insurance coverage.<sup>69</sup>

KBCA claimed that it would not be possible for them to comply with utilities insurance requirements, because they negotiate comprehensive contracts with their contractors that include specific insurance requirements and all of the utilities have

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<sup>68</sup> Amendments after Comments and Statement of Consideration for 807 KAR 5:015 at 52 (filed Sept. 15, 2021) ("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 overlashing evaluation requires a more complicated review, such as an engineering study, and this is a cost that the overlasher, not the utility's customers, should bear.").

<sup>69</sup> KBCA's Initial Objections at 20-23; KBCA's Initial Brief at 14-15.

different insurance requirements. KBCA asserted that it cannot simply re-negotiate and rewrite each contract with each agent, contractor, or subcontractor to satisfy each utility's unique insurance preferences. Even if attachers could negotiate such insurance requirements with their contractors, they claim that such an undertaking is not necessary because attachers are ultimately on the hook if their own contractor's insurance is inadequate. They claim that the "utilities efforts to superintend the relationships between attachers and their own contractors is an unjust, unreasonable, and unnecessary overreach."<sup>70</sup>

LG&E/KU stated the insurance requirements to which KBCA objects are in its current tariff such that it should not have to renegotiate any terms with contractors that work on LG&E/KU's poles. LG&E also stated that the requirement that attacher's contractors and subcontractors maintain insurance ensures there is coverage in the event that an attacher disputes liability for the actions of the third party contractor.<sup>71</sup> Duke Kentucky and Kentucky Power both argue that their insurance requirements are reasonable means to mitigate risk that liability arising from the actions of third parties will result in a loss.<sup>72</sup>

Based on the indemnity language in the Companies' tariffs and attachment agreements, attachers would likely be directly liable for certain losses caused by their contractors, subcontractors, and agents. However, as a matter of law, attachers would

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<sup>70</sup> KBCA's Initial Brief at 14-15; Direct Testimony of Jerry Avery (Avery Testimony) (filed June 9, 2022) at 10.

<sup>71</sup> LG&E/KU's Initial Brief at 30-32.

<sup>72</sup> Duke Kentucky's Brief (filed Oct. 11, 2022) at 10; Initial Brief of Kentucky Power Company in Support of Revised Tariff (Kentucky Power's Initial Brief) (filed Oct. 11, 2022) at 30.

not generally be independently liable in tort for the actions of third party contractors and without such liability the attachers insurance coverage, which could provide pole owners security against non-payment (and the ability to resolve disputes quickly) may not provide coverage for the loss. Further, KBCA failed to establish that attachers would be unable to negotiate or enter into agreements with their contractors that required them to meet the insurance requirements of a utility on whose poles the contractor works, and it is not credible that there would be no way to require contractors to meet a utilities' insurance requirements, given that KBCA's members apparently already require their contractors to meet certain insurance requirements. Thus, the Commission finds that the Companies' insurance requirements are fair, just and reasonable.

#### Indemnity as a Condition of Pole Attachment Service

The Companies have various indemnity provisions in their tariffs as proposed.

Duke Kentucky's tariff states:

Attachee agrees to indemnify and save harmless Company from and against any and all liability, loss, damage, costs, attorney fees, or expense, of whatsoever nature or character, arising out of or occasioned by any claims or any suit for damages, injunction or other relief, on account of injury to or death of any person, or damage to any property including the loss of use thereof, or on account of interruption of attachee's service to its subscribers or others, or for public charges and penalties for failure to comply with federal, state or local laws or regulations, growing out of or in connection with any actual or alleged negligent act or omission, whether said negligence is sole, joint or concurrent, of attachee or its servants, agents or subcontractors, whether or not due in part to any act, omission or negligence of Company or any of its representatives or employees. Company may require attachee to defend any suits concerning the foregoing, whether such suits are justified or not.<sup>73</sup>

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<sup>73</sup> Duke Kentucky's KY.P.S.C. Electric No. 2 Fifth Revised Sheet No. 92, Section 19.

