ENERGY AND ENVIRONMENT CABINET

Public Service Commission

(AMENDED AFTER COMMENT)

807 KAR 5:015. Access and attachments to utility poles and facilities.

RELATES TO: KRS Chapter 278, 47 U.S.C.A. 224(c)

STATUTORY AUTHORITY: KRS 278.030(1), 278.040(2), 278.040(3), HB 320 (2021)

NECESSITY, FUNCTION, AND CONFORMITY: KRS 278.040(3) authorizes the commission to promulgate administrative regulations to implement the provisions of KRS Chapter 278. KRS 278.040(2) requires the commission to have exclusive jurisdiction over the regulation of rates and service of utilities. KRS 278.030(1) authorizes utilities to demand, collect, and receive fair, just, and reasonable rates. KRS 278.030(2) requires every utility to furnish adequate, efficient, and reasonable service. House Bill 320 from the 2021 Regular Session of the General Assembly requires the commission to promulgate administrative regulations regarding pole attachments under its jurisdiction, including those necessary for the provision of broadband. 47 U.S.C.A. § 224(c) requires that state regulation of pole attachments shall only preempt federal regulation of poles under federal jurisdiction if the state regulates the rates, terms, and conditions of access to those poles, has the authority to consider and does consider the interest of the customers of attachers and the pole owning utilities, has effective rules and regulations governing attachments; and addresses complaint's regarding pole attachments within 360 days. This administrative regulation establishes the process by which the

commission regulates the rates, terms, and conditions of utility pole attachments and access to other utility facilities, establishes specific criteria and procedures for obtaining access to utility poles within the commission's jurisdiction, and establishes a process by which the complaints of those seeking to access utility facilities shall be addressed within the period established by federal law.

Section 1. Definitions

(1) "Attachment" means any attachment by a cable television system operator, telecommunications carrier, broadband internet provider, or governmental unit to a pole owned or controlled by a utility.

(2) "Broadband internet provider" means a person who owns, controls, operates, or manages any facility used or to be used to offer internet service to the public with download speeds of at least twenty-five (25) megabits per second and upload speeds of at least three (3) megabits per second. **The term "broadband internet provider" does not include a utility with an applicable joint use agreement with the utility that owns or controls the poles to which it is seeking to attach.**

(3) "Communication space" means the lower usable space on a utility pole, which is typically reserved for low-voltage communications equipment.

(4) "Complex make-ready" means any make-ready that is not simple make-ready, such as the replacement of a utility pole; splicing of any communication attachment or relocation of existing wireless attachments, even within the communications space; and any transfers or work relating to the attachment of wireless facilities.

(5) "Existing attacher" means any person or entity with equipment lawfully on a utility pole.

(6) "Governmental unit" means an agency or department of the federal government; a department, agency, or other unit of the Commonwealth of Kentucky; or a county or city, special district, or other political subdivision of the Commonwealth of Kentucky.

(7) "Macro cell facility" means a wireless communications system site that is typically high-power and high-sited, and capable of covering a large physical area, as distinguished from a distributed antenna system, small cell, or WiFi attachment, for example.

(8) "Make-ready" means the modification or replacement of a utility pole, or of the lines or equipment on the utility pole, to accommodate additional facilities on the utility pole.

(9) "New attacher" means a cable television system operator, telecommunications carrier, broadband internet provider, or governmental unit requesting to attach new or upgraded facilities to a pole owned or controlled by a utility, except that a new attacher does not include a utility with an applicable joint use agreement with the utility that owns or controls the pole to which it is seeking to attach or a person seeking to attach macro cell facilities.

(10) "Red tagged pole" means a pole that a utility that owns or controls the pole:

(a) Designated for replacement based on the **pole's**~~**[poles]**~~ non-compliance with an applicable safety standard;

(b) 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; or

(c) Would have needed to replace at the time of replacement even if the new attachment were not made.

(11) "Telecommunications carrier" means a person who owns, controls, operates, or

manages any facility used or to be used for or in connection with the transmission or conveyance over wire, in air, or otherwise, any message by telephone or telegraph for the public, for compensation. **The term "telecommunications carrier" does not include a utility with an applicable joint use agreement with the utility that owns or controls the poles to which it is seeking to attach.**

(12) "Simple make-ready" means make-ready in which existing attachments in the communications space of a pole could be rearranged without any reasonable expectation of a service outage or facility damage and does not require splicing of any existing communication attachment or relocation of an existing wireless attachment.

Section 2. Duty to Provide Access to Utility Poles and Facilities.

(1) Except as established in paragraphs (a), (b), and (c) of this subsection, a utility shall provide any cable television system operator, telecommunications carrier, broadband internet provider, or governmental unit nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.

(a) A utility may deny access to any pole, duct, conduit, or right-of-way on a non-discriminatory basis where there is insufficient capacity or for reasons of safety, reliability, and generally applicable engineering purposes;

(b) A utility shall not be required to provide access to any pole that is used primarily to support outdoor lighting; and

(c) A utility shall not be required to secure any right-of-way, easement, license, franchise, or permit required for the construction or maintenance of attachments or facilities from a third party for or on behalf of a person or entity requesting access pursuant to this administrative regulation to any pole, duct, conduit, or right-of-way owned or

controlled by the utility.

(2) A request for access to a utility's poles, ducts, conduits or rights-of-way shall be submitted to a utility in writing, either on paper or electronically, as established by a utility's tariff or a special contract between the utility and person requesting access.

(3) If a utility provides access to its poles, ducts, conduits, or rights-of-way pursuant to an agreement that establishes rates, **terms**~~[charges]~~, or conditions for access not contained in its tariff:

(a) The rates, **terms**~~[charges]~~, and conditions of the agreement shall be in writing; and

(b) The utility shall file the written agreement with the commission pursuant to 807 KAR 5:011, Section 13.

Section 3. Pole Attachment Tariff Required.

(1) A utility that owns or controls utility poles located in Kentucky shall maintain on file with the commission a tariff that includes rates, terms, and conditions governing pole attachments in Kentucky that are consistent with the requirements of this administrative regulation and KRS Chapter 278.

(2) The tariff may incorporate a standard contract or license for attachments if its terms and conditions are consistent with the requirements of this administrative regulation and KRS Chapter 278.

(3) Standard contracts or licenses for attachments permitted by subsection (2) of this section shall prominently indicate that the contracts or licenses are based wholly on the utility's tariff and that the tariff shall control if there is a difference.

(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.

(5) **Overlashing** **[~~The tariff shall not prohibit overlashing except if doing so is justified by lack of capacity, safety or reliability concerns, or applicable engineering standards.~~]**

(a) A utility shall not require prior approval for an existing attacher that overlashes its existing wires on a pole; or for third party overlashing of an existing attachment that is conducted with the permission of an existing attacher.

(b) A utility may not prevent an attacher from overlashing because another existing attacher has not fixed a preexisting violation. A utility may 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.

(c) A utility may require no more than 30 days' advance notice of planned overlashing. If a utility requires advance notice for overlashing, then the utility must include the notice requirement in its tariff or include the notice requirement in the attachment agreement with the existing attacher. If after receiving advance notice, the utility determines that an overlash would create a capacity, safety, reliability, or engineering issue, it must provide specific documentation of the issue to the party seeking to overlash within the 30 day advance notice period and 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.

(d) A party that engages in overlashing is responsible for its own equipment and shall ensure that it complies with reasonable safety, reliability, and engineering practices. If damage to a pole or other existing attachment results from overlashing or overlashing work causes safety or engineering standard violations, then the overlashing party is responsible at its expense for any necessary repairs.

(e) An overlashing party shall notify the affected utility within 15 days of completion of the overlash on a particular pole. The notice shall provide the affected utility at least 90 days from receipt in which to inspect the overlash. The utility has 14 days after completion of its inspection to notify the overlashing party of any damage or code violations to its equipment caused by the overlash. If the utility discovers damage or code violations caused by the overlash on equipment belonging to the utility, then the utility shall inform the overlashing party and provide adequate documentation of the damage or code violations. The utility may either complete any necessary remedial work and bill the overlashing party for the reasonable costs related to fixing the damage or code violations or require the overlashing party to fix the damage or code violations at its expense within 14 days following notice from the utility.

(6) Signed standard contracts or licenses for attachments permitted by subsection (2) of this section shall be submitted to the commission but shall not be filed pursuant to 807 KAR 5:011, Section 13.

(7) Tariffs conforming to the requirements of this administrative regulation and with a

proposed effective date no later than March 31, 2022, shall be filed by February 28, 2022.

Section 4. Procedure for New Attachers to Request Utility Pole Attachments.

(1) All time limits established in this section shall be calculated according to 807 KAR 5:001, Section 4(7).

(2) Application review and survey.

(a) Application completeness.

1. A utility shall review a new attacher's pole attachment application for completeness before reviewing the application on its merits and shall notify the new attacher within ten (10) business days after receipt of the new attacher's pole attachment application if the application is incomplete.

2. A new attacher's pole attachment application shall be considered complete if the application provides the utility with the information necessary under its procedures, as established in the utility's applicable tariff or a special contract regarding pole attachments between the utility and the new attacher, to begin to survey the affected poles.

3. If the utility notifies a new attacher that its attachment application is not complete, then it must specify all reasons for finding it incomplete.

4. If the utility does not respond within ten (10) business days after receipt of the application, or if the utility rejects the application as incomplete but fails to state any reasons in the utility's response, then the application shall be deemed complete.

(b) Survey and application review on the merits.

1. A utility shall complete a survey of poles for which access has been requested within forty-five (45) days of receipt of a complete application to attach facilities to its utility

poles (or within sixty (60) days in the case of larger orders as established in subsection (7) of this section) for the purpose of determining if the attachments may be made and identifying any make-ready to be completed to allow for the attachment.

2. Participation of attachers in surveys conducted by a utility.

a. A utility shall allow the new attacher and any existing attachers on the affected poles to be present for any field inspection conducted as part of a utility's survey conducted pursuant paragraph (b)1. of this subsection.

b. A utility shall use commercially reasonable efforts to provide the affected attachers with advance notice of not less than five (5) business days of any field inspection as part of the survey and shall provide the date, time, and location of the inspection, and name of the contractor, if any, performing the inspection.

3. If a new attacher has conducted a survey pursuant to subsection (10)(**b[c]**) of this section, or a new attacher has otherwise conducted and provided a survey, after giving existing attachers notice and an opportunity to participate in a manner consistent with subsection (10)(**b[c]**), a utility may elect to satisfy survey obligations established in this paragraph by notifying affected attachers of the intent to use the survey conducted by the new attacher and by providing a copy of the survey to the affected attachers within the time period established in subparagraph 1. of this paragraph.

4. Based on the results of the applicable survey and other relevant information, a utility shall respond to the new attacher either by granting access or denying access within forty-five (45) days of receipt of a complete application to attach facilities to its utility poles (or within 60 days in the case of larger orders as described in subsection (7) of this section).

5. A utility's denial of a new attacher's pole attachment application shall be specific, shall include all relevant evidence and information supporting the denial, and shall explain how the evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability, or engineering standards.

6. Payment of survey costs and estimates.

a. A utility's tariff may require prepayment of the costs of surveys made to review a pole attachment application, or some other reasonable security or assurance of credit worthiness, before a utility shall be obligated to conduct surveys pursuant to this section.

b. If a utility's tariff requires prepayment of survey costs, the utility shall include a per pole estimate of costs in the utility's tariff and the payment of estimated costs shall satisfy any requirement that survey costs be prepaid.

c. The new attacher shall be responsible for the costs of surveys made to review the new attacher's pole attachment application even if the new attacher decides not to go forward with the attachments.

(3) Payment of make-ready estimates.

(a) Within fourteen (14) days of providing a response granting access pursuant to subsection (2)(b)4. of this section, a utility shall send a new attacher whose application for access has been granted a detailed, itemized estimate in writing, on a pole-by-pole basis if requested and reasonably calculable, and consistent with subsection (6)(b) of this section, of charges to perform all necessary make-ready.

(b) A utility shall provide documentation that is sufficient to determine the basis of all estimated charges, including any projected material, labor, and other related costs that form the basis of the estimate.

(c) A utility may withdraw an outstanding estimate of charges to perform make-ready beginning fourteen (14) days after the estimate is presented.

(d) A new attacher may accept a valid estimate and make payment any time after receipt of an estimate, except a new attacher shall not accept the estimate after the estimate is withdrawn.

(4) Make-ready. Upon receipt of payment for survey costs owed pursuant to the utility's tariff and the estimate specified in subsection (3)(d) of this section, a utility shall, as soon as practical but in no case more than seven (7) days, notify all known entities with existing attachments in writing that could be affected by the make-ready.

(a) For make-ready in the communications space, the notice shall:

1. State where and what make-ready will be performed;

2. State a date for completion of make-ready in the communications space that is no later than thirty (30) days after notification is sent (or up to seventy-five (75) days in the case of larger orders as established in subsection (7) of this section);

3. State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date established for completion;

4. State that, if make-ready is not completed by the completion date established by the utility in subparagraph 2. of this paragraph, the new attacher may complete the make-ready specified pursuant to subparagraph 1 of this paragraph; and

5. State the name, telephone number, and email address of a person to contact for more information about the make-ready procedure.

(b) For make-ready above the communications space, the notice shall:

1. State where and what make-ready will be performed;

2. State a date for completion of make-ready that is no later than ninety (90) days after notification is sent (or 135 days in the case of larger orders, as established in subsection (7) of this section).

3. State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date established for completion;

4. State that the utility may assert the utility's right to fifteen (15) additional days to complete make-ready;

5. State that if make-ready is not completed by the completion date established by the utility in subparagraph 2. of this paragraph (or, if the utility has asserted its fifteen (15) day right of control, fifteen (15) days later), the new attacher may complete the make-ready specified pursuant to subparagraph 1 of this paragraph; and

6. State the name, telephone number, and email address of a person to contact for more information about the make-ready procedure.

(c) Once a utility provides the notices required by this subsection, the utility shall provide the new attacher with a copy of the notices and the existing attachers' contact information and address where the utility sent the notices. The new attacher shall be responsible for coordinating with existing attachers to encourage completion of make-ready by the dates established by the utility pursuant to paragraph (a)2. of this subsection for communications space attachments or paragraph (b)2. of this subsection for attachments above the communications space.

(5) A utility shall complete its make-ready in the communications space by the same dates established for existing attachers in subsection (4)(a)2 of this section or its make-ready above the communications space by the same dates for existing attachers in

subsection (4)(b)2 of this section (or if the utility has asserted its fifteen (15) day right of control, fifteen (15) days later).

(6) Final invoice.

(a) Within a reasonable period, not to exceed **120[~~ninety (90)~~]** days after a utility completes the utility's make-ready, the utility shall provide the new attacher:

1. A detailed, itemized final invoice of the actual survey charges incurred if the final survey costs for an application differ from any estimate previously paid for the survey work or if no estimate was previously paid; and

2. A detailed, itemized final invoice, on a pole-by-pole basis if requested and reasonably calculable, of the actual make ready costs to accommodate attachments if the final make-ready costs differ from the estimate provided pursuant to subsection (3)(d) of this section.

(b) Limitations on make ready costs.

1. A utility shall not charge a new attacher, as part of any invoice for make-ready, to bring poles, attachments, or third-party or utility equipment into compliance with current published safety, reliability, and pole owner construction standards if the poles, attachments, or third-party or utility equipment were out of compliance because of work performed by a party other than the new attacher prior to the new attachment.

2. A utility shall not charge a new attacher, as part of any invoice for make ready, the cost to replace any red tagged pole with a replacement pole of the same type and height.

3. If a red tagged pole is replaced with a pole of a different type or height, then the new attacher shall be responsible, as part of any invoice for make ready, only for the

difference, if any, between the cost for the replacement pole and the cost for a new utility pole of the type and height that the utility would have installed in the same location in the absence of the new attachment.

4. The make ready cost, if any, for a pole that is not a red tagged pole to be replaced with a new utility pole to accommodate the new attacher's attachment shall be charged in accordance with the utility's tariff or a special contract regarding pole attachments between the utility and the new attacher.

(7) For the purposes of compliance with the time periods in this section:

(a) A utility shall apply the timeline as established in subsections (2) through (4) of this section to all requests for attachment up to the lesser of 300 poles or zero and five-tenths (0.5) percent of the utility's poles in the state;

(b) A utility may add up to fifteen (15) days to the survey period established in subsection (4) of this section to larger orders up to the lesser of 1,000 poles or 1.50 percent of the utility's poles in Kentucky.

