COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION

REGULATIONS REGARDING ACCESS AND ATTACHMENTS TO UTILITY POLES AND FACILITIES; 807 KAR 5:015	))))))

COMMENTS OF THE KENTUCKY BROADBAND AND CABLE ASSOCIATION ON THE KENTUCKY PUBLIC SERVICE COMMISSION'S POLE ATTACHMENT REGULATIONS

The Kentucky Broadband and Cable Association and its members ("KBCA" or "Association") submits these comments in response to the Commission's proposed regulations regarding access and other aspects of poles attachments to utility poles.

INTRODUCTION

The Commission's proposal represents a significant and positive step towards creating a regulatory environment that will spur broadband deployment in rural communities throughout the Commonwealth of Kentucky and ensure "every area of the state has high-speed internet."[1] Among other important proposed rules, the Kentucky Public Service Commission's ("the Commission's") proposal seeks to establish a timeline for access to poles, adopt a one touch make ready ("OTMR") process, take steps to ensure pole attachers are not unfairly required to pay to replace poles the owner would have had to replace anyway, and require utilities to submit timely and detailed invoices for make-ready work.

[1] Andy Beshear, Governor of the Commonwealth of Kentucky, State of the Commonwealth Address (Jan. 14, 2020), *available at* https://www.usnews.com/news/best-states/kentucky/articles/2020-01-14/text-of-kentucky-gov-beshears-state-of-commonwealth-speech.

While KBCA appreciates the Commission's current proposals, KBCA urges the Commission to further clarify and strengthen certain rules so they more effectively advance the Commission's goals to spur rural broadband deployment.[2] *First*, the Commission should ensure that the costs of pole replacements are appropriately shared in all cases and not only with regard to "red tagged" poles, as defined in the Commission's proposal. Unless a pole is very recently installed, its replacement always conveys a substantial benefit to the pole owner, and not solely to the new attacher. Moreover, pole owners' expectation that new attachers pay the full cost of installing new poles is a substantial driver of rural broadband deployment costs that inhibit the extension of service to unserved areas. The Commission should extend its proposed rule to require equitable sharing of pole replacement costs in all cases between utilities and attachers.

Second, the Commission should clarify its overlashing rule so that utilities do not abuse the rule in order to prohibit or thwart cable operators' long-standing reliance on overlashing, which is an extremely important, safe, and economically efficient process to upgrade and deploy broadband. Specifically, KBCA urges the Commission to formally adopt FCC rules regarding overlashing, which require an attacher to provide 15 days' advance notice of overlashing to ensure safety, but do not require permitting for overlashing of already permitted poles.

Third, the Commission should adopt a 90-day "fast track" procedure for resolving disputes related to pole access and other such disputes that could have a direct effect on timely broadband deployment. While longer timeframes are appropriate for certain other disputes, such as rate issues, requiring an attacher to wait an extended period of time for resolution of an access dispute

[2] KBCA has included with these comments proposed redlines to the Commission's regulations (attached as Exhibit A).

will hamper broadband deployment, particularly in Rural Digital Opportunity Fund ("RDOF") buildout areas where attachers are subject to strict schedules and timelines.

Fourth, and finally, the Commission should ensure utilities cannot easily circumvent its regulations and policies by unilaterally imposing pole attachment terms and conditions outside of approved and negotiated tariffs. To prevent this occurrence, the Commission should expressly prohibit utilities from making unilateral rule changes through *ad hoc* documents falling outside of the Commission's tariff and rulemaking process or negotiated pole attachment agreements. The Commission should also require utilities to provide 60-day advance written notice prior to any pole attachment rate increases or tariff filings so that attachers have an opportunity to verify that any increases are consistent with the Kentucky rate formula.

I. THE COMMISSION'S RULES MUST ENSURE THAT ATTACHERS ARE NOT REQUIRED TO INCUR POLE REPLACEMENT COSTS THAT ARE PROPERLY BORNE BY POLE OWNERS.

The Commission's proposed regulations would appropriately prevent a pole owner from forcing an attacher to pay to replace "red tagged" poles. The Commission defines "red tagged" poles as poles a utility "designated for replacement based on the pole's non-compliance with an applicable safety standard" or otherwise "would have needed to replace at the time of replacement even if a new attachment were not made." 807 KAR 5:015, Sections 1(10) & 4(6)(b). The proposal further defines "red tagged" poles to include poles "designated for replacement within two (2) years of the date of [their] actual replacement for any reason unrelated to a new attacher's request for attachment." *Id.* As the Commission correctly recognized, requiring attachers to pay to replace red tagged poles would generate a windfall for utilities because attachers would be

required to pay costs the utilities would have had to incur regardless of the attacher. This requirement is consistent with the sound cost-causation principles recognized by the FCC.[3]

While the regulations expressly address cost-allocation principles for the replacement of red-tagged poles, the Commission failed to address cost allocation for poles that are prematurely retired beyond noting that such costs "shall be charged in accordance with the utility's tariff or a special contract." 807 KAR 5:015, Section 4(6)(b)(4). The lack of guidance on this issue could create unnecessary disputes and delays, as well as inequitable cost allocation to attachers, and is likely to be construed by pole owners as implicitly authorizing the unfair practice of requiring attachers to pay the entire cost to replace aging poles – that mostly benefit the utility – as a condition of attachment. As Patricia Kravtin, an expert in pole related matters, explains, "no good purpose is served by the current practice of make-ready charges for replacement poles well in excess of efficient levels."[4] Pole owners enjoy operational, strategic, revenue-enhancing, capital cost saving, and tax saving benefits in connection with pole replacements.[5] New attachers, on the other hand, face real barriers to market entry where they must pay to replace partially depreciated poles, which only "results in fewer or delayed broadband infrastructure investments, reduced

[3] *See, e.g., In the Matter of Accelerating Wireline Broadband Deployment By Removing Barriers to Infrastructure Development*, WC Dkt. No. 17-84, Declaratory Ruling, ¶¶ 6–8 (Jan. 19, 2021) (holding "utilities may not require requesting attachers to pay the entire cost of pole replacements that are not necessitated solely by the new attacher and, thus, may not avoid responsibility for pole replacement costs by postponing replacements until new attachment requests are submitted"); 47 C.F.R. § 1.1408 (stating "the cost of modifying a facility shall be borne by all parties that obtain access to the facility as a result of the modification and by all parties that directly benefit from the modification").

[4] Patricia Kravtin, *Pole Policy & the Public Interest: Cost Effective Policy Measures for Achieving Full Broadband Access in the Commonwealth of Kentucky*, at 13 (July 22, 2021) (attached as Exhibit B).

[5] *Supra* note 3, at 11–12.

service availability, and ultimately higher broadband prices in unserved areas of the Commonwealth."[6]

To avoid these disputes, delays, and inequities, and consistent with the cost-causation principle reflected in its red-tagged pole proposal, the Commission should go further and expressly prohibit a pole owner from requiring an attacher to pay the full replacement cost of a pole that is prematurely retired pursuant to an access request.[7] Even when a pole is not red tagged, the utility derives a significant economic benefit from the pole's replacement.[8] Under the Commission's current regulations, there is a risk that utilities may seek to unreasonably avoid their responsibility for replacing these non-red tagged poles by deferring their own designation of such poles for replacement until a new attacher submits an attachment application that would require a new pole.

KBCA's approach that an attacher be responsible only for the remaining un-depreciated value of a prematurely retired pole is particularly fair and reasonable given that the utility, not the attacher, will become the owner of the new pole, and the attacher must and will continue to pay rent to attach to the new pole. Requiring new attachers to pay the full cost of replacement poles except when the poles are red tagged will impose substantial and unreasonable costs – costs that the utility should incur given it is the main beneficiary – on attachers at the expense of broadband deployment in rural Kentucky. The Commission should recognize the economic benefit a new

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[6] *Supra* note 3, at 13.

[7] *Supra* note 3, at 8 (explaining "from a true economic cost causative perspective only those costs relating to the intrinsic nature of the avoidable costs causally linked to the attacher, *i.e.*, the temporal costs of shifting forward the inevitable retirement/replacement of the existing pole that otherwise would have ensued in the normal course of utility operations, are appropriately allocated to the attacher").

[8] *Supra* note 3, at 11–12. Economic benefits to the utility include: the operational benefits of the replacement pole (*e.g.*, additional height, strength, and resiliency); strategic benefits, such as the added ability for a utility to offer additional services; revenue-enhancing benefits, including enhanced rental opportunities derived from increased pole capacity; and capital, operational, and tax cost savings.

pole provides to the utility, even when the pole is not red-tagged, by clarifying that an attacher is only required to pay the remaining un-depreciated value of the replaced pole.

II. THE COMMISSION SHOULD STRENGTHEN ITS OVERLASHING RULE TO ENSURE THIS WIDESPREAD, EFFICIENT, AND COST-EFFECTIVE CONSTRUCTION PRACTICE IS NOT UNREASONABLY BURDENED.

Overlashing is a long-standing practice that enhances a cable operator's ability to deploy, expand, and upgrade its services in a safe, efficient, and expedited manner. As the FCC has long-recognized, "[c]able companies have, through overlashing been able for decades to replace deteriorated cables or expand the capacity of existing communications facilities, by tying communications conductors to existing, supportive strands of cables on poles."[9] Many pole owners have recognized these benefits as well; in the proceeding in which the FCC developed its current overlashing rules, several pole owners noted their support for the practice.[10] Yet as Ms. Kravtin notes, overlashing is "often singled out by pole owners and subject to additional charges, without economic justification."[11] That is why the FCC has always had a policy that forbids pole

[9] *In the Matter of Amendment of Rules and Policies Governing Pole Attachments & In the Matter of Implementation of Section 703(e) of The Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, CS. Dkts. 97-98 & 97-151, FCC 01-170, ¶ 73 (May 25, 2001).

[10] *See, e.g.*, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Comments of Xcel Energy Services, Inc. at 4, WC Dkt. No. 17-84 (Jan. 17, 2018) ("Xcel Energy has substantial experience with overlashing throughout its service area and appreciates the value of overlashing as a means to maximize the usable space on utility poles and facilitate the deployment of new communications services."); *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Comments of the Edison Electric Institute at 2, WC Dkt. No. 17-84 (Jan. 17, 2018) ("EEI and its members generally support 'the use of overlashing to maximize the useable space on utility poles' when the overlashing neither compromises the safety or engineering of the pole nor the utility's core mission of electrical generation and transmission."); *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Reply Comments of the Electric Utilities on Overlashing at iii, WC Dkt. No. 17-84 (Feb. 16, 2018) (explaining advance notice of overlashing "is a necessary first step toward facilitating a discussion about processes that fairly balance the safety and reliability of the infrastructure with the benefits afforded to incumbents through efficient overlashing processes.").

[11] *Supra* note 3, at 14.

owners from obtaining additional approval for the overlashed cable on a previously permitted mainline attachment.[12] In its most recent pronouncement on overlashing, the FCC observed that overlashing "often marks the difference between being able to serve a customer's broadband needs within weeks versus six or more months when delivery of service is dependent on a new attachment."[13] For this and other policy reasons, the FCC in 2018 codified its rule that attachers need only notify pole owners when overlashing to allow the pole owner to ensure safety.[14]

KBCA's members have extensively relied on overlashing to extend service across the Commonwealth, and hope the Commission will strengthen its support of this vital, safe, and cost-effective practice. For example, Charter performs more overlashing than any other type of construction technique or attachment work in the Commonwealth. In 2020 alone, overlashing helped Charter more quickly and efficiently extend broadband services to hospitals, surgery centers, places of worship, and hundreds of other businesses across the Commonwealth. In particular, Charter's use of overlashing helped it quickly expand broadband to serve a VA housing facility in Lexington and a new Amazon facility in Shepherdsville. Overlashing was fundamental to all KBCA members' ability to serve customers during the pandemic.[15]

While it is helpful that the Commission seeks to ensure that utility tariffs "shall not prohibit overlashing except if doing so is justified by lack of capacity, safety or reliability concerns, or

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[12] *Supra* note 8, ¶ 75.

[13] *Accelerating Wireline Broadband Deployment By Removing Barriers To Infrastructure Investment*, Third Report & Order & Declaratory Ruling, 33 FCC Rcd. 7705, 7761–62 ¶ 115 (Aug. 3, 2018).

[14] *Id.*

[15] *Supra* note 3, at 14 (recognizing "from a service deployment perspective, the practice of overlashing greatly facilitates the ability of providers to efficiently and cost effectively expand their service capacity and roll out service to new customers. From a resource utilization perspective, the practice of overlashing helps optimize use of capacity on existing utility poles by eliminating the need for entirely new wired attachments, thereby minimizing any additional capacity burdens on the pole").

applicable engineering standards," 807 KAR 5:015, Section 3(5), KBCA urges the Commission to formally adopt the FCC's overlashing rules to ensure that utilities do not use Section 3(5) to cut back or limit existing overlash rights under current tariffs, which are more expansive than the proposed rule.[16] Following the FCC's lead, many other states have either adopted or proposed to adopt pole attachment legislation or regulation that tracks the FCC approach to overlashing.[17]

KBCA is concerned that the Commission's current proposal may encourage utilities to adopt overlashing protocols that are less favorable than attachers have been able to negotiate in the absence of any regulation. To guard against that outcome, the Commission, like other certified states, should adopt the FCC's overlash rules, or at least adopt regulations consistent with those existing in the market today, to ensure that cable operators can deploy broadband quickly and efficiently.[18]

III. THE COMMISSION SHOULD FAST-TRACK TIME-SENSITIVE ACCESS DISPUTES.

KBCA is concerned that the timelines the Commission adopted for its dispute resolution process do not appropriately reflect market realities for disputes involving access denials or other such disputes that directly impact timely broadband deployment. *See* 807 KAR 5:015, Section 7

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[16] Rather than promoting the efficient use of overlashing, the Commission's current rules provide less protection than the tariffs attachers have negotiated with Kentucky utilities. For example, LG&E's and KU's existing tariffs do not require any advance notice where an initial overlash does not exceed certain parameters. *See* LG&E and KU Tariffs, P.S.C. Electric No. 12, Pole and Structure Attachment Charges at ¶ 10.

[17] *See, e.g.*, Proposed Ohio Admin. Code § 4901:1-3-03(D) (requiring an overlashing party and public utility to comply with "overlashing rules established pursuant to 47 C.F.R. 1.1415") (attached to Exhibit C); Me. Admin. Code § 65-407 Ch. 880 § 2(A)(1)(b) (stating joint use entity "need not submit a request to overlash to existing facilities, so long as the joint-use entity provides written notice of the overlash within 10 calendar days after making it").

[18] *See, e.g.*, LG&E and KU Tariff, P.S.C. Electric No. 12, Pole and Structure Attachment Charges at ¶ 10 (establishing overlashing guidelines for a Kentucky tariff); Proposed Ohio Admin. Code § 4901:1-3-03(D) (establishing overlashing rules in Ohio); 47 C.F.R. 1.1415 (establishing federal overlashing rules).

(setting a 180-day window for the Commission to make a final action on a dispute, though the Commission may extend the window to one year for "good cause"). Six months to a year for resolving access disputes is not commercially viable given cable operators' need to roll out service on a predictable and timely basis in order to meet contractual commitments to customers. These disputes are "especially onerous in connection with the replacement of poles, thereby further compounding the direct cost-related impediments to broadband deployment associated with excess pole replacement costs."[19] Under the current timeframes, an attacher would likely lose its customer(s) while the dispute was being resolved. KBCA's concern with such access delays is further heightened given the existing timelines necessary to meet RDOF build-out requirements, and how a single dispute along a series of poles can hold up deployment to all other areas downstream from the pole.