Kentucky Power's proposed tariff states:

Operator hereby agrees to indemnify, hold harmless, and defend Company from and against any and all loss, damage, cost or expense which Company may suffer or for which Company may be held liable because of interruption of Operator's service to its subscribers, or by reason of bodily injury, including death, to any person, or damage to or destruction of any property, including loss of use thereof, arising out of or in any manner connected with the attachment, operation, and maintenance of the 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.<sup>74</sup>

LG&E/KU's proposed tariffs include similar broad indemnity language but state:

The indemnity set forth in this section shall include indemnity for any claims arising out of the joint negligence of Attachment Customer and Company; provided however, the indemnity set forth in this section, but not Attachment Customer's duty to defend, shall be reduced to the extent it is established by final adjudication or mutual agreement of Attachment Customer and Company that the liability to which such indemnity applies was caused by the negligence or willful misconduct of Company. If Attachment Customer is required under this provision to indemnify Company, Attachment Customer shall have the right to select defense counsel and to direct the defense or settlement of any such claim or suit.<sup>75</sup>

KBCA objects to any standard that would hold an attacher responsible for the negligence of the pole owner.<sup>76</sup> KBCA's witness, Jerry Avery, stated that:

While each party on a pole should be responsible for any issues that it causes, no party should be responsible for issues it did not cause, especially when the damaging party is negligent.<sup>77</sup>

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<sup>74</sup> Kentucky Power's P.S.C. KY. NO. 12 ORIGINAL SHEET NO. 16-8, Section 18.

<sup>75</sup> LG&E's P.S.C. Electric No. 13, First Revision of Original Sheet No. 40.21, Section 18; KU's P.S.C. Electric No. 13, First Revision of Original Sheet No. 40.21, Section 18.

<sup>76</sup> KBCA's Initial Objections at 6; KBCA's Initial Brief at 15-16.

<sup>77</sup> Avery Testimony at 11; KBCA's Initial Brief at 15-16.

Mr. Avery, who is an Area Vice President for Charter Communications, further stated that he was not aware of any situation where an attacher has sought to shift blame to a utility for damage that it caused and asserted it was unreasonable to allow a utility to shift liability for its own negligence based on the hypothetical situation of an attacher attempting to shift liability.<sup>78</sup>

Duke Kentucky argued that its indemnity language is unchanged from its current proposed tariff and that the language, which it stated requires attachers to indemnify Duke Kentucky when the attacher or its agents are solely, jointly, or concurrently negligent, is reasonable.<sup>79</sup> Kentucky Power asserted that its indemnity provision is reasonable, because it is limited to damages and claims arising from or connected to the attachers presence on the pole and the acts or omissions of the attacher, and therefore, claims associated with the presence of the attachers on the poles. Kentucky Power also noted that such provisions are customary in commercial contracts.<sup>80</sup> LG&E/KU argued that their proposed tariff would not require an attacher to indemnify them for the attachers own negligence because of the exception mentioned above. However, like Kentucky Power, LG&E/KU argues that their indemnity language would be reasonable even without the exception, because it is limited to situations arising from the attachment customers' pole attachment activities or presence on LG&E/KU's premises. LG&E/KU asserted that it would be reasonable to require the attachers to bear that risk, because the alternative

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<sup>78</sup> Avery Testimony at 12; KBCA's Initial Brief at 15-16.

<sup>79</sup> Duke Kentucky's Initial Brief at 10-11; see also Gibson Rebuttal Testimony at 8-9.

<sup>80</sup> Direct Testimony of Pamela Ellis (Ellis Testimony) (filed Jul. 11, 2022) at 9.

would be requiring electric ratepayers to bear a risk that would not exist but for the utilities' accommodation of third-party attachers.<sup>81</sup>

As an initial matter, LG&E/KU's tariffs do not include the broad indemnity language to which KBCA objected. Rather, in the event that LG&E/KU were negligent, the language in LG&E/KU's tariffs would simply apportion liability for claims and damages based on the comparative fault of the parties in the same manner that fault would be apportioned under common law in Kentucky. The primary effect of LG&E/KU's indemnity language with the exception would be that the attacher would have to compensate LG&E/KU for its defense in the event that the attacher was jointly responsible for causing the claim or damages at issue. The Commission believes that this indemnity language is reasonable given its limited nature and the fact that the claim or damages at issue would be arising from or related to the attachers pole attachment activities or presence on LG&E/KU's premises, which LG&E/KU are required by 807 KAR 5:015 to allow. Thus, the Commission finds that LG&E/KU's indemnity language is reasonable and should be allowed to remain in its tariff.

The Commission has concerns about the reasonableness of the broader indemnity language in Duke Kentucky and Kentucky Power's tariffs. While the Commission recognizes that it is common in commercial contracts,<sup>82</sup> as alleged by Kentucky Power, such broad indemnity language, which could require an attacher to indemnify the utilities for their own negligence, is not universal in commercial contracts, and Kentucky courts have historically disfavored such provisions, and therefore, strictly construe them against

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<sup>81</sup> Rebuttal Testimony of Michael E. Hornung (Hornung Rebuttal Testimony) at 2.