(c) A utility may add up to forty-five (45) days to the make-ready periods established in subsection (4) of this section to larger orders up to the lesser of 1,000 poles or 1.50 percent of the utility's poles in Kentucky.

(d) A utility shall negotiate in good faith the timing of all requests for attachment larger than the lesser of 1,000 poles or 1.50 percent of the utility's poles in Kentucky.

(e) A utility may treat multiple requests from a single new attacher as one request if the requests are submitted within thirty (30) days of one another; and

(f) As soon as reasonably practicable, but no less than sixty (60) days before the new attacher expects to submit an application in which the number of requests exceed the

lesser of the amounts identified in paragraph (a) of this subsection, a new attacher shall provide written notice to a utility in the manner and form stated in the utility's tariff that the new attacher expects to submit a high volume request.

(8) Deviations from make-ready timeline

(a) A utility may deviate from the time limits specified in this section before offering an estimate of charges if the new attacher failed to satisfy a condition in the utility's tariff or in a special contract between the utility and the new attacher.

(b) A utility may deviate from the time limits established in this section during performance of make-ready for good and sufficient cause that renders it infeasible for the utility to complete make-ready within the time limits established in this section. A utility that so deviates shall immediately notify, in writing, the new attacher and affected existing attachers and shall identify the affected poles and include a detailed explanation of the reason for the deviation and a new completion date. The utility shall deviate from the time limits established in this section for a period no longer than necessary to complete make-ready on the affected poles and shall resume make-ready without discrimination once the utility returns to routine operations.

(c) An existing attacher may deviate from the time limits established in this section during performance of complex make-ready for reasons of safety or service interruption that renders it infeasible for the existing attacher to complete complex make-ready within the time limits established in this section. An existing attacher that so deviates shall immediately notify, in writing, the new attacher and other affected existing attachers and shall identify the affected poles and include a detailed explanation of the basis for the deviation and a new completion date, which shall not extend beyond sixty (60) days from

the completion date provided in the notice described in subsection (4) of this section **as**~~**is**~~ sent by the utility (or up to 105 days in the case of larger orders described in subsection 6(b) and (c) of this section). The existing attacher shall not deviate from the time limits established in this section for a period for longer than necessary to complete make-ready on the affected poles.

(9) Self-help remedy.

(a) Surveys. If a utility fails to complete a survey as established in subsection (2)(b) of this section, then a new attacher may conduct the survey in place of the utility by hiring a contractor to complete a survey as specified in Section 5 of this administrative regulation.

1. A new attacher shall allow the affected utility and existing attachers to be present for any field inspection conducted as part of the new attacher's survey.

2. A new attacher shall use commercially reasonable efforts to provide the affected utility and existing attachers with advance notice of not less than five (5) business days of a field inspection as part of any survey the attacher conducts.

3. The notice shall include the date and time of the survey, a description of the work involved, and the name of the contractor being used by the new attacher.

(b) Make-ready. If make-ready is not complete by the applicable date established in subsection (4) of this section, then a new attacher may conduct the make-ready in place of the utility and existing attachers by hiring a contractor to complete the make-ready as specified in Section 5 of this administrative regulation.

1. A new attacher shall allow the affected utility and existing attachers to be present for any make-ready.

2. A new attacher shall use commercially reasonable efforts to provide the affected

utility and existing attachers with advance notice of not less than seven (7) days of the impending make-ready.

3. The notice shall include the date and time of the make-ready, a description of the work involved, and the name of the contractor being used by the new attacher.

(c) The new attacher shall notify an affected utility or existing attacher immediately if make-ready damages the equipment of a utility or an existing attacher or causes an outage that is reasonably likely to interrupt the service of a utility or existing attacher.

(d) Pole replacements. Self-help shall not be available for pole replacements.

(10) One-touch make-ready option. For attachments involving simple make-ready, new attachers may elect to proceed with the process established in this subsection in lieu of the attachment process established in subsections (2) through (6) and (9) of this section.

(a) Attachment application.

1. A new attacher electing the one-touch make-ready process shall elect the one-touch make-ready process in writing in its attachment application and shall identify the simple make-ready that it will perform. It is the responsibility of the new attacher to ensure that its contractor determines if the make-ready requested in an attachment application is simple.

2. Application completeness.

a. The utility shall review the new attacher's attachment application for completeness before reviewing the application on its merits and shall notify the new attacher within ten (10) business days after receipt of the new attachers attachment application whether or not the application is complete.

b. An attachment application shall be considered complete if the application provides the utility with the information necessary under its procedures, as established in the utility's applicable tariff or a special contract regarding pole attachments between the utility and the new attacher, to make an informed decision on the application.

c. If the utility notifies the new attacher that an attachment application is not complete, then the utility shall state all reasons for finding the application incomplete.

d. If the utility fails to notify a new attacher in writing that an application is incomplete within ten (10) business days of receipt, then the application shall be deemed complete.

3. Application review on the merits. The utility shall review on the merits a complete application requesting one-touch make-ready and respond to the new attacher either granting or denying an application within fifteen (15) days of the utility's receipt of a complete application (or within thirty (30) days in the case of larger orders as established in subsection (7)(b) of this section or within a time negotiated in good faith for requests equal to or larger than those established in (7)(d)).

a. If the utility denies the application on its merits, then the utility's decision shall be specific, shall include all relevant evidence and information supporting its decision, and shall explain how the evidence and information relate to a denial of access.

b. Within the fifteen (15) day application review period (or within thirty (30) days in the case of larger orders as established in subsection (7)(b) of this section or within a time negotiated in good faith for requests equal to or larger than those established in (7)(d)), a utility or an existing attacher may object to the designation by the new attacher's contractor that certain make-ready is simple.

c. An objection made pursuant to clause b. of this subparagraph shall be specific and in writing, include all relevant evidence and information supporting the objection, be made in good faith, and explain how the evidence and information relate to a determination that the make-ready is not simple.

d. If the utility's or the existing attacher's objection to the new attacher's determination that make-ready is simple complies with clause c. of this subparagraph, then the make-ready shall be deemed to be complex**, and the new attacher may not proceed with the affected proposed one-touch make-ready**.

(b) Surveys.

1. The new attacher shall be responsible for all surveys required as part of the one-touch make-ready process and shall use a contractor as established in Section 5(2) of this administrative regulation to complete surveys.

2. The new attacher shall allow the utility and any existing attachers on the affected poles to be present for any field inspection conducted as part of the new attacher's surveys.

3. The new attacher shall use commercially reasonable efforts to provide the utility and affected existing attachers with advance notice of not less than five (5) business days of a field inspection as part of any survey and shall provide the date, time, and location of the surveys, and name of the contractor performing the surveys.

(c) Make-ready. If the new attacher's attachment application is approved and if the attacher has provided fifteen (15) days prior written notice of the make-ready to the affected utility and existing attachers, the new attacher may proceed with make-ready using a contractor in the manner established for simple make-ready in Section 5(2) of this

administrative regulation.

1. The prior written notice shall include the date and time of the make-ready, a description of the work involved, the name of the contractor being used by the new attacher, and provide the affected utility and existing attachers a reasonable opportunity to be present for any make-ready.

2. The new attacher shall notify an affected utility or existing attacher immediately if make-ready damages the equipment of a utility or an existing attacher or causes an outage that is reasonably likely to interrupt the service of a utility or existing attacher.

3. In performing make-ready, if the new attacher or the utility determines that make-ready classified as simple is complex, then all make-ready on the impacted poles shall be halted and the determining party shall provide immediate notice to the other party of its determination and the impacted poles. All remaining make-ready on the impacted poles shall then be governed by subsections (2) through (9) of this section, and the utility shall provide the notices and estimates required by subsections (2)(a), (3), and (4) of this section as soon as reasonably practicable.

(d) Post-make-ready timeline. A new attacher shall notify the affected utility and existing attachers within fifteen (15) days after completion of make-ready on a one-touch make ready application.

Section 5. Contractors for Survey and Make-ready.

(1) Contractors for self-help complex and above the communications space make-ready. A utility shall make available and keep up-to-date a reasonably sufficient list of contractors the utility authorizes to perform self-help surveys and make-ready that is complex and self-help surveys and make-ready that is above the communications space

on the utility's poles. The new attacher must use a contractor from this list to perform self-help work that is complex or above the communications space. New and existing attachers may request the addition to the list of any contractor that meets the minimum qualifications in subsection (3) of this section and the utility shall not unreasonably withhold its consent.

(2) Contractors for surveys and simple work. A utility may keep up-to-date a reasonably sufficient list of contractors the utility authorizes to perform surveys and simple make-ready. If a utility provides this list, then the new attacher shall choose a contractor from the list to perform the work. New and existing attachers may request the addition to the list of any contractor that meets the minimum qualifications in subsection (3) of this section and the utility shall not unreasonably withhold its consent.

(a) 1. If the utility does not provide a list of approved contractors for surveys or simple make-ready or no utility-approved contractor is available within a reasonable time period, then the new attacher may choose its own qualified contractor that shall meet the requirements in subsection (3) of this section.

2. If choosing a contractor that is not on a utility-provided list, the new attacher shall certify to the utility that the attacher's contractor meets the minimum qualifications established in subsection (3) of this section upon providing notices required by Section 4(9)(a)2., (9)(b)2., (10)(b)3., and (10)(c) of this administrative regulation.

(b) 1. The utility may disqualify any contractor chosen by the new attacher that is not on a utility-provided list, but a disqualification shall be based on reasonable safety or reliability concerns related to the contractor's failure to meet any of the minimum qualifications established in subsection (3) of this Section or to meet the utility's publicly

available and commercially reasonable safety or reliability standards.

2. The utility shall provide notice of the utility's objection to the contractor within the notice periods established by the new attacher in Section 4 (9)(a)2, (9)(b)2, (10)(b)3, and (10)(c) of this administrative regulation and in the utility's objection must identify at least one available qualified contractor.

(3) Contractor minimum qualification requirements. Utilities shall ensure that contractors on a utility-provided list, and new attachers shall ensure that contractors selected pursuant to subsection (2)(a) of this section, meet the minimum requirements established in paragraphs (a) through (e) of this subsection.

(a) The contractor has agreed to follow published safety and operational guidelines of the utility, if available, but if unavailable, the contractor shall agree to follow National Electrical Safety Code (NESC) guidelines.

(b) The contractor has acknowledged that the contractor knows how to read and follow licensed-engineered pole designs for make-ready, if required by the utility.

(c) The contractor has agreed to follow all local, state, and federal laws and regulations including the rules regarding Qualified and Competent Persons under the requirements of the Occupational and Safety Health Administration (OSHA) rules.

(d) The contractor has agreed to meet or exceed any uniformly applied and reasonable safety and reliability thresholds established by the utility, if made available.

(e) The contractor shall be adequately insured or shall establish an adequate performance bond for the make-ready the contractor will perform, including work the contractor will perform on facilities owned by existing attachers.

(4) A consulting representative of **a**~~**[an electric]**~~ 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.

Section 6. Notice of changes to existing attachers

(1) Unless otherwise established in a joint use agreement or special contract, a utility shall provide an existing attacher no less than 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; or

(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.

(2) Stays from removals, terminations, and modifications noticed pursuant to subsection (1) of this section.

(a) An existing attacher may request a stay of the action contained in a notice received pursuant to subsection (1) of this section by filing a motion pursuant to 807 KAR 5:001, Section 4 within fifteen (15) days of the receipt of the first notice provided pursuant to subsection (1) of this section.

(b) The motion shall be served on the utility that provided the notice pursuant to 807 KAR 5:001, Section 5(1).

(c) The motion shall not be considered unless it includes the relief sought, the reasons for such relief, including a showing of irreparable harm and likely cessation of cable television system operator or telecommunication service, a copy of the notice, and a

certification that service was provided pursuant to paragraph (b) of this subsection.

(d) The utility may file a response within ten (10) days of the date the motion for a temporary stay was filed.

(e) No further filings under this subsection shall be considered unless requested or authorized by the commission.

(3) Transfer of Attachments to New Poles

(a) Unless an applicable tariff or special contract or Section 4 of this administrative regulation establishes a different timeframe, existing attachers shall transfer their attachments within 60 days of receiving written notice from the utility pole owner.

(b) Existing attachers may deviate from the time limit established in paragraph (a) of this subsection for good and sufficient cause that renders it infeasible for the existing attacher to complete the transfer within the time limit established. An existing attacher that requires such a deviation shall immediately notify, in writing, the utility and shall identify the affected poles and include a detailed explanation of the reason for the deviation and the date by which the attacher shall complete the transfer. An existing attacher shall deviate from the time limits established in paragraph (a) of this subsection for a period no longer than is necessary to complete the transfer.

(c) If an existing attacher fails to transfer its attachments within the timeframe established in paragraph (a) of this subsection and the existing attacher has not notified the utility of good and sufficient cause for extending the time limit pursuant to paragraph (a) of this subsection, a utility pole owner may transfer attachments at the existing attacher's expense.

(d) A utility pole owner may transfer an existing attacher's attachment prior to the

expiration of any period established by paragraph (a) or (b) of this subsection if an expedited transfer is necessary for safety or reliability purposes.

Section 7. Complaints for Violations of This Administrative Regulation.

(1) Contents of complaint. Each complaint shall be headed "Before the Public Service Commission," shall establish the names of the complainant and the defendant, and shall state:

(a) The full name and post office address of the complainant;

(b) The full name and post office address of the defendant;

(c) Fully, clearly, and with reasonable certainty, the act or omission, of which complaint is made, with a reference, if practicable, to the law, order, or administrative regulation, of which a failure to comply is alleged, and other matters, or facts, if any, as necessary to acquaint the commission fully with the details of the alleged failure; and

(d) The relief sought.

(2) Signature. The complainant or his or her attorney, if applicable, shall sign the complaint. A complaint by a corporation, association, or another organization with the right to file a complaint, shall be signed by its attorney.

(3) How filed.

(a) Complaints shall be filed in accordance with the electronic filing procedures in 807 KAR 5:001, Section 8.

(b) Notwithstanding 807 KAR 5:001, Section 8(3), the filing party shall file two (2) copies in paper medium with the commission in the manner required by 807 KAR 5:001, Section 8(12)(a)2.

(4) Procedure on filing of complaint.

(a) Upon the filing of a complaint, the commission shall immediately examine the complaint to ascertain if it establishes a prima facie case and conforms to this administrative regulation.

1. If the commission finds that the complaint does not establish a prima facie case or does not conform to this administrative regulation, the commission shall notify the complainant and provide the complainant an opportunity to amend the complaint within a stated time.

2. If the complaint is not amended within the time or the extension as the commission, for good cause shown, shall grant, the complaint shall be dismissed.

(b) If the complaint, either as originally filed or as amended, establishes a prima facie case and conforms to this administrative regulation, the commission shall serve an order upon the person complained of, accompanied by a copy of the complaint, directed to the person complained of and requiring that the matter complained of be satisfied, or that the complaint be answered in writing within ten (10) days from the date of service of the order. The commission may require the answer to be filed within a shorter period if the complaint involves an emergency situation or otherwise would be detrimental to the public interest.

(5) Satisfaction of the complaint. If the defendant desires to satisfy the complaint, he or she shall submit to the commission, within the time allowed for satisfaction or answer, a statement of the relief that the defendant is willing to give. Upon the acceptance of this offer by the complainant and with the approval of the commission, pursuant to KRS Chapter 278 and this administrative regulation, the case shall be dismissed.

(6) Answer to complaint. If the complainant is not satisfied with the relief offered, the defendant shall file an answer to the complaint within the time stated in the order or the

extension as the commission, for good cause shown, shall grant.

(a) The answer shall contain a specific denial of the material allegations of the complaint as controverted by the defendant and also a statement of any new matters constituting a defense.

(b) If the defendant does not have information sufficient to answer an allegation of the complaint, the defendant may so state in the answer and place the denial upon that ground.

(7) Burden of proof.

(a) The complainant has the burden of establishing it is entitled to the relief sought.

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

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

2. 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.

(8) Time for final action.

