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September 15, 2020

Administrative Regulations Working Group  
Kentucky Public Service Commission  
*Via email: psc.regulations@ky.gov*

**Re: Comments Regarding Proposed Pole Attachment Regulation, 807 KAR 50XX**

Working Group Members,

Please accept this correspondence as the initial written comments of Kentucky Association of Electric Cooperatives, Inc. (the “Kentucky Electric Cooperatives”), to the above-referenced proposed regulation of the Kentucky Public Service Commission (the “Commission”).

As the statewide organization representing the interests of Kentucky’s electric cooperatives,<sup>1</sup> the Kentucky Electric Cooperatives appreciate the opportunity to submit these comments as part of the Commission’s proactive efforts to engage stakeholders in the development and revision of its administrative regulations. The overarching objective of these comments is to ensure the Commonwealth’s member-owned electric cooperatives remain capable of providing safe, reliable and affordable electric service to their local communities

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<sup>1</sup> The membership of the Kentucky Electric Cooperatives includes the following jurisdictional utilities: Big Rivers Electric Corporation; Big Sandy RECC; Blue Grass Energy Cooperative Corporation; Clark Energy Cooperative, Inc.; Cumberland Valley Electric, Inc.; East Kentucky Power Cooperative, Inc.; Farmers RECC; Fleming-Mason Energy Cooperative; Grayson RECC; Inter-County Energy Cooperative Corporation; Jackson Energy Cooperative Corporation; Jackson Purchase Energy Corporation; Kenenergy Corporation; Licking Valley RECC; Meade County RECC; Nolin RECC; Owen Electric Cooperative; Salt River Electric Cooperative Corporation; Shelby Energy Cooperative, Inc.; South Kentucky RECC; and Taylor County RECC. These comments reflect the views of the association and do not necessarily represent the views of each individual member. These comments are not intended to bind any of the foregoing members in this matter or in any future docket or proceeding.

while utilizing existing infrastructure to promote the responsible proliferation of broadband and related technologies. It is the hope of the Kentucky Electric Cooperatives that their valuable experience and real-world input will assist in shaping whether and how the Commission exercises its authority to regulate attachments to utility poles across the wide variety of diversely-situated pole owners, especially those predominantly situated in the more rural areas of the state.

The Kentucky Electric Cooperatives submit these comments in order to promote a regulatory scheme governing pole attachments in the Commonwealth that:

- Respects existing arrangements in local areas where relationships are working well and allows for parties to mutually agree to terms that work well for them based on local conditions;
- Properly considers the unique characteristics and challenges of rural electric cooperatives, particularly with respect to timeframes and administrative burdens, and thus permits reasonable flexibility;
- Prioritizes safety and reliability; and
- Protects rural electric cooperatives and their member-owners from costs they did not cause, and from liabilities for which they should not be responsible.

Though it is difficult to fully capture the unique experiences and viewpoints of the Kentucky Electric Cooperatives' diverse membership, these comments are intended to address matters of particular importance consistent with a consensus of the statewide organization.<sup>2</sup> The Kentucky Electric Cooperatives look forward to engaging in further constructive discussions as this stakeholder process progresses, as well as participating in the procedures provided under KRS Chapter 13A should the Commission proceed to formal regulatory procedures.

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<sup>2</sup> At least one member of the Kentucky Electric Cooperatives, East Kentucky Power Cooperative, Inc., intends to submit its own comments as part of this process. Those comments are supported by the Kentucky Electric Cooperatives.

### ***Background***

Few know better the importance of sensible and timely infrastructure development than the cooperatives established to help electrify rural America. With roughly 100,000 miles of conductor supported by hundreds of thousands of wooden poles and similar structures, the Kentucky Electric Cooperatives' assets at issue here represent a significant, ongoing, and vital investment—ubiquitous and unremarkable, yet incredibly valuable to the greater grid they substantially comprise. Each of Kentucky's electric cooperatives has worked around-the-clock, decade after decade to construct and maintain a useful network of poles, ducts, conduits, and rights-of-way, and each has done so in service of a singular ultimate objective: to provide safe, reliable, affordable power to its member-owners. It is against this backdrop that the Kentucky Electric Cooperatives approach the use of utility assets by public and private third-parties, and particularly the pole attachment regulation presently proposed by the Commission.