<sup>82</sup> Gibson Rebuttal Testimony at 8-9.

the parties relying upon them.<sup>83</sup> The Commission also has concerns about allowing such provisions in conditions for pole attachment tariffs for regulated utilities given the bargaining power that utilities have against non-pole owning attachers.

However, the Commission ultimately finds that Kentucky Power and Duke Kentucky's provisions are reasonable, because they generally assign costs—responsibility for claims and damages—to attachers that arise from their accommodation of the attachers equipment i.e. costs that arise from or are related to the utilities' pole attachment service. As with the cost for non-red tagged pole replacements, the alternative would generally be requiring other electric customers, such as residential or industrial commercial customers, to pay for such claims and damages through base rates, which would be inconsistent with cost causation principals and unreasonable since such costs would arise from the utilities pole attachment service. Such indemnity language is also common in commercial contracts as a means of allocating risk, and while pole owning utilities do have significant bargaining power, pole attachments are not the only means for attachers to deliver their service. Thus, the Commission finds that Duke Kentucky and Kentucky Power's indemnity provisions are reasonable and should be permitted in their tariffs at this time, but the Commission does still have reservations about them and notes that it may further investigate such provisions in rate cases or pursuant to KRS 278.260 to determine if they are being applied fairly.

#### Removal of Attachments following a Default

Kentucky Power's proposed pole attachment tariff states in relevant part that:

If Operator fails to comply with any of the provisions of this  
Tariff or defaults in the performance of any of its obligations

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<sup>83</sup> See *Speedway SuperAmerica, LLC v. Erwin*, 250 S.W.3d 339, 341 (Ky. 2008).

under this Tariff and fails within sixty (60) days, after written notice from Company to correct such default or non-compliance, Company may, in addition to all other remedies under this Tariff, take any one or more of the following actions: terminate the specific permit or permits covering the Company Facilities to which such default or non-compliance is applicable; remove, relocate or rearrange Attachments of Operator to which such default or non-compliance relates, all at Operator's expense; decline to permit additional Attachments hereunder until such default is cured; or in the event of any failure to pay any of the charges, fees or amounts provided in this Tariff or any other substantial default, or of repeated defaults, terminate Operator's right of attachment. Operator shall remove all Attachments where Company has terminated the right of attachment herein within sixty (60) days of Company providing notice of termination. If Operator fails to remove such Attachments within sixty (60) days, then Company may remove such Attachments at Operator's expense. Company shall have no obligation to store or recover any value for such removed Attachments.<sup>84</sup>

KBCA objects to the broad default language in Kentucky Power's tariff that allows the utility to terminate attachers' rights under the tariff and remove attachments "[i]f Operator fails to comply with any of the provisions of this Tariff or defaults in the performance of any of its obligations under this Tariff and fails within sixty (60) days, after written notice from the Company to correct such default or non-compliance," including "failure to pay any of the charges, fees or amounts provided in this Tariff."<sup>85</sup> KBCA asserted that this requirement would give far too much leverage to the pole owner, including in disputes over compliance. KBCA argued that the parties would never be able to resolve any issue without bringing a case to the Commission if pole owners were

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<sup>84</sup> Kentucky Power's P.S.C. KY. NO. 12 ORIGINAL SHEET NO. 16-8, Section 16.

<sup>85</sup> KBCA's Initial Objection at 20-23; see *also* Kentucky Power's P.S.C. KY. NO. 12 ORIGINAL SHEET NO. 16-8, Section 16.



allowed to remove attachments even in the event of a dispute.<sup>86</sup> KBCA indicated that the attacher should be provided a reasonable opportunity to correct an issue if they are actively working to remedy it.<sup>87</sup>

Kentucky Power argued that its provision is consistent with the requirements of 807 KAR 5:015, which specifically contemplate allowing a pole owner to remove non-compliant attachments.<sup>88</sup> Kentucky Power noted that its current pole attachment tariff includes the same provision except that Kentucky Power is proposing to extend the time within which it can remove any attachment from 30 days to 60 days to comply with 807 KAR 5:015, which specifically required utilities to provide 60 days' notice prior to removal of facilities arising out of a rate, term, or condition of a utility's tariff.<sup>89</sup> Kentucky Power's witness stated that it has "not exercised this right outside of the context of remedying a dangerous situation" and that "these types of removals would be limited to specific locations within a pole line and would not involve removal of entire systems."<sup>90</sup>

Section 6(1) of 807 KAR 5:015 states in relevant part that:

A utility shall provide an existing attacher no less than sixty (60) days written notice prior to:

- (a) Removal of facilities or termination of any service to those facilities if that removal or termination arises out of a rate, term, or condition of the utility's pole attachment tariff or any special contract regarding pole attachments between the utility and the attacher.