To ensure that cable operators do not miss contract deadlines, or lose customers or government funding over an access dispute, the Commission should adopt a 90-day fast track process for any dispute over pole access or other similarly time-sensitive issues. Other issues – such as rate disputes – are appropriate for the Commission's existing regulations. 807 KAR 5:015, Section 7(8).

In addition, as KBCA noted earlier this year, the Commission should also require utilities to provide 60-day advance written notice before any pole attachment rate increases. *See, e.g.* Proposed Ohio Admin. Code § 4901:1-3-04(A); Letter from James W. Gardner to Kentucky Public Service Commission (Apr. 27, 2021) (attached as Exhibit C). This notice requirement is critical for attachers to ensure pole attachment rates, terms, and conditions are just and reasonable, and to have a fair and full opportunity to challenge a proposed rate or term change. Indeed, recently, a

[19] *Supra* note 3, at 15.

pole owner in Kentucky raised its pole attachment rate significantly without notice to the affected attachers, effectively prohibiting them from challenging the increase and ensuring a lawful rate. The Commission can avoid such situations by requiring utilities to provide timely prior notice of pole attachment rate increases or tariff filings.

IV. THE COMMISSION SHOULD ENSURE ITS RULES ARE NOT EASILY CIRCUMVENTED THROUGH UNILATERAL UTILITY POLICIES.

The Commission has taken important steps to promulgate regulations that are fair and reasonable and aimed to spur broadband deployment. To make sure that utilities cannot unilaterally side step them through informal policies and standards, the Commission should, as KBCA had earlier recommended, *expressly prohibit* utilities from imposing terms and policies beyond those specified in their negotiated and/or approved agreements and tariffs, or any final Commission rules. KBCA Comments as 23–24. It should further make clear that any utility construction standard that deviates from the National Electric Safety Code ("NESC") must be reasonably necessary to achieve specific, and demonstrable safety objectives, and must be applied on a non-discriminatory, prospective basis. Moreover, any changes to a utility's construction standards should be negotiated between the parties or submitted to the Commission for approval. These guardrails are necessary and appropriate given KBCA's members' experiences with utilities that frequently use un-negotiated handbooks and other manuals to undermine or revise tariffs and previously-agreed to terms. *Id.*

CONCLUSION

KBCA appreciates this opportunity to provide comments to the Commission regarding the new regulations and looks forward to providing any additional information or insight the Commission may require as it considers these important policy issues.

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EXHIBIT A

ENERGY AND ENVIRONMENT CABINET

Public Service Commission

(New Administrative Regulation)

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.

(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 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.

(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, charges, or conditions for access not contained in its tariff:

(a) The rates, 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 engineering standards.

(5) Overlashing.

(a) A utility shall not require prior approval for an existing attache r

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.

~~23~~1 (~~5~~e) ~~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

~~1 capacity, safety or reliability concerns, or applicable engineering standards.~~

2 overlash on a particular pole. The notice shall provide the affected utility at least 90 days from

3 receipt in which to inspect the overlash. The utility has 14 days after completion of its

4 inspection to notify the overlashing party of any damage or code violations to its equipment

5 caused by the overlash. If the utility discovers damage or code violations caused by the

6 overlash on equipment belonging to the utility , then the utility shall inform the overlashing

7 party and provide adequate documentation of the damage or code violations. The utility may

8 either complete any necessary remedial work and bill the overlashing party for the reasonable

9 costs related to fixing the damage or code violations or require the overlashing party to fix the

10 damage or code violations at its expense within 14 days following notice from the utility.

~~2~~11 (6) Signed standard contracts or licenses for attachments permitted by subsection (2)

~~3~~12 of this section shall be submitted to the commission but shall not be filed pursuant to 807

~~4~~ 13 KAR 5:011, Section 13.

~~5~~14 (7) Tariffs conforming to the requirements of this administrative regulation and with a

~~6~~15 proposed effective date no later than March 31, 2022, shall be filed by February 28, 2022.

16 (8) A utility may not unilaterally impose any pole attachment rate, term, or condition on an

17 attaching party through construction manuals or other informal documents that is inconsistent

18 with the terms of its tariff or the Commission’s rules.

~~7~~19 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)(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)(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 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~~not ~~charged in accordance with the utility's tariff or a special contract regarding pole~~exceed the remaining un-depreciated value of the replaced pole, provided that, if the ~~attachments between the utility and the new~~replacement pole is of a different type or height, the attacher~~.~~ shall also be responsible for any difference in cost computed in accordance with subsection (6)(b)(3).

~~13~~14 (7) For the purposes of compliance with the time periods in this section:

~~14~~15 (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;

~~17~~18 (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.

~~20~~21 (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.

~~23~~24 (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 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.

(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 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

23 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 alleging that a person or

entity was unlawfully denied access to a utility's pole, duct, conduit, or right-of-way within 90 days of a complaint establishing a prima facie case being filed.

(b) The Commission shall take final action on a complaint alleging disputes not related to a denial of pole access 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~~c) 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.

FILED WITH LRC

This is to certify that the Public Service Commission approved promulgation of this administrative regulation, pursuant to KRS 278.040(3), on May 13, 2021.

(Mod) Linda C Bridwell May 13,

Linda Bridwell, Executive Director Date

(Add) Michael J. Schmitt

Michael J. Schmitt, Date

PUBLIC HEARING AND PUBLIC COMMENT PERIOD: A virtual public hearing on this administrative regulation shall be held on July 29, 2021, at 9:00 a.m. eastern standard time at the Kentucky Public Service Commission, 211 Sower Boulevard, Frankfort, Kentucky 40601. Individuals interested in being heard at this hearing shall notify this agency in writing by five workdays prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public and instructions on how to attend and participate virtually will be published on the commission's website at psc.ky.gov. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted through July 31, 2021. Written notification of intent to be heard at the public hearing and written comments on the proposed amendment should be sent or delivered to the contact person listed below.

Contact person: John E.B. Pinney, Acting General Counsel, 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 PSC 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 PSC may promulgate administrative regulations to implement the provisions of KRS Chapter 278. KRS 278.040(2) states that the PSC 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: N/A

(b) The necessity of the amendment to this administrative regulation: N/A

(c) How the amendment conforms to the content of the authorizing statutes: N/A

(d) How the amendment will assist in the effective administration of the statutes: N/A

(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:

FEDERAL MANDATE ANALYSIS COMPARISON

807 KAR 5:015

Contact Person: J.E.B. Pinney, phone 502-564-3940, email Jeb.Pinney@ky.gov
(1) Federal statute or regulation constituting the federal mandate: 47 U.S.C.A. § 224 does not mandate action but allows states to preempt federal regulation by adopting their own regulation. If states do not preempt federal regulation, then the federal standards in 47 C.F.R. § 1.1401 through 47 C.F.R. § 1.1415 would apply within Kentucky.

(2) State compliance standards: N/A
(3) Minimum or uniform standards contained in the federal mandate: 47 U.S.C.A. § 224(c) governs the minimum standards necessary to preempt federal regulation. Generally, it 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.
(4) Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements, than those required by the federal mandate? The PSC would not need to assert jurisdiction over access to facilities owned or controlled by cooperatives in order to preempt federal regulation. The rural electric and telephone cooperatives subject to the jurisdiction of the PSC would be regulated under this administrative regulation. Thus, this administrative regulation does extend the regulation of pole attachments beyond what would be required to preempt federal regulation pursuant to 47 U.S.C.A. § 224(c).

With respect to the specific obligations imposed on regulated parties, 47 U.S.C.A. § 224(c) is not specific in the nature of the regulation required to preempt federal regulation. The PSC potentially could continue to regulate pole attachment rates and access primarily through the utility tariffs and the complaint process. However, 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 the PSC feels that there is a need for a clear process to govern pole attachments to avoid delays that may slow or prevent broadband deployment in Kentucky. The PSC further felt that such a process would promote investment in broadband infrastructure in Kentucky.

This administrative regulation does differ from FCC regulation on which it is based to fit within the PSC's regulator frame work; to address circumstances specific to Kentucky; and to address issues that have been identified in the federal regulation. Most notably, this administrative regulation: (1) Adds broadband internet providers and governmental units to the entities entitled to non-discriminatory access to ensure that there is no confusion regarding such entities ability to obtain access; (2) Reduces the number of poles that may be filed as part of a single application pursuant to Section 4(7)(c) and (d) from the lesser of 3,000 and 5.0% in the federal regulation to the lesser of 1,000 and 1.5% to better reflect realities regarding the speed at which pole attachment requests have been made in Kentucky in circumstances where utilities have allowed high volume applications; (3) Adds a requirement that new attachers provide utilities sixty (60) days-notice before they begin submitting applications larger than the lesser of 300 or 0.5 percent of the utility's poles in the state to provide the utilities time to put the resources in place to address larger applications; (4) Requires a utility to file a tariff pursuant to KRS Chapter 278 governing the rates, terms, and conditions of pole attachments; (5) Requires any standard license

agreement for attachments made pursuant to the tariff to be based on the terms of the utility tariff or incorporated therein instead of negotiating license agreements on an ad-hoc basis before the attachment process begins to comply with KRS Chapter 278 and avoid delays that arise under the federal regulation when parties negotiate agreements; (6) Explicitly states utilities' obligations with respect to underlying easements and right of ways in a manner consistent with how the FCC regulation has been interpreted after litigation between utilities and attachers to avoid such litigation regarding this regulation; (7) Provides that new attachers shall pay survey costs to ensure that costs are properly allocated and to avoid an ambiguity in the FCC regulation; (7) Addresses the allocation of the cost of replacing poles in a manner consistent with a recent FCC order regarding the same and the PSC's traditional cost allocation methodology to ensure that costs are properly allocated and to avoid an ambiguity in the FCC regulation; (8) Sets a specific timeline for utilities to bill make-ready costs to address an issue under the FCC regulation in which such bills are sometimes sent years after work is completed, which potentially prevents the attacher from determining the validity of the bill; (9) Allows utilities to include general prohibitions against attachments to certain poles in the utilities tariff, for reasons specified in the regulation, instead of excluding transmission poles from the access provisions in the regulation due to the fact specific and technical nature of such determinations; (10) Establishes make-ready deadlines based on the location of the make-ready instead of the location of the attachment to better reflect industry practice and match deadlines to the nature of the work involved; and (11) Sets a process governing the transfer of attachments to new poles installed by utilities in Section 6(3) to address an issue in which some attachers fail or refuse to transfer their attachments in a timely manner when utilities install new poles.

(5) Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements.

Many of the state and federal efforts to expand broadband access have focused more on areas served by the cooperatives, because they are more likely to be in rural areas that often have less access to broadband internet service than urban and suburban areas. The PSC has also received many informal written comments from legislators and members of the public regarding the need to facilitate the deployment of broadband in rural areas. Thus, the PSC felt it was important that cooperatives be subject to this regulation, because there is a need for a clear process to govern pole attachments in areas served by the cooperatives to facilitate the deployment of broadband internet service.

Further, while 47 U.S.C.A. § 224(c) does not require the PSC to regulate cooperatives to preempt federal regulation, the Court of Appeals previously held that utility pole attachments are a service that is provided for a rate. *See Kentucky CATV Ass'n v. Volz*, 675 S.W.2d 393 (Ky. App. 1983). KRS 278.030 requires that rates received by a utility be fair, just, and reasonable and that a utility furnish adequate, efficient, and reasonable service. This administrative regulation will serve that statutory purpose for cooperatives as it does investor owned utilities. Thus, the PSC felt it was appropriate that cooperatives be subject to this administrative regulation.

As noted above, this administrative regulation differs from FCC regulation to fit within the PSC's regulatory framework; to address circumstances specific to Kentucky; and to address issues that have been identified in the federal regulation.

EXHIBIT B

Pole Policy and the Public Interest: Cost Effective Policy Measures for Achieving Full Broadband Access in the Commonwealth of Kentucky

By Patricia D. Kravtin*, **

July 22, 2021

* This report has been underwritten by Charter Communications, Inc. The opinions and viewpoints expressed are those of the author alone.

** The author is Principal and Owner of Patricia D. Kravtin Economic Consulting, a private consultancy specializing in telecommunications, energy, and cable regulation and broadband markets. She is frequently called upon as an expert witness and advisor on pole attachment related matters before state, federal, and international regulatory bodies. Ms. Kravtin studied in the Ph.D. program in economics at MIT, with concentrations in Government Regulation of Industry, Industrial Organization, and Urban and Regional Economics.

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Introduction and Summary

Pole attachments are a necessary and largely unavoidable input in the provision of broadband internet services in Kentucky as it is nationwide. Broadband providers face little, and in many cases, no practical alternative in their ability to attach their broadband facilities to the poles of incumbent pole owners, most often the local electric utility. Utility dominance of pole facilities arose as a result of public policies to establish the widespread availability of electric and phone service, along with the growth and stability of those industries. Early on, lawmakers and municipal officials recognized the importance of electricity and telephone services and adopted policies to encourage utilities to build, own, and maintain ubiquitous pole networks within their service areas. Cable operators and other providers of communications and broadband services were never expected to build parallel pole plants for the delivery of their services and are largely prohibited from doing so. Rather, public policies have historically relied on the use of economic regulation to ensure shared access to these ubiquitous utility-owned pole facilities by cable operators and other communications companies to provide services to users.

Given that poles are, in economic terms, "essential" or "bottleneck" facilities that serve as a critical input to the production of communication and broadband services, the goal of pole attachment regulation, historically and continuing today, is to prevent utility pole owners from leveraging their monopoly power over attachers by imposing unjust and unreasonable rates, terms, and conditions on attacher access to utility poles. In this vein, the effective regulation of pole attachment recurring rates and nonrecurring charges is a surrogate for competitive market forces and strives for economically efficient allocations of resources and favorable market entry conditions. This includes the formulation and imposition of non-recurring charges for "make-

ready" activities at the front-end of the pole attachment process, such as the rearrangement of wires on the pole up to and including the replacement of utility poles.

However, the make-ready charges of many if not most pole owners subject to the jurisdiction of the FCC under Section 224 of the 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. In particular, when utility poles are replaced as a part of make-ready activities, 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.

If the attacher yields to the imposition of these charges (typically offered by the utility on a "take it or leave it" basis) to obtain pole attachment space, the utility and its core utility service customers receive a new utility pole without any corresponding cost responsibility. This prevailing practice 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. Other prevailing utility practices and time frames that hold up new pole attachments needed to bring high speed broadband into unserved areas of the Commonwealth by imposing inefficiently costly and time-consuming requirements for pole permit applications, surveys, various pre- and post-construction work activities, and the handling of disputes, have similar harmful economic impacts on the public interest.

Efficient pricing practices along with low transactional or process-related costs of entry promote the best possible use of resources and access to high quality services. Present utility pricing practices that shift to the attacher the utility's total loaded cost of new poles—regardless of the utility's endogenously-determined replacement program, for which the primary cost driver is the provision of the utility's core electric service—result in far less than optimal outcomes especially in unserved areas. The gap between the pole attachment make-ready replacement costs currently demanded by utilities from attachers and those that would result from more efficient, marginal cost pricing is not just a theoretical problem. This mispricing carries serious real-world consequences. There are significant harms to the consuming public and overall societal welfare when pole attachment costs, a critical input to broadband deployment, substantially deviate from socially optimal and efficient levels as defined in accordance with established, objective economic principles. On the demand side, these harms include substantial consumer welfare losses that derive from the benefits of high-speed quality broadband connectivity (conservatively estimated for Kentucky in the range of $119 million per year or roughly upwards of a total $ 2 billion in present value terms based on the average service lives of poles), and on the supply side, lower rates of investment in broadband, slower deployment of broadband infrastructure in hard-to-reach rural areas, and the delayed roll out of higher quality broadband service offerings.