Pole attachment frameworks work best not when there is extensive involvement by the Commission, but rather when local parties have invested the time and effort to build solid working relationships and maintain open lines of communication. Highly prescriptive statewide regulation will be very difficult to track and enforce without significant investments in people (additional staffing and/or contracting) and software, and could limit the flexibility of local parties to work together to produce positive results. Although issues surely arise that both pole owners and pole attachers must work to address, there is no evidence to indicate that putting in place additional regulatory burdens on electric cooperatives will increase or improve broadband deployment. Indeed, it appears that the principal reason broadband deployment has struggled to advance in certain electric cooperative territories is due largely to a lack of customer density, and certainly not an unwillingness or inability of the local electric cooperative to work with third parties to bring additional services to its member-owners. In that context, increasing the regulatory burden on rural electric cooperatives will not alleviate the central issue affecting the decision of certain broadband providers to focus their efforts in more densely-populated areas than those served generally by the cooperatives.

The Kentucky Electric Cooperatives have consistently provided safe, reliable, and affordable service because they have been afforded the flexibility to develop the pole attachment processes and guidelines best suited for their particular circumstances. Put simply, no two electric cooperatives share the same size, customer density, workforce, service territory, or operational needs. The absence of a rigid, uniform framework across the state has allowed each cooperative to consider factors such as local demand, available cooperative personnel, and topographical challenges—all of which can vary greatly—when reasonably addressing the requests of third parties to attach to utility poles.

The unique characteristics of rural electric cooperatives explain why Congress initially excluded them from the jurisdictional scope of Federal Communications Commission (“FCC”) regulation under the Pole Attachment Act of 1978. To this day, cooperative pole attachments remain categorically excluded from regulation by the FCC,<sup>3</sup> and thus investor-owned utilities (“IOUs”) have been the dominant concern during the negotiation and development of federal policy governing pole attachments during the past 40+ years. Consequently, while the federal rules (from which the Commission borrowed in drafting its proposed regulation) undoubtedly reflect decades of substantial FCC efforts to strike an appropriate balance among various stakeholders, the federal rules have never considered the interests and challenges faced by rural electric cooperatives. This is because, quite simply, cooperatives (as well as municipal utilities) are not subject to the FCC’s pole attachment rules.<sup>4</sup> Therefore, while there may be some appeal to modeling Kentucky’s proposed pole attachment regulations at least in part on existing FCC regulations, the blanket application of those rules to rural electric cooperatives takes on a distinctly different character in light of the fact that those FCC regulations were never developed with cooperative concerns in mind. Here, realistic differences support reasonable distinctions, and thus one-size-fits-all regulation demands significant scrutiny.

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<sup>3</sup> See 47 U.S.C. §224(a)(1) (“The term ‘utility’ ... does not include ... any person who is cooperatively organized ...”).

<sup>4</sup> *Id.*

### ***Discussion***

Each rural electric cooperative in Kentucky is an integral part of the community it serves, and each supports new opportunities for economic growth in its region. For this reason, the Commission should continue to encourage strong local relationships whenever reasonably possible, and parties should be free to mutually agree to terms and conditions for pole access as they see fit. Likewise, electric cooperatives should remain capable of filing specific tariff schedules describing the terms upon which they will provide service, consistent with KRS Chapter 278 and the needs of the particular cooperative. Maintaining this flexibility ensures that smaller pole-owners, like many rural electric cooperatives, may continue to balance attachment interests with the cooperative mission to provide safe, reliable, and affordable electric service to its member-owners. However, to the extent the Commission believes detailed regulation is required in this area, the electric cooperatives ask that the rules be reasonable and that they recognize (and, where possible, minimize) the unique and varying burdens faced by the cooperatives.

#### **A. Flexibility Should Be Preserved, Burdens Minimized.**

In Kentucky, if the Commission determines it should pursue uniformity in pole attachment administration between service territories, it should allow for exceptions and appropriate flexibility. As stated, this flexibility is imperative to ensure that each cooperative's ability to provide safe, reliable, and affordable electric service remains uncompromised, particularly considering the unique characteristics of each cooperative's workforce and terrain.