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<sup>86</sup> Avery Testimony at 3; *see also* KBCA's Initial Brief at 12-13.

<sup>87</sup> Avery Testimony at 4; *see also* KBCA's Initial Brief at 12-13.

<sup>88</sup> Ellis Rebuttal Testimony at 7; *see also* Kentucky Power's Initial Brief at 32-33.

<sup>89</sup> Ellis Rebuttal Testimony at 8; *see also* Kentucky Power's Initial Brief at 32-33.

<sup>90</sup> Ellis Rebuttal Testimony at 8; *see also* Kentucky Power's Initial Brief at 32-33.

(b) Any modification of facilities by the utility other than make-ready noticed pursuant to Section 4 of this administrative regulation, routine maintenance, or modifications in response to emergencies.<sup>91</sup>

An attacher may request a stay of the proposed removal or modification from the Commission pursuant to 807 KAR 5:015, Section 6(2).

Kentucky Power's tariff provision, which allows removal of equipment following 60 days' notice, is generally consistent with 807 KAR 5:015, Section 6, and it is reasonable that noncompliance with a utilities tariff will ultimately result in the termination of service, subject to oversight by the Commission pursuant to 807 KAR 5:015, Section 6(2). Further, Kentucky Power's tariff provision is reasonable in that it limits its ability to remove or modify facilities to the facilities to which the default relates, except in limited circumstances, and evidence presented by Kentucky Power demonstrates that the this provision has been in its tariff for some time and that it has not been applied in an unreasonable manner. However, other than modifications made pursuant to the exceptions in 807 KAR 5:015, Section 6(1)(b), the regulation requires 60 days notice of the action to be taken pursuant to Section 6(1)(b). This is clear based on the statement in 807 KAR 5:015, Section 6(2)(a) that "[a]n existing attacher may request a stay *of the action contained in a notice* received pursuant to subsection (1) of this section."

Kentucky Power's proposed tariff states that "after written notice from Company to correct such default or non-compliance" Kentucky Power may "remove, relocate or rearrange Attachments of Operator to which such default or non-compliance relates." While the tariff later states that specific notice would be given in the event Kentucky Power

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<sup>91</sup> 807 KAR 5:015, Section 6(1).

is terminating the right of attachment and requiring the attacher to remove all facilities, the tariff is unclear regarding whether the notice to “correct such default or non-compliance” would indicate that Kentucky Power may remove or modify the facilities “to which such default or non-compliance relates” when it is not seeking to have an attacher to remove all facilities. Thus, in order to comply with 807 KAR 5:015, Section 6(1), the Commission finds that Section 26 of Kentucky Power’s proposed tariff should be modified to indicate that the “written notice from Company to correct such default or non-compliance” must specifically indicate that the Kentucky Power may “remove, relocate or rearrange Attachments of Operator to which such default or non-compliance relates” if the attacher fails to correct such default or non-compliance within 60 days.

Reasonableness of Penalty for Failing to Correct Non-Compliant Attachments in Section 9.j. of LG&E/KU’s Tariffs

Section 9.j. of LG&E/KU’s current tariffs generally require an attacher that fails to install any attachment in accordance with the utilities’ standards to correct the attachment within 30 days of receiving notice of the issue from the utility. In the event that the attacher does not correct the issue within 30 days of receiving notice, the current tariffs allow LG&E/KU to make the necessary repairs or adjustments, and if LG&E/KU makes the repairs or adjustments, then the attachment customer is required to reimburse LG&E/KU for the cost of the repair or adjustment and pay a 10 percent penalty on that cost. LG&E/KU proposed to increase that 10 percent penalty to 25 percent in its proposed pole attachment tariff.

KBCA initially objected to any penalties other than unauthorized attachment fees as unreasonable, including LG&E/KU's penalty in Paragraph 9.j.,<sup>92</sup> but KBCA did not provide any testimony in support of its objection to Paragraph 9.j. Conversely, LG&E/KU noted that the 10 percent penalty was adopted in a rate case to encourage responsible maintenance practices and the prompt repair non-compliant attachments pursuant to a settlement agreement that Charter Communications Operating LLC, KBCA's largest member, stipulated was fair, just and reasonable. LG&E/KU argued that increasing the 10 percent penalty to 25 percent is reasonable to address continued delays in the correction of non-compliant attachments.<sup>93</sup>