Given the pressing need to close the digital divide, Kentuckians would experience significant economic and welfare benefits from the adoption of uniform, cost effective and efficient make-ready policies described in this report. The converse also holds true, there will be substantial economic and social welfare losses to the Commonwealth associated with leaving in place a status quo where pole owners are free to exercise their market power over poles by imposing economically inefficient and inequitable make-ready charges and practices. The effect

of existing pole owner behaviors, if left unchecked by policymakers, is to cause higher costs and delayed expansion of quality broadband into unserved areas, with large negative spillover effects rippling throughout the Commonwealth.

To this end, this paper sets forth a strong public interest case for the adoption of make-ready rules and regulations that guide pole owners and attachers towards an efficient, cost effective make-ready process that best promotes achievement of full, high quality broadband access with the least delay and foregone economic and social welfare gains to Kentuckians. The specific public policy prescriptions advanced in this paper provide practical remedies to mitigate pole owner behaviors that directly and indirectly raise the costs or otherwise hold up broadband entry and service deployment in unserved areas to the detriment of consumers. These include policies that promote: (1) efficient and equitable cost sharing arrangements between new attachers and pole owners for the costs of pole replacement to keep costs for new attachers at efficient, competitive levels, while also compensatory for pole owners based on the net book value of the replaced pole and that recognize the pole owner's inevitable replacement of the pole as part of its normal utility operations; and (2) the establishment of reasonable, expedited time frames for permitting, make-ready activities, and dispute resolution so as not to create delay that slows deployment and deters future broadband investment.

The proactive adoption by policymakers of such economically efficient, cost-effective policies is necessary to reduce existing and inefficient high transaction costs of entry associated with monopoly type behaviors by pole owners – especially the largely unregulated cooperatively and municipally owned utilities – that can slow down the current rate of deployment and create disincentives for future broadband investment. Policies that create an economically just, reasonable and fair pole access framework serve the public interest. It creates long run economic

and social welfare benefits for all, including for electric utility customers that subscribe or seek internet service, in the form of enhanced economic benefits, new and expanded opportunities, and growth associated with ubiquitous broadband coverage, as well increasing the impact of the substantial state and federal money being allocated currently and in the near future to support broadband infrastructure expansion into unserved areas.

Pole Policies Should Promote the Economically Efficient and Equitable Sharing of Pole Replacement Costs, a Major Cost Impediment to New Attachers in Achieving Full Broadband Access

Today, when a request for a new pole attachment by a third-party attacher is deemed by the pole owner to necessitate the total changeout or replacement of an existing utility pole – not just the simple rearrangement of wires on the pole – attachers are often required to make substantial payments to pole owners as make-ready charges to the utility. These charges are typically based on the fully loaded cost of labor and materials to install a new pole, as well as the costs to remove the existing pole, as determined by the utility at its own discretion and typically on a "take it or leave it" basis. Under current rules, attachers may be charged make-ready fees for a pole change-out that the utility would have made in the absence of the wire attachment either at the present or some prospective date in the near to immediate future, or the broadband provider may be charged costs in excess of those actually incurred due to the attachment, especially after all the loadings are applied. These make-ready charges, especially those in connection with pole replacement, can be quite substantial, as a percent of the provider's total broadband deployment costs on a location-specific basis, and especially when considered on an additive basis across multiple unserved locations.

Because utilities set make-ready charges in the general absence of regulatory scrutiny, pole owners have both the incentive and opportunity to set make-ready charges at levels that recover more than an economically efficient or cost causative attribution of the pole replacement cost owing to the essential facilities nature of the pole attachment. A third-party attacher has effectively no practical, feasible alternative to paying the make-ready charges. The alternative of going underground is often prohibitively expensive, and building a duplicative network of poles is infeasible and often unlawful. In theory and in practice, the utility as monopoly owner of the pole network has extraordinary leverage over the attacher, regardless of the latter's size. High make-ready fees meet the classic industrial organization textbook definition of a barrier to entry, and attachers' real-life experiences bear that out.

The replacement of poles is an inevitable or unavoidable cost to the utility that would occur in the normal course of utility operations independent of the existence of the third-party attacher. Every year utilities must replace poles on account of pole failure or destruction, storm hardening, or due to routine capital replacement activities. While long-lived, no pole lasts forever and recent requirements for greater pole resiliency has hastened the pole replacement plans of utilities, to the extent that an increasing number of poles are being replaced before the end of their average service lives. Consistent with economic theory, pole replacements are a long-term fact of life for utilities, and the inevitable need for the replacement of any given pole is a 'but for' consequence of the *pole owner's core utility service* and *not* of a new attacher's request. Those requests merely change the *timing* of the pole's eventual replacement.

Thus, from a true economic cost causative perspective only those costs relating to the intrinsic nature of the avoidable costs causally linked to the attacher, *i.e.*, the temporal costs of shifting forward the inevitable retirement/replacement of the existing pole that otherwise would

have ensued in the normal course of utility operations, are appropriately allocated to the attacher. This is because only the costs associated with the temporal shift of the replacement or upgrade to the pole align with the marginal or incremental costs that "but for" the attacher would not be incurred by the pole owner in its normal course of operations. These are mainly in the form of the remaining (yet to be depreciated) *net book value* of the retired pole, plus any proven additional unique incremental costs that are well documented and directly traceable to the attacher rather than the utility's normal course of operations.

All types of utilities, including those cooperatively and municipally owned, write down the cost of their assets over the assets' average service lives in recognition of the loss in service value due to the "consumption" or prospective retirement of the asset over time by virtue of "wear and tear" and/or the natural obsolescence of the plant in the course of service as the plant matures in age. Accordingly, plant asset values decline over time as depreciation expense (an accounting allocation/accrual, not an actual cash outlay of the utility) associated with those assets is recognized in each period and accumulated on the books of the utility as those assets approach the end of their normal useful service life to the utility. The younger the pole asset subject to replacement in connection with an attachment request (compared to the pole's average service life), the higher the net investment value remaining on the utility's books that would be left unrecovered or "stranded" due to the earlier-than-planned retirement. Conversely, for poles closer to the end of their average service life, the lower the existing net book value of the replaced pole remaining on the utility's books that would be left unrecovered. From an economic perspective, it is inefficient to allocate to the attacher a proportionate share of costs greater than those causally linked to the timing of the plant replacement due to the attacher's action, *i.e.*, the deviation from the otherwise planned or naturally-occurring retirement or replacement of the utility pole in the

normal course of its operations, since from a cost-causation perspective, there is no net impact on the utility's depreciation accrual due to pole attachments. Both the original purchase of the pole asset, its consumption over time, and its replacement are driven by the utility's *provision of core utility service*.

This economic cost causative net-book value approach to the cost sharing of the replacement pole in cases where the utility deems it necessary for new pole attachments is consistent with the approach I advanced in a recent paper.[1] The paper accompanied a NCTA petition asking the FCC to preclude utilities under its jurisdiction from imposing the entire cost of a pole replacement on a requesting attacher when the attacher is not the sole cost causer of the pole replacement. While the FCC "decline[d] to act on the NCTA Petition at this time" given that the issues presented were more appropriate for a broader rulemaking proceeding, the agency unambiguously agreed that imposing the entire cost of a pole replacement on a new attacher, where it was not the sole cost causer, was unreasonable and inconsistent with Section 224 pole rate regulation.[2]

This temporal approach to the sharing of pole replacement costs between pole owner and new attachers avoids cross-subsidies and inefficiencies in make-ready chargers. It is also consistent with the proper, long-run economic perspective that utilities themselves similarly take

[1] See Patricia D. Kravtin, *The Economic Case For A More Cost Causative Approach To Make-Ready Charges Associated With Pole Replacement In Unserved/Rural Areas* (Sept. 2, 2020) (filed *In the Matter of Accelerating Wireline Broadband Deployment By Removing Barriers To Infrastructure Investment,* Comments of Charter Communications, Inc., Ex. 1, WC Dkt. No. 17-84 (Sept. 2,2020)) (attached as Exhibit 1 to KBCA Comments dated September 2, 2020).

[2] See FCC Declaratory Ruling, op cit., re: January 19, 2021, DA 21-78 at ¶3 ("Thus, in an effort to provide clarity and promote consistency, today we issue a Declaratory Ruling to clarify that it is unreasonable and inconsistent with section 224 of the Communications Act, the Commission's rules, and past precedent, for utilities to impose the entire cost of a pole replacement on a requesting attacher when the attacher is not the sole cause of the pole replacement.")

in assessing capital investment decisions, given that most of the economic value of a utility pole replacement comes in its usefulness to core *utility* service operations. Moreover, it ensures that pole owners are compensated for the marginal costs of the pole replacement associated with the new attachment request. It takes into account the real betterment value or economic gains that the pole owner receives from make-ready – of which pole replacement is the starkest example and also the clearest instance of an otherwise inevitable utility investment given all poles eventually must be replaced.

The economic gains enjoyed by the pole owner in connection with the pole replacement as with other utility planned pole upgrades are multi-fold and apply for all poles – not just the limited set of poles "red tagged" by the utility as slated for imminent replacement. These include:

- Operational benefits of the replacement pole (*e.g.*, additional height, strength and resiliency) that can enhance the productive capacity of the plant to meet service quality and other regulatory mandates;

- Strategic benefits, including the ability to offer additional service offerings and enhancements of its own (*e.g.*, smart grid applications) as well as broadband in competition with the attacher;

- Revenue-enhancing benefits, including enhanced rental opportunities from the increased capacity on the new replacement pole;

- Capital cost savings associated with future planned plant upgrades and cyclical replacement programs;

- Operational cost savings in the form of lower maintenance and operating expenses inherent to features of the new, upgraded/higher-class replacement pole, or as a result of the earlier time shift of the removal and installation of the new pole, given the generally rising costs of labor and material over time as measured by published industry cost indices; and,

- Enjoyment of additional tax savings or cash flow opportunities from the accelerated depreciation of a new capital asset which reverses as the asset ages.

From a practical and administrative perspective, the net book value approach to assigning costs of pole replacement to attachers vis-à-vis pole owners can be easily administered, as outlined in my earlier paper and as described in the Appendix to this paper. The remaining net book value of the existing pole to be replaced, which is at the core of the approach, is readily calculated on an average historic booked basis (*i.e.*, total gross booked investment in Account 364 pole plant less total accumulated depreciation divided by total corresponding number of poles). It relies on the same data used to calculate the recurring pole rental rate either under the widely used FCC formula or the Kentucky specific variation of the federal formula,[3] or by using an alternative method based on the application of a standard utility cost index to current pole construction costs.

The public interest problem of the status quo assignment of 100% of pole replacement costs to new attachers is particularly acute in unserved, rural areas due to the generally higher number of poles required per-customer and lower population densities in these areas. Broadband providers thus face the compounding challenges of higher costs of entry from excess make-ready charges

[3] The Kentucky pole attachment rate formula applies a more disaggregated two/three user approach as compared to the federal formula, but the underlying calculation of the average cost per unit of net bare pole investment as well as other formula inputs is conceptually the same.

and fewer subscribers over which to spread those higher costs, making an already difficult and costly undertaking even more challenging financially.

In sum and as a general economic proposition, no good purpose is served by the current practice of make-ready charges for replacement poles well in excess of efficient levels. It only results in fewer or delayed broadband infrastructure investments, reduced service availability, and ultimately higher broadband prices in unserved areas of the Commonwealth. It is both economic and common sense that the more dollars that attachers must pay over economically fair and efficient levels to a utility for pole replacements, the higher their cost of entry. This puts them at an absolute and/or relative competitive disadvantage relative to the utility's own or affiliate potential broadband activities, and siphons off dollars that they could otherwise be investing today in broadband infrastructure needed to bring high speed broadband service into unserved areas. Charging make-ready costs that represent the fully-loaded replacement cost of a pole to the pole owner generates only efficiency and consumer welfare *losses* from the extraction of monopoly rents and the creation of deadweight loss to society and consumers from delayed or foregone broadband access.

On the flip side of the economic calculus, there are substantial concrete economic gains to be realized by the consuming public and overall societal welfare from the realignment of make-ready charges pertaining to replacement poles to more economically efficient, cost effective levels based on the net book value of the replaced pole. As described further below, the potential substantial gains to Kentuckians from the adoption of policies that promote broadband deployment, such as the pole replacement cost sharing approach advanced in this paper, can be measured in terms of the additional "consumer surplus" that would accrue to Kentucky households and businesses from efficient and timely access to high quality broadband.

Policies Should Promote the Commonly Used Practice of Overlashing as an Efficient, Cost Effective Means of Bringing Kentuckians High Quality Broadband Services

In addition to imposing excessive nonrecurring charges in connection with pole replacement, pole owners have further exploited their monopoly ownership of the pole network by imposing onerous, commercially unreasonable terms and conditions of access on attachers. These terms and conditions further undermine the effectiveness of pole attachment regulation to prevent pole owners from creating barriers to entry and other impediments to broadband deployment. Adoption of policies that promote the effective regulatory oversight of *both* price and non-price aspects of utility pole attachment practices is needed to help ensure an outcome that appropriately balances the interests of the utility and the third-party attacher. These measures would also advance public policy goals to accelerate ubiquitous deployment of advanced information-age broadband services and technology into unserved areas of the Commonwealth.

One practice by attachers that is often singled out by pole owners and subject to additional charges and onerous terms and conditions, without economic justification, is the longstanding and widespread industry practice of overlashing (*i,e.*, the practice of physically tying new attachments to existing ones, such as by adding a new, lightweight fiber optic cables to an existing wire on the utility pole). From a service deployment perspective, the practice of overlashing greatly facilitates the ability of providers to efficiently and cost effectively expand their service capacity and roll out service to new customers. From a resource utilization perspective, the practice of overlashing helps optimize use of capacity on existing utility poles by eliminating the need for entirely new wired attachments, thereby minimizing any additional capacity burdens on the pole.

No valid economic or public policy basis exists to allow pole owners to impose additional fees, or other transactional impediments such as time-consuming permitting processes, on overlashing because overlashing imposes no additional economic cost or other impact on the utility not otherwise recovered in make-ready. When overlashing occurs, fiber is lashed to existing attached cable, and accordingly, there is no additional space requirement and no lost opportunity for the pole owner, *i.e.*, no uses or users are displaced. To the contrary, from an economics perspective, overlashing is a space optimizing/cost minimizing practice to be encouraged, consistent with the public policy goal of removing barriers to broadband deployment so as to provide the consuming public, including the utility's own electric customers, the myriad of benefits associated with high quality broadband services.