(a) The commission shall take final action on a complaint **regarding the rates, terms, or conditions for**[~~**alleging that a person or entity was unlawfully denied**~~] access to a utility's pole, duct, conduit, or right-of-way within 180 days of a complaint establishing a prima facie case being filed, unless the commission finds it is necessary to continue the proceeding for good cause for up to 360 days from the date the complaint establishing a

prima facie case is filed.

(b) The period within which final action shall be taken may be extended beyond 360 days upon agreement of the complainant and defendant and approval of the commission.

This is to certify that the Public Service Commission approved promulgation of this administrative regulation, pursuant to KRS 278.040(3), on September 15, 2021.

Linda Bridwell, P.E. Executive Director
Public Service Commission

9/15/2021
Date

Kent A. Chandler, Chairman
Public Service Commission

9/15/2021
Date

Contact person: John E.B. Pinney, Executive Advisor, Kentucky Public Service Commission, 211 Sower Boulevard, Frankfort, Kentucky 40601, phone (502) 782-2587, mobile (502) 545-6180, fax (502) 564-7279, email Jeb.Pinney@ky.gov.

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

807 KAR 5:015

Contact Person: J.E.B. Pinney, phone 502-564-3940, email Jeb.Pinney@ky.gov

(1) Provide a brief summary of:

(a) What this administrative regulation does: This administrative regulation provides the process by which the commission regulates the rates, terms, and conditions of utility pole attachments and access to other utility facilities, establishes specific criteria and procedures for obtaining access to utility poles within the Kentucky Public Service Commission's (PSC) jurisdiction, and establishes a process by which the complaints of those seeking to access utility facilities shall be addressed within the period established by federal law.

(b) The necessity of this administrative regulation: House Bill 320 from the 2021 Regular Session of the General Assembly requires the Commission to promulgate administrative regulations regarding pole attachments under its jurisdiction, including those necessary for the provision of broadband by December 31, 2021. Further, pursuant to 47 U.S.C.A. § 224(c), if a state does not regulate the rates, terms, and conditions of access to utility poles in a manner proscribed therein, then poles owned by investor owned utilities are subject to regulation by the Federal Communications Commission (FCC). Finally, various state and federal efforts to expand broadband access, as well as changes in technology, have or are likely to result in increased interest in new pole attachments, and there is a need for a clear process to govern pole attachments to avoid delays that may slow or prevent broadband deployment in Kentucky.

(c) How this administrative regulation conforms to the content of the authorizing statutes: KRS 278.040(3) provides that the Commission may promulgate administrative regulations to implement the provisions of KRS Chapter 278. KRS 278.040(2) states that the Commission has exclusive jurisdiction over the regulation of rates and services of utilities. KRS 278.030(1) provides that all rates received by a utility shall be fair, just, and reasonable. KRS 278.030(2) provides that every utility shall furnish adequate, efficient, and reasonable service. In *Kentucky CATV Ass'n v. Volz*, 675 S.W.2d 393 (Ky. App. 1983), the Court of Appeals held that utility pole attachments are a service that is provided for a rate. House Bill 320 from the 2021 Regular Session of the General Assembly requires the PSC to promulgate administrative regulations regarding pole attachments under its jurisdiction, including those necessary for the provision of broadband. This administrative regulation creates a uniform process with specific timelines and self-help remedies by which cable television providers, telecommunications carriers, broadband internet providers, and government units may seek to make new attachments, while minimizing burdens placed on utilities and considering the fair allocation of costs between attachers and the traditional utility customers.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This administrative regulation creates a uniform process with specific timelines and self-help remedies, including one-touch make-ready, by which cable television providers, telecommunications carriers, broadband internet providers, and government units may seek to make new attachments, while minimizing burdens placed on utilities and considering the fair allocation of costs between attachers and traditional utility customers.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation: The amendments will respond to some of the concerns of the commenters by clarifying vague or ambiguous language or by providing additional guidance regarding the process for attaching to utility poles. The amendment will also change some applicable timelines for utility pole owners

(b) The necessity of the amendment to this administrative regulation after comment: The Commission is making amendments to the following sections of the proposed regulation: Section 3(5) in order to clarify and strengthen the rules addressing overlashing of third party attachers and to reduce confusion regarding the timing of notice of overlashing and, to clarify that overlashing may only done on an attacher's own facilities or two existing facilities with the permission of the owner; Section 2(1) to provide clarity regarding engineering standards and to clarify language in Section 2(1) that language in Section 3(4) and (5) are intended to reference; Section (4)(6) to extend the time from 90 days to 120 days for pole owners to submit invoices to attachers which allows a more reasonable time for pole owners to compile invoices from its contractors; Section 4(10)(a)3.d to clarify that a new attacher may not proceed with one touch make ready work if the work is deemed to be complex, mimicking a federal regulation and clarifying the Commission's intent in originally promulgating this section; Section 5(4) to delete the term "electric," because it could create confusion regarding what utilities can reject attachments for reasons of safety, reliability, and generally applicable engineering purposes; Section 7(8)(a) to clarify that a complaint may be brought for rates, service,

and conditions for access to poles, and not just for complaints regarding access to poles; and several minor changes containing typographical errors that will be listed in the statement of consideration.

(c) How the amendment conforms to the content of the authorizing statutes: The amendments House Bill 320 from the 2021 Regular Session of the General Assembly requires the Commission to promulgate administrative regulations regarding pole attachments under its jurisdiction, including those necessary for the provision of broadband by December 31, 2021. The amendments will further the provisions of broadband service by clarifying the proposed regulation, particularly where overlashing is concerned. The amendments also further the Commission general jurisdiction pursuant to KRS 278.030 and KRS 278.040.

(d) How the amendment will assist in the effective administration of the statutes: By clarifying and amending the proposed regulation the Commission hopes to remove ambiguity for the proposed regulation and provide additional guidance on certain issues. By doing so, the amendments will reduce the number of formal complaints with regard to pole attachments and promote the deployment of broadband service in the Commonwealth as exhorted by General Assembly in House Bill 320.

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: The administrative regulation will primarily affect regulated utilities in Kentucky that own or control utility poles, including investor owned electric utilities, rural electric cooperatives, and incumbent local exchange carriers. There are currently four investor owned electric utilities, 21 rural electric cooperates, and 20 incumbent local exchange carriers, which

include investor owned telephone utilities and telephone cooperatives, operating in Kentucky.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment: Currently, utilities process pole attachment requests pursuant to utility specific pole attachment tariffs. The PSC reviews the pole attachment tariffs when they are filed or modified to determine if they meet the requirements of KRS Chapter 278, such as whether service provided is adequate, efficient, and reasonable and whether rates charged are fair, just, and reasonable. Further, under the current process, if a new attacher or existing attacher contends that the terms of a pole attachment tariff or its implementation violates KRS Chapter 278 or PSC regulations, then they may file a complaint, which must be addressed within 360 days, and request relief from the alleged violation. When setting pole attachment rates under the current process, the PSC has applied the same principles it applies when establishing rates for other customers—that each customer classification should pay for the cost of the service they are being provided.

This administrative regulation creates a uniform process with specific timelines and self-help remedies, including one-touch make-ready, by which cable television providers, telecommunications carriers, broadband internet providers, and government units may seek to make new attachments, while minimizing burdens placed on utilities and considering the fair allocation of costs between attachers and the traditional utility

customers based on cost causation principals traditionally applied by the PSC. To comply with this administrative regulation, utilities will have to update their pole attachment tariffs so the tariffs are consistent with this regulation and process pole attachment requests and make-ready in a manner consistent with this administrative regulation. Costs will still be allocated pursuant to the principles the PSC applies when establishing rates for other customers, though this administrative regulation does specifically address make ready and survey costs, where practical, to avoid future disputes and delays in the pole attachment process.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): The regulated entities will incur some initial costs in updating their tariffs to comply with this administrative regulation. The costs of such a process are likely to vary depending on the size and complexity of the utility involved and whether and the extent to which potential attachers or other customer groups object to the proposed tariff.

An estimate of the costs regulated entities might incur to update their tariffs would be between $25,000 and $200,000 per regulated entity. However, such costs could likely be mitigated if similarly situated utilities worked together to draft tariffs that comply with this regulation. Further, the adoption of a uniform process should reduce potential conflicts in the future that would have to be resolved through the potentially costly complaint process. Finally, a number of the utilities periodically update their pole attachment tariffs in the absence of this regulation.

The regulated entities will also incur costs in processing pole attachment applications and performing make ready, and such costs will be based on the size and

frequency of new attachment projects. However, like the federal regulation, and consistent with the cost causation principles the PSC applies when setting rates for other customers, utilities are able to recover the costs of processing pole attachment applications and completing make-ready from the attaching entities that caused them to be incurred, so the timelines for reviewing applications and completing make-ready should not result in the regulated entities incurring uncompensated costs. Further, while attaching entities will bear those costs, the process outlined in this regulation should actually reduce their overall costs by reducing or eliminating costly disputes and delays in the pole attachment process. Thus, this administrative regulation is expected to result in a net reduction in costs.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3): The adoption of a uniform process should reduce potential conflicts in the future that would have to be resolved through the complaint process. This should reduce the overall cost of pole attachments by reducing or eliminating costly delays.

(5) Provide an estimate of how much it will cost the administrative body to implement this administrative regulation:

(a) Initially: Zero Dollars; no fiscal impact.

(b) On a continuing basis: Zero Dollars; no fiscal impact.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: The PSC does not anticipate this amendment increasing its enforcement cost. The PSC currently funds enforcement of regulations through its general operating budget funded through annual assessments

paid by regulated utilities pursuant to KRS 278.130, *et. seq.*, and this amendment has no effect on that funding.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment: No fiscal impact.

(8) State whether or not this administrative regulation established any fees or directly or indirectly increased any fees: No new fees are established and existing fees will not be affected.

(9) TIERING: Is tiering applied? Yes. The speed at which utilities are required to process applications and complete make ready is tiered based on the number of poles owned the utility. Tiering the regulation in this manner, which is consistent with how the federal regulation is tiered, will allow smaller utilities to process pole attachment applications at slower rates, while maintaining a relatively consistent attachment speed throughout the state.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

807 KAR 5:015

Contact Person: J.E.B. Pinney, phone 502-564-3940, email Jeb.Pinney@ky.gov

(1) What units, parts or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation? Government units will be affected to the extent that they are seeking to attach to poles owned or controlled by regulated utilities. As with other attachers, it is expected that costly delays will be reduced or eliminated.

(2) Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation. KRS 278.040; HB 320 (2021).

(3) Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect. Zero Dollars; no fiscal impact.

(a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year? Zero Dollars; no fiscal impact.

(b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years? Zero Dollars; no fiscal impact.

(c) How much will it cost to administer this program for the first year? Zero Dollars; no fiscal impact.

(d) How much will it cost to administer this program for subsequent years? Zero Dollars; no fiscal impact.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-):

Expenditures (+/-):

Other Explanation:

STATEMENT OF CONSIDERATION
Relating to 807 KAR 5:015

Access and attachments to utility poles and facilities.
(Amended After Comments)

I. The public hearing on 807 KAR 5:015 was conducted as scheduled on July 29, 2021, at 9:00 a.m. at the Kentucky Public Service Commission. Commission staff received public comment at the hearing from Eric Langley on behalf of Louisville Gas and Electric Corporation (LG&E), Kentucky Utilities Corporation (KU), and Kentucky Power Corporation (Kentucky Power); Scott Freeburn and Jeremy Gibson on behalf of Duke Energy Kentucky, Inc. (Duke Kentucky); Daniel Rhinehart on behalf of BellSouth Telecommunications, LLC d/b/a AT&T Kentucky (AT&T Kentucky); Jason Keller, Paul Werner, Jill Valenstein, Dan Gonzalez, and Patricia Kravtin on behalf of the Kentucky Broadband and Cable Association (KBCA); and Matt DeTura on behalf of CTIA – The Wireless Association (CTIA).

II. The following people submitted written comments:

Name and Title	Organization/Entity/Other
Paul Werner, Counsel to KBCA	Sheppard Mullin Richter & Hampton
Dave Thomas, Counsel to KBCA	Sheppard Mullin Richter & Hampton
Hannah Wigger, Counsel to KBCA	Sheppard Mullin Richter & Hampton
James Gardner, Counsel to KBCA	Sturgill, Turner, Barker, & Moloney
M. Todd Osterloh, Counsel to KBCA	Sturgill, Turner, Barker, & Moloney
John T. Tyler, AVP-Senior Legal Counsel	AT&T Kentucky
Chris Perry, CEO & President	Kentucky Association of Electric Coops.
Rocco D'Ascenzo, Deputy General Counsel	Duke Energy Kentucky, Inc.
Matthew DeTura	CTIA
Benjamin Aron	CTIA
Rick Lovekamp, Manager Regulatory	LG&E/KU
Brian K. West, VP, Regulatory & Finance	Kentucky Power Company
Speaker David Osbourne	Kentucky State Representative
Sen. Chris McDaniel	Kentucky State Senator
Rep. Jim DuPlessis	Kentucky State Representative
Sen. C. Lynn Bechler	Kentucky State Representative
Sen. Julie Raque Adams	Kentucky State Senator
Rep. Keven D. Bratcher	Kentucky State Representative
Rep. Savannah Maddox	Kentucky State Representative

Rep. Jerry T. Miller	Kentucky State Representative
Rep. Sal Santoro	Kentucky State Representative
Rep. Kim Banta	Kentucky State Representative
Rep. Josh Bray	Kentucky State Representative
Rep. Chad McCoy	Kentucky State Representative
Rep. Richard White	Kentucky State Representative
Sen. Rick Girdler	Kentucky State Senator
Carrie Adams	Private Individual
Kevin Kennedy	Private Individual
Elaine Lewis	Private Individual
Laura Lewis	Private Individual
Dennis Perry	Private Individual
Kim Bryant	Private Individual

III. The following people from the promulgating administrative body responded to the comments:

Name and Title

J.E.B. Pinney, Executive Advisor
Benjamin Bellamy, Staff Attorney III

IV. Summary of Comments and Responses

(1) Subject Matter: Allocation of costs for poles replaced to accommodate new attachments

(a) Comments: Chris Perry on behalf of Kentucky Association of Electric Cooperatives, Inc. (KAEC) – KAEC supports addressing pole attachment costs through tariff filings. KAEC argues that any discussion of rates and cost-sharing related to pole attachments demands and deserves much more focused attention, specific data and fact-finding, and informed testimony from interested parties; therefore, efforts to broaden the scope of the proposed regulation at this point should continue to be rejected.

Paul Werner on behalf of KBCA – KBCA asserts that while the Commission appropriately prevents a pole owner from charging an attacher for replacing a "red tagged" pole, the proposed regulation fails to address cost allocation for poles that are prematurely retired to accommodate a new attachment. KBCA asserts that this creates unnecessary disputes and delays and that pole owners may interpret the rules to allow them charge the full cost of a pole replacement to an attacher if the pole is not "red tagged."

KBCA argues that new pole attachers face barriers to market entry when required to pay the full cost to replace a partially depreciated pole. KBCA asserts that the regulation should prevent a pole owner from requiring an attacher to pay the full cost of a

replacement pole that is prematurely retired pursuant to an attachment request. KBCA asserts that a utility derives an economic benefit from any pole that is replaced, whether it is "red tagged" or not. KBCA also asserts that a utility may defer "red tagging" a pole so that an attacher may have to pay the full cost of replacement. KBCA proposes to amend Section 4(6)(b)4 to prohibit a utility from charging a new attacher more than the remaining un-depreciated value of the pole replaced to accommodate the new attachment plus the difference in the cost of a pole of the same height and type of the pole replaced and the cost of the pole necessary to accommodate the new attacher's attachment.

Patricia Kravtin, on behalf of KBCA – Ms. Kravtin, an economic consultant speaking and submitting an exhibit on behalf of KBCA, argues that consistent pricing practices consistent with the fundamental economic cost-causation principles along with low transactional or process-related cost of entry for broadband provider access to utility promotes the best possible utilization of resources and also maximizes gains to consumer welfare. However, she argues that make ready charges of many if not most pole owners subject to the jurisdiction of the FCC under Section 224 of the 1996 Communications Act, or subject to state jurisdiction, as here in Kentucky, are typically based on a critical yet flawed assumption: that all of the make ready activities undertaken and associated costs incurred by the pole owner immediately after a request for a new attachment were in fact caused by that request, rather than by underlying utility operations and needs independent of the new attachment.