Pole owning utilities should not be required to become the contractors for attachers that fail to comply with a utility's standards, which would be the obvious result if there was no penalty when a utility is forced to perform work to bring a third party attacher's facilities into compliance. Further, the penalty in Paragraph 9.j. of LG&E/KU's tariffs only applies if an attacher fails to correct an issue after 30 days' notice such that it is within their power to avoid the penalty. However, the Commission has disfavored penalties that are not cost based, and while there likely is a cost arising from delays in correcting non-complaint attachments, LG&E/KU have not established that the penalty in Paragraph 9.j. is cost based. Further, while LG&E/KU note that attachers have taken on average 105 days to correct violations, LG&E/KU indicated that they have not actually imposed the penalty since it was instituted, and therefore, could not say what the penalty would likely be for a

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<sup>92</sup> KBCA's Objections at 22-23 ("KBCA objects to any provision imposing penalties other than an unauthorized attachment fee charge on it following inspections.").

<sup>93</sup> LG&E/KU Initial Brief at 9-10.

typical repair.<sup>94</sup> Thus, the Commission finds that the current 10 percent penalty for failing to correct non-compliant attachments within the time allowed is reasonable and should be accepted, but that LG&E/KU failed to establish that increasing the penalty to 25 percent would be fair, just and reasonable such that the proposed increase in the penalty should be denied.<sup>95</sup>

### One Touch Make-Ready Timelines

LG&E/KU and Kentucky Power included language in their tariffs requiring attachers who use one-touch make-ready to “complete all make-ready within thirty (30) days of the date on which Company approved Attachment Customer’s OTMR application (or within forty-five (45) days in the case of a Large Order), or the Attachment Customer’s OTMR application will be deemed closed.”<sup>96</sup> KBCA objected to this language and argues that attachers using OTMR should get the same amount of time as utilities and other attachers to complete make-ready if the attachers had proceeded under the traditional process, including extensions for good cause.<sup>97</sup>

LG&E/KU and Kentucky Power argued that the requirement that OTMR be completed in 30 or 45 days is reasonable, because it is only barely shorter than that time allowed under the traditional process, which is 30 days for smaller orders and 75 days for

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<sup>94</sup> LG&E/KU’s Response to Staff’s First Request for Information, Item 1.

<sup>95</sup> The Commission also notes that LG&E’s proposed tariff filed on February 28, 2022 did not include the proposed increase in the penalty. Rather, LG&E filed the updated tariff with its response to KBCA’s objections.

<sup>96</sup> See LG&E’s P.S.C. Electric No. 13, First Revision of Original Sheet No. 40.11, Section 8.e.; KU’s P.S.C. Electric No. 13, First Revision of Original Sheet No. 40.11, Section 8.e.; see *also* Kentucky Power’s 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.”)

<sup>97</sup> KBCA’s Initial Objections at 20-23.

larger orders in the communication space. They argued that the slightly shorter period is reasonable, because OTMR is completed by a single person and involves only simple make ready.<sup>98</sup> They argued that a clause allowing extensions for good cause is unnecessary as the tariff already contains an exception for non-performance in the Force Majeure clause.<sup>99</sup>

The Commission agrees that the point of OTMR is to allow make-ready to be completed more quickly, and it should be easier to complete, since it is being completed by a single party and is only available for simple make-ready. However, the effect of make-ready not being completed in a timely manner under the traditional method is not that the application is deemed closed. Given that harsh result of failing to complete make-ready within the timelines in the tariff, the Commission thinks it would be reasonable to give OTMR attachers 30 days to complete make-ready for small orders and 75 days to complete make-ready for larger orders, and therefore, finds that the deadlines in LG&E/KU and Kentucky Power's tariffs should be extended in that manner.

#### Kentucky Power's Conduit Charge

KBCA alleged that Kentucky Power's charge for attachments within ducts and conduits of \$2.70 per linear foot was not supported by any cost justifications.<sup>100</sup> Kentucky Power argued in its initial response to KBCA's objections that:

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

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<sup>98</sup> LG&E/KU's Initial Brief at 22-23; Kentucky Power's Initial Brief at 22-23.

<sup>99</sup> LG&E/KU's Response to Initial Objections at 7-8; Kentucky Power's Response to Initial Objections at 10-11.

<sup>100</sup> KBCA's Initial Objection at 20.

LEXIS 12 4 (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.<sup>101</sup>

Kentucky Power noted that KBCA did not follow-up on its objection to the conduit charge but stated that Kentucky Power provided support for the charge in response to Commission Staff’s Request for Information.