Of course, not only is each electric cooperative unique in size and territory when compared to its sister cooperatives (*e.g.*, the Kentucky electric cooperative with the most poles has over 110,000, while the cooperative with the least has roughly 14,000), but differences between cooperatives and other types of providers—such as investor-owned utilities, “IOUs”—can be far more stark. For example, certain rural electric cooperatives in Kentucky average roughly seven (7) customers per mile of line, and in certain places within their territories, far fewer. When this figure is compared to the average number of customers per mile of line served

by Louisville Gas & Electric Company, for example (roughly sixty-four (64)),<sup>5</sup> it is clear how cooperatives may face dissimilar operational and logistical issues in light of the nature of their predominantly rural territories. While an IOU may regularly address a steady and predictable flow of pole attachment requests, many electric cooperatives find it difficult to justify maintenance of sufficient on-hand resources to accommodate the occasional attachment without running afoul of predetermined deadlines. Population density, topography, overall demand for attachments, and other factors necessarily impact how and when work is completed by a utility. These matters should therefore be taken into account when devising regulations applicable to electric cooperatives.

In the Commission's proposed pole attachment regulation, the day-to-day realities of cooperative operations are not reflected in the specific timeframes established for completing the various steps in the pole attachment process. At the outset, the proposed regulation should be clarified to reflect that all timelines are in business days (as opposed to calendar days), as the draft regulation is presently inconsistent and unclear in that respect. Furthermore, all timelines should be made to run consecutively, rather than concurrently. These simple changes will help align expectations and promote ongoing compliance.

Most important, though, are the durations of the timeframes themselves. Most rural electric cooperatives, unlike many IOUs, work with limited staffing and with infrastructure oftentimes spanning difficult and diverse terrain. These facts render unrealistic the base deadlines set forth in the proposed regulation, absent a corresponding and significant increase in staffing or contracting costs. Most cooperatives, for example, are simply not staffed to meet the proposed deadlines for reviewing applications for completeness (Sec. 4(2)(a)1.), completing surveys (Sec. 4(2)(b)1.), and completing make-ready (Sec. 4(4)) with the degree of absolute consistency required by the proposed regulations. This is particularly true for "large" pole attachment requests, which by regulation might involve between 301 and 3,000 poles but only impact time limits by a matter of weeks. In the case of a rural electric cooperative with under

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<sup>5</sup> See <https://lge-ku.com/our-company/about-lge> (last accessed September 11, 2020).

fifty (50) employees (only a small portion of which are designated or trained to handle pole attachments, frequently on a part-time basis), the threshold of what it would consider a “large” amount of pole attachments is certainly much lower than contemplated by the proposed regulation. For this reason, the size delineations and relevant timelines must be extended so that they may realistically reflect cooperative operations and allow for significant flexibility to accommodate the cooperatives’ diverse operational paradigms.

While the proposed regulation at Sec. 4(8) does allow utilities to deviate from make-ready deadlines “...for good and sufficient cause that renders it infeasible for the utility to complete make-ready within the time limits specified...,” it should be made clear that electric cooperatives need not prioritize pole attachment matters to the detriment of electric operations to meet deadlines that are sometimes simply unworkable. For example, cooperative personnel generally should not face diversion from electric service installation or restoration tasks because a particularly sizable or complicated pole attachment request is pending. Accordingly, the Commission should ensure that Kentucky’s rural cooperatives maintain reasonable flexibility in fulfilling their obligations to ensure attachments can be made safely and without imposing an unreasonable burden.

In addition to revising prescribed timeframes, other relatively-minor adjustments to the proposed regulation may also assist in minimizing the negative impacts to electric cooperatives. These include requiring certain notices be sent by the new attacher, rather than the relevant utility,<sup>6</sup> as well as requiring attachers to cooperate in pole audits and maintain up-to-date contact information with the utility and the Commission. After all, the practical and timely workability of attachment processing is only as good as the base-level of information about existing attachments and an ongoing effort to ensure that attacher facilities are properly labeled or identified. It is also important that any regulation be limited to space available on above-ground poles, and not within ducts or conduits constructed and maintained by electric cooperatives for their own use.<sup>7</sup> This is consistent with the National Electric Safety Code’s restrictions on shared

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<sup>6</sup> See Proposed Regulation, Sec. 4(2)(b); Sec. 4(4).