Ms. Kravtin argues that when poles are replaced as part of make ready activities that new attachers are often assessed the fully loaded costs of the pole replacement, even though that project produced a facility improvement with joint economic value to both the utility and the attacher, with the lion's share of that betterment value accruing to the utility in connection with the replacement pole. She states that those benefits include operation benefits of the replacement pole (e.g., additional height, strength and resiliency); strategic benefits such as the ability to offer new services like smart grid and broadband in competition with the attacher; revenue-enhancing benefits such as the ability to offer space for additional attachers; capital cost savings associated with longer lives for the new poles; operational savings from alleged lower maintenance costs; and additional tax "savings" arising from the ability to deduct the increased costs from revenue.

Ms. Kravtin argues that the prevailing practice discussed above is at odds with the economic principles of cost causation, economic efficiency, and the greater public interest given the significant benefits of and urgent need for access to high-speed broadband service in unserved areas. To correct this issue, she argues that new attachers should only be responsible for the temporal effects of their request, i.e., the premature replacement of the pole, measured by the remaining undepreciated value of the pole.

Eric Langley and Rick Lovekamp – on behalf of LG&E/KU and Kentucky Power: Mr. Langley, who spoke on behalf of both LG&E/KU and Kentucky Power at the public hearing, indicated that they supported the changes made by the Commission following informal comments with respect to the cost of pole replacements. He argued that it

offered a fair approach that placed the cost of red tagged poles on the utility and its customers and the cost of poles replaced to accommodate a new attachment on the new attacher. He also noted that there are issues with KBCA's proposed approach, because there is a difference between the accounting useful life and the actual useful such that poles may not need to be replaced even when they are fully depreciated. He argued electric rate-payers should not be funding now a pole that they do not currently need for electric service.

Matthew DeTura on behalf of CTIA – CTIA indicated that it agreed with KBCA regarding how pole replacement costs should be handled.

Speaker David Osborne – Speaker Osborne noted that inadequate broadband access has stifled growth and opportunity in unserved communities across the Commonwealth. He noted that the General Assembly passed HB 320 earlier this year, which directed the Commission to implement pole attachment rules to help facilitate and expedite broadband deployment. As the Commission puts these rules in place, Speaker Osbourne requested further improvements to the rules. Specifically, he noted that, by ensuring more clarity and fairness related to costs associated with utility pole replacements, the process for providers to attach new infrastructure to poles will become quicker and more cost-effective.

Sen. Chris McDaniel – Sen. McDaniel urges the Commission to take additional steps to clarify and strengthen a policy that promotes a more equitable cost-sharing framework between broadband providers and utility owners for pole replacement costs.

Rep. Jim DuPlessis – Rep. Jim DuPlessis states that the cost of replacing and installing poles that may be required for many of these new connections should not fall on the shoulders of utility customers. The costs should be largely supported by those who are using the broadband services and the companies that provide them.

Sen. C. Lynn Bechler – Sen. Bechler urged the Commission to take additional actions to clarify a policy that promotes an equitable cost-sharing framework between broadband providers and utility owners for pole replacement costs.

Sen. Julie Raque Adams – Sen. Adams urged the Commission to expand the proposed pole attachment policies to ensure that broadband providers and pole owners pay their respective fair share for costs to replace utility poles.

Rep. Keven D. Bratcher – Rep. Bratcher urged the Commission to make further improvements to the utility pole regulations under current consideration so that unserved communities are set up for success. Rep. Bratcher states that, by establishing more clarity related to costs associated with utility pole replacements, the process for broadband providers to attach new infrastructure to utility poles will become more cost-effective and efficient.

Rep. Savannah Maddox – Rep. Maddox stated that the Commission's proposed regulations represent a good start, yet additional measures are necessary, for example, to ensure that all parties pay their fair share of costs when outdated poles need to be replaced.

Rep. Jerry T. Miller – Rep. Miller argued that the proposed regulation should introduce greater clarity and fairness to the process by including specific provisions that more fairly apportion pole replacement costs—a burden that falls disproportionately on broadband providers.

Rep. Sal Santoro – Rep. Santoro argued that the Commission should build on the proposed regulation and introduce greater clarity and fairness to the process by including specific measures that more fairly appropriate pole replacement costs, a burden that now falls disproportionately on broadband providers.

Rep. Kim Banta – Rep. Banta urged the Commission to provide stronger guidance to make clear and direct a fairer allocation of pole replacement costs between pole owners and service providers that seek to deploy their broadband lines and serve our citizens.

Rep. Josh Bray – Rep. Bray encouraged the Commission to make improvements to these rules that will clarify the share of costs of replacing old utility poles.

Rep. Chad McCoy – Rep. McCoy stated that the proposed regulations represent a valuable start, but additional measures are necessary, including, for example, ensuring all parties pay their fair share of costs when outdated poles need to be replaced.

Rep. Richard White – Rep. White stated that it has historically been difficult for students in more rural areas of the state to gain proper internet access due to the barriers in the way of infrastructure expansion, as more poles are needed to provide access to more people. He stated that encouraging broadband providers to invest in expansion, the Commonwealth must ensure the costs of pole replacement are divided more fairly and equitably between broadband providers and pole owners than they currently are.

Sen. Rick Girdler – Sen. Girdler stated that the Commission's ongoing pole attachment proceeding has the promise to deliver long overdue change to his constituents and residents across the Bluegrass. He argued that the Commonwealth needs policies that promote fair cost sharing between broadband providers and pole owners for the replacement of outdated utility poles.

Carrie Adams – Carrie Adams indicated the importance of broadband and that the pole replacement process is a primary barrier to broadband deployment. Carrie Adams urges the Commission to further clarify and strengthen the utility pole replacement regulations to ensure broadband providers and pole owners are paying their fair share of costs.

Kevin Kennedy – Mr. Kennedy indicated the importance of broadband and that the pole replacement process is a primary barrier to broadband deployment. He urges the Commission to further clarify and strengthen the utility pole replacement regulations to ensure broadband providers and pole owners are paying their fair share of costs.

Elaine Lewis – Elaine Lewis indicated the importance of broadband and that the pole replacement process is a primary barrier to broadband deployment. She urges the Commission to further clarify and strengthen the utility pole replacement regulations to ensure broadband providers and pole owners are paying their fair share of costs.

Laura Lewis – Laura Lewis indicated the importance of broadband and that the pole replacement process is a primary barrier to broadband deployment. She urges the Commission to further clarify and strengthen the utility pole replacement regulations to ensure broadband providers and pole owners are paying their fair share of costs.

Dennis Perry – Dennis Perry indicated the importance of broadband and that the pole replacement process is a primary barrier to broadband deployment. He urges the Commission to further clarify and strengthen the utility pole replacement regulations to ensure broadband providers and pole owners are paying their fair share of costs.

Kim Bryant – Kim Bryant indicated the importance of broadband and that the pole replacement process is a primary barrier to broadband deployment. She urges the Commission to further clarify and strengthen the utility pole replacement regulations to ensure broadband providers and pole owners are paying their fair share of costs.

(b) Response: The Commission allowed the public and any stakeholders that wanted to participate to provide significant input regarding this proposed regulation as part of an informal review before the regulation was filed pursuant to KRS Chapter 13A. That review included written comments, response comments, and multiple public meetings. As part of that process, a number of attachers, including KBCA, requested more specific language regarding how the cost to replace poles should be allocated. They generally argued that such language was necessary for two reasons. First, they alleged that pole owners were attempting to charge them for the cost of poles that had to be replaced for reasons other than a need to accommodate their new attachments i.e. the pole was damaged or had reached the end of its life. Second, they argued, as KBCA does in its comments here, that it is inequitable to charge a new attacher for the full cost of a replacement pole that is installed to accommodate a new attachment, because they argue utilities will derive benefits from the new poles as well. In response to those concerns, the Commission added Section 4(6)(b)2 through 4 and Section 7(7) before this regulation was filed pursuant to KRS Chapter 13A.

Section 4(6)(b)2 now explicitly states that new attachers do not have to pay the cost to replace "red tagged" poles, generally defined as poles that the utility designated for replacement in the next two years or poles the utility would have had to replace even if the attachment request had not been made, with poles of the same type and height.

Section 4(6)(b)3 states that if a "red tagged" pole has to be replaced with a pole of a different type or height to accommodate a new attachment, and the new attacher would only be responsible for the difference in the cost of a new pole of the type and height necessary to accommodate its new attachment and the cost of the pole the utility would have installed but for the new attacher's request. Section 4(6)(b)4, with which KBCA now takes issue, then indicates that the replacement costs for non-red tagged poles that must be replaced to accommodate a new attachment will be charged in accordance with each utility's tariff or an applicable special contract. Section 7(7) allows the Commission to presume that a pole was a "red tagged" pole in the event of a dispute if the utility did not adequately document pole inspections.

The amendment proposed by KBCA could result in electric rates that are not fair, just and reasonable. When reviewing utility rates and charges to determine if they are fair, just and reasonable and otherwise comply with statutory requirements imposed by KRS Chapter 278, the Commission generally attempts to ensure that costs are assigned to the party responsible for causing the utility to incur the cost. If a utility must replace a pole that does not need to be replaced with a larger pole or a pole of a different type to accommodate a new attachment, then the cost to replace that pole is caused by the new attacher.

Other utility customers may eventually benefit from the installation of the new pole installed to accommodate a new attacher as alleged by KBCA, but only to the extent the new pole adds useful life. For instance, if a new pole has a 50-year life and the pole that was replaced had a 30 year remaining useful life, then other customers may get the benefit of 20 additional years of life that were paid for by the new attacher. However, in 30 years, the relevant pole may not be necessary such that other customers would not receive any benefit from the new pole installed to accommodate the new attacher's equipment. Further, depending on the age of the pole being replaced and the types of poles involved, it is possible that a new pole of a different type necessary to accommodate a new attacher may not actually have a longer life than the existing pole.

The regulation, as written, allows for the cost of replacement poles to accommodate a new attachers equipment to be addressed through each utility's tariff, which is the same manner in which the Commission allocates most utility costs among various classes of utility customers.[1] As argued by Chris Perry on behalf of KAEC, addressing the cost of replacement poles that are necessary to accommodate a new attacher in that manner is the best way to allocate such costs at this time, because it will allow the Commission to address the issue in a more nuanced manner based on evidence regarding specific utilities, including information regarding the age of each utility's poles and the level of specificity with which they track depreciation expense for utility poles.

[1] For example, when a utility proposes to increase its base utility rates, it files a tariff with the proposed rates and charges, along with required evidence and explanations, and the Commission then determines whether those proposed rates are fair, just and reasonable by reviewing evidence and asking questions regarding the costs a utility must cover in a given year, how those cost should be allocated to various customers or classes of customers, and how rates and charges should be designed such that customer classes cover the costs allocated to them without giving the utility a windfall.

Further, the process in the proposed regulation should not result in unnecessary disputes and delays. Once a utility's pole attachment tariff is accepted, with or without modification following a review and investigation, the tariff, including the provision regarding pole costs, become the filed rate that must be applied to pole attachments made pursuant to thetariff, so attachers will simply have to look to the tariff to determine the costs they will owe.

KBCA's proposed language for addressing cost allocation for pole replacements will also not eliminate disputes regarding the cost of new poles. As KBCA acknowledged, utilities do not track depreciation on a pole-by-pole basis. Rather, they track them in groups such that questions regarding the undepreciated value of a pole are likely to arise even under KBCA's proposal. There will also potentially be disputes regarding the cost of a new pole of the same height/type of the pole replaced and the cost of the pole necessary to accommodate the new attachment. In fact, while it is not being proposed here, simply requiring the new attacher to pay the full cost of a new pole necessary to accommodate a new attacher would likely result in the fewest disputes and delays, because the cost would be easily identifiable.

Finally, the evidence is not clear that requiring a utility to cover the cost of a new pole that is necessary to accommodate a new attacher will have a significant effect on the deployment of broadband in unserved or underserved areas. This situation will only arise when there is no capacity on poles to make new attachments, which would presumably occur less in areas with fewer pole attachments. Thus, while capacity could be affected by other issues, i.e., pole size and type, utilities will more likely be asked to replace poles to increase capacity in areas where poles have more attachments or in situations in which a cell phone provider seeks to make a microcell attachment to the top of pole.

As an anecdotal example, a recent case before the Commission dealt with a dispute between a new attacher and a pole owner regarding a request to attach to about 12,000 poles in Lexington for the deployment of high speed broadband. The parties settled, but file periodic status reports with the Commission regarding the progress of the pole attachment applications. On September 7, 2021, they reported that licenses have been granted for attachments to 8,761 poles and that 8,726 of attachments were determined to be simple by the parties whereas 35 were determined to be complex. Using the FCC's language, an attachment that requires a pole to be replaced is considered to be complex, although an attachment could be complex for other reasons. Thus, based on those numbers and assuming they designated the replacement of a pole as a complex attachment, it has only been necessary to replace <u>at most</u> 35 out of 8,761 poles as the new attacher has made attachments to poles in Lexington, which is presumably an area in which poles are more crowded by third-party attachers.

(2) Subject Matter: Strengthen Overlashing

(a) Comments: Paul Werner on behalf of KBCA – KBCA urges the Commission to strengthen overlashing rules by adopting the FCC rules pertaining to overlashing. The

FCC rule forbids a pole owner from requiring approval for overlashing on a pole on which there is already an attachment. KBCA states that its members rely extensively on the FCC rule for deployment. KBCA proposes to add the FCC rule to Section 3(5) of the regulation as follows (with edits in bold):

> **(5) Overlashing.**
>
> **(a) A utility shall not require prior approval for an existing attacher that overlashes its existing wires on a pole; or for third party overlashing of an existing attachment that is conducted with the permission of an existing attacher.**
>
> **(b) A utility may not prevent an attacher from overlashing because another existing attacher has not fixed a preexisting violation. A utility may not require an existing attacher that overlashes its existing wires on a pole to fix preexisting violations caused by another existing attacher.**
>
> **(c) A utility may require no more than 15 days' advance notice of planned overlashing. If a utility requires advance notice for overlashing, then the utility must provide existing attachers with advance written notice of the notice requirement or include the notice requirement in the attachment agreement with the existing attacher. If after receiving advance notice, the utility determines that an overlash would create a capacity, safety, reliability, or engineering issue, it must provide specific documentation of the issue to the party seeking to overlash within the 15 day advance notice period and 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. A utility may not charge a fee to the party seeking to overlash for the utility's review of the proposed overlash.**
>
> **(d) A party that engages in overlashing is responsible for its own equipment and shall ensure that it complies with reasonable safety, reliability, and engineering practices. If damage to a pole or other existing attachment results from overlashing or overlashing work causes safety or engineering standard violations, then the overlashing party is responsible at its expense for any necessary repairs.**

(~~5e~~) ~~The tariff shall not prohibit~~ **An** overlashing ~~except if doing so is justified by lack of~~ **party shall notify the affected utility within 15 days of completion of the** ~~capacity, safety or reliability concerns, or applicable engineering standards~~**. overlash on a particular pole. The notice shall provide the affected utility at least 90 days from receipt in which to inspect the overlash. The utility has 14 days after completion of its inspection to notify the overlashing party of any damage or code violations to its equipment caused by the overlash. If the utility discovers damage or code violations caused by the overlash on equipment belonging to the utility, then the utility shall inform the overlashing party and provide adequate documentation of the damage or code violations. The utility may either complete any necessary remedial work and bill the overlashing party for the reasonable costs related to fixing the damage or code violations or require the overlashing party to fix the damage or code violations at its expense within 14 days following notice from the utility.**

Chris Perry on behalf of KAEC – KAEC requests that the Commission clarify that a tariff may limit an attacher's right to overlash only to those existing facilities owned or controlled by the attacher. KAEC states that occasionally its member cooperatives receive requests from new attachers to overlash the facilities of an existing attacher. KAEC asserts that this would cause administrative confusion and present significant safety concerns due to a "network of mismatched and intertwined attachments."

Speaker David Osborne – Speaker Osborne encouraged the Commission to address other critical issues in its upcoming deliberations such as the overlashing of fiber lines, which is a common construction practice that has an important role to play in broadband expansion.

Sen. Chris McDaniel – Sen. McDaniel urged the Commission to address matters related to overlashing—a construction issue that, once resolved, will further aid in broadband expansion.

