From: Fitz
To: Pinney, Jeb E (PSC)
Subject: 807 KAR 5:015 and 5:015E
Date: Monday, April 28, 2025 1:07:41 AM

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Dear Mr. Pinney:

Please accept these comments on behalf of the Kentucky Resources Council, Inc. concerning both the emergency regulation 807 KAR 5:015E, and the replacement ordinary regulation 807 KAR 5:015.

The Kentucky Resources Council, Inc. (KRC), is a nonprofit environmental advocacy organization incorporated under the laws of the Commonwealth of Kentucky and dedicated to providing legal assistance without charge on a range of environmental and energy issues. KRC has in past years represented landowners in Kentucky who have been subject to efforts to co-locate cable or other third-party communication cables on telephone poles that were erected and maintained under easements with specific limitations that did not allow third-party use of the easements.

KRC's concerns pertain to Section 2 of the emergency and ordinary regulation, which prescribe the scope of the "duty to provide access to utility poles and facilities." KRC believes that this section of the regulations should be revised to specifically authorize and require the utility to deny access to attachment or third-party use of an easement for broadband unless there is a deed, lease, or easement from the surface owner of the property authorizing such use by a third-party for the proposed purpose(s).

It is axiomatic that "[n]either the physical size, nor the purpose, nor the use of an easement may be expanded beyond the terms as contained in the original grant, and any such attempt by the grantee unduly interferes with the reserved rights of the grantor." 25 Am Jur 2d Easements and Licenses in Real Property § 67. KRC is concerned that the rights of property owners whose lands are burdened by an easement granted for a specific utility purpose, are not subject to additional burdens from third-party use of the

easement and structures for purposes not specifically authorized in the easements. KRC has advised and assisted clients in cases where a third-party seeks to use a right-of-way or easement granted to a specific entity or for specific use. Another case involved an easement with printed language that would have allowed “any other person or company to attach wires or lay cable or conduit within the right of way for communication or electric power transmission or distribution” in which that language was specifically struck-through. In other cases, the easement has explicitly precluded any third-party use or occupancy. Where an easement does not allow both third-party access and the proposed use of the easement, a utility must be allowed and required to deny access to the easement by the broadband provider. The PSC would effect a taking by physical intrusion were it to mandate by regulation that access be allowed in such cases, or by failing to allow denial of access where underlying easement or deed precludes third-party use or access.

In order to fully protect the rights of landowners who have granted the utility an easement and across whose property broadband access to poles is sought, the utility should be deny such request absent a demonstration that the requesting party has a right-of-way, easement, license, franchise, or other agreement from the landowner allowing for the construction or maintenance of attachments or facilities by a third party. Section 2(1) should be revised to require that the utility "deny access to any pole, duct, conduit, or right-of-way on a non-discriminatory basis if there is insufficient demonstration that the requesting party possesses a right-of-way, easement, license, franchise, or other agreement from the landowner allowing for the construction or maintenance of attachments or facilities by that party.

Two additional provisions should be added to protect the rights of the landowners across whose property the broadband provider seeks pole attachment. First, at the time an application is made for pole attachment access, the requester should provide the landowner by certified mail a copy of the application, in order that the landowner may interject any objections to the utility and PSC regarding the proposed third-party use. Second, a provision should be added that where there is a bona fide dispute regarding whether the requesting party's documentation adequately demonstrates the right to access and pole attachment, the utility should reject the application until a court of competent jurisdiction resolves the underlying right of access

dispute or an agreement has been reached allowing such access.

Thank you for your consideration of these concerns. KRC supports broadband deployment in Kentucky, and co-location of facilities, but believes that in no case should third party access to easements for purposes of co-location or pole attachment be approved absent a demonstration that the utility is specifically authorized by the deed, lease, or easement, to allow such third-party access, or the third-party has separately acquired that right from the landowner.

Cordially,
/s/
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