The Commission notes that in this instance KBCA did not raise its objection to Kentucky Power’s conduit charge again following Kentucky Power’s explanation in its initial response to KBCA’s objections on April 14, 2022. Further, Kentucky Power provided support for the conduit fee, and although it used the net book value methodology as opposed to the gross book value methodology approved by the Commission in the 1987 Conduit Rate Order, there was little difference in the outcome in this case. Thus, the Commission finds that Kentucky Power’s proposed conduit charge is reasonable and should be approved.

#### Automatic Withdrawal of Make-Ready Estimates

AT&T Kentucky objected to language in LG&E/KU and Kentucky Power’s tariffs indicating that make-ready estimates that are not paid within 14 days will be automatically withdrawn. AT&T Kentucky acknowledged that the provisions are not inconsistent with 807 KAR 5:015,<sup>102</sup> which permits a utility to withdraw a make-ready estimate within 14

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<sup>101</sup> Kentucky Power Response to Initial Objections at 6.

<sup>102</sup> Rhinehart Testimony at 4; AT&T’s Reply Brief (filed Oct. 18, 2022) at 3-5.

days if it is not paid by the attacher.<sup>103</sup> However, AT&T Kentucky asserted that “review, acceptance, and remittance of funds within 14 days may be challenging to some applicants,” and therefore, that the “[a]utomatic termination of make-ready estimates can result in unnecessary resubmissions of applications, increased engineering work, and generally increased administrative burdens,” which AT&T Kentucky argued could result in increased costs.<sup>104</sup> LG&E/KU and Kentucky Power argued that the automatic withdrawal of the make-ready estimates after 14 days is consistent with the regulation and ensures that make-ready estimates are acted on promptly, which limits the chances of overlapping requests for the same poles and prevents estimates from becoming stale. They also argued that the automatic withdrawal reduced administrative burdens, because the utilities would no longer have to send a second correspondence withdrawing make-ready estimates 14 days after the estimate is made.<sup>105</sup>

Section 4(3)(c) of 807 KAR 5:015, consistent with the FCC regulation, plainly allows pole owners to withdraw make-ready estimates after 14 days. Further, while there could be arguments both ways and the Commission may reevaluate the question if significant issues arise, the Commission finds that allowing the automatic withdrawal of make-ready estimates is reasonable, because it will create certainty regarding when an estimate must be paid and eliminate the need of utilities to create a process to ensure that estimates are withdrawn after 14 days.

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<sup>103</sup> See 807 KAR 5:015, Section 4(3)(c).

<sup>104</sup> Rhinehart Testimony at 4; see *also* AT&T’s Reply Brief (filed Oct. 18, 2022) at 3-5.

<sup>105</sup> Kentucky Power’s Initial Brief at 10-12; LG&E/KU’s Initial Brief at 34-36; see *also* Ellis Rebuttal Testimony at 15; Rebuttal Testimony of Jason P. Jones (Jones Rebuttal Testimony)(filed Jul. 11, 2022) at 8-9.



### Definition of Attachment in LG&E/KU and Kentucky Power's Tariffs

AT&T Kentucky argued that LG&E/KU and Kentucky Power's tariffs could be read as indicating that the rental charges are based on each attachment, because they use language indicating the charges are "per year for each wireline pole attachment" (LG&E and KU) and "per attachment per year" (Kentucky Power).<sup>106</sup> AT&T Kentucky argues that the language tying rental charges to attachments in addition to the broad definition of the term attachment in the tariffs could result in excessive charges. AT&T Kentucky is specifically concerned about being charged for the attachment of the wireline to the pole and again for the attachment of the service line to the same pole or being charged for the original attachment and each line overlashing the original attachment. AT&T Kentucky requests that the Commission require the tariffs be modified such that the rental charges are clearly based on usable space or that the Commission provide such clarification in the final order.<sup>107</sup>

LG&E/KU noted that the definition of attachment in their proposed pole attachment tariff is identical to the definition in their current pole attachment tariff and that the billing issue AT&T Kentucky is concerned about has never arisen. LG&E/KU also noted that there is already a distinction between attachments for billing purposes and for purposes of general compliance with the requirements of the tariff.<sup>108</sup> Kentucky Power similarly noted that the definition of attachment about which AT&T Kentucky was concerned exists for the purposes of the broader use of the term within the tariff whereas billing issues are

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<sup>106</sup> Rhinehart Testimony at 7-8.

<sup>107</sup> Rhinehart Testimony at 7-8.