Sen. C. Lynn Bechler – Sen. Bechler urged the Commission to take additional actions to clarify guidelines around overlashing.

Sen. Julie Raque Adams – Sen. Adams urged the Commission to further address overlashing of fiber lines.

Rep. Keven D. Bratcher – Rep. Bratcher urged the Commission to address other related matters such as the overlashing of broadband fiber lines, which can help expedite deployment.

Rep. Savannah Maddox – Rep. Maddox encouraged the Commission to address other important issues to support broadband deployment such as overlashing, which is a common construction practice.

Rep. Jerry T. Miller – Rep. Miller stated that he Commission should address other important issues to encourage broadband deployment such as the overlashing of broadband service lines, a process that helps expedite deployment.

Rep. Sal Santoro – Rep. Santoro encouraged the Commission to address other important issues to support broadband deployment such as overlashing, which is a common construction practice.

Rep. Josh Bray – Rep. Bray encouraged the Commission to strengthen regulations related to overlashing.

Rep. Chad McCoy – Rep. McCoy stated that the proposed regulations represent a valuable start, but additional measures are necessary, including, establishing clear guidelines for overlashing to help facilitate faster broadband investments and deployments.

Rep. Richard White – Rep. White stated allowing broadband providers the ability to take advantage of overlashing opportunities allows for an increased rate of deployment.

Sen. Rick Girdler – Sen. Girdler urged the Commission to further address overlashing of broadband service lines, which is a process that can help expedite deployment.

(b) Response: Overlashing is an important element of broadband rollout and clarifying the rules surrounding overlashing should reduce confusion and complaints regarding overlashing and expedite broadband rollout. For that reason, KBCA's proposed amendments will be accepted with some minor modifications, as discussed below.

First, the Commission will modify KBCA's proposed language in proposed Section 3(5)(b) to specifically state that a utility may prevent an attacher from overlashing an existing attachment that has a preexisting violation of the utilty's rules if failure to fix the violation, and the subsequent overlashing, would create a capacity, safety, reliability, or engineering issue. Even though subsection (5)(c) contains similar language that would allow denial of access in general, the amendment to subsection (5)(b) will make it clear that the general prohibition on preventing overlashing of an existing violation would not

trump safety, reliability, capacity, or engineering concerns. This appropriately balances the interests of a third-party overlasher and the interests of the utility and its customers.

Second, the Commission will amend Section 3(5)(c) to allow a utility to require up to 30 days' advance notice of planned overlashing and that this advance requirement be included in the utility's tariff and any attachment agreement with an existing attacher. Fifteen days is too short a period for a utility to review such a notice, particularly for large requests, and 30 days is not long enough to prejudice an overlasher. Requiring that the notice provision be included in a utility's tariff is consistent with KRS 278.160, which requires all rates, terms, and conditions of a utility be included in its tariff.

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, and not the utility's customers, should bear. Should a utility choose to charge a fee for the overlashing evaluation, such fee, and the terms and conditions of charging of the fee, would have to be included in the utility's tariff and subject to Commission approval.

With respect to KAEC's comment regarding who is entitled to overlash, the Commission accepted KBCA's language, in part, such that the language will state that attachers may only overlash their own attachments or the attachments of others with permission. While this is different than KAEC's proposal, it addresses KAEC's concerns, in part, because any third-party overlasher would have to have permission from the existing attacher it is overlashing. Further, to the extent utilities have specific concerns regarding capacity, safety, and reliability, they can still raise them and may prevent overlashing under those circumstances.

(3) Subject Matter: Amend Section 7(8)(a) to shorten the period within which the Commission must resolve Complaints regarding access to utility poles.

(a) Comments: Paul Werner on behalf of KBCA – KBCA states its concerns that the currently proposed 180-day timeline for the Commission to rule upon a pole attachment complaint will take too long. KBCA proposes that complaints relating to access to a pole be ruled upon within 90 days, whereas other complaints can take up to 180 days (or 360 days if agreed to by the parties).

Matthew DeTura on behalf of CTIA – CTIA also proposes that the Commission shorten from 180 days to 90 days the time in which the Commission is to rule on pole attachment complaints.

(b) Response: Parties' desires to have cases resolved as quickly as possible is understandable. However, as a practical matter, it is unlikely that the Commission could

resolve cases regarding access within 90 days, given the need to hear from all parties in complaint cases, the Commission's typical caseloads, and other statutory obligations establishing deadlines for and requiring the Commission to prioritize other cases.

(4) Subject Matter: Limit changes to construction requirements.

(a) Comments: Paul Werner on behalf of KBCA – KBCA suggests that the proposed regulation be amended to specifically prohibit utilities from imposing terms and policies in excess of those in the utility's tariff, in Commission regulations, or negotiated. KBCA asserts that the regulation should also make clear that any construction standard that deviates from the National Electric Safety Code must be necessary to achieve demonstrable safety goals and be applied prospectively in a non-discriminatory way. KBCA proposes the following addition to Section 3:

> **(8) A utility may not unilaterally impose any pole attachment rate, term, or condition on an attaching party through construction manuals or other informal documents that is inconsistent with the terms of its tariff or the Commission's rules.**

(b) Response: Pursuant to KRS 278.160(1), a utility is required to file schedules (i.e., tariffs) showing all rates and conditions for service with the Commission. Pursuant to KRS 278.160(2), a utility is prohibited from charging more or less for service than the amount prescribed by the schedule it filed with the Commission. These provisions generally provide the statutory basis for the filed-rate doctrine in Kentucky, which is a concept that the rates, terms, and conditions of a utility's tariff control until they are modified in a specific manner proscribed by law and then those modifications only apply prospectively. Thus, KRS Chapter 278 includes protections against unilateral changes in the terms and conditions of service imposed by a utility.

However, the language proposed by KBCA arguably goes a little farther than limitations imposed by the filed-rate doctrine. A tariff filed with the Commission could reference outside documents such as a construction manual, which might set forth very specific terms regarding how certain work should be done. A tariff could also include language that allowed a utility to change its construction standards, subject to limits in the regulation and the tariff, without requiring a utility to file an entirely new tariff. KBCA's proposed language could potentially be read as requiring a new tariff filing for even minor changes to utility construction standards.

Even without the proposed edit, utilities will be limited by the regulation and specific language in their tariffs, which must be approved by the Commission, so it will be difficult for utilities to add items to construction standards beyond generally applicable engineering standards. Further, if a utility did add unnecessary construction standards simply to prevent or delay attachments, the Commission could address the issue by

requiring tariff changes for the specific utility that limit its ability to change such standards. Conversely, it would be burdensome for every utility to list or reference every construction standard in a tariff with no ability to update them without a formal tariff change. Thus, the amendment proposed by KBCA does not appear to be necessary or practical at this time.

(5) Subject Matter: Applicability of proposed regulation to utilities with joint use agreements and attachers with special contracts

(a) Comments: John T. Tyler on behalf of AT&T – AT&T asserts that the new pole attachment regulation should apply to all pole attachments, even if those attachments are currently governed by existing agreements, tariffs, etc. AT&T states that the proposed regulation should not make any distinction in pricing based upon their provision of service or the name of the attachment agreement and that pricing should deviate from tariffed rules by agreement of the partiers and only after the enactment of the new regulation. AT&T proposed the following changes to the proposed regulation at Section 1(9) (with proposed amendments in bold):

> (9) "New attacher" means a cable television system operator, telecommunications carrier, broadband internet provider, or **properly authorized** governmental unit requesting to attach new or upgraded facilities to a pole owned or controlled by a utility, except that a new attacher does not include ~~**a utility with an applicable joint use agreement with the utility that owns or controls the pole to which it is seeking to attach or**~~ a person seeking to attach macro cell facilities.

AT&T proposes amending Section 3(7), relating to pole attachment tariffs, as follows:

> (7) Tariffs conforming to the requirements of this administrative regulation and with a proposed effective date no later than March 31, 2022, shall be filed by February 28, 2022. **Absent express agreement by contracting parties to ratify rates that differ from tariffed rates, existing special contracts and joint use agreements shall conform their pricing to that in the tariffs filed pursuant to this subsection no later than March 31, 2022.**

Eric Langley and Rick Lovekamp on behalf of LG&E/KU – LG&E/KU propose two changes that they argue would clarify how the proposed regulation applies to existing joint use agreements. LG&E/KU asserts that Section 2(1), as written, means that incumbent local exchange carriers (ILECs) could be considered telecommunications carriers or broadband internet providers. LG&E/KU contend this would extend mandatory access rights to an ILEC, but an electric utility would not have the same access to the ILEC's facilities, which undermines the existing joint use agreements. LG&E/KU also

note that federal rules do not grant an ILEC mandatory access rights to poles, and that the Commission has indicated that it would not deviate from the that rule.

LG&E/KU assert that displacing joint-use agreements will leave electric utilities "out in the cold" because Section 3(1) would require electric utilities to file pole attachment tariffs applicable to ILECs, but electric utilities would not have reciprocal rights on ILEC poles. LG&E/KU also assert that the joint use agreements are bilateral in nature and replacing that with unilateral tariff terms would put ILECs at an advantage to other attachers.

LG&E/KU propose the following revisions to Section 1:

> (2) "Broadband internet provider" means a person who owns, controls, operates, or manages any facility used or to be used to offer internet service to the public with download speeds of at least twenty-five (25) megabits per second and upload speeds of at least three (3) megabits per second. **The term "broadband internet provider" does not include a utility with an applicable joint use agreement with the utility that owns or controls the poles to which it is seeking to attach.**
>
> (11) "Telecommunications carrier" means a person who owns, controls, operates, or manages any facility used or to be used for or in connection with the transmission or conveyance over wire, in air, or otherwise, any message by telephone or telegraph for the public, for compensation. **The term "telecommunications carrier" does not include a utility with an applicable joint use agreement with the utility that owns or controls the poles to which it is seeking to attach.**

Rocco D'Ascenzo and Jeremy Gibson on behalf of Duke Kentucky – Duke Kentucky makes the same argument as LG&E/KU that ILECs should be excluded from the definitions of broadband provider and telecommunications carrier.

Eric Langley and Brian West on behalf of Kentucky Power – Kentucky Power makes the same argument as LG&E/KU that ILECs should be excluded from the definitions of broadband provider and telecommunications carrier.

Chris Perry on behalf of KAEC – KAEC requests the regulation clarify the effect on existing agreements. KAEC states that the Commission should make clear that attachers and pole owners may continue to enter into such contracts, subject to Commission approval, and that neither the proposed regulation or a subsequent pole attachment tariff will nullify or supersede arrangements reached by mutual agreement. KAEC also asserts

that the regulation should make clear that it does not apply to existing or future joint use agreements.

(b) Response: A joint use agreement is an agreement between two pole-owning utilities in which they negotiate and establish terms under which they will provide access to each other's poles. Joint use agreements have been used by electric utilities and incumbent telephone utilities for decades. When 47 U.S.C.A. § 224 was amended to require access to utility poles, it initially only applied to cable television providers, because cable television providers, which generally did not own poles, were having difficulty gaining access to poles. When telephone service was deregulated at the federal level, 47 U.S.C.A. § 224 was expanded to require non-discriminatory access to telephone carriers, but the definition of telephone carrier in 47 U.S.C.A. § 224(a)(5) specifically excludes incumbent local exchange carriers (ILEC) from the definition of telephone carriers entitled to access pursuant to 47 U.S.C.A. § 224.

Telephone carriers with joint use agreements are in a better bargaining position than new attachers without such agreements, because the electric utilities need access to the telephone carriers' poles. Further, if ILECs could abandon their joint use agreements and seek to obtain access pursuant to the proposed regulations at tariffed rates, then electric utilities would have little bargaining power in gaining needed access to ILEC's poles and it would be necessary to create a process to regulate electric utilities' access to those poles. Finally, pole attachments are a service offered by a utility for a rate,[2] and therefore, even if the proposed regulation is not applicable to ILECs, the Commission has indicated that joint use agreements are subject to the Commission's jurisdiction and the provisions of KRS Chapter 278, including those requiring fair, just, and reasonable rates. For that reason, if an ILEC believes that rates or terms of service in a joint use agreement violate the provisions of KRS Chapter 278, then they can complain to the Commission, and the Commission has the authority to modify the agreement prospectively.

Based on the above, AT&T's comment does not support amending the regulation. Conversely, amending the definitions of broadband provider and telecommunications carrier as proposed by the electric utilities would provide clarity in the application of the regulation. Thus, the Commission will amend the regulation as proposed by LG&E/KU. However, KRS Chapter 278 would still apply to attachments made pursuant to a joint use agreement.

The proposed regulation should not be amended as proposed by AT&T to require that existing special contracts conform to the pricing and access terms in proposed tariffs absent an express agreement by contracting parties to ratify rates that differ from the tariffed rates. Prior to proposing this regulation, the Commission regulated pole attachments through utility tariffs and special contracts, which are contracts for service with terms that are different than those in a utility's filed tariff. Special contracts are

[2] *See Kentucky CATV Ass'n v. Volz,* 675 S.W.2d 393 (Ky. App. 1983).

generally negotiated by sophisticated parties and presumably involve give and take among the parties as to their specific terms. It would not be appropriate to simply conform the pricing and access terms in a special contract to the terms in a new tariff filed pursuant to this regulation without looking at the relevant contract. Rather, the Commission believes that existing special contracts should continue to control until they expire or until they are amended or are otherwise modified. If a party to an existing special contract contends that rates or terms contained therein are no longer fair, just and reasonable in light of changes in this regulation, then they have to the ability to file a complaint with the Commission and the Commission may review the contract at that time and modify as necessary consistent with KRS Chapter 278.

(6) Subject Matter: Adoption of provision specifically establishing how rates for pole attachments shall be established.

(a) Comment: John T. Tyler on behalf of AT&T – AT&T Kentucky indicates that in order to comply with House Bill 320 and to properly preempt federal regulation that the Commission must adopt regulations that specifically address the rates of pole attachments, including the rates of pole attachments for ILECs with joint use agreements and broadband affiliates of electric utilities. AT&T Kentucky proposes a new section to the regulation of the following:

> **Section 7. Rates**
>
> **(1) Rates for access to utility poles, ducts, conduits and rights-of-way shall be developed in accordance with rate rules promulgated by the Federal Communications Commission in 47 C.F.R. Chapter I, Subchapter A, Part 1, Subpart J, section 1.1406(d)(2) inclusive of future changes as those regulations may be amended or interpreted by the FCC or bureau order or a court of competent jurisdiction.**
>
> **(2) Changes in effective and applicable Federal Communications Commission rate regulations shall be deemed to take effect under this administrative regulation 90 days after the effective date of the changes in the FCC rule(s).**

Matthew DeTura on behalf of CITA – CTIA asserts that the proposed regulation does not provide guidance on what are fair, just and reasonable rates, which increases the possibility of discriminatory rate structures, particularly for pole-top attachments. CTIA also asserts that the lack of clarity in the proposed rules pertaining to rates, terms, and conditions, and reliance on tariffs to incorporate these, will make it more likely that the attachers will bring complaints with the Commission.

CTIA proposes that the Commission include a model tariff within the proposed rules that specifies a baseline for rates, terms, and conditions that the Commission finds just and reasonable. CTIA recommends that the model tariff incorporate the FCC's pole rate formula, and require pole owners to explain and justify any deviations from the formula.

Chris Perry on behalf of KAEC – KAEC supports addressing pole attachment rates through tariff filings. KAEC argues that any discussion of rates and cost-sharing related to pole attachments demands and deserves much more focused attention, specific data and fact-finding, and informed testimony from interested parties; therefore, efforts to broaden the scope of the proposed regulation at this point should continue to be rejected.

(b) Response: The Commission is not required to adopt a provision indicating specifically how rates will be calculated. i.e., a specific formula, in order to preempt federal regulation of pole attachments pursuant to 47 U.S.C.A. 224 or to comply with HB 320. 47 U.S.C.A. 224(c)(1) indicates that the FCC does not have jurisdiction with respect to the rates, terms, and conditions, or access to poles, ducts, conduits, and right-of-ways if such matters are regulated by a State. Section 224(c)(3) states, in relevant part, that a State shall not be considered to regulate rates, terms, and conditions for pole attachments "unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments." House Bill 320 (2021) states, in relevant part, as follows:

> Prior to December 31, 2021, the commission shall promulgate administrative regulations regarding pole attachments under the commission's jurisdiction, including those necessary for the provision of broadband service.