<sup>7</sup> See Proposed Regulation, Sec. 2(1) (“A utility shall provide any cable television system operator,

use of conduit, clearly put in place to support safety and reliability. Moreover, because conduit and duct space is so much more limited, and because adding space is significantly more expensive in comparison to pole-based facilities, the costs and complication involved in attempting to strictly regulate conduit and duct access weighs in favor of their exclusion from the proposal. Again, attempting to impose one-size-fits-all rules on the electric cooperatives would be unreasonable under the circumstances.

Furthermore, while the proposed regulation speaks specifically to the requirements and responsibilities of pole owners in enabling new attachers to access their poles and speed the build-out of new broadband, existing attachers also play a part in allowing the new attacher to access the pole. We would urge the Commission to consider adding language to its proposed regulation to address late transfers (sometimes known as “double wood” or “buddy poles”) and unauthorized attachments as a part of its regulation. When these conditions exist in the field, they slow new attacher access to poles, and they can create dangerous conditions. Addressing these issues would help even existing attachers and likewise help speed broadband access and deployment without imposing additional burdens and costs on the pole owner.

While these modifications will aid in minimizing the burdens experienced by rural electric cooperatives, meeting the timelines required in the proposed regulation will require electric cooperatives to be ready to go to work “on demand” for attachers. Developing the operations and staffing capabilities to meet timelines on demand will create costs of compliance that simply cannot be avoided. These costs – dedicated staffing, software, communications systems, and other administrative and operational needs – can be significant and must ultimately be recovered from pole attachers, the cost-causers. If costs such as these are not able to be recovered from the attachers, electric cooperative members will be forced to subsidize the costs of this regulation.

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telecommunications carrier, broadband internet provider, or governmental unit nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.”).



## **B. Safety and Reliability Must Remain Paramount.**

While the Kentucky Electric Cooperatives thoroughly support expansion of broadband and advanced communication technologies throughout the Commonwealth, all cooperatives must have the ability to ensure the safety and reliability of their systems. Consequently, utility pole owners should maintain the discretion to reasonably define where and under what conditions attachments occur. This is particularly true with respect to complex make-ready and make-ready which may impact areas above a pole's communication space (such as small cell/5G technologies), as utilities must maintain the right to control any activity in or near the pole space which accommodates their supply.

A paramount concern to many Kentucky cooperatives is the risk that accompanies any activity on utility poles, and particularly if the activity is completed without the full knowledge and oversight of the pole owner. The provisions in the proposed regulation that provide for "self-help" for new attachers are unworkable in their current form. Providing attachers the right to undertake their own work on an electric cooperative's pole without the oversight and consent of the cooperative creates a safety concern of the highest order. Further, the regulation provides no potential method of remedy for the pole owner if the new attacher performs substandard work and leaves behind a noncompliant and/or dangerous situation. Will the new attacher come back to fix the issue at its own cost? Will the electric cooperative be forced to correct the issue and pursue the unresponsive attacher for payment? Who is liable if the substandard workmanship later causes an accident or death? The proposed regulation does not speak to these concerns.

## **C. Cooperatives Should Face No Undue Risk or Cost.**

Finally, if third-parties are to be permitted to work on electric cooperative poles, it is essential that electric cooperatives be protected from liability related to any such work.<sup>8</sup> Although it is encouraging that the proposed regulation explicitly permits utilities to include in their tariffs

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<sup>8</sup> Due largely to historical practices and economic considerations related to potential use of attachment clearinghouse systems like NJUNS, many cooperatives maintain system information themselves. Consequently, safety concerns generally compel the utility pole-owner to handle any attachment processing and related work itself and without the use of third-parties who will not have the level of system knowledge required to safely process attachment requests without impacting service reliability, safety considerations aside.