<sup>108</sup> LG&E'KU's Initial Brief at 33-34; Jones Rebuttal Testimony at 6-7.

addressed separately in Section 3 of the proposed tariff where it identifies the “Charge for a Wireline Facility.”<sup>109</sup>

LG&E/KU and Kentucky Power have indicated that the broad definition of attachment in their tariff is not intended to result in a separate charge for every overlashing, and the Commission does not read the definitions in that way in conjunction with the provisions regarding charges for rental rates. Further, LG&E/KU and Kentucky Power’s tariffs specifically indicate that service drops are only considered to be a separate attachment for billing purposes in situations in which a service drop is attached outside of the 1 foot allocated for the attachers use or if the service drop is on a separate drop or lift pole.<sup>110</sup> Thus, the Commission finds that LG&E/KU and Kentucky Power’s definition of attachment is reasonable under the circumstances.

#### Requirement that Untagged Attachments be Tagged Within 180 Days

AT&T Kentucky objected to identical provisions in Kentucky Power’s and LG&E/KU’s tariffs that require an attacher to tag all of its attachments within 180 days of the effective date of the tariff. AT&T Kentucky stated that existing attachers could have tens of thousands of attachments and argues that it would be unreasonable to impose such a new requirement and for them to be expected to complete it within 180 days given the number of poles involved. AT&T Kentucky also noted that as a practical matter that

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<sup>109</sup> Kentucky Power’s Initial Brief at 3; Ellis Rebuttal Testimony at 18.

<sup>110</sup> See LG&E/KU’s P.S.C. Electric No. 13, First Revision of Original Sheet No. 40.10, Section 7.k. (“Any Service Drop affixed to a pole more than six (6) inches above or below a through-bolt shall be considered a separate Attachment for billing purposes. On drop or lift poles only, all Service Drops affixed within one foot of usable space shall be considered a single Attachment for billing purposes.”); Kentucky Power’s P.S.C. KY. NO. 12 1ST REVISED SHEET NO. 16-1, Section 2 (“For billing purposes, the term “Attachment” also includes: (1) a Service Drop affixed to a pole that is located more than one (1) vertical foot away from the point at which the messenger strand is attached to the pole; and (2) a Service Drop located on a dedicated service, drop or lift pole.”).

they could tag an attachment and that their tag could be removed by a third party performing work on the pole such that it would be unreasonable to hold them responsible. AT&T Kentucky argued that there should be no hard deadline but rather that attachers should simply be required to tag attachments as they perform work on poles.<sup>111</sup>

LG&E/KU argued that AT&T Kentucky has very few attachments that would be subject to the pole attachment tariffs (though AT&T Kentucky replied that it could elect to take more service under the pole attachment tariffs). LG&E/KU argued that tagging is important so that the utility, other third-party attachers, and potentially first responders can identify the owner of equipment on poles. LG&E/KU also noted that since 2017 its tariff has included a requirement that new attachments be tagged and that existing attachments be tagged as work is completed on the attachment such that attachers have had time tag equipment as work has proceeded.<sup>112</sup>

Kentucky Power argued that AT&T Kentucky has very few attachments that would be subject to the pole attachment tariffs.<sup>113</sup> Kentucky Power also stated that AT&T Kentucky “all but admitted” that it does not perform routine maintenance and inspections on its attachments. Kentucky Power also noted that AT&T Kentucky could not even provide an estimate of how long it would take to tag all of its existing untagged attachments under its proposed method, and stated that its concern is that—in the

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<sup>111</sup> Rhinehart Testimony at 4-5, 9; see also AT&T's Reply Brief at 3-5.

<sup>112</sup> LG&E/KU's Initial Brief at 36-39; Jones Rebuttal Testimony at 9-10.

<sup>113</sup> Kentucky Power's Initial Brief at 12-13.

absence of an actual backstop—attachers will never get around to tagging their existing untagged attachments.<sup>114</sup>

The Commission agrees that 180 days might be too short to tag all attachments to the extent that tariffs are imposing a new deadline for completing tagging. However, the Commission believes that requiring attachments to be tagged is reasonable so the owners of equipment on the poles can be identified. Further, if attachers were simply allowed to tag attachments as they performed work on a pole, it would be nearly impossible to enforce the requirement, because utilities would never know if work had been performed that would require an attachment to be tagged. Moreover, AT&T Kentucky indicated it could not even provide an estimate for how long it would take to tag all of its equipment if it did it as it completed other work on poles i.e. how often it performs work on every attachment in its system. Thus, the Commission finds that the provisions in LG&E/KU's and Kentucky Power's proposed tariffs requiring all existing attachments to be tagged within 180 days of the effective date of the tariffs should be modified to require all attachments to be tagged by December 31, 2024, and that with that modification that the tariffs are reasonable.