The proposed regulation, among other things, requires utilities to file tariffs, consistent with KRS Chapter 278 that include rates, terms, and conditions governing pole attachments. This establishes the process by which rates are set and generally applicable rules in KRS Chapter 278 and 807 KAR Chapter 5 establish how rates should be determined—e.g., KRS 278.030 (requiring rates to be fair, just and reasonable), KRS 278.170 (prohibiting any unreasonable preference or advantage in terms of service and rates), KRS 278.2201 (prohibiting a utility from subsidizing unregulated activity), and KRS 278.2207 (indicating that services provided to an affiliate must be provided at the tariffed rate and in no event less than market). The proposed regulation, in establishing rates in the same manner the Commission establishes rates for other utility services, is sufficient to preempt federal regulation and to comply with HB 320 and is a reasonable method for setting rates. Further, there is an administrative case, often referred to by commenters throughout this process, in which the Commission provides guidance for pole attachment rates.

With respect to the specific proposal to incorporate the federal formula for calculating pole attachment rates by reference, it is likely unlawful and may result in rates

that are not fair, just and reasonable. KRS Chapter 13A includes specific prohibitions against incorporating federal regulations by reference that would potentially be violated by AT&T's proposal. Additionally, the current federal formula does not allow utilities to recover all costs and returns associated with pole investments from attachers, so costs that should be borne by attachers would be shifted to other utility customers if the Commission adopted the federal formula. Thus, even if it were necessary to include a formula in the regulation, an amendment adopting the federal formula would not be appropriate.

CTIA's proposal for a model tariff would also be inappropriate. First, the proposed regulation itself includes a number of very specific requirements regarding how applications for pole attachments must be processed and how make ready costs should be paid, and the proposed regulation requires that utilities' tariffs only contain terms that are consistent with the regulation. In that way, the proposed regulation already provides specific guidance regarding what must be in a utility's tariff. There is no need to place these requirements in the form of a tariff that would be attached to the regulation.

CTIA's comments also do not support adding more specific terms to the regulation at this time. With respect to rates, the proposed regulation appropriately requires rates to be set in a manner similar to other utility rates. Other than its suggestion with respect to rates, CTIA does not suggest specific terms for the Commission to include in a model tariff, so it is unclear what other terms CTIA would suggest the Commission include. However, it would be extremely difficult, if not impossible, to craft all terms and conditions for attachments in a generally applicable regulation, because all of the utilities' systems, staffing, resources, and service areas are different.

In fact, the federal pole attachment regulation does not include all required attachment terms and conditions. Rather, under the federal regulation, pole owners may require new attachers to sign license agreements with extensive terms and conditions established by each utility, and the deadlines in the federal regulation, which are similar to those in the proposed regulation, are tolled while the parties work out the terms and conditions of the licensing agreement. Conversely, by requiring utilities to include the terms and conditions for pole attachments in the tariffs, the proposed regulation will eliminate the need for new attachers to negotiate license agreements with utilities before they can pursue attachment requests and, therefore, should make Kentucky's process more streamlined than even the federal rules, at least with respect to the licensing agreements.

(7) Subject Matter: Amend proposed regulation to allow exception where union contracts require work to be performed by union employees.

(a) Comments: John T. Tyler on behalf of AT&T – AT&T asserts that the self-help and one touch make ready (OTMR) attachment rules should include an exception "honoring attachers' collective bargaining agreements." AT&T states that its union contracts require union employees to complete make ready. AT&T states that there is no sound justification

to not exempt AT&T and similarly situated employers from this requirement. AT&T proposes a new subsection to Section 4 of the proposed regulation that states as follows:

> **(11) A utility with a collective bargaining agreement existing as of the effective date of these administrative regulations, requiring the engineering or make-ready on its poles or attachments be performed by its own employees shall not be subject to the self-help remedies or one-touch make-ready described in subsections 9 and 10.**

(b) Response: The proposed regulation was conceived primarily to establish specific deadlines for the completion of make ready and self-help remedies for the completion of make ready if those deadlines were not met. The proposed amendment would effectively eliminate the self-help remedies and OTMR in situations where a utility has an agreement with a union to perform work. AT&T's comment does not justify amending the regulation to create such an exemption.

(8) Subject Matter: Add definitions for "Standard Contract," "Special Contract," and "Joint Use Agreement" to Section 1.

(a) Comment: John T. Tyler on behalf of AT&T – AT&T proposes to add definitions for the terms "Standard Contract," "Special Contract," and "Joint Use Agreement" to Section 1 based on the manner in which they are used in the regulation. Specifically, AT&T proposes to add the following definitions:

> **(13) "Standard Contract" is one that solely incorporates rates, terms and conditions from the tariff.**
>
> **(14) "Special Contract" is one that is negotiated by the parties and contains rates, terms or conditions that vary from the tariff.**
>
> **(15) "Joint Use Agreement" is a particular type of Special Contract between two entities with rates, terms and conditions for attachments to each other's poles.**

(b) Response: These definitions are not necessary in the proposed regulation. The standard contracts or licenses are described in detail in Section 3 such that it is apparent that they must be based on the tariff. Special contract is a term that is used in KRS Chapter 278 and elsewhere in 807 KAR Chapter 5 such that it is not necessary to define it here. Finally, joint use agreement is a term with a generally understood meaning in the utility industry.

(9) Subject Matter: Narrow the exclusion for attaching to poles used to primarily support lighting by amending Section 2(1)(b)

(a) Comment: John T. Tyler on behalf of AT&T – AT&T proposes to amend Section 2(1)(b) as follows (with amendments in bold):

> (b) A utility shall not be required to provide access to any **decorative** pole**, though access to any wood pole** that is used primarily to support outdoor lighting **shall not be denied except for reasons described in paragraph (a) of this subsection**; and

(b) Response: The exception AT&T proposes to edit was added before this regulation was filed pursuant to KRS Chapter 13A, because certain electric utilities felt that the term "poles" or "utility poles" could be interpreted to include lighting poles. They argued that while they are the owners of the light poles, they are generally installed at the request of a specific customer. They further noted that the light poles are often selected from a number of options based on the aesthetics chosen by the customer and argued that customers should not be forced to allow attachments on their lights. AT&T's comments do not support editing the exception at issue, because lighting customers should not be required to allow attachments on their lights simply because they chose a wood light pole. Attachments would still be required for poles with a light if lighting is not the primary purpose of the pole i.e. if there is a light on an electric distribution pole.

(10) Subject Matter: Narrow Section 3, subsections (4) and (5) to limit/prohibit individual company determined engineering standards.

(a) Comment: John T. Tyler on behalf of AT&T – AT&T proposes making minor edits to Section 3(4) and Section (5) as shown below in bold:

> (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.
>
> (5) The tariff shall not prohibit overlashing except if doing so is justified by lack of capacity, safety or reliability concerns, or **generally** applicable engineering standards.

(b) Response: In Section 2(1), the proposed regulation explicitly states that utilities may deny access for "reasons of safety, reliability, and generally applicable engineering purposes." Section 3(4) and (5) were added following informal comments but are intended to reference language in Section 2(1). The Commission agrees with AT&T's proposed edit to Section 3(4). The proposed edit to Section 3(5) is not necessary due to other changes to that Section.

(11) Subject Matter: The time in which to submit a final make ready invoice

(a) Comments: John T. Tyler on behalf of AT&T – AT&T Kentucky notes that a new attacher has up to 12 months to make the attachment, regardless of when the make ready work is completed. AT&T Kentucky states that 90 days is too short of a period in which to submit make ready invoices and proposes the following changes, which are bolded, to Section 4(6)(a):

> (a) Within a reasonable period, not to exceed ninety (90) days after ~~**a utility completes the utility's make-ready**~~ **the new attachment is constructed or the new attachment passes the utility's inspection, whichever is later**, the utility shall provide the new attacher:

Rocco D'Ascenzo and Jeremy Gibson on behalf of Duke Kentucky – Section 4(6)(a) currently provides utilities a reasonable time, not to exceed 90 days from the completion of make ready work, to submit final bills for make ready work. Duke Kentucky argues that it takes time to close out work orders from contractors, which is necessary to submit the final bill to new attachers. Duke Kentucky argues that the period for submitting final bills should be extended to 180 days minimum.

> Eric Langley and Brian West on behalf of Kentucky Power – Kentucky Power asserts that 90 days will be too short a period of time in which to issue final-make ready invoices. Kentucky Power states that a work order is not closed until at least 60 days after completion of work, after which there is a reconciliation to ensure that all charges are correct. This process, Kentucky Power asserts, usually takes more than 90 days. Kentucky Power proposes to remove the 90-day requirement. In the alternative, Kentucky Power proposes that the 90-day requirement be extended to 180 days.

Paul Werner on behalf of KBCA – KBCA argues that 6 months to submit final invoices is reasonable and that the deadline should remain at 90 days as the Commission initially required.

(b) Response: The federal pole attachment regulation does not include a specific time period in which a final make ready invoice must be sent, and this has apparently resulted in certain utilities sending their final invoices months or even years after make ready is complete. Such late bills make it very difficult for attachers to assess the validity of the

charges, so the Commission added language to the proposed regulation indicating that final invoices must be sent within a reasonable period not to exceed 90 days.

The language proposed by AT&T could push back the deadline for the final bill for make ready significantly and would establish a deadline based on events other than the completion of make ready. However, the commenters have made the case that additional time may be necessary to send final invoices for make ready work to give the utilities time resolve issues with contractor bills. To balance the interest of the attachers, the Commission will amend Section 4(6) to allow a reasonable period, not to exceed 120 days, as opposed to the 90 days in the proposed regulation or the 180 days proposed by utilities.

(12) Subject Matter: Amend Section 4(1)(a)3.d. to explicitly state what happens when an attachment is deemed complex.

(a) Comment: John T. Tyler on behalf of AT&T – AT&T Kentucky suggest clarifying the procedure after a simple classification for an OTMR is successfully challenged. AT&T Kentucky proposes the following amendment to Section 4(10)(a)3.d:

> d. If the utility's or the existing attacher's objection to the new attacher's determination that make-ready is simple complies with clause c. of this subparagraph, then the make-ready shall be deemed to be complex, **and the new attacher may not proceed with the affected proposed one-touch make-ready**.

(b) Response: The language proposed by AT&T is consistent with how the federal regulation has been interpreted and how the Commission believes this regulation would be interpreted. Thus, the Commission will accept the proposed amendment as it may provide clarity.

(13) Subject Matter: Delete Section 5(4) because it is duplicative of Section 2(1)(a).

(a) Comment: John T. Tyler on behalf of AT&T – AT&T proposes deleting Section 5(4), because it contends it is duplicative of Section 2(1)(a). In lieu of deletion, AT&T Kentucky proposes the following amendment to Section 5(4), in bold:

> (4) A ~~**consulting representative of an electric**~~ 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.

(b) Response: Section 2(1)(a) provides a broad substantive exception to the general rule requiring a utility to provide non-discriminatory access to poles, stating:

> A utility may deny access to any pole, duct, conduit, or right-of-way on a non-discriminatory basis where there is insufficient capacity or for reasons of safety, reliability, and generally applicable engineering purposes.

While it is arguably duplicative, Section 5(4) deals more with process, indicating that it is the utility's representative, as opposed to the contractors referenced in Section 5, that can make the determination regarding whether there is insufficient capacity for an attachment or whether an attachment request should be denied for reasons of safety, reliability, and generally applicable engineering purposes. Thus, Section 5(4) should not be deleted but Section 5(4) should be amended to delete the term "electric," because it could create confusion regarding when utilities can reject attachments for reasons of safety, reliability, and generally applicable engineering purposes.

(14) Subject Matter: Allow for electronic notice in Section 6(3)(a)

(a) Comment: John T. Tyler on behalf of AT&T – AT&T proposed to amend Section 6(3)(a) to allow electronic notice in Section 6(3)(a) by making the following amendment, in bold, to that section:

> (a) Unless an applicable tariff or special contract or Section 4 of this administrative regulation establishes a different timeframe, existing attachers shall transfer their attachments within 60 days of receiving written **or electronic** notice from the utility pole owner.

(b) Response: This edit is not necessary, because "written notice" could be a document in paper medium or in electronic form. Further, the manner in which the edit is proposed implies that written notice and electronic notice are two distinct things.

(15) Subject Matter: Utilities' ability to move existing attachments for safety and reliability purposes

(a) Comment: John T. Tyler on behalf of AT&T – AT&T proposed deleting Section 6(3)(d), which allows a utility to unilaterally move existing attachments to a new pole "if an expedited transfer is necessary for safety or reliability purposes." AT&T argues that it leaves too much discretion to the pole owners to determine when such expedited pole replacements are necessary.

(b) Response: It is not necessary to delete or amend Section 6(3)(d). Utilities can only engage in an expedited transfer if the expedited transfer, not just the transfer itself, is necessary for safety or reliability purposes. Further, this provision is important to ensure that Section 6(3)(a) or (b), which require notice before such transfers are made in

the ordinary course of business, are not read as prohibiting utilities from taking actions necessary to protect public safety and the continuity of service.

(16) Subject Matter: Delete or modify the presumption in Section 7(7)(b) that poles may be presumed to be "red tagged" poles if there is a dispute and the utility does not have adequate inspection records.

(a) Comment: John T. Tyler on behalf of AT&T – AT&T proposed to delete Section 7(7)(b) as each new attacher has the opportunity to be present at the field inspection as part for the application process. The new attacher, during the field inspection, may then inspect the pole to determine if it should be "red tagged."

Eric Langley and Rick Lovekamp on behalf of LG&E/KU – LG&E/KU take issue with the provision in Section 7(7)(b) which provides a pole may be presumed to be "red-tagged" if a utility failed to document and maintain records regarding inspections of a pole and that no deficiencies were found on the pole.

LG&E/KU assert that this may require the utility to produce a "clean bill of health" for a pole in a dispute to overcome the presumption that the pole is to be "red-tagged." LG&E/KU assert that this does not appear to be the Commission's intent because the inspection regulation, 807 KAR 5:006 (referenced in Section 7(7)(b)), does not impose that level of documentation. LG&E/KU assert that such an interpretation would impose an onerous administrative burden, and unnecessary expenses, on an electric utility.

LG&E/KU argue that they would have to change how they inspect poles – they currently inspect their distribution system, circuit by circuit, every two years, asserting this complies with 807 KAR 5:006. This includes a visual inspection of each pole and a "sounding" of 10% of all poles in each circuit for internal decay. LG&E/KU note the poles that have issues but they do not maintain a "clean bill of health" record for the poles that do not have issues. LG&E/KU state that if they had to maintain the "clean bill of health" they would have to maintain two separate sets of records, one showing deficient poles, the other the healthy poles.

Eric Langley and Rick Lovekamp on behalf of LG&E/KU: LG&E/KU also assert that attachers could exploit this ambiguity to shift costs of pole replacements to utilities' customers.

LG&E/KU proposed that the Commission either delete Section 7(7)(b) or adopt a new section, 7(7)(c) as proposed below:

> **Records indicating that a pole was inspected as part of a circuit inspection and not designated as requiring replacement are sufficient to overcome the presumption in subsection (7)(b) of this section.**

Eric Langley and Brian West on behalf of Kentucky Power – Kentucky Power made the same argument as LG&E/KU regarding this issue.

(b) Response: Section 7(7)(b) was added to address concerns that utilities were not properly inspecting poles such that long-term issues were identified when surveys for make ready were performed with attachers being asked to cover the cost. Attachers also alleged that utilities would sit on poles that are in a bad condition and would seek to replace them when a new attachment request is made. While the utilities deny those allegations, Section 7(7)(b) was added to create rebuttable presumption that a pole is a red tagged pole that the utility would be responsible for replacing if there is a dispute regarding the condition of the pole and the utility could not produce evidence that it conducted required or periodic inspections of the pole. While the presumption may apply in limited circumstances, if a utility can produce direct evidence as to the condition of the pole, it is important to ensure that regular inspections are completed and poles are designated for replacement where necessary before attachers make attachment requests. Further, without commenting on whether inspections described by utilities comply with 807 KAR 5:006, Section 7(7)(b) is clear as to how it should apply. Thus, no amendment is necessary at this time.

(17) Subject Matter: Amend Section 7(a) to include complaints regarding attachment rates.