Policies Should Minimize the Indirect Costs of Delay, Another Key Impediment to Achieving Full Broadband Access, by Promoting Short Timeframes and the Fast Tracking of Time Sensitive Access Disputes

Just as excessive recurring or non-recurring charges for pole replacement raise the transactional costs of entry, so too do inefficiencies and delays in the make-ready process pertaining to a host of pre-construction and construction activities and timelines that raise transaction costs of entry. Such delays can be especially onerous in connection with the replacement of poles, thereby further compounding the direct cost-related impediments to broadband deployment associated with excess pole replacement costs. In some respects, these "indirect" time-related transactional costs can be even more harmful to the provider's bottom line because of their direct impact on getting high quality product to market on a predictable and timely basis, meeting initial customer expectations, and satisfying investor and/or grant requirements. The latter is a special concern given the obligations and timelines that broadband providers must meet in connection with the RDOF program. These indirect cost factors also result in less

broadband deployment, hurting local economies that do not get it or that get it delayed into the future, given linkages of broadband to lost productivity, less economic opportunity, less educational opportunities, and less access to medical care and other civic services. Accordingly, public policy prescriptions that best promote the public interest objective of timely and accessible high-quality broadband access will address and remedy *both* direct and indirect cost factors identified as entry barriers and other holdups to entry. These include reasonable, shortened time frames for permitting, various make-ready work requirements, and expedited dispute resolution. The costs to consumers associated with delay-related impediments that pole owners have built into the make-ready process are substantial and measurable. There is a growing body of economic literature addressing the foregone value to consumers (referred to in economics as "consumer surplus") per month associated with the lack of broadband access based on the willingness-to-pay ("WTP") of currently unserved households and businesses to improve from a low-quality connection at slow speeds to a high-quality broadband connection at high speeds as compared to their willingness to pay for other goods and services they consume. Building on this body of economic research, a dollar amount of potential economic gains to households and businesses associated with the achievement of full broadband access throughout unserved areas of the Commonwealth can be quantified using program award data from the federal RDOF grant program for locations awarded in Kentucky. Specifically, the aggregate new consumer willingness to pay for broadband connectivity, defined as a household upgrading from Mobile 5/1 Mbps to representative fixed wireline speeds is conservatively[4] estimated for the Commonwealth of

[4] These estimates of economic gain associated with the full expansion of broadband are conservative in that they are based on the RDOF data only and do not take into account other federal and state expansion plans. Nor do they fully reflect the total economic and social welfare value of the higher network speeds and lower latency prioritized in the grant programs or the increased broadband demand since the pandemic, especially in the state's expansive rural areas, and are demand driven. Moreover, the methodology models only the direct consumer value effects. Multiplier positive externalities that broadband is known to generate throughout the local and regional economy, *e.g.*, increased

Kentucky in the range of **$119 million** per year of economic gains. The derived annual figures translate into roughly upwards of a total **$ 2 billion** in present value terms based on the average service lives of utility poles. These very substantial new economic gains estimated as poised to accrue to households and businesses in unserved areas of the Commonwealth *would be foregone or delayed* absent proactive policies to check the status quo behaviors of utility pole owners that impede full broadband expansion by imposing unjust and unreasonable rates, term, and conditions that stymie third-party broadband provider efforts to build out into unserved, rural areas of the Commonwealth.

Conclusion

Given the underlying characteristics of poles and their necessity in rolling out broadband into unserved areas, policies that support a more favorable entry environment for broadband providers align with the public interest; conversely, the unfavorable entry conditions facing broadband providers today under the status quo which gives pole owners large discretion over rates, terms, and conditions of access have significant and measurable detriment impacts on the public interest. This is especially true as applied to make-ready work, where pole owners historically have enjoyed unilateral controlled of most aspects of the make-ready process. That said, opportunities exist for pole owner hold up in connection with recurring pole attachment rental rates, even in jurisdictions such as Kentucky that have adopted effective recurring rate regulation. For example, pole owners can harm the public interest by failing to give proper written notice of recurring pole attachment rate increases, thereby diminishing or entirely precluding the attacher from effectively challenging the increase and the right to a just and reasonable rate.

job growth, employment opportunities, GDP, etc., are not directly modelled, nor are the deadweight losses associated with the flow through of higher input prices.

In conclusion, pole owner behaviors and the set of unjust and unreasonable make-ready rates, terms and conditions imposed on third-party broadband providers associated with those behaviors creates substantial economic deadweight loss to the people of Kentucky, especially those in hard-to-reach rural unserved areas of the Commonwealth, by their potential to hold up access to high-quality broadband services for these customers. Allowing these behaviors to go unchecked is unreasonable and contrary to a public interest standard, *i.e.*, one which compares outcomes under the status quo against the economic societal welfare performance benchmark of an efficient, effectively competitive or well-functioning market outcome and allocation of societal resources.

Moreover, as state and federal resources are increasingly used to support broadband expansion into unserved areas, the public interest in supporting a cost-efficient and timely pole attachment process is only heightened. Significantly, the public interest alignment of policies supporting favorable rates, terms, and conditions of access to poles for broadband providers takes into account the welfare of all citizens of the Commonwealth, including the utilities' own electric customers, who are also consumers of broadband. In the context of achieving full broadband access for Kentuckians in unserved areas, both theoretical economics and common sense align to create a pressing public interest case for policy makers to check the market power of pole owners which allows them unilateral control over the rates, terms, and conditions by which new broadband attachments are made by adopting consistent, efficient policies for make-ready such as those described in this paper.

Appendix 1: Net Book Value Approach to Make Ready Charges for Pole Replacement

As described in this paper, and further expanded upon in my earlier paper in connection with the NCTA petition,[1] there are two major categories of costs that meet the criteria for true "but for" costs attributable to attachment requests in an economically dynamic efficiency framework. These are: (1) the net book value (*i.e.*, original net pole cost not yet depreciated or recovered by the utility) of the existing utility pole plant that "but for" the new attachment could have remained in service until such time it was fully depreciated and/or reached the end of its service life or used and useful life to the utility (whichever came first); and (2) an additional category of incremental costs, to apply where the existing pole is not near the end of its useful life as measured by the utility's current depreciation rate, to account for the cost differential, to the extent any could be demonstrated with verifiable data, between the replacement pole and the pole the utility would otherwise have installed upon retirement of the existing pole "but for" the new attacher. This would include, for example, the additional unique costs owing to extra height, class or strength of pole that "but for" the new attachment the utility would have deployed to serve its own core electric service) with the pole required to accommodate the new attachment. Except in these limited cases where the additional cost component can be fully supported and well documented, the utility will be made whole by make-ready charges that simply recover the net book value of the earlier retired replaced pole remaining on its books. In many respects, this charge is analogous to a stranded investment recovery charge, a widely accepted practice for making utilities whole in light of events or decisions to replace plant earlier than planned or anticipated or before the end of the plant's historical useful life.

Net book Value of the Replaced/Retired Pole. Specifically, and with respect to the net book value of the removed pole, the recommended approach establishes a presumptive value based on the average booked net bare pole cost under the widely used FCC recurring rate formula methodology (or here in Kentucky, state certified to regulate pole attachments, the net book value

[1] See Patricia D. Kravtin, *The Economic Case For A More Cost Causative Approach To Make-Ready Charges Associated With Pole Replacement In Unserved/Rural Areas* (Sept. 2, 2020) (filed *In the Matter of Accelerating Wireline Broadband Deployment By Removing Barriers To Infrastructure Investment,* Comments of Charter Communications, Inc., Ex. 1, WC Dkt. No. 17-84 (Sept. 2,2020)) (attached as Exhibit 1 to KBCA Comments dated September 2, 2020).

as calculated under the state's close simile of the FCC formula could be used). **Table 1** below provides an illustrative example of that sort of calculation for an illustrative electric utility. As shown in **Table 1** below, the per-unit net bare pole cost is calculated in the following four steps:

- **First**, the electric utility's gross investment in pole cost is determined based on amounts reported in the utility's books of account in Account 364 ("Poles, Towers and Fixtures").
- **Second**, this gross investment amount is converted to a net investment figure by subtracting accumulated depreciation for pole plant, and accumulated deferred taxes applicable to poles (not applicable to cooperatively and municipally owned utilities).
- **Third**, the net investment in bare pole plant is determined by making a further reduction to remove amounts booked to Account 364 for "appurtenances," such as cross-arms, used in the provision of the core electric service only and from which communications attachers do not derive benefit.
- The **fourth** and final step is to divide the net investment in bare pole plant figure by the total number of poles the utility has in service to derive a per-unit pole cost figure, which can then be scaled to the number of poles replaced in the course of a particular project.

Table 1
Illustrative Example of Per-Pole Average Remaining Net Book Value
(Based on FCC Recurring Rate Formula Methodology Applied to a Cooperatively Owned Utility)

Formula Calculation: Net Bare Pole Cost Component	**Data as of 12/31/xx Current Cost Year**	*Sources/ Notes*
Investment in Pole Plant Acct 364	$37,500,000	Utility Accounting Records corresponding to FERC Form 1 Report Acct 364
- Accumulated depreciation for poles	$15,000,000	Prorated from Electric/ Distribution Plant or Internal Utility Records
- Accumulated deferred income taxes for poles	$00.00	Prorated from Total/Electric Plant including Excess ADIT Amounts N/A for Coop and Muni Owned Util.
= Net Pole Investment	$22,500,000	
x (1- Appurtenances Factor)	.85	FCC 15% Rebuttable Presumption or Actual
= Net Pole Investment allocable to Attachments	$19,125,000	
/ Total Number of Poles	50,000	Utility Records
= **Estimated Average Remaining Net Book Value/Pole**	**$382.50**	

Employing the recurring rate formula methodology as a basis for calculating the net book value offers many advantages. The methodology is widely accepted and used throughout the country, relies primarily on publicly available utility cost information (the one exception being aggregate utility pole count, but that is generally available data and provided in recurring rate calculations), and parties could rely on existing agency and judicial precedent accumulated over the past four decades in providing substantial guidance. That said, there is an alternative method to the use of the recurring rate formula to estimate the net book value of the removed pole from the bottom-up based on the current installed per unit cost of a newly installed pole that could be applied in the limited instances where historic records cannot be relied upon, *e.g.*, where data on pole counts is not readily available or deemed reliable. This alternative method starts with the average cost of a standard joint use pole being installed by the utility in the relevant geographic area, and adjusts that cost by the average age of the utility's embedded base of poles to account for (1) cost changes from the installed date of the new pole using a published cost index; and (2) to develop an age-appropriate amount of accumulated depreciation to net against the age-adjusted gross investment cost. This alternative method is illustrated in **Table 2** below. Given the reporting requirements applicable or followed by most all utilities, that parties could almost always rely on the recommended method of the recurring rate formula.

Table 2
Alternative Method to Estimate Remaining Net Book Value of an Installed Pole – Illustrative Example

Step	Description	
1	Utility Current Installed Per-Bare Pole Cost (2020)	$1,500.00
2	Cost Deflator from 2020 to 2003 (1)	0.6451
3	Estimated Installed Per-Pole Cost (2003)	$967.65
4	Depreciation Rate (default 33-year life)	3.00%
5	Annual Depreciation (2)	$29.03
6	Accumulated Depreciation (default 17 Years) (3)	$493.50
7	**Net Installed Per-Pole Cost (4)**	**$474.15**

(1) The Handy Whitman Index, Bulletin No. 175, South Atlantic Region, was used to deflate pole cost from 2020 to 2003 (50% service life).
(2) Annual depreciation (straight-line) using depreciation rate associated with utility Account 364 life and accrual rate inputs.
(3) Line 5 times 17 years (50% service life).
(4) Line 3 minus Line 6.

Additional Unique, Data-Verified Incremental Costs. As a practical matter and an economic reality, the second category of avoidable costs —additional/incremental pole costs beyond what a utility would have installed in its normal course of pole replacements—should be a very limited occurrence. As described in this report, utilities are increasingly deploying taller, stronger poles to meet their own expanding operational needs such as to meet growth and satisfy regulatory mandates for quality of service, safety, and resiliency. There are an increasing number of pole resiliency/hardening and upgrade modernization programs underway nationwide in response to a generally aging pole infrastructure or to meet the growing demands of the utility's primary service. While fair to the utility to allow for the possibility of this second area of cost recovery by the utility in make-ready charges for pole replacement, the appropriate (rebuttable) presumption is that such costs do not exist. As with the rebuttable presumptions in the recurring rate formula, the parties would have the opportunity to challenge the presumption based on actual, well supported and documented data that could be substantiated and verified. In light of the utility's opportunity and incentive to seek additional cost recovery in excess of true "but for" costs as defined in an economically dynamic efficiency framework, such additional cost recovery to the utility would be allowed only in those instances where the utility can provide actual, detailed factual documentation in support of such a claim.

Either party would have the opportunity to challenge the use of the average net book cost based on the average age of the utility's pole plant and support instead the use of a net book value amount associated with the actual vintage of the removed pole. In particular, the pole owner could seek to use a higher net book value to calculate make-ready charges where it could be demonstrated with verifiable data the age of the removed pole was younger than average vintage pole and hence subject to fewer than average years of depreciation-related capital recovery. Similarly, attachers could seek to use a lower net book value where it could be demonstrated the age of the removed pole was older than the average vintage pole and hence subject to more years of depreciation-related capital recovery (*i.e.*, write-down) by the utility.

Given both the incentive for the utility to overcharge, its control over the data used in the calculations, and the desirability of setting make-ready charges at efficient, just and reasonable broadband promoting levels for the reasons explained in this report, it is important the utility be required to provide well documented reliable and verifiable forms of support for any challenge to

a rebuttable presumption that raises make-ready charges. Generally reliable sources of data would include: published construction guidelines or specific pole replacement plans including current or future pole resiliency and hardening programs, detailed pole construction planning and budgeting schedules provided in connection with rate case filings, fixed asset accounting records pertaining to Account 364 with detailed depreciation entries for tax and ratemaking purposes, and detailed work orders pertaining to the specific removed poles. Holding utilities responsible for documenting and proving any challenge to these rebuttable presumptions will help ensure that the Commission's time in sorting through those challenges is well spent. In addition, to be balanced, attachers should also have a reasonable opportunity to make presumptive challenges, including a process by which they could obtain reasonable, timely access to sources of utility data not publicly reported but internally tracked and available to the utility as potential support for its data claims. **Table 3** below provides an illustrative example of how the net book value approach would work in practice. As demonstrated in **Table 3**, the approach offers a relatively straightforward, uniform, easily administered approach to determining just and reasonable make-ready charges as compared to the status quo.

Table 3
Illustrative Calculation of Net Book Value Approach for Pole Replacement

	Newer than Average Vintage Poles	**Average-aged Poles, or No Verifiable Pole-Specific Data**	**Older than Avg. Poles/Poles Scheduled for Near-Term Replacement**
Estimated Average Remaining Net Book Value (NBV)/Pole	$382.50	$382.50	$382.50
+/– Reasonable Adjustment to Accumulated Depreciation (Add/Subtract Annual Depreciation Accrual x No. Years Younger/Older than Average)	+$425.00	n/a	-$190.00
+ Additional Unique Cost/Pole (in Limited Cases Where Documented/Demonstrated Costs Caused by Attacher)	+$200.00	Presumed zero or no sufficient documentation	Presumed zero or no sufficient documentation
– Less Net Cost Savings (from Earlier Replacement and Lower Maintenance Amortized over Life)	-$50.00	Presumed zero or no sufficient documentation	Presumed zero or no sufficient documentation
Adjusted Average NBV/Pole	$957.50	$382.50	$192.50

EXHIBIT C

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April 27,2021

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Re: Proposed Regulations Regarding Access And Attachments To Utility Poles And Facilities, 807 KAR 50XX: Notice To Kentucky PSC Of Public Utilities Commission Of Ohio Pole Attachment Finding And Order

Dear Mr. Pinney:

As the Commission considers adopting pole attachment regulations to ensure just and reasonable rates, terms, and conditions for attachment, I am writing on behalf of the Kentucky Broadband and Cable Association and its members ("KBCA") to alert you to the Public Utilities Commission of Ohio's ("PUCO's") recent Finding and Order, adopting new pole attachment rules. *See* **Attachment 1** (hereinafter "Order"). Among other things, the Order requires a pole owner to provide notice to all affected attachers of any proposed amendment to a tariffed pole attachment rate, term, or condition. Order ¶ 55; *see also* Ohio Admin. Code § 4901:1-3-04(A) (requiring notice of tariff filing). Upon such notice, affected attachers also have an opportunity to object to any proposed change. *Id.*

Notice requirements like these are critical to allow attachers a fair and full opportunity to challenge a proposed change to a pole attachment rate or term, in order to ensure pole attachment rates, terms, and conditions are just and reasonable. Indeed, recently, a pole owner in Kentucky raised its pole attachment rate significantly without notice to the affected attachers, effectively prohibiting them from challenging the increase and ensuring a lawful rate. To avoid such situations in the future, KBCA urges the Commission to adopt a tariff notice requirement similar to the one adopted by the PUCO as part of its forthcoming pole attachment regulations.