#### Presumption of Unauthorized Attachment

AT&T Kentucky objected to the process in Kentucky Power's tariff for identifying unauthorized attachments and the presumption that excess numbers of attachments are presumed to be unauthorized, because it argued there is insufficient process for disputing that attachments are in fact unauthorized.<sup>115</sup> Kentucky Power argued that: (1) its tariff

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<sup>114</sup> Kentucky Power's Initial Brief at 12-13.

<sup>115</sup> AT&T's Initial Objections at 18-19; Rhinehart Testimony at 5.

allows attachers to participate in Kentucky Power's attachment inventory, which will allow attachers to refute unauthorized attachment designations in real time; (2) its tariff provides attachers with the right to request a summary report for the field inventory within a reasonable time after its completion, which will provide attachers with the means to identify and challenge particular unauthorized attachment designations; and (3) its tariff states that excess numbers of attachments are presumed to be unauthorized and that since it is an assumption, there is an opportunity to rebut the presumption.

The Commission finds that Kentucky Power's tariff is plain in that it allows an attacher to participate in a field inventory and request a summary report of the field inventory to refute any claims that an attachment is unauthorized.<sup>116</sup> Given those protections, the Commission finds that Kentucky Power's process and presumption is reasonable, but notes that to the extent it is applied in an unreasonable way, an attacher could file a complaint with the Commission.

IT IS THEREFORE ORDERED that:

1. Duke Kentucky pole attachment tariff is approved as proposed for service rendered on and after the date of this Order.
2. LG&E, KU, and Kentucky Power's proposed tariffs are approved for service rendered on and after the date of this Order with the following modifications:
  - a. Section 14.c. of LG&E's tariff, Section 14.c of KU's tariff, and Section 13 are not approved and shall be removed from each utilities respective tariff;

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<sup>116</sup> See Kentucky Power's Revised Tariff, P.S.C. KY. NO. 12 ORIGINAL SHEET NO. 16-7, Section 15.

b. LG&E/KU's application review fees of \$75 for wireline attachments and \$200.00 for wireless attachments are approved as proposed, but in an effort to be fully transparent, LG&E/KU shall add language to their tariffs indicating that the application review fees will be refunded or credited to the new attacher if the amount of the prepayment of application review fees exceeds the actual costs of the work performed by LG&E/KU;

c. Kentucky Power's make-ready survey fee of \$275 per pole is approved, but Kentucky Power shall add language to its tariff indicating that the make-ready survey fee will be refunded or credited to the new attacher if the amount of the prepayment of the make-ready survey fee exceeds the actual costs of the work performed by Kentucky Power;

d. Section 26 of Kentucky Power's proposed tariff shall be modified to indicate that the "written notice from Company to correct such default or non-compliance" must specifically indicate that the Kentucky Power may "remove, relocate or rearrange Attachments of Operator to which such default or non-compliance relates" if the attacher fails to correct such default or non-compliance within 60 days;

e. The penalty in Section 9.j. of LG&E and KU's tariffs shall remain 10 percent and shall not be increased to 25 percent as proposed;

f. The forty-five (45) days to complete make-ready for OTMR in Section 8.e. of LG&E's tariff, Section 8.e. of KU's tariff, and Section 12 of Kentucky Power's Tariff shall be increased to seventy-five (75) days; and

g. The 180 days from the effective date of the tariffs for attachers to tag existing attachments in LG&E, KU, and Kentucky Power's tariffs shall be modified to require all existing attachments to be tagged by December 31, 2024.<sup>117</sup>

3. Within 20 days of the date of this Order, LG&E/KU, Kentucky Power, and Duke Kentucky shall file with the Commission, using the Commission's electronic Tariff Filing System, their proposed tariffs (as modified herein), setting out the rates approved herein and reflecting that they were approved pursuant to this Order.

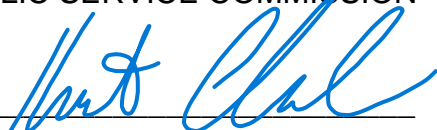
4. This case is closed and removed from the Commission's docket.

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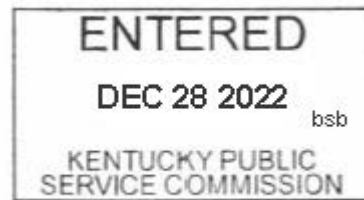
<sup>117</sup> The requirement that new attachments be tagged on an ongoing basis should not be affected by this modification.

PUBLIC SERVICE COMMISSION

  
\_\_\_\_\_  
Chairman

\_\_\_\_\_  
Vice Chairman

  
\_\_\_\_\_  
Commissioner



ATTEST:

  
\_\_\_\_\_  
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