(a) Comment: John T. Tyler on behalf of AT&T – AT&T proposes to amend Section 7(8)(a) such that the deadline for resolving claims applies to complaints about rates. Specifically, AT&T proposes to amend paragraph (a) by adding the bolded language below.

> (a) The commission shall take final action on a complaint alleging that a person or entity was **charged an unlawful rate or was** unlawfully denied access to a utility's pole, duct, conduit, or right-of-way within 180 days of a complaint establishing a prima facie case being filed, unless the commission finds it is necessary to continue the proceeding for good cause for up to 360 days from the date the complaint establishing a prima facie case is filed.

Chris Perry on behalf of KAEC – KAEC requests that the proposed regulation be amended to clarify that pole owners may bring complaints against attachers. KAEC asserts that the regulation allows for complaints to be filed against an attacher, but that the time limitation in complaints applies only to a complaint, "alleging that a person or entity was unlawfully denied access to a utility's pole, duct, conduit, or right-of-way." KAEC asserts that complaints filed by pole owners should be subject to the same time limitation.

(b) Response: Section 7(8)(a) should be amended to expand applicability of the deadlines. Upon reviewing this matter, it was determined that 47 USCA § 224 requires that any complaint regarding the rates, terms, and conditions of pole attachments be addressed within 180 days if a State does not establish a shot clock in a regulation or within 360 days if a State establishes a shot clock in a regulation. As indicated in the bolded language below, the Commission will mirror the language from 47 USCA § 224(c) and indicate that the deadline will apply to any complaint regarding the rates, terms, and conditions for access to poles, ducts, conduits, or right of ways.

> (a) The commission shall take final action on a complaint **regarding the rates, terms, and conditions for** ~~**alleging that a person or entity was unlawfully denied**~~ access to a utility's pole, duct, conduit, or right-of-way within 180 days of a complaint establishing a prima facie case being filed, unless the commission finds it is necessary to continue the proceeding for good cause for up to 360 days from the date the complaint establishing a prima facie case is filed.

This edit should bring complaints regarding rates within the deadline in Section 7(8)(a) and should also be broad enough to include any complaints regarding the denial of access.

(18) Subject Matter: Remedy Process and liability protection for pole owners

(a) Comment: Chris Perry on behalf of KAEC – KAEC requests that the regulation provide a remedy process and liability protection for pole owners when attachers exercise self-help or one-touch make-ready rights. KAEC states that the regulation currently does not provide a mechanism for a utility to remedy issues or be compensated for damages caused by third parties performing OTMR work. KAEC asserts that the Commission sets a dangerous precedent by providing for self-help and OTMR but not providing liability protections similar to those contained in the FCC regulations.

KAEC asserts that there are significant inherent risks when dealing with pole attachments, particularly those performed by a third party, and that reliability and economic injuries are abundant. KAEC asserts that the Commission should explicitly limit the liability of pole owners and existing attachers at locations where another party has exercised these unilateral rights in order to ensure that electric ratepayers are responsible only for costs associated with the electric service they receive.

(b) Response: Section 3(2) of the proposed regulation allows utilities to require new attachers sign a standard contract or license agreement before they are allowed to attach so long as such an agreement is consistent with the tariff. Section 3(4) allows a utility to include fair, just and reasonable terms, subject to approval by the Commission, "such as certain limitations on liability, indemnification and insurance requirements . . . ."

Section 3(4), which is similar to language in Vermont's pole attachment regulation, was included to make clear that the Commission will allow insurance and indemnity requirements, in at least some form, to be included in the terms and conditions of the pole attachment tariff. This language was included to allow utilities to propose terms shifting liability like those typically found in most commercial leases. Section 3(2) allows utilities to include those terms in a standard contract in the event it is determined that limitations on liability in tariffs are invalid. Those provisions address the liability issues KAEC raises. Further, given constitutional limitations on the Commonwealth's ability to impose limits on liability, often referred to as the jural rights doctrine, the Commission's ability to impose limitations on liability, as distinguished from not prohibiting a utility from imposing such limitations through a contract, is not entirely clear. Thus, Section 3(4) and Section 3(2) address KAEC's concerns appropriately and in the manner most consistent with Kentucky law.

With respect to KAEC's request for a remedy process, utilities can file a complaint pursuant to Section 7 regarding the rates, terms and conditions for access to poles within the Commission's jurisdiction. If KAEC is seeking a remedy process for tort damage, e.g. a new attacher negligently damages property, the claim would potentially be outside the Commission's jurisdiction such that it would need to be addressed in the relevant court. However, if a utility has insurance and indemnity requirements in its standard contracts, it should be able to resolve such claims quickly.

(19) Subject Matter: Implementation period for regulation may cause confusion for attachers

(a) Comment: Matthew DeTura on behalf of CTIA: CTIA asserts that the current February 2022 deadline for utilities to file tariffs conforming with the new regulation will cause confusion for attachers during the transition period as the attachers and the Commission will have to review the new tariffs. CTIA asserts this places attachers at a negotiating disadvantage and increase the likelihood for error. CTIA also proposes a docket consolidating all tariffs in one place for review.

(b) Response: Reviewing tariffs filed pursuant to the regulation should not place an undue burden on attachers. There will always be some confusion regarding the timing of the implementation of a new regulation. However, this regulation is implemented through tariff filings that change the rates, terms, and conditions of utility pole attachment service. The Commission routinely addresses such tariff changes.

Pursuant to KRS 278.180, a utility, with limited exceptions, must provide 30 days' notice to the Commission of any proposed tariff changes. This is accomplished by a utility filing a tariff with a proposed effective date at least 30 days from the date the tariff is filed. Pursuant to KRS 278.190, the Commission can then suspend the effective date of the regulation by 5 or 6 months, depending on the manner in which rates are projected, in order to review the tariff and, if necessary, order changes to the same. If a tariff is suspended, it establishes a formal case before the Commission in which evidence can

be taken, parties can seek to intervene, and members of the public can comment. The utility's existing tariff continues to apply during the suspension period pursuant to KRS 278.190.

The Commission anticipates suspending the tariffs filed pursuant to this regulation such that the Commission and any relevant parties will have at up to 6 months, as necessary, to review the tariffs as part of a formal Commission case. The Commission does have the ability, under its general procedural rules, to consolidate cases arising from the same or similar issues, and believes that might be appropriate in reviewing some tariffs here for similarly situated utilities, but does not believe the regulation should be amended to require a consolidated review of the initial tariffs. Further, if an attacher is not currently interested in a tariff but later seeks to make attachments and believes that a tariff is unreasonable, then they could file a complaint with the Commission and the Commission, in its discretion, could open a case to determine if the tariff is reasonable and whether it should be modified.

(20) Subject Matter: Notice of proposed tariff changes

(a) Comment: Matthew DeTura on behalf of CTIA – CTIA asserts that the proposed regulation should implement a notice process for any tariff changes, with a reasonable time to allow attachers to review the tariffs.

Paul Werner on behalf of KBCA – KBCA also exhorts the Commission to require pole owners to provide 60-day advance notice before a change to rates or terms and conditions of pole attachments.

(b) Response: There are generally applicable notice requirements for tariff changes in 807 KAR 5:011 and 807 KAR 5:001 that essentially require any current customers to receive notice of the proposed changes, sometimes through publication, and require notice to be posted on a utility's website at or about the time the changes are filed with the Commission. These notice requirements should be sufficient. Further, the timing of required notice in the regulation is consistent with the period within which utilities must provide notice of proposed changes to the Commission pursuant to KRS 278.180.

(21) Subject Matter: Application of proposed regulation to transmission facilities.

(a) Comments: Chris Perry on behalf of KAEC – KAEC requests that the proposed regulation be amended to clarify to what facilities it applies, especially transmission facilities. Specifically, KAEC requests that the regulation specifically exempt the transmission facilities of the two cooperative generation and transmission utilities in Kentucky and specifically exempt the two from filing pole attachment tariffs. KAEC claims that this is consistent with the regulation, which is designed to only apply to distribution facilities.

Rocco D'Ascenzo and Jeremy Gibson on behalf of Duke Kentucky – Duke Kentucky noted that it appreciated the Commission's comments in the Regulatory Impact Analysis indicating that transmission lines could be excluded, where appropriate, as part of a tariff filing. However, it argued that the methodology shifts the burden onto the utility to prove why attachments should not be permitted on transmission poles in its service territory. Duke Kentucky then notes that transmission poles are inherently different from distribution poles, that attachments on transmission poles can cause reliability issues, transmission structures will have integrity issues due to excessive loading that become problematic in ice and windstorms, and transmission poles are the backbone of reliability.

(b) Response: The federal regulation does exempt transmission lines from the federal pole attachment regulation. Electric utilities argued during the informal process that transmission lines should be excluded from the definition of poles in the proposed regulation such that the proposed regulation would not govern access to transmission poles, in part, because making attachments to transmission poles presents unique safety, reliability, and engineering issues. The attachers that were part of the informal process argued that there are poles that act as both transmission and distribution poles (with distribution lines below and transmission lines above), and they argued those should be subject to the regulation. There was also a discussion during the informal process regarding how to define a transmission pole and whether the definition would be the same for all utilities.

Ultimately, the proposed regulation did not exclude transmission lines from the definition of poles subject to the regulation. However, it was modified to indicate that utilities may include tariff terms that restrict access to utility poles for reasons of lack of capacity, safety, reliability, or engineering standards. This specific language was added to allow utilities to include general prohibitions for attachments for certain types of poles, mainly transmission poles, in the utility tariffs. This is distinct from the federal regulation, which excludes transmission poles from the definition of poles subject to the regulation, but has otherwise been interpreted as prohibiting utilities from applying generally applicable prohibitions on classes of poles. The proposed regulation, by allowing utilities to include general prohibitions in tariffs, should allow utilities to define transmission facilities on their systems for which attachments present an issue. This should address the issues raised by commenters.

The proposed regulation will place the burden of establishing that certain poles should not be subject to the regulation on the utility, at least initially (if someone later files a complaint regarding an existing tariff, they would have the burden). However, as the party making the claim that such attachments should be prohibited, they should be the party with the burden. Further, even if they fail to establish that a generally applicable provision prohibiting attachments to certain poles for reasons of lack of capacity, safety, reliability, or engineering standards is appropriate, they would be able to reject certain attachments in specific instances for reasons of lack of capacity, safety, reliability, or engineering standards.

(22) Subject Matter: Whether a cooperative may be considered an attacher and allowed non-discriminatory access to others' poles.

(a) Comment: Chris Perry on behalf of KAEC – KAEC states that the proposed regulation does not make clear that electric distribution utilities would be considered attachers for the purpose of the regulation. KAEC notes that HB 320 addresses the cooperatives' role in broadband proliferation and non-discriminatory access to poles of other utilities is necessary for electric distribution utilities.

Daniel Reinhardt on behalf of AT&T – AT&T made a comment indicating that the regulation does not address whether cooperatives providing broadband service can make such attachments to their own poles under favorable rates.

(b) Response: The proposed regulation explicitly requires utilities to provide access to broadband providers. To the extent cooperatives, through an affiliate or otherwise, are acting as a broadband provider, no amendment is necessary to make clear that they are entitled to non-discriminatory access. However, consistent with KAEC's comments regarding joint use agreements, the proposed regulation would not apply to cooperatives' attachments subject to an applicable joint use agreement. In that sense, electric cooperatives are treated in a non-discriminatory manner with respect to other broadband providers to the extent they, through an affiliate or otherwise, are acting in the capacity as a broadband provider.

Like the FCC regulation, the proposed regulation was not contemplated as a means to provide access to electric distribution utilities acting in that capacity, because electric utilities have distinct service areas in which they own or have access to poles through joint use agreements. While it is not entirely clear what specific amendments KAEC would propose, the proposed regulation would likely require significant amendments, which have not been addressed, if electric distribution utilities acting in their capacities as electric distribution utilities were entitled to access poles at tariffed rates pursuant to the proposed regulation. Further, because electric distribution utilities generally only have equipment on their own poles or on the poles of other utilities with which they have joint use agreements, the applicability of such a change would presumably be limited. Lastly, in circumstances where an electric distribution cooperative, as distinguished from a broadband affiliate, seeks access to poles it does not own and which are not subject to an applicable joint use agreement, the regulation and KRS Chapter 278 would permit such attachments through a special contract.

With respect to cooperatives obtaining pole attachments on their own poles, the affiliate transaction statutes and KRS 278.170 should prohibit a utility from providing an unreasonable preference to such attachments to the extent they are made by an affiliate. If the attachments are made by the utility itself, a utility's use of more of its pole to provide service to its customers or otherwise will be addressed when costs are allocated to set rates.

(23) Subject Matter: Reserving capacity for future use

(a) Comment: Chris Perry on behalf of KAEC – KAEC requests that the Commission clarify that a utility has the authority to deny access to its poles, ducts, conduits and rights-of-way due to insufficient capacity based both on current use and reasonably-anticipated future need. KAEC states that it is not uncommon for utilities to build and reserve additional capacity for itself in its conduits and ducts, and that the sharing of ducts and conduits presents reliability and safety concerns not present for pole attachments.

(b) Response: This amendment would not be appropriate, because it creates a broad exception that would allow a utility to reserve unused capacity for an indefinite period. This could unnecessarily slow the deployment of broadband.

(24) Subject Matter: Revise rules to limit any self-help remedy to the communication space.

(a) Comment: Eric Langley and Rick Lovekamp on behalf of LG&E/KU – LG&E/KU exhorts the Commission to clarify in Section 4(9) that self-help remedy is confined to the communications space. LG&E/KU argues that new attachers should not be permitted to perform make ready work in the electric space because doing so is far more dangerous than make ready work in the communications space. Currently LG&E/KU permit only their personnel, or parties under LG&E/KU's direct control, to work in the electric space. LG&E/KU assert that there is no compelling policy reason to allow attacher to perform make ready work in the electric space as there is no indication that in Kentucky requiring an electric utility to perform work in the electric space hinders broadband deployment.

LG&E/KU propose revisions to three sections of the regulation to address their concerns, with the amendments in bold.

> Section 4(9):
>
> Make-ready. If make-ready **in the communications space** is not complete by the applicable date specified in subsection (4) of this section, then a new attacher may conduct the make-ready in place of the utility and existing attachers by hiring a contractor, ~~**to complete the make-ready**~~ as specified in Section 5 of this administrative regulation, **to complete such communications space make-ready. Under no circumstances shall any attacher, or any contractor hired by an attacher, complete make-ready above the communications space without the express written consent of the electric utility**.
>
> Section 4(4)(b)5:

State that if make-ready is not completed by the completion date established by the utility in subparagraph 2. of this paragraph (or, if the utility has asserted its fifteen (15) day right of control, fifteen (15) days later) the new attacher may ~~complete the make-ready specified pursuant to subparagraph 1 of this paragraph~~ **file a complaint with the Commission pursuant to Section 7 of this administrative regulation.**

Section 5(1):

Contractors for self-help **surveys and** complex ~~and above the communications space~~ make-ready. A utility **may, but is not required to,** ~~shall make available and~~ keep up-to-date a reasonably sufficient list of contractors the utility authorizes to perform self-help surveys and make-ready that is complex ~~and self-help surveys and make-ready that is above the communications space on the utility's poles~~. **If a utility provides such a list, then** ~~T~~**the** new attacher must use a contractor from this list to perform self-help work that is complex ~~or above the communications space~~. New and existing attachers may request the addition to the list of any contractor that meets the minimum qualifications in subsection (3) of this section and the utility shall not unreasonably withhold its consent.

LG&E/KU state that their proposed revisions only limit a new attacher's rights to work within the electric space but would not eliminate the ability for a pole owner to negotiate with attachers for a contractual right to work in the electric space, subject to utility-approved safeguards.

Eric Langley and Brian West on behalf of Kentucky Power – Kentucky Power, like LG&E/KU, proposes amendments to Section 4(4)(b)5, Section 4(9)(b), and Section 5(1) to eliminate self help for make ready above the communication space. Kentucky Power opposes any self-help work that extends beyond the communications space and states that allowing such work does not make sense from a risk/benefit perspective. Kentucky Power asserts that there is no record in the proceeding that an electric utility's failure to perform make-ready work in the electric space causes delay in broadband deployment. Kentucky Power states that, in its experience, less than 5% of all make-ready work occurs within the electric space. Thus, Kentucky Power asserts the self-help remedy in the electric space would provide a minimum benefit to attachers.