Very truly yours,
STURGILL, TURNER, BARKER & MOLONEY, PLLC

James W. Gardner

cc: Linda Bridwell [Linda.Bridwell@ky.gov]
Enc. (1)

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMMISSION'S REVIEW OF OHIO ADM.CODE CHAPTER 4901:1-3, CONCERNING ACCESS TO POLES, DUCTS, CONDUITS, AND RIGHT-OF-WAY.	CASE NO. 19-834-AU-ORD

FINDING AND ORDER

Entered in the Journal on April 7, 2021

I. SUMMARY

{¶ 1} The Commission adopts the proposed amendments to Ohio Adm.Code Chapter 4901:1-3 regarding the Commission's rules for access to poles, ducts, conduits, and right-of-way, as determined in and attached to this Finding and Order.

II. DISCUSSION

A. Applicable Law

{¶ 2} R.C. 111.15(B) and R.C. 106.03(A) require all state agencies to conduct a review of their rules every five years to determine whether the rules should be continued without change, amended, or be rescinded. The Commission has opened this docket to review the rules regarding pole attachments in Ohio Adm.Code Chapter 4901:1-3.

{¶ 3} R.C. 106.03(A) requires that the Commission determine whether the rules:

(a) Should be continued without amendment, be amended, or be rescinded, taking into consideration the purpose, scope, and intent of the statute under which the rules were adopted;

(b) Need amendment or rescission to give more flexibility at the local level;

(c) Need amendment or rescission to eliminate unnecessary paperwork;

(d) Incorporate a text or other material by reference and, if so, whether the citation accompanying the incorporation by reference would reasonably enable the Joint Committee on Agency Rule Review or a reasonable person to whom the rules apply to find and inspect the incorporated text or material readily and without charge and, if the rule has been exempted in whole or in part from R.C. 121.71 to 121.74 because the incorporated text or material has one or more characteristics described in R.C. 121.75(B), whether the incorporated text or material actually has any of those characteristics;

(e) Duplicate, overlap with, or conflict with other rules;

(f) Have an adverse impact on businesses, as determined under R.C. 107.52;

(g) Contain words or phrases having meanings that in contemporary usage are understood as being derogatory or offensive; and,

(h) Require liability insurance, a bond, or any other financial responsibility instrument as a condition of licensure.

{¶ 4} In accordance with R.C. 121.82, in the course of developing draft rules, the Commission must evaluate the rules against the business impact analysis (BIA). If there will be an adverse impact on businesses, as defined in R.C. 107.52, the agency is to incorporate features into the draft rules to eliminate or adequately reduce any adverse impact. Furthermore, the Commission is required, pursuant to R.C. 121.82, to provide the Common Sense Initiative office the draft rules and the BIA.

{¶ 5} Pursuant to R.C. 121.95(F), a state agency may not adopt a new regulatory restriction unless it simultaneously removes two or more other existing regulatory restrictions. In accordance with R.C. 121.95, and prior to January 1, 2020, the Commission

identified rules having one or more regulatory restrictions that require or prohibit an action, prepared a base inventory of these restrictions in the existing rules, and submitted this base inventory to the Joint Committee on Agency Rule Review, as well as posted this inventory on the Commission's website at https://puco.ohio.gov/wps/portal/gov/puco/documents-and-rules/resources/restrictions. With regard to the amendments discussed in this Finding and Order with respect to Ohio Adm.Code Chapter 4901:1-3, the Commission has both considered and satisfied the requirements in R.C. 121.95(F).

B. Procedural History

{¶ 6} On May 21, 2019, the Commission held a workshop in this proceeding to afford interested stakeholders an opportunity to propose revisions to the rules in Ohio Adm.Code Chapter 4901:1-3 for the Commission's consideration. The purpose of the workshop was to allow stakeholders to propose their own revisions to the rules for consideration. Approximately 21 interested stakeholders attended the workshop, and representatives from the Ohio Cable Telecommunications Association (OCTA) provided comments.

{¶ 7} Commission Staff (Staff) evaluated the rules contained in Ohio Adm.Code Chapter 4901:1-3 and, following Staff's review, proposed amendments to Ohio Adm.Code 4901:1-3-01, 4901:1-3-02, 4901:1-3-03, 4901:1-3-04, and 4901:1-3-05. The remaining rules in the chapter were, under Staff's proposal, to remain unchanged.

{¶ 8} By Entry issued on July 17, 2019, the Commission requested comments and reply comments on Staff's proposed revisions to Ohio Adm.Code Chapter 4901:1-3, and ordered that comments and reply comments be filed by August 15, 2019, and September 9, 2019, respectively.

{¶ 9} Consistent with the Entry issued on July 17, 2019, written comments were timely filed on August 15, 2019, by Sprint Corporation (Sprint), Crown Castle Fiber LLC

(Crown Castle), The Dayton Power and Light Company (DP&L), the Ohio Telecom association (OTA), Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy), OCTA, and collectively by Duke Energy Ohio, Inc. (Duke) and the Ohio Power Company (AEP), in response to Staff's proposed revision. Reply comments were then timely filed on September 9, 2019, by DP&L, Crown Castle, OTA, AT&T Ohio (AT&T), FirstEnergy, OCTA, and collectively by Duke and AEP.

III. COMMENTS ON PROPOSED REVISIONS TO OHIO ADM.CODE CHAPTER 4901:1-3

{¶ 10} Before addressing the individual rules, the Commission thanks all participants for their contributions toward the development of these rules and the insightful comments and reply comments submitted in this proceeding. In some instances, we will be making substantial changes to the structure and content of the rules proposed by Staff, often at the suggestion of the comments that we have received. However, due to the volume of materials and time constraints, we will not attempt to address every issue or suggestion raised. In certain instances, we may have incorporated suggested changes into our rules or addressed concerns without expressly acknowledging the source of the suggestion in this Finding and Order. To the extent that a comment is not specifically addressed in this Finding and Order, it has been rejected.

{¶ 11} Ohio Adm.Code 4901:1-3-01 (Definitions). Staff recommends adding a definition for overlashing as the term is used in Ohio Adm.Code 4901:1-3-03.

{¶ 12} Most commenters support Staff's recommendation to add a definition for "overlashing" to Ohio Adm.Code 4901:1-3-01, but some commenters believe that the proposed definition needs modifications. In particular, Crown Castle believes that the definition of "overlashing" should be expanded to allow strand-mounted wireless facilities to be included as equipment that can be overlashed. Crown Castle asserts that although as the Staff-proposed definition limits overlashing, in practice, varied equipment such as fiber splice cases, fiber snow shoes, cable TC amplifiers, cable TV taps, copper splitters, Wi-Fi

enclosures, and fiber to the home multi-port cases have been overlashed by attaching entities to their own strands for many years, and in some cases decades. OCTA argues that its members not only overlash fiber optic cable; they also overlash coaxial cable and other cables. Accordingly, OCTA recommends that the Commission remove the words "fiber optic" after "additional," and instead, reference different cables, such as coaxial and fiber optic, to ensure there is no dispute over what OCTA members overlash. OTA supports the Commission's proposed definition of "overlashing."

{¶ 13} AEP and Duke also recommend that the Commission revise Staff's proposed draft definition of "overlashing." Specifically, AEP and Duke argue that the phrase "similar to incidental equipment such as fiber slice closers" is vague and open ended and could be abused. AEP and Duke believe that the definition should exclude materials other than cables. Similarly, FirstEnergy suggests striking the term "similar incidental equipment" arguing that the term is not defined or specifically limited and could be susceptible to disputes over conflicting interpretations. OCTA also recommends striking the phrase "or similar incidental equipment such as fiber splice enclosures" because cable companies do not consider that example to be overlashing.

{¶ 14} In addition to the Staff-proposed addition of "overlashing" to Ohio Adm.Code Chapter 4901:1-3, Crown Castle recommends that the rules should be amended to create a definition for complex make-ready and simple make-ready. Specifically, Crown Castle represents that the Federal Communication Commission's (FCC) one-touch-make-ready process (OTMR) has been effective since May 2019, and most, if not all, of Ohio's public utility pole owners have experience implementing the process into their systems. In order to facilitate roll-out of broadband, Crown Castle believes Ohio should embrace the one-touch-make-ready process and incorporate the definitions of "complex make-ready" and "simple make-ready" within 47 C.F.R. 1.1402(p) and (q), respectively, into Ohio Adm.Code 4901:1-3-01.

{¶ 15} As a final matter, OCTA argues that the Commission should adopt a definition for "customer service drop" and recommends that the following definition be included in Ohio Adm.Code 4901:1-3-01: "Customer service drop means a pole attachment that extends from a pole directly to a customer's premises." OCTA represents that the rules make clear that a customer service drop is an attachment for rental rate purposes, but the public utility may not require an application for customer service drops. OCTA argues that this definition, if adopted, will help clarify when and for which types of equipment a pole attachment application is required.

{¶ 16} After reviewing the comments and reply comments, we agree with Crown Castle and find it appropriate to adopt definitions for the terms "complex make-ready" and "simple make-ready." Additionally, as AEP, Duke, and FirstEnergy argue, we find that the phrase "similar to incidental equipment such as fiber slice closers" within the definition of "overlashing" is vague and open ended. Accordingly, we have modified Staff's proposed language in the term "overlashing" as reflected in the draft rules attached to the Finding and Order.

{¶ 17} Ohio Adm.Code 4901:1-3-02 (Purpose and Scope). Paragraph (A) provides that each citation in Ohio Adm.Code Chapter 4901:1-3 that is made to a section of the United States Code or a regulation in the Code of Federal Regulations is intended, and shall serve, to incorporate by reference the particular version of the cited matter that was effective on July 1, 2014. To incorporate recent federal changes, Staff recommended the date in paragraph (A) be updated to October 1, 2019. Additionally, Staff recommends this rule incorporate language regarding full and partial suspension during the application for the tariff approval process as a new subsection (G).

{¶ 18} OCTA avers that the effective date of the statutes and regulations incorporated by reference should not be a future date. As drafted, Ohio Adm.Code 4901:1-3-02(B) states that any cited United States Code section or Code of Federal Regulations be the version effective on October 1, 2019. OCTA believes that by proposing a future date as a trigger

date, the parties cannot effectively consider and comment today on what impact, if any, would occur from such a change in the rules. OCTA suggests that the Commission modify Ohio Adm.Code 4901:1-3-02(A) to reflect the current date, when parties are presenting their initial comments, instead of a future date, because parties are in a position to comment effectively on the proposed change as of the date of their comment filings.

{¶ 19} FirstEnergy argues that, as proposed, Ohio Adm.Code 4901:1-3-02(G) is confusing with respect to the suspension of an application. FirstEnergy suggests that this section be rewritten to provide clarity of the intended process and that the rewritten section be circulated for additional review and comments. OCTA and OTA argue that the suspension process detailed in Ohio Adm.Code 4901:1-3-02(G) would be more appropriately located in Ohio Adm.Code 4901:1-3-04(A) because the intent of the proposal appears to involve only the applications outlined in Ohio Adm.Code 4901:1-3-04.

{¶ 20} In response to OCTA's concerns about the effective date of the statutes and regulations incorporated by reference, the Commission finds it appropriate to update the effective date to March 1, 2021, given that there has been no significant change(s) to the federal rules that would, in the Commission's opinion, impact any parties prior comments. The rule has been amended accordingly. Additionally, we adopt OTA and OCTA's recommendation to move the suspension process detailed in Ohio Adm.Code 4901:1-3-02(G) to Ohio Adm.Code 4901:1-3-04(A)(2), as opposed to FirstEnergy's proposition to rewrite the section, because the intent of the proposal involves the applications outlined in Ohio Adm.Code 4901:1-3-04. This change is reflected in the draft rules attached to the Finding and Order.

{¶ 21} Ohio Adm.Code 4901:1-3-03(A)(2) (Access to poles, ducts, conduits, and rights-of-way). Staff did not propose to amend Ohio Adm.Code 4901:1-3-03(A)(2).

{¶ 22} OCTA avers that, consistent with its previous recommendation for the Commission to adopt a definition for "customer service drop," the Commission should

clarify that a public utility should not be allowed to require an attacher to submit an application for a customer service drop within Ohio Adm.Code 4901:1-3-03(A)(2).

{¶ 23} Ohio Adm.Code 4901:1-3-03(A)(4). Staff did not propose to amend Ohio Adm.Code 4901:1-3-03(A)(4).

{¶ 24} Crown Castle argues that, in spite of the language contained in Ohio Adm.Code 4901:1-3-03(A)(4) requiring, inter alia, a public utility's denial of access to be specific, a number of public utilities persist in denying access to their poles without specific explanations. Accordingly, Crown Castle suggests that in order to clarify that denials of access must be supported by particularized, concrete support for the reasons under which the public utility is denying access, the Commission modify Ohio Adm.Code 4901:1-3-03(A)(4) to clarify that blanket prohibitions related to access do not adequately support a denial of access.

{¶ 25} Ohio Adm.Code 4901:1-3-03(A)(7). Staff recommends the implementation of overlashing language by creating a new subsection (A)(7) within this rule which pertains to the applicable procedure when dealing with an existing attaching entity.

{¶ 26} Crown Castle argues that overlashing permissions should be extended to strand-mounted wireless facilities in Staff-proposed Ohio Adm.Code 4901:1-3-03(A)(7).

{¶ 27} DP&L argues that proposed Ohio Adm.Code 4901:1-03(A)(7) should be rejected as a whole. DP&L posits that entities seeking to overlash on existing attachments should go through the same process as any other attacher. In support of its position, DP&L first argues that overlashing imposes a quantifiable increase in pole loading and references an engineering analysis depicting the effects of a typical overlash on pole loading. DP&L avers that, in order to assure safety and avoid overloading, the Commission should require an application identifying where the overlash will occur and the configuration and type of overlash facilities that will be installed and then the utility must be allowed to determine whether the proposal will overload any pole, and thus require make-ready work before it

can be authorized. DP&L recommends that, if a load study shows that the pole would be overloaded as a result of a proposed overlash, then the overlash proposal should be rejected unless the overlashing entity is willing to pay for make-ready work to replace the existing pole or poles with a stronger pole or poles.

{¶ 28} Secondly, DP&L argues that, even if overloading does not occur, the increased weight of an overlashed attachment increases the risk of mid-span sag into other facilities. DP&L recommends that a pre-approval inspection and mid-span sag analysis should be required.

{¶ 29} While it is DP&L's position that an entity seeking to overlash should be treated in a non-discriminatory manner, DP&L states that it understands its opposition may not be realistic and suggests that, at the very least, certain minimum requirements should apply to overlashing entities. To streamline the overlashing process, DP&L recommends that Ohio Adm.Code 4901:1-3-03(A)(7) be amended to: (1) clarify that an overlashing entity is required to enter into a pole attachment agreement with the pole owner; (2) include minimum requirements for what the overlashing entity should provide to the utility pole owner in the advance notice, such as type, size, and location of the overlashed facilities; (3) remove unused and obsolete attachments in connection with any proposed overlash; (4) authorize pole owners to impute default values for additional loading for overlashing as a substitute for a full load study; (5) allow additional time for very large timeline overlash build-outs; (6) charge a non-discriminatory annual fee to new overlashing entities; and (7) prohibit overlashed entities from subsidizing the cost of inspecting overlashing facilities by ratepayers.