“...terms that are fair, just, and reasonable subject to approval by the commission such as limitations on liability, indemnification, insurance requirements, and restrictions on access to utility poles that are consistent with the requirements of this administrative regulation[,]” the Kentucky Electric Cooperatives are concerned that they may be left “holding the bag” if third parties exacerbate the high safety and reliability risks that accompany working with electric poles and conductors. These risks are not difficult to recognize; they may be immediate (such as the electrocution of an improperly-trained third-party attacher working near an energized line) or much delayed (such as an attachment which becomes dislodged and creates clearance issues between poles). Additionally, reliability and economic injuries are abundant—if an attachment has become dislodged and a third-party’s sagging wire results in damage to poles and other lines, it may jeopardize electric service (and potentially other services, like emergency/911 communications) for nearby residences and businesses. These consequences are clearly significant and must be duly considered by the Commission. Moreover, cooperative tariffs and agreements should be liberally accepted by the Commission and permitted to reflect the realities of pole ownership and pole use by electric utilities.

Additionally, and as noted above, pole owners under Kentucky’s regulatory scheme should at least be afforded similar post-attachment rights and remedies as pole owners under the comparable FCC rule (*i.e.*, the rule upon which the Commission’s proposed regulation was evidently based). Under 47 C.F.R. § 1.1411(i)(2) and § 1.1411(j), utilities are granted ninety (90) days to inspect make-ready performed by new attachers, as well as given the ability to either require remediation of any issues/damage or address such issues/damage themselves at the new attacher’s expense.<sup>9</sup> These or similar protections are noticeably absent from the Commission’s proposed regulation, but if regulation on this issue proceeds, they should be restored.

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<sup>9</sup> For example, the text of 47 C.F.R. § 1.1411 (i)(2)(ii) & (iii) is duplicated below. Only the parts in bold are reflected in the Commission’s proposed regulation.

**(ii) 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.** Upon receiving notice from the new attacher, the utility or existing attacher may either: (A) Complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage; or (B) Require the new attacher to fix the damage at its expense immediately following notice from the utility or existing attacher.

### *Conclusion*

The Kentucky Electric Cooperatives have constructed and maintained a vast network of poles that is essential to the provision of electric service to over 1.5 million Kentuckians. As members of the communities they serve, all cooperatives seek to spread the benefits of new technologies, particularly in rural areas that are all-too-often left behind. For this reason, the Kentucky Electric Cooperatives continue to support reasonable third-party access to their poles, as they always have, consistent with and in no way compromising the utility's obligation to provide safe, reliable, and affordable electric service. Ideally, these matters can be driven by strong local working relationships, with all service meeting or exceeding reasonableness and adequacy standards statutorily-required of electric cooperatives.

While the Kentucky Electric Cooperatives certainly recognize the benefits of a better-connected world and indeed support it, responsible growth cannot be had at the expense of the local electric utility, its assets, or its general ratepayers. Rural electric cooperatives face significant risks and costs (financial, operational, legal, safety, reliability, and perhaps others) in connection with third-party pole attachments. These costs are sure to increase if the Commission mandates compliance with a new regulatory scheme derived from the FCC's IOU-centric federal regulations. The predominant purpose of electric cooperative poles remains the safe and reliable delivery of power, and it is imperative that the applicable rules reflect that fact. The Commonwealth's rural electric cooperatives thank the Commission for the opportunity to provide feedback through the comment process and ask that their input be considered and implemented as the regulatory process develops.

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**(iii) A new attacher shall notify the affected utility and existing attachers within 15 days after completion of make-ready on a particular pole.** The notice shall provide the affected utility and existing attachers at least 90 days from receipt in which to inspect the make-ready. The affected utility and existing attachers have 14 days after completion of their inspection to notify the new attacher of any damage or code violations caused by make-ready conducted by the new attacher on their equipment. If the utility or an existing attacher notifies the new attacher of such damage or code violations, then the utility or existing attacher shall provide adequate documentation of the damage or the code violations. The utility or existing attacher may either complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage or code violations or require the new attacher to fix the damage or code violations at its expense within 14 days following notice from the utility or existing attacher.

Please do not hesitate to contact me with any questions or concerns.

Respectfully,

A handwritten signature in blue ink that reads "Chris Perry". The signature is written in a cursive style with a large, prominent "C" and "P".

Chris Perry  
CEO & President