Kentucky Power emphasizes the dangers of allowing self-help work in the electric space and points to states (Arkansas, Georgia, New Hampshire, and Washington) that prohibit self-help in the electric space. Kentucky Power exhorts the Commission to adopt

a similar prohibition and allow an atatcher to file a complaint if an electric utility fails to timely perform make-read work within the electric space.

Rocco D'Ascenzo and Jeremy Gibson on behalf of Duke Kentucky – Duke Kentucky agreed with LG&E/KU and Kentucky Power's oral comments that self help should not be available in the Communication space.

Paul Werner on behalf of KBCA – KBCA supported maintaining self help remedies in the communication space as a means to ensure that make ready is completed in a timely manner. KBCA noted that the work would be completed by utility approved contractors.

(b) Response: The remedy of self-help above the communications space, whether in the electric space or above the electric space, can occur only if the electric utility fails to complete make ready within the time specified in the regulation and the attacher may only exercise this self-help remedy using a utility-approved contractor. This provides a useful incentive to a pole owner to conduct make ready in a timely manner, and, in the event such work is not completed in a timely manner, the utility is protected by preapproving contractors that may perform the make ready in the electric space, which should alleviate safety/reliability concerns.

(25) Subject Matter: Revise Section 3 to allow electric utilities to incorporate existing terms and conditions that deviate from the proposed rules into the new tariffs

(a) Comment: Eric Langley and Rick Lovekamp on behalf of LG&E/KU –LG&E/KU assert that Section 3 should be revised to clarify that electric utilities can retain existing pole attachment terms and conditions contained in their tariffs. LG&E/KU state that they oppose any rule that would displace or contradict their existing pole attachment tariffs.

LG&E/KU explain that their existing pole attachment tariffs are the product of several regulatory proceedings and negotiations, which LG&E/KU state make their tariffs presumptively just and reasonable. LG&E/KU point to their pole attachment tariffs adopted as a result of a 2016 rate case, which, *inter alia*, limited the standard make ready response time for requests exceeding 300 poles. LG&E/KU included the high volume application clause in its subsequent tariffs filed pursuant to rate cases and notes that no party contested this inclusion.

LG&E/KU argue that because the current terms and conditions in pole attachment tariffs are presumptively just and reasonable, the proposed regulation should "embrace" these existing terms and conditions. To that end, LG&E/KU propose the following for a new section, Section 3(8):

> **A utility is not prohibited from including in the tariff required by subsection (7) of this section any term or**

condition from the tariff that it had on file with the commission as of the effective date of 807 KAR 5:015.

Paul Werner on behalf of KBCA – KBCA noted that the proposal by electric utilities to create exceptions for terms in existing tariffs would defeat the entire purpose of the proposed regulation. It would mean that attachers are simply left to negotiate terms and conditions of attachment in a piecemeal fashion, which would simply result in delays.

(b) Response: This proposed amendment would essentially create an exception to the requirements of this regulation for any pole attachment term or condition in existing pole attachment tariffs. Utilities have had tariffs on file with the Commission addressing pole attachments for decades, but there were no specific regulatory requirements such as deadlines for reviewing applications and completing make ready. This amendment would essentially allow those existing tariffs to control. It would make large parts of the proposed regulation inapplicable to most utilities based on their existing tariffs, and it would make the proposed regulation apply differently to every utility based on the tariff they had on file as of the effective date of the regulation. Thus, LG&E/KU's proposed amendment undermines the purpose of this regulation.

(26) Subject Matter: Reconsider the timeline in Section 4(7) on larger attachment requests

(a) Comment: Eric Langley and Rick Lovekamp on behalf of LG&E/KU – LG&E/KU exhort the Commission to amend Section 4(7) to allow electric utilities to negotiate the timing of large (greater than the lesser of 300 poles or 0.5% of the utility's poles) attachment orders. LG&E/KU state that its largest order to date has been 220 pole per month, and it is unnecessary to require utilities to be ready to process larger orders before a duty to negotiate is triggered. LG&E/KU also state that the current proposed threshold for large orders (the lesser of 1,000 poles or 1.5% of the total poles) does not provide a utility with sufficient time to complete large orders. LG&E/KU proposes requiring new attachers to negotiate attachment timelines with utilities for attachment requests that exceed the lesser of 300 poles or 0.5% in 30 days.

Paul Werner on behalf of KBCA – KBCA noted that the number of attachment requests that have been made in the past is not actually indicative of the number of attachment requests that will be made in the future, in part due to federal and state funding that has been allocated for broadband deployment. KBCA would ask that the Commission evaluate attachment numbers in that light.

(b) Response: The Commission, as part of the informal drafting process with stakeholders, substantially reduced the high volume threshold as compared to those of the FCC from the lesser of 3,000 or 5% of a utility's poles to the lesser of 1,000 or 1.5% of a utility's poles. The Commission also added a notice requirement that is not in the federal regulation that required a new attacher to provide a utility 60 days' notice before

it can make an attachment request that exceeds 0.5% of a utility's total poles or 300 poles to allow a utility time to retain staff to address the high volume requests. With those modifications, the proposed timelines are reasonable.

(27) Subject Matter: Remove the requirement for advance notice of pre-application surveys for new attachers.

(a) Comment: Eric Langley and Rick Lovekamp on behalf of LG&E/KU – LG&E/KU propose that the Commission amend the regulation to accommodate LG&E/KU's existing practice requiring attaching entities to submit a survey as part of a complete application. LG&E/KU state that this expedites the approval process, and it believes that the Commission intended to include this requirement in the proposed regulation. LG&E/KU assert, however, that requiring new attachers to provide advance notice to existing attachers of pre-application surveys would undermine LG&E/KU's requirement for a survey to expedite the application process. LG&E/KU propose the following amendment to Section 4(2)(b)3 to address their concern:

> If a new attacher has conducted a survey pursuant to subsection (10)(~~c~~**b**) of this section, or **if a new attacher has conducted and provided a survey as part of its pole attachment application** ~~**a new attacher has otherwise conducted and provided a survey, after giving existing attachers notice and an opportunity to participate in a manner consistent with subsection (10)(c)**~~, a utility may elect to satisfy survey obligations established in this paragraph by notifying affected attachers of the intent to use the survey conducted by the new attacher and by providing a copy of the survey to the affected attachers within the time period established in subparagraph 1. of this paragraph.

(b) Response: LG&E/KU's comment does not justify amending the regulation. In other circumstances, including when the attacher performs the survey under the OTMR provisions, the regulation requires existing attachers to receive notice of the survey, so they can attend the field inspection to assess the make ready that may relate to their equipment. However, LG&E did correctly note that the subparagraph quoted improperly referenced subsection (10)(c) instead of (10)(b), so the Commission will make that edit.

(28) Subject Matter: Pole attachment regulations should be consistent with those of the FCC.

(a) Comment: Rocco D'Ascenzo and Jeremy Gibson on behalf of Duke Kentucky – Duke Kentucky argues that the regulation should mirror the federal regulation to the extent possible, because it argues it is easier to comply with the regulation if it mirrors the

federal regulation with which it is familiar. Duke Kentucky then refers to Section 4(4)(c) of the proposed regulation, which requires the pole owner to provide a new attacher with a copy of the notices sent to existing attachers notifying them of the new attachment and the existing attachers' contact information and address where the utility sent the notices, so the new attacher can coordinate make ready with existing attachers.

Duke Kentucky argues Section 4(4)(c) is overly broad and unduly burdensome for a utility. It notes that it currently provides notice to existing attachers using an electronic system and argues that it should not be required to provide the contact information and all notices sent to existing attachers. Duke requests that Section 4(4)(c) be eliminated.

(b) Response: The proposed regulation is modeled on the federal regulation and should be applied in a substantially similar way. It was primarily modified to address issues that have arisen under the federal regulation and to fit the regulation within the Commission's regulatory structure, including the requirement in KRS 278.160 that require all rates and terms of service to be included a utility tariff.

With respect to the provision specifically mentioned by Duke Kentucky, Section 4(4)(c) is substantively identical to the FCC regulation at 47 C.F.R. § 1.1411(e)(3), which states:

> Once a utility provides the notices described in this section, it then must provide the new attacher with a copy of the notices and the existing attachers' contact information and address where the utility sent the notices.

Section 4(4)(c) in the proposed regulation is intended to allow the new attacher to confirm that existing attachers received notice and to allow new attachers to coordinate with existing attachers to complete make ready. This is important to ensure the completion of make ready. Further, this provision should not prevent Duke Kentucky from using its electronic notice system as long as it provides the new attacher with the notices and the existing attachers contact information.

(29) Subject Matter: Contractors for survey and make ready

(a) Comment: Rocco D'Ascenzo and Jeremy Gibson on behalf of Duke Kentucky – Duke Kentucky takes issue with language in Section 5 of the proposed regulation that allows new and existing attachers to request the addition of "any contractor" to the list of the utility's authorized contractors. Duke Kentucky argues that it has approved contractor lists "for a reason." It notes that the utility-approved contractors have the requisite training and knowledge to access poles in a manner that complies with the applicable safety regulation. Duke Kentucky argues that third-party attachers should be permitted to request to have their preferred contractor "qualified by the utility" but that they should be

subject to the exact standards and requirements as all other persons qualified to perform work on power lines.

(b) Response: The proposed regulation allows a utility to reject a contractor proposed by an attacher based on reasonable safety or reliability concerns related to the contractor's failure to meet minimum standards listed in the regulations or the utility's publically available and commercially reasonable safety and reliability standards. Thus, there is no need to modify Section 5 based on Duke Kentucky's comments.

(30) Subject Matter: Limitations on make ready costs

(a) Comment: Eric Langley and Brian West on behalf of Kentucky Power – Kentucky Power proposes the following amendment to Section 4(6)(b)1:

> A utility shall not charge a new attacher, as part of any invoice for make-ready, to bring poles, attachments, or third-party or utility equipment into compliance with current published safety, reliability, and pole owner construction standards if the poles, attachments, or third-party or utility equipment were out of compliance because of work performed by a party other than the new attacher prior to the new attachment. **In no event shall a utility be required to bear such cost unless the utility was the cause of such non-compliance.**

Kentucky Power states that it agrees that the new attacher should not be responsible for the cost, since it did not cause the cost. However, Kentucky Power notes that the regulation is silent regarding where the cost should ultimately fall. Kentucky Power proposes the language at issue to specifically state that the cost should not be the utility's responsibility. Kentucky Power then argues that untraceable costs should be allocated on a pro rata basis, though it does not propose specific language to accomplish that.

LG&E/KU – Eric Langley, who spoke on behalf of LG&E/KU and Kentucky Power at the public hearing, made comments similar those of Kentucky Power's here.

(b) Response: A utility, and ultimately its customers, should not be responsible for costs that were not caused the utility. However, the proposed regulation allows a utility, subject to Commission approval, to shift liability for violations or damage caused by an existing attacher to the existing attacher through tariff provisions and standard contracts. Further, if damage or a violation is caused by an unrelated third party, the utility would have the right, and perhaps the responsibility, to seek to recover the cost of that damage. However, in all of those instances, the utility, as the owner of the relevant property and the entity setting terms and conditions for attachment, is in the position to ensure that its property is protected and that it has the ability to recover costs necessary to correct

violations and damage caused by others. If the utility cannot identify who caused an issue or is unable to pursue the appropriate party, then it will be necessary for the utility to make any necessary repairs at its expense and those costs could be recovered in rates, assuming they are reasonable, just like any other costs incurred by a utility.

Additional language is not necessary to specifically define how costs that cannot be traced to a specific entity should be treated. There is also a concern that the language proposed by Kentucky Power could be interpreted as excusing the utility from incurring the cost to make a necessary repair or allowing a utility to delay make ready while it secures payment from a third party to make a repair (since the proposed amendment plainly states the utility shall not pay). Thus, Kentucky Power's comment does not justify amending the regulation at this time.

V. Summary of Statement of Consideration and Action Taken by Promulgating Administrative Body

The public hearing on this administrative regulation was conducted, and the Commission received comments at the hearing. Additionally, written comments were received. The Commission responded to the comments and amends the administrative regulation as follows:

Page 2
Section 1(2)
Line 13-15

After "per second", insert the following: **The term "broadband internet provider" does not include a utility with an applicable joint use agreement with the utility that owns or controls the poles to which it is seeking to attach.**

Page 3
Section 1(10)
Line 15

After "based on the" insert "**pole's**".
Delete "poles".

Page 4
Section 1(11)
Line 1

After "for compensation." insert **The term "telecommunications carrier" does not include a utility with an applicable joint use agreement with**

the utility that owns or controls the poles to which it is seeking to attach.

Page 5
Section 2(3)
Line 2

After "rates", insert "**terms**".
Delete "charges".

Page 5
Section 2(3)(a)
Line 4

After "rates", insert "**terms**".
Delete "charges".

Page 5
Section 3(4)
Line 22

After "reliability, or" insert "**generally applicable**".

Page 5
Section 3(5)
Line 23

After "(5)" insert the following:

Overlashing

(a) A utility shall not require prior approval for an existing attacher that overlashes its existing wires on a pole; or for third party overlashing of an existing attachment that is conducted with the permission of an existing attacher.

(b) A utility may not prevent an attacher from overlashing because another existing attacher has not fixed a preexisting violation. A utility may 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.

(c) **A utility may require no more than 30 days' advance notice of planned overlashing. If a utility requires advance notice for overlashing, then the utility must include the notice requirement in its tariff or include the notice requirement in the attachment agreement with the existing attacher. If after receiving advance notice, the utility determines that an overlash would create a capacity, safety, reliability, or engineering issue, it must provide specific documentation of the issue to the party seeking to overlash within the 30 day advance notice period and 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.**

(d) **A party that engages in overlashing is responsible for its own equipment and shall ensure that it complies with reasonable safety, reliability, and engineering practices. If damage to a pole or other existing attachment results from overlashing or overlashing work causes safety or engineering standard violations, then the overlashing party is responsible at its expense for any necessary repairs.**

(e) **An overlashing party shall notify the affected utility within 15 days of completion of the overlash on a particular pole. The notice shall provide the affected utility at least 90 days from receipt in which to inspect the overlash. The utility has 14 days after completion of its inspection to notify the overlashing party of any damage or code violations to its equipment caused by the overlash. If the utility discovers damage or code violations caused by the overlash on equipment belonging to the utility, then the utility shall inform the overlashing party and provide adequate documentation of the damage or code violations. The utility may either complete any necessary remedial work and bill the overlashing party for the reasonable costs related to fixing the damage or code violations or require the overlashing party to fix the damage or code violations at its expense within 14 days following notice from the utility.**

Delete: "The tariff shall not prohibit overlashing except if doing so is justified by lack of capacity, safety or reliability concerns, or applicable engineering standards."

Page 7
Section 4(2)(b)3
Line 17

After "subsection (10)" insert "**b**".
Delete "c".

Page 7
Section 4(2)(b)3
Line 20

After "subsection (10)" insert "**b**".
Delete "c".

Page 11
Section 4(6)(a)
Line 9

After "not to exceed" insert "**120**".
Delete "ninety 90".

Page 14
Section 4(8)(c)
Line 6

After "described in" insert "**as**".
Delete "is".

Page 17
Section 4(10)3.d
Line 12

After "deemed to be complex" insert "**, and the new attacher may not proceed with the affected proposed one-touch make-ready**".

Page 21
Section 5(4)
Line 4

After "representative of" insert "**a**'.
Delete "an electric".

Page 25
Section 7(8)(a)
Line 23

After "on a complaint" insert "**regarding the rates, terms, or conditions for**". Delete "alleging that a person or entity was unlawfully denied".

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Jay D. Hartz
Director

MEMORANDUM

TO: John E.B. Pinney, Acting General Counsel, Kentucky Public Service Commission

FROM: Emily Caudill, Regulations Compiler

RE: Amended After Comments – 807 KAR 005:015

DATE: September 15, 2021

A copy of the Amended After Comments regulation listed above along with the required Statement of Consideration are enclosed for your files.

This administrative regulation will be reviewed by the Administrative Regulation Review Subcommittee at its **September 2021** meeting. Please notify the proper person(s) of this meeting.

If you have questions, please contact us at RegsCompiler@LRC.ky.gov or (502) 564-8100.

Enclosure