{¶ 30} AEP and Duke support the portion of draft rule Ohio Adm.Code 4901:1-3-03(A)(7)(c) that expressly allows a pole owner to require up to 15 days' advance notice of overlashing stating that advance notice of overlashing is the only way an electric utility can determine whether the proposed overlashing meets the electric utility's engineering

standards for loading and clearance. In addition, AEP and Duke believe this advance notice will allow an electric utility to excise its right under Ohio Adm.Code 4901:1-3-03.

{¶ 31} Furthermore, AEP and Duke support the portion of draft rule Ohio Adm.Code 4901:1-3-03(A)(7)(c) that expressly provides for post-inspections and correction of code violations and equipment damage. AEP and Duke represent that post inspections are essential for electric utilities to ensure that the overlasher has performed the overlashing in the manner proposed in its advance notice and that code violations or pole damage have not resulted from the overlashing. Further, AEP and Duke believe that this rule incentivizes overlashers to perform their work properly the first time.

{¶ 32} With respect to the remaining portion of draft rule Ohio Adm.Code 4901:1-3-03(A)(7)(c), AEP and Duke recommend that the Commission adopt a modified version of proposed Ohio Adm.Code 4901:1-3-03(A)(7)(c) that: (1) prohibits overlashing onto existing violations; (2) confirms that public utilities may deny overlashing for reasons of insufficient capacity, safety, reliability, and general applicable engineering purposes; and (3) confirms that overlashers are responsible for the cost of evaluating the proposed overlashing. Additionally, AEP and Duke recommend that Ohio Adm.Code 4901:1-3-03(A) make clear that public utilities can recover the cost of performing an engineering analysis of proposed overlashing and that public utilities are not responsible for the cost of correcting code or standards violations caused by third-party attaching entities.

{¶ 33} AEP and Duke recommend that the Commission modify Ohio Adm.Code 4901:1-3-03(A)(7)(b) to require existing attachers to correct violations identified by a utility within 15 days of notice to the existing attacher of same, and providing that where the existing attacher fails to do so, the new attacher can proceed with correcting the violation at the existing attacher's sole expense. AEP and Duke believe this modification will address the delay in correcting existing violations.

{¶ 34} FirstEnergy also takes issue with Ohio Adm.Code 4901:1-3-03(A)(7), as proposed. Like DP&L, FirstEnergy believes that entities seeking to overlash on existing

attachments should go through the same process as any other attacher. FirstEnergy recommends Ohio Adm.Code 4901:1-3-03(A)(7) be amended to: (1) authorize public utilities to require pre-approval before overlashing; (2) authorize a public utility to delay an existing attaching entity from overlashing to fix preexisting violations; (3) allow a public utility to require 45 days' advance notice of planned overlashing; (4) allow pole owners, on a nondiscriminatory basis, to make the final determination where there are disputes over capacity, safety, reliability, or engineering issues; (5) allow pole owners to charge the overlashing party a fee for costs incurred by the pole owner for pole inspections.

{¶ 35} As a final matter with respect to overlashing, DP&L calls attention to "double wood," a term used to describe a circumstance in which there are two sets of poles installed next to each other when only one pole is required. DP&L avers that having two sets of poles in close proximity raises safety concerns as well as aesthetics. DP&L represents that double wood arises when either (1) an attacher fails to comply with tariff requirements to move its attachment(s) to a new pole and remove an old pole or (2) an attacher avoids make-ready work by the utility by installing its own poles. Accordingly, DP&L recommends that the Commission adopt a new sub-section (d) in Ohio Adm.Code 4901:1-3-03(B)(3) to authorize public utilities to deny access to one or more poles in a pole line if there are other poles in the same pole line that would require make-ready work and the attaching entity has declined such make-ready work, and instead, installs or seeks to install, its own poles.

{¶ 36} With respect to Ohio Adm.Code 4901:1-3-03(B)(6)(f), DP&L recommends amending this section so that it references the time periods set forth in Ohio Adm.Code 4901:1-3-03(A)(7)(c) and (e). In effect, DP&L states that, for overlash notices involving the lesser of 3,000 poles or five percent of the utility's poles in the state, the public utility may add 45 days for the initial determination of whether there is a capacity, safety, reliability, or engineering issue, and may add 45 days for the post-overlash inspection.

{¶ 37} Sprint represents that, as proposed, draft Ohio Adm.Code 4901:1-3-03(A)(7)(a)(ii), gives existing attaching entities the power to grant or withhold permission

for a third-party to overlash its own equipment, and because the proposed rule contains no prohibitions, limits, or constraints on an existing attacher's ability to withhold consent, an existing attacher could withhold consent for no other reason than to impede another carrier and obtain a competitive advantage. Sprint recommends that Ohio Adm.Code 4901:1-3-03(A)(7)(a)(ii) and Ohio Adm.Code 4901:1-3-03(A)(7)(d) be amended to require a potential overlasher to provide reasonable notice of its intention to overlash an existing attacher instead of requiring permission from the existing attaching entity.

{¶ 38} OCTA states that it fully supports the substance of the Commission's proposed overlash provisions in Ohio Adm.Code Chapter 4901:1-3 and avers that the absence of any rules governing overlashing has caused confusion. However, OCTA believes clarification is necessary with respect to Ohio Adm.Code 4901:1-3-03(A)(7). Specifically, OCTA recommends that the Commission modify subsection (b) and (c) to reflect that a public utility may not prohibit overlashing or subject an overlasher to a fee. In addition, OCTA suggests that subsection (c) of Ohio Adm.Code 4901:1-3-03(A)(7) should, at most, require identification of the location, size and type of cable, and anticipated date to conduct the overlashing. OCTA argues that this additional language are key aspects of overlashing not only in Ohio but across the country as well, and that by listing the maximum information that a utility may require in an advance notice ensures abuse will not take place. Specifically, OCTA contends that pole owners in Ohio and elsewhere are confronting OCTA members with attempts to define overlashing and the notification process so as to make the advance notification tantamount to a full application.

{¶ 39} Ohio Adm.Code 4901:1-3-03(B). Staff did not propose to amend Ohio Adm.Code 4901:1-3-03(B).

A. Make-ready

{¶ 40} Crown Castle believes that make-ready timelines for application review should be incorporated into Ohio Adm.Code 4901:1-3-03(B). Specifically, Crown Castle argues that untimely notification of an incomplete application to attach delays deployment

timelines, and under the present rules, the delay can be by as much as 45 days. Therefore, Crown Castle recommends that the Commission adopt 47 C.F.R. 1.1411(c)(1), which requires a pole owner to inform an attaching entity within ten business days of submission of an application for attachment whether the application is complete, and if the utility pole owner does not inform the attaching entity within 10 business days that its application is complete or otherwise, the application is deemed complete and the survey period begins.

{¶ 41} Of similar note, Crown Castle believes that the Commission should also shorten the make-ready timeline for complex make-ready in the communications space from 60 to 30 days in Ohio Adm.Code 4901:1-3-03(A)(7)(a)(ii).

{¶ 42} Crown Castle also recommends amending Ohio Adm.Code 4901:1-3-03(B)(2) to incorporate requirements for itemized, detailed, invoices for make-ready, consistent with 47 C.F.R. 1.1411(d). To support this recommendation, Crown Castle states that frequently, attaching entities are provided with make-ready estimates that provide no level of detail from which to determine if the costs therein are reasonable, and in order to ensure transparency and guarantee that attaching entities are bearing only the reasonable economic responsibility for make-ready, the Commission should replace a portion of Ohio Adm.Code 4901:1-3-03(B)(2) with the language of 47 C.F.R. 1.1411(d).

B. Self-help

{¶ 43} Crown Castle further argues that the FCC recently provided attaching entities with the ability to perform self-help above the communications space when the utility or other third-party attachers have not complied with their make-ready timeframes under 47 C.F.R. 1.1411(e)(2) by permitting the use of a utility-approved contractor by the attaching entity. Crown Castle urges the Commission to adopt similar self-help provisions into Ohio Adm.Code Chapter 4901:1-3.

{¶ 44} Additionally, Crown Castle argues that the Commission should incorporate 47 C.F.R. 1.1412(a) and (c)(1) through (c)(5) regarding a list of contractors for self-help

complex and make-ready work above the communications space as well as minimum qualifications for such contractors into Ohio Adm.Code 4901:1-3-03(B)(5) and (C).

{¶ 45} FirstEnergy recommends that the Commission move the phrase "[o]nly the public utility or its direct contractor may perform make ready work above the communications space" in Ohio Adm.Code 4901:1-3-03(B)(5) to subdivision (C)(2) in order to clarify that it applies to all make-ready work in the power space, and not just for wireless attachments.

{¶ 46} With respect to Ohio Adm.Code 4901:1-3-03(C), OCTA believes that greater detail and flexibility are needed with respect to contractors used for survey and make-ready work. Accordingly, OCTA recommends that, when an attacher uses "self-help" because a pole owner fails to perform survey and make-ready work in a timely manner, the attaching entity be able to choose its own qualified contractors, approved by the utility, rather than use a utility-chosen contractor. OCTA suggests modifying Ohio Adm.Code 4901:1-3-03(C) to allow an attaching entity to add contractors that meet specified minimum qualifications to the utility-provided authorized contractors list.

C. One-Touch Make-Ready

{¶ 47} Lastly, Crown Castle, AEP, and Duke believe that the Commission should incorporate the OTMR process set forth in 47 C.F.R. 1.1411(j) as an alternative make-ready process for attachment applications involving simple make-ready into Ohio Adm.Code 4901:1-1-3-03(B). AEP and Duke believe a OTMR rule would encourage competition and broadband deployment while minimally burdening electric safety and reliability. AEP and Duke refute OCTA's recommendation that the Commission should not consider OTMR rules because those rules had only recently gone into effect and state that there is little downside to implementing OTMR rules if the Commission fashions them after the FCC's so as to only apply to simple make-ready in the communications space. Lastly, AEP and Duke contend that, although there is a pending Ninth Circuit case challenging other portions of

the FCC's order that adopted the OTMR rules, the OTMR rules are not being challenged by any party on appeal.

{¶ 48} The Commission notes that, after reviewing this docket, many of the comments received related largely in part to Staff's proposal to adopt overlashing language when dealing with an existing attaching entity and the effects these suggested provisions have on other sections of this rule chapter. Many of the interested stakeholders who filed comments requested that Ohio Adm.Code 4901:1-3-03 be modified to provide more clarity to both public utilities and attaching entities, specifically with respect to time frames, make-ready, contractors, overlashing, OTMR, and self-help. In addition, several stakeholders recommended that the Commission adopt certain provisions from the FCC's regulations in order to promote efficacy and consistency within the industry since many of the interested stakeholders must already adhere to the FCC's requirements in states that do not regulate pole attachments. Rather than having two different sets of rules – federal and state – we believe that adopting certain provisions of the FCC's regulations will help alleviate some of the administrative burden public utilities and attaching entities face to reach compliance. Additionally, the adoption of federal regulations to replace certain current Commission rules eliminates redundant regulatory restrictions fulfilling the purpose underlying R.C. 121.95(F) and reduces the adverse impact on business pursuant to R.C. 107.52 by not requiring affected business stakeholders to bear the expense of complying with two different sets of regulations, i.e., federal and state.

{¶ 49} After much consideration and in response to the comments the Commission received to modify this rule, we adopt the following provisions as reflected in the draft rules attached to this Finding and Order: 47 C.F.R. 1.1403 with respect to the duty to provide access and required notifications; 47 C.F.R. 1.1411(c) with respect to the application review and survey requirements; 47 C.F.R. 1.1411(d) with respect to the make-ready estimates; 47 C.F.R. 1.411(e) with respect to the notification requirements and make-ready time periods for attachments in the communications space and above the communications space; and 47 C.F.R. 1.1411(g) and 1.411(h) with respect to the time periods in Ohio Adm.Code 4901:1-3-

03. With respect to self-help, we adopt 47 C.F.R. 1.411(i). For attachments involving simple make-ready, the Commission adopts 47 C.F.R. 1.1411(g). Specific to contractors for self-help complex make-ready and above the communications space make-ready, the Commission adopts 47 C.F.R. 1.1412(a). Relating to contractors for simple make-ready work, the Commission adopts 47 C.F.R. 1.1412(b). Lastly, with respect to overlashing, the Commission adopts 47 C.F.R. 1.1415. All time limits in this chapter are to be calculated according to Ohio Adm.Code 4901-1-07.

{¶ 50} Ohio Adm. Code 4901:1-3-04 (Rates, terms, and conditions for poles, ducts, and conduits). Staff recommends that initial tariffs or any subsequent changes in tariff rates, terms, and conditions, for access to poles, ducts, conduits, or rights-of-way filed pursuant to R.C. 4905.71 shall be filed as an application for tariff amendment and be subject to an automatic approval process. Additionally, Staff recommends that when calculating a just and reasonable rate for pole attachments and conduits, any unamortized excess accumulated deferred income tax resulting from the Tax Cut and Jobs Act of 2017 shall be deducted from the gross plant and gross pole investment total.

{¶ 51} DP&L proposes that Ohio Adm.Code 4901:1-3-04(A) be modified to address double wood and suggests that the following language be added to the end of (A):

> "A public utility tariff shall include a charge to an attaching entity of up to $100 per day per pole that is imposed if the attaching entity is under an obligation to move its attachment to a new pole and to remove the existing pole and fails to comply with such obligation within 30 days after being notified of such obligation."

{¶ 52} Crown Castle avers that Ohio Adm.Code 4901:1-3-04(E) should incorporate a prohibition on charging an attaching entity to bring poles, attachments, or existing attachers' equipment into compliance with current published, safety, reliability, and pole owner construction standards, consistent with 47 C.F.R. 1.1411(d)(4). Crown Castle states that this language will ensure that the burden to remedy pre-existing, non-compliant conditions

remains with the appropriate parties and does not prevent or burden new deployment. For example, if a pole has a pre-existing, non-compliant condition, and an attaching entity applies to attach, the new attacher should not have to pay to bring the pole into compliance with applicable stands to facilitate its attachment.

{¶ 53} OCTA recommends modifying Ohio Adm.Code 4901:1-3-04(A) to include language that tariff applications: (1) be consistent with all applicable rules in Ohio Adm.Code Chapter 4901:1-3, rather than just the stated parameters of Ohio Adm.Code 4901:1-3-03; (2) be just and reasonable; (3) be subject to a simple automatic approval process; (4) be served upon the attacher's Ohio trade association; and (5) the suspension process be removed from Ohio Adm.Code 4901:1-3-02 and placed in Ohio Adm.Code 4901:1-3-04(A).

{¶ 54} With respect to Ohio Adm.Code 4901:1-3-04(D), OCTA believes that tariff applications should be transparent, complete, and understandable. Accordingly, OCTA recommends incorporating language that provides a list of specific details on what information to include in tariff applications. Specifically, OCTA recommends that the Commission require the following information be provided in tariff applications: calculation sheet, identification of the specific sources of the formula inputs, work papers, and any company-specific records/data underlying the formula inputs including the appurtenance factor, pole height, and pole count. Additionally, OCTA suggests that the application should identity the manner in which the unamortized excess accumulated deferred income tax has been deducted and the amortization schedule(s) relied upon. As a final suggestion, OCTA recommends that the Commission adopt a new subsection (6) within Ohio Adm.Code 4901:1-3-04(D) which would require a public utility to work with and respond in good faith to timely requests for additional information in order to review the application. Lastly, OCTA states that it fully supports the proposed language in Ohio Adm.Code 4901:1-3-04(D)(1) and believes this language is consistent with Commission precedent. In effect, OCTA believes its forgoing recommendations will provide Staff and interested parties the necessary information to review, verify, and analyze a tariff proposal.

{¶ 55} We decline to adopt Crown Castle, DP&L, and OCTA's recommendations relating to Ohio Adm.Code 4901:1-3-04(A). However, we adopt specific language relating to increases to tariffed rates which require customer notice to be sent to all affected attachers concurrent with the filing of the ATA, and any objections to the ATA should be filed within 21 days from the ATA filing. The applicant will have ten days to file its reply to the stated objections. Additionally, at the suggestion of OCTA, we have moved the suspension process in this rule outlined in Ohio Adm.Code 4901:1-3-02(G) to Ohio Adm.Code 4901:1-3-04(A)(2) because the intent of the proposal involves the applications outlined in Ohio Adm.Code 4901:1-3-04. Lastly, we adopt Staff's recommendations to Ohio Adm.Code 4901:1-3-04(D)(1).

{¶ 56} Ohio Adm.Code 4901:1-3-05 (Complaints). Staff recommends that in joint use agreement complaint proceedings challenging pole attachment or conduit occupancy rates, terms, and conditions, a rebuttable presumption exists that an incumbent local exchange carrier (ILEC) should be treated as a non-utility attaching entity. To that end, Staff suggested adopting a rebuttable presumption that ILECs may be charged no higher than the rate determined in Ohio Adm.Code 4901:1-3-04(D). In such complaint cases challenging pole attachment or conduit occupancy rates established in joint use agreements, a public utility can rebut either or both of the two presumptions with clear and convincing evidence that the ILEC receives benefits under its joint use agreement with a public utility that materially advantages the ILEC over an attaching entity that is not a public utility on the same pole.

{¶ 57} OCTA argues that Ohio Adm.Code 4901:1-3-05(A) should be revised so that the rule cannot be interpreted as only allowing limited types of claims. OCTA avers that Ohio law does not limit the types of claims, and therefore, Ohio Adm.Code 4901:1-3-05(A) should not limit the types of claims to those filed pursuant to R.C. 4905.26 and 4927.21.

{¶ 58} OCTA and Crown Castle believe a shorter timeframe for the Commission to resolve a filed complaint is warranted. Specifically, OCTA and Crown Castle believe that

complaint resolution timelines under Ohio Adm.Code 4901:1-3-05(A) should be modified to mirror the timeline under 47 C.F.R. 1.1414(a). OCTA and Crown Castle suggest that the 360-day complaint timeline in Ohio Adm.Code 4901:1-3-05(A) should be shortened to 180 days for complaints involving a denial of access and 270 days for all other complaints filed pursuant to Ohio Adm.Code 4901:1-3-05(A), which would be consistent with 47 C.F.R. 1.1414(a).

{¶ 59} Sprint argues that the complaint process detailed in Ohio Adm.Code 4901:1-3-05 should extend to third-party overlashers. Sprint points out that the complaint process applies to "attaching entities" and that the current definition of "attaching entity" does not expressly include overlashers. Sprint believes that, if the overlashing process is to be exempt from Commission approval requirements, it should be clear that third-party overlashers have a forum to bring complaints against pole owners or existing attachers before the Commission for resolution.

{¶ 60} Crown Castle argues that the rebuttable presumption extended to ILECs in joint use agreement complaint proceedings proposed in Ohio Adm.Code 4901:1-3-05(B) should also be offered to other attaching entities filing complaints about the rates, terms, and conditions of attachment pursuant to pole attachment agreements against public utility pole owners. Crown Castle argues that extending the rebuttable presumption of non-utility status to ILEC attachers but no other attaching entities could ultimately bring about a competitive advantage for ILEC attachers over other attaching entities – Crown Castle believes this competitive advantage would be an unintended consequence of the proposed rule.

{¶ 61} DP&L, AEP, Duke, and FirstEnergy argue that Ohio Adm.Code 4901:1-3-05(B) should not be adopted by the Commission. In support of this position, DP&L argues that Ohio Adm.Code 4901:1-3-05(B) is contrary to fundamental legal principals and sound regulatory policy and should be struck. Specifically, DP&L avers that allowing ILECs to retain all of the benefits of their existing joint use agreements with public utilities while

simultaneously seeking a reduction in the charges that are imposed under such joint use agreements is one-sided. DP&L states that ILECs are not small entities who need special protection because ILECs, in general, are large organizations with economic power and legal resources. Similarly, AEP and Duke also take issue with this burden stating that the rule would place the burden of proof on the party seeking to uphold the voluntary, joint use agreement between the parties.

{¶ 62} Further, DP&L, AEP, Duke, and FirstEnergy aver that the "clear and convincing" standard to rebut the presumption is improper, as this standard is typically applied in cases involving fraud, wills, and inheritances. FirstEnergy states that the evidentiary standard in every other complaint case is a "preponderance of the evidence" and complaint proceedings filed pursuant to Ohio Adm.Code 4901:1-3-05 should be treated no differently. FirstEnergy argues that, if the Commission adopts proposed Ohio Adm.Code 4901:1-3-03(B), the Commission also adopt, at the end of Ohio Adm.Code 4901:1-3-05(B), the following amendment: "[i]n such proceedings, an ILEC must present clear and convincing evidence to rebut any other presumptions under this Chapter."

{¶ 63} Lastly, DP&L, AEP, and Duke point to several benefits that ILECs receive, such as additional space, larger stronger poles installed for the ILECs with no make ready costs, no charge for application fees, engineering, or pole inspections, and preferential location, which are unavailable to non-ILEC attachers. DP&L argues that it is inappropriate for an ILEC operating under a joint use agreement to be charged the same low attachment rate that a non-ILEC attacher is charged. AEP and Duke believe that the FCC adopted a presumption, which is similar to that proposed in Ohio Adm.Code 4901:1-3-05(B), based upon the alleged repeated disputes between ILECs and electric utilities. AEP and Duke believe the FCC's presumption is unlawful and have challenged that particular portion of the FCC's 2018 order. Ultimately, whether the FCC's presumption is unlawful or not, AEP and Duke aver that the Commission should not follow suit.

{¶ 64} AEP and Duke agree with DP&L and aver that the Commission should not adopt Ohio Adm.Code 4901:1-3-05(B). Specifically, AEP and Duke argue that the proposed rule would undermine long-standing joint use agreements, create a regulatory presumption at odds with the facts, and conflict with Commission precedent. AEP and Duke posit that the joint use relationship between electric utilities and ILECs is fundamentally different from the relationship between electric utilities and attaching entities who make attachments under an electric utility's pole attachment tariff, and the differences between joint use agreements and pole attachment tariffs reflect inseverable bargained-for exchanges and the fact that each party to the joint use agreement is a public utility with rights, powers, obligations, and regulatory oversite that is not attendant to other attaching entities.

{¶ 65} Additionally, AEP and Duke state that proposed Ohio Adm.Code 4901:1-3-05(B) conflicts with existing Ohio Adm.Code 4901:1-3-04(A). Specifically, AEP and Duke cite to the Commission order adopting Ohio Adm.Code 4901:1-3-04(A) providing that joint use rates are to be determined through negotiated agreements and argue that the proposed presumption, if adopted, would immediately cast doubt upon the negotiated agreements the Commission expressly condoned in 2014. *In re Adoption of Chapter 4901:1-3, Ohio Administrative Code, Concerning Access to Poles, Ducts, Conduits, and Rights-of-Way by Public Utilities*, Case No. 13-5779-AU-ORD, Finding and Order (Jul. 30, 2014) at 42. AEP and Duke ultimately believe that the presumption embedded within Ohio Adm.Code 4901:1-3-05(B) – that telephone utilities are similarly situated to other attaching entities – is incorrect.

{¶ 66} AEP and Duke believe that ILECs place a greater burden on poles than their competitors stating that ILECs take up more space on a pole and ILECs have heavier, bundled lines which create mid-span sag. AEP and Duke propose that draft Ohio Adm.Code 4901:1-3-05(B) be deleted and recommend that the Commission adopt the following:

> "(B) In complaint proceedings challenging the rates, terms, and conditions of existing joint use agreements between public utilities,

> there is a presumption that such rates, terms, and conditions are just and reasonable. A public utility can rebut this presumption with clear and convincing evidence demonstrating that a rate, term, or condition is not just and reasonable."

{¶ 67} In response to OCTA and Crown Castle's recommendation to shorten the complaint timeframe from 360 days to 180 days, we note that 47 C.F.R. 1.1405(f) provides states up to 360 days to resolve a complaint before jurisdictions reverts back to the FCC. Therefore, we reject OCTA and Crown Castle's modification with respect to the complaint timeframe of 360 days as reflected in the draft rules attached to the Finding and Order.

{¶ 68} We decline to adopt Sprint's modifications to explicitly outline a forum for third-party overlashers to bring complaints against pole owners or existing attachers before the Commission. We note that the only complaint a third-party could file is if the third-party is denied access by a public utility that has an advance notice requirement pursuant to 47 C.F.R. 1.1415(c). If an existing attacher or third-party attaching with an existing attachers permission is denied access, the existing attacher or third-party attaching with an existing attachers permission has to address the issue with the public utility. 47 C.F.R. 1.1415(c) states, in pertinent part, ". . . 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. . ." To adopt Sprint's recommendation when there is already a federal process in place for third-party overlashers seeking recourse when advance notice is required would conflict with the intent of R.C. 121.95 by adopting redundant regulatory restrictions.

{¶ 69} We generally agree with the arguments made by DP&L, AEP, Duke, and FirstEnergy in relation to Staff's recommendations to Ohio Adm.Code 4901:1-3-05. The presumption that telephone utilities are similarly situated to other attaching entities is incorrect. As currently proposed by Staff, Ohio Adm.Code 4901:1-3-05(B) would permit ILECs to receive the same rates as non-utilities under tariff agreements. By allowing ILECs

to negotiate joint use agreements, which are presumed just and reasonable, while, at the same time, being treated equal to non-public utility attachers who are attaching pursuant to a tariff would provide ILECs with a competitive advantage over other attachers. Furthermore, the Commission previously reasoned that default rate formulas may be negotiated among the parties to a joint use agreement but may not be unilaterally insisted upon due to the unique nature of joint use agreements. *In re the Commission's Review of Ohio Adm.Code Chapter 4901:1-3, Concerning Access to Poles, Ducts, Conduits, and Right-of-Way*, Case No. 13-5779-AU-ORD, Finding and Order (July 30, 2014) at 42. Staff's proposal, if adopted, would immediately conflict with the policy concerning the allowance for negotiated agreements between utilities we expressly condoned five years ago. Finally, permitting ILECs to retain all of the benefits of their existing joint use agreements with public utilities while simultaneously seeking a reduction in the charges that are imposed under such joint use agreements is one-sided.

{¶ 70} We also reject Staff's recommendations to adopt a "clear and convincing" standard to rebut the presumption. As DP&L, AEP, Duke, and FirstEnergy point out, this standard is typically applied in cases involving fraud, wills, and inheritances. Additionally, we note that the evidentiary standard in every other complaint case is a "preponderance of the evidence," and complaint proceedings filed pursuant to Ohio Adm.Code 4901:1-3-05 should be treated no differently.

{¶ 71} By adopting AEP and Duke's proposed language, there is a rebuttable presumption that the rates, terms, and conditions of the joint use agreements are just and reasonable unless the public utilities demonstrate, by a preponderance of the evidence, otherwise. In response to the arguments mentioned supra, we reject Staff's proposed draft of Ohio Adm.Code 4901:1-3-05(B) and adopt AEP and Duke's recommended language as reflected in the draft rules attached to the Finding and Order.

IV. CONCLUSION

{¶ 72} In making its rules, an agency is required to consider the continued need for the rules, the nature of any complaints or comments received concerning the rules, and any factors that have changed in the subject matter area affected by the rules. The Commission has evaluated Ohio Adm.Code Chapter 4901:1-3 and recommends amending the rules as demonstrated in the attachment to this Finding and Order.

{¶ 73} An agency must also demonstrate that it has included stakeholders in the development of the rule, that it has evaluated the impact of the rule on businesses, and that the purpose of the rule is important enough to justify the impact. The agency must seek to eliminate excessive or duplicative rules that stand in the way of job creation. Moreover, the agency must remove two or more existing regulatory restrictions for every new regulatory restriction added. The Commission has included stakeholders in the development of these rules, has sought to eliminate excessive or duplicative rules that stand in the way of job creation, and has adhered to the requirement regarding the removal of regulatory restrictions.

{¶ 74} Accordingly, at this time, the Commission finds that amendments to Ohio Adm.Code 4901:1-3-01, -02, -03, -04, and -05, should be adopted and filed with Joint Committee on Agency Rule Review (JCARR), the Secretary of State, and the Legislative Service Commission (LSC). The Commission also finds that no changes should be made to Ohio Adm.Code 4901:1-3-06.

{¶ 75} The rules are posted on the Commission's Docketing Information System website at http://dis.puc.state.oh.us. To minimize the expense of this proceeding, the Commission will serve a paper copy of this Finding and Order only. All interested persons are directed to input case number 19-834 into the Case Lookup box to view this Finding and Order, as well as the rules, or to contact the Commission's Docketing Division to request a paper copy.

V. CONCLUSION

{¶ 76} It is, therefore,

{¶ 77} ORDERED, That amended Ohio Adm.Code 4901:1-3-01, -02, -03, -04, and -05 be adopted. It is, further,

{¶ 78} ORDERED, That Ohio Adm.Code 4901:1-3-06 be adopted with no changes. It is, further,

{¶ 79} ORDERED, That the adopted rules be filed with JCARR, the Secretary of State, and LSC, in accordance with divisions (D) and (E) of R.C. 111.15. It is, further,

{¶ 80} ORDERED, That the final rules be effective on the earliest date permitted. Unless otherwise ordered by the Commission, the five-year review date for Ohio Adm. Code Chapter 4901:1-3 shall be in compliance with R.C. 106.03. It is, further,

{¶ 81} ORDERED, That a copy of this Finding and Order, with the rules and BIA, be served upon the Common Sense Initiative at CSIPublicComments@governor.ohio.gov. It is, further,

{¶ 82} ORDERED, That a copy of this Finding and Order be sent to the Telephone and Electric industry list-serves. It is, further,

{¶ 83} ORDERED, That a copy of this Finding and Order be served upon all certified telephone companies, including all certified commercial mobile radio service providers; all

regulated electric distribution companies; the Ohio Cable Telecommunications Association; the Ohio Telecom Association; and all other interested persons of record.

COMMISSIONERS:
Approving:
Jenifer French, Chair
M. Beth Trombold
Lawrence K. Friedeman
Dennis P. Deters

LLA/hac

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AMENDED

4901:1-3-01 Definitions.

[Comment: For dates of references to a section of either the United States Code or a regulation in the code of federal regulations see rule 4901:1-3-02 of the Administrative Code.]

As used within this chapter, these terms denote the following:

(A) "Attaching entity" means cable operators, telecommunications carriers, incumbent and other local exchange carriers, public utilities, governmental entities and other entities with either a physical attachment or a request for attachment to the pole, duct, conduit, or right-of-way and that is authorized to attach pursuant to section 4905.51 or 4905.71 of the Revised Code. It does not include governmental entities with only seasonal attachments to the pole.

(B) "Cable operator" for purposes of this chapter, shall have the same meaning as defined in 47 U.S.C. 522(5), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(C) "Cable service" for purposes of this chapter, shall have the same meaning as defined in 47 U.S.C. 522(6), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(D) "Cable system" for purposes of this chapter, shall have the same meaning as defined in 47 U.S.C. 522(7), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(E) "Commission" means the public utilities commission of Ohio.

(F) "Communications space" means that portions of the pole typically used for the placement of communications conductors beginning below the bottom point of the communications workers safety zone and ending at the lowest point on the pole to which horizontal conductors may be safely attached.

(G) "Complex make-ready" means the transfers and work within the communications space that would be reasonably likely to cause a service outage(s) or facility damage, including work such as splicing of any communications attachment or relocation of existing wireless attachments. Any and all wireless activities, including those involving mobile, fixed, point-to-point wireless communications and wireless internet service providers, are to be considered complex.

(H) "Conduit" means a structure containing one or more ducts, usually placed in the ground, in which cables or wires may be installed.

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(~~H~~I) "Conduit system" means a collection of one or more conduits together with their supporting infrastructure.

(~~I~~J) "Days" means calendar days for the purposes of these rules.

(~~J~~K) "Duct" means a single enclosed raceway for conductors, cable, and/or wire.

(~~K~~L) "Electric company" for purposes of this chapter, shall have the same meaning as defined in division (A)(3) of section 4905.03 of the Revised Code.

(~~L~~M) "Inner-duct" means a duct-like raceway smaller than a duct that is inserted into a duct so that the duct may carry multiple wires or cables.

(~~M~~N) "Local exchange carrier" (LEC) for purposes of this chapter, shall have the same meaning as defined in division (A)(7) of section 4927.01 of the Revised Code.

(O) "Overlashing" means the tying or lashing of an additional fiber optic cables to an existing communications wires, cables, or supporting strand already attached to poles.

(P) "Pole attachment" means any attachment by an attaching entity to a pole, duct, conduit, or right-of-way owned or controlled by a public utility.

(Q) "Public utility" for purposes of this chapter, shall have the same meaning as defined in section 4905.02 of the Revised Code.

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

(S) "Telecommunications" for purposes of this chapter, shall have the same meaning as defined in division (A)(10) of section 4927.01 of the Revised Code.

(T) "Telecommunications carrier" for purposes of this chapter, shall have the same meaning as defined in division (A)(11) of section 4927.01 of the Revised Code.

(U) "Telecommunications services" for purposes of this chapter, shall have the same meaning as defined in division (A)(12) of section 4927.01 of the Revised Code.

(V) "Telephone company" for purposes of this chapter, shall have the same meaning as defined in division (A)(13) of section 4927.01 of the Revised Code and includes the definition of

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"telecommunications carrier" incorporated in 47 U.S.C. 153(44), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(W) "Unusable space" with respect to poles, means the space on a public utility pole below the usable space, including the amount required to set the depth of the pole.

(X) "Usable space" with respect to poles, means the space on a public utility pole above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment, and which includes space occupied by the public utility. With respect to conduit, the term usable space means capacity within a conduit system which is available, or which could, with reasonable effort and expense, be made available, for the purpose of installing wires, cable, and associated equipment for telecommunications or cable services, and which includes capacity occupied by the public utility.

AMENDED

4901:1-3-02 Purpose and scope.

[Comment: For dates of references to a section of either the United States Code or a regulation in the code of federal regulations see rule 4901:1-3-02 of the Administrative Code.]

(A) Each citation contained within this chapter that is made to either a section of the United States code or a regulation in the code of federal regulations is intended, and shall serve, to incorporate by reference the particular version of the cited matter as effective on ~~July~~ March 1, 2021~~4~~.

(B) This chapter establishes rules for the provision of attachments to a pole, duct, conduit, or right-of-way owned or controlled by a utility under rates, terms, and conditions that are just and reasonable. Ohio has elected to regulate this area pursuant to 47 U.S.C. 224(c)(2).

(C) The obligations found in this chapter, shall apply to:

(1) All public utilities pursuant to 47 U.S.C. 224(c) through (i), 47 U.S.C. 253(c), as effective in paragraph (A) of this rule, and section 4905.51 of the Revised Code; and

(2) A telephone company and electric light company that is a public utility pursuant to section 4905.71 of the Revised Code.

(D) The commission may, upon an application or motion filed by a party, waive any requirement of this chapter, other than a requirement mandated by statute, for good cause shown.

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(E) Any party seeking a waiver(s) of rules contained in this chapter shall specify the period of time for which it seeks such a waiver(s), and a detailed justification in the form of a motion filed in accordance with rule 4901-1-12 of the Administrative Code.

(F) All of the automatic time frames set forth in this chapter may be suspended pursuant to directives of the commission or an attorney examiner.

AMENDED

4901:1-3-03 Access to poles, ducts, conduits, and rights-of-way.

(A) Duty to provide access and required notifications

(1) A public utility will comply with the duty to provide access and required notification pursuant to 47 C.F.R 1.1403, as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(2) An attaching entity may file with the commission a petition for temporary stay of action contained in a notice received pursuant to 47 C.F.R. 1.1403(c), as effective in paragraph (A) of rule 4901:2-3-02 of the Administrative Code, within fifteen days of receipt of such notice. Such submission shall not be considered unless it includes, in concise terms, the relief sought, the reasons for such relief, including a showing of irreparable harm and likely cessation of service and a copy of the notice. The public utility may file an answer within seven days of the date the petition for temporary stay was filed. No further filings under this rule will be considered unless requested or authorized by the commission. If the commission does not rule on a petition filed pursuant to this paragraph within thirty days after the filing of the answer, the petition shall be deemed denied unless suspended.

(3) If the public utility establishes or adopts an electronic notification system, the attaching entity must participate in the electronic notification to qualify under this chapter.

(B) Timeline for access to public utility poles

(1) Application review and survey:

A public utility or a new attaching entity will comply with the application review and survey requirements, pursuant to 47 C.F.R 1.1411(c), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

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(2) Estimate

A public utility or a new attaching entity will comply with the make-ready estimate requirements pursuant to 47 C.F.R 1.1411(d), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(3) Make-ready

A public utility will comply with the notification requirements and make-ready time periods for new and existing attaching entities; for attachments in the communications space and above the communications space, pursuant to 47 C.F.R 1.1411(e) – (f), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(4) Compliance with the time periods in this rule:

A public utility will comply with the time periods pursuant to 47 C.F.R 1.1411(g), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(5) Deviation from the time limits specified in this rule unless:

A public utility will comply with the deviation from time limits pursuant to 47 C.F.R 1.1411(h), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(6) Self-help remedy:

A public utility or new attaching entity will comply with the self-help remedy process for incomplete survey and make-ready pursuant to 47 C.F.R 1.1411(i), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(7) One-touch make-ready option.

For attachments involving simple make-ready, a public utility or a new attaching entity will comply with one-touch make-ready option requirements pursuant to 47 C.F.R. 1.1411(g), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(C) Contractors for survey and make-ready.

(1) Contractors for self-help complex make-ready and above the communications space make-ready:

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A public utility will comply with the contractor requirements for self-help complex make-ready and above the communications space make-ready pursuant to 47 C.F.R 1.1412(a), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(2) Contractors for simple make-ready work:

A public utility will comply with the contractor requirements for simple make-ready work pursuant to 47 C.F.R 1.1412(b), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(D) Overlashing

(1) An existing attaching entity or third party overlashing with permission from an existing attaching entity (overlashing party) and a public utility will comply with overlashing rules established pursuant to 47 C.F.R 1.1415, as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code, with the following exceptions:

(a) A public utility may not prevent an overlashing party from overlashing because another overlashing party has not fixed a preexisting violation; unless the overlashing will exacerbate the violation or create a capacity, safety, reliability, or engineering issue.

(b) If a public utility requires advance notice of a planned overlashing, the public utility may charge the overlashing party the just and reasonable costs the public utility actually incurs to inspect the proposed overlash.

(E) Rights-of-way

(1) Public utilities are subject to all constitutional, statutory, and administrative rights and responsibilities for use of public rights-of-way.

(2) Private rights-of-way for all public utilities are subject to negotiated agreements with the private property owner, exclusive of eminent domain considerations.

(3) Public utilities are prohibited from entering into exclusive use agreements of private building riser space, conduit, and/or closet space.

(4) Public utilities shall coordinate their right-of-way construction activity with the affected municipalities and landowners. Nothing in this rule is intended to abridge the legal rights and obligations of municipalities and landowners.

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(F) The commission reserves the right to require any or all arrangements between public utilities and between public utilities and private landowners to be submitted to the commission for its review and approval, pursuant to sections 4905.16 and 4905.31 of the Revised Code.

(G) All time limits in this chapter are to be calculated according to 4901-1-07 of the Administrative Code.

AMENDED

4901:1-3-04 Rates, terms, and conditions for poles, ducts, and conduits.

[Comment: For dates of references to a section of either the United States Code or a regulation in the code of federal regulations see rule 4901:1-3-02 of the Administrative Code Code.]

(A) Rates, terms, and conditions for nondiscriminatory access to poles, ducts, conduits, and right-of-way of a telephone company or electric light company by an entity that is not a public utility are established through tariffs pursuant to section 4905.71 of the Revised Code. Initial implementation of such tariff or any subsequent change in the tariffed rates, terms, and conditions for access to poles, ducts, conduits, or rights-of-way shall be filed as an application for tariff amendment (ATA) and will be approved in accordance with a sixty-day automatic approval process. Increases to tariffed rates pursuant to this paragraph require customer notice to be sent to all affected attachers concurrent with the filing of the ATA. Any objections to the ATA application should be filed within twenty-one days of its filing. The applicant shall have ten days to file its reply to the stated objections. The tariffed rates, terms and conditions must be consistent with parameters established in rule 4901:1-3-03 of the Administrative Code. Nothing in this chapter prohibits an attaching entity that is not a public utility from negotiating rates, terms, and conditions for access to poles, ducts, conduits, and rights-of-way of a telephone company or electric light company through voluntarily negotiated agreements.

(1) An automatic time frame will begin on the day after a filing is made with the commission's docketing division. Under the automatic approval process, if the commission does not take action before the expiration of the filing's applicable time frame, the filing shall be deemed approved and become effective on the following day, or a later date if requested by the company. For, example, a filing subject to a sixty-day process will, absent suspension or other commission action, become effective on the sixty-first day after the initial filing is made with the commission. Unless otherwise ordered, any motions not ruled upon by the commission during the filing's applicable time frame are deemed to be denied.

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(2) Unless the law specifically precludes suspension of an automatic approval process, a pending application filed with the Commission under full or partial suspension will be automatically approved thirty days from the date of suspension if all issues are resolved. If all issues are not resolved by the thirtieth day, the application will be either dismissed by entry or suspended a second time. Any such second suspension shall be accompanied by notice to the applicant explaining the rationale for the additional suspension. Applications under a second suspension cannot be approved without a commission entry or order.

(3) Under this paragraph, an application under full suspension is entirely precluded from taking effect.

(4) Under this paragraph, an application under partial suspension is permitted to take effect, in part or in its entirety, under the proposed terms and conditions, subject to further review by the commission. The applicant is put on notice that the commission, subsequent to further review, may modify the rates and/or terms and conditions of tariffed pole, duct, conduit, and rights-of-way access affected by the applications.

~~(1)~~(5) A full or partial suspension of tariffed pole, duct, conduit, and rights-of-way access may also be imposed, after an application is approved under the automatic approval process, if an ex post facto determination is made that the tariff is in violation of law or commission rules. Applications proposing to change the rate shall include a calculation sheet, identification of the specific sources of the formula inputs, workpapers, and any company-specific records/data underlying the formula inputs including the appurtenance factor, pole height and pole count. The application shall identify the manner in which the unamortized excess accumulated deferred income tax has been deducted and the amortization schedule(s) relied upon.

(B) Rates, terms, and conditions for nondiscriminatory access to public utility poles, ducts, conduits, and rights-of-way by another public utility shall be established through negotiated agreements.

(C) Access to poles, ducts, conduits, and rights-of-way as outlined in paragraphs (A) and (B) of this rule shall be established pursuant to 47 U.S.C. 224, as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(D) Pole attachment and conduit occupancy rate formulas

(1) The commission shall determine whether a rate, term, or condition is just and reasonable in complaint proceedings or in tariff filings. For the purposes of this paragraph, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied

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by the pole attachment by the sum of the operating expenses and actual capital costs of the public utility attributable to the entire pole, duct, conduit, or right-of-way. When calculating the pole attachment and conduit occupancy rates, any unamortized excess accumulated deferred income tax resulting from the Tax Cut and Jobs Act of 2017 shall be deducted from the gross plant and gross pole investment total.

(2) The commission will apply the formula set forth in 47 C.F.R. 1.1406(d)(1) and (e), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code for determining a maximum just and reasonable rate for pole attachments.

(3) The commission will apply the formula set forth in 47 C.F.R. 1.1406(d)(3) – (4) and (e), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code for determining a maximum just and reasonable rate for conduit occupancy.

(4) With respect to the formula referenced in paragraph (D)(2) of this rule, the space occupied by an attachment is presumed to be one foot. The amount of usable space is presumed to be thirteen and one-half feet. The amount of unusable space is presumed to be twenty-four feet. The pole height is presumed to be thirty-seven and one-half feet. These presumptions may be rebutted by either party.

(5) Relative to joint use agreements, the default rates may be negotiated or determined by the commission in the context of a complaint case.

(E) The costs of modifying a facility shall be borne by all parties that obtain access to the facility as a result of the modification and by all parties that directly benefit from the modification. Each party described in the preceding sentence shall share proportionately in the cost of the modification. A party with a preexisting attachment to the modified facility shall be deemed to directly benefit from a modification if, after receiving notification of such modification as provided in paragraph (B)(3) of rule 4901:1-3-03 of the Administrative Code, it adds to or modifies its attachment. Notwithstanding the foregoing, a party with a preexisting attachment to a pole, conduit, duct, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment or the modification of an existing attachment sought by another party. If a party makes an attachment to the facility after the completion of the modification, such party shall share proportionately in the cost of the modification if such modification rendered possible the added attachment.

(F) A public utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole

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attachment rate for which such company would be liable under this rule, pursuant to 47 U.S.C. 224(g), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

AMENDED

4901:1-3-05 Complaints.

[Comment: For dates of references to a section of either the United States Code or a regulation in the code of federal regulations see rule 4901:1-3-02 of the Administrative Code.]

(A) Any attaching entity may file a complaint against a public utility pursuant to section 4905.26 or 4927.21 of the Revised Code, as applicable, to address claims that it has been denied access to a public utility pole, duct, conduit, or right-of-way in violation of section 4905.51 of the Revised Code or 47 U.S.C. 224, as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code; and/or that a rate, term, or condition for a pole attachment are not just and reasonable. The provisions and procedures set forth in sections 4905.26 and 4927.21 of the Revised Code, and Chapters 4901-1 and 4901-9 of the Administrative Code, shall apply. The commission shall issue a decision resolving issue(s) presented in a complaint filed pursuant to this rule within a reasonable time not to exceed three hundred sixty days after the filing of the complaint.

(B) In complaint proceedings challenging the rates, terms, and conditions of existing joint use agreements between public utilities, there is a presumption that such rates, terms, and conditions are just and reasonable. A public utility can rebut this presumption by a preponderance of the evidence demonstrating that a rate, term, or condition is not just and reasonable.

NO CHANGE

4901:1-3-06 Mediation and arbitration of agreements.

All public utilities have the duty to provide nondiscriminatory access to poles, ducts, conduits, and rights-of-way consistent with paragraph (A)(1) of rule 4901:1-3-03 of the Administrative Code. If parties are unable to reach an agreement on rates, terms, or conditions regarding access to poles, ducts, conduits, and rights-of-way, either party may petition the commission to mediate

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or arbitrate such agreement according to procedures established in rules 4901:1-7-08 to 4901:1-7-10 of the Administrative Code.

Summary: Finding & Order adopting the proposed amendments to Ohio Adm.Code Chapter 4901:1-3 regarding the Commission's rules for access to poles, ducts, conduits, and right-of-way, as determined in and attached to this Finding and Order electronically filed by Heather A Chilcote on behalf of Public Utilities Commission of Ohio