DELIVERED VIA EMAIL

September 10, 2020

Kentucky Public Service Commission
Administrative Regulations Working Group
P.O. Box 615
Frankfort, Kentucky 40602-0615
psc.regulations@ky.gov

RE: Kentucky Power Company's Comments regarding Proposed Chapter 807 KAR 5:0XX, Access and Attachments to Utility Poles and Facilities

Dear Sir or Madam:

Kentucky Power Company ("Kentucky Power" or the "Company") hereby respectfully submits the following comments regarding proposed chapter 807 KAR 5:0XX, Access and Attachments to Utility Poles and Facilities. Kentucky Power appreciates the Public Service Commission of Kentucky's ("Commission") consideration of Kentucky Power's suggestions below as the Commission finalizes utility pole attachment rules for the Commonwealth.

807 KAR 5:0XX – Section 1. Definitions.

Subsection (1): "Attachment."

Subsection (1) of the proposed rules defines "attachment" as follows:

> "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.

Section 1(1) of the Proposed Rules (emphasis added). Kentucky Power commends the Commission's decision to specifically include attachments made by "broadband internet providers" within the proposed definition of "attachment." This distinguishes the Commission's proposed rules from the FCC's pole attachment framework which, due to statutory constraints, does not include broadband internet providers (unless they also happen to be cable television operators or telecommunications carriers). *See* 47 U.S.C. § 224(a)(4) (defining "pole attachment" to mean "any attachment by a cable television system or provider of telecommunications

service…"). By putting broadband internet providers on equal footing with cable television operators and telecommunications carriers, the Commission is encouraging broadband deployment and fostering competition.

The Commission's proposed rules also stand out favorably against the rules very recently promulgated by the West Virginia Public Service Commission ("WVPSC"), which inherited the shortcomings of the FCC's pole attachment rules, including the anti-competitive exclusion of broadband internet providers from mandatory access and other pole attachment rights. Kentucky Power's West Virginia affiliates, Appalachian Power Company and Wheeling Power Company, argued in favor of expanding attachment rights to include broadband internet providers. *See* Joint Initial Comments of Appalachian Power Company, Wheeling Power Company, Monongahela Power Company, and the Potomac Edison Company at pp. 4-5 , General Order No. 261, (Nov. 7, 2019). The rules ultimately adopted by the WVPSC, though, track the FCC's rules almost verbatim. *See* W. Va. Code R. §§ 150-38-1 *et seq*. Kentucky Power applauds the Commission for seizing this opportunity and proposing a set of pole attachment rules that are tailored to meet the needs of stakeholders in Kentucky.

Subsections (2) and (10): "Broadband Internet Provider" and "Telecommunications Carrier."

Subsections (2) and (10) should be revised to exclude incumbent local exchange carriers ("ILECs") in a manner similar to the exclusion of ILECs in Subsection (9):

> (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 25 megabytes per second and upload speeds of at least 3 megabytes per second. **The term "broadband internet provider" does not include a utility with an applicable joint use agreement with the utility that owns or controls the poles to which it is seeking to attach.**
>
> (10) "Telecommunications carrier" means a person who owns, controls, operates, or manages any facility used or to be used for or in connection with the transmission or conveyance over wire, in air, or otherwise, any message by telephone or telegraph for the public, for compensation. **The term "telecommunications carrier" does not include a utility with an applicable joint use agreement with the utility that owns or controls the poles to which it is seeking to attach.**

Reasoning: Standing alone, Kentucky Power does not have any objections to the proposed definitions of "broadband internet provider" and "telecommunications carrier." However, Section 2(1) of the proposed rules uses these definitions to define the scope of mandatory access rights:

> 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.

As proposed, the Commission's definitions of "broadband internet provider" and "telecommunications carrier," when read in conjunction with Section 2(1), would extend mandatory access rights to ILECs with whom Kentucky Power and other electric utilities have joint use agreements. Kentucky Power opposes such an outcome for two main reasons.

First, as the Commission appears to recognize in its proposed definition of "new attacher," an ILEC that is party to a joint use agreement with an electric utility already holds an advantage over other attaching entities. *See* Section 1(9) of the Proposed Rules (defining "new attacher" to exclude "a utility with an applicable joint use agreement with the utility that owns or controls the pole to which it is seeking to attach…"). ILECs not only own a significant number of poles (unlike other attaching entities) but also originally gained access to electric utility poles through the much-more-favorable provisions of joint use agreements. In those joint use agreements, ILECs and electric utilities agreed to share their infrastructure for the distribution of their respective services, thus saving costs through a single, shared pole network in their overlapping service areas, rather than building separate, redundant networks. To accommodate ILEC attachments on electric utility poles, electric utilities, *inter alia*, invested in much larger (and much more costly) utility poles than would have been necessary in the absence of ILEC attachments. These were huge investments, and electric utilities made them pursuant to the mutually agreed upon joint use agreements, which defined the access rights of each party. In short, ILECs do not need mandatory access right because they already have access under existing joint use agreements (which have long been subject to the Commission's jurisdiction).

For example, Kentucky Power's two largest ILEC joint use partners are AT&T and Windstream. In the AT&T joint use relationship, Kentucky Power is attached to approximately, 19,000 poles and AT&T is attached to approximately 50,000 Kentucky Power poles. In the Windstream joint use relationship, Kentucky Power is attached to approximately 23,000 Kentucky Power poles and Windstream is attached to approximately 42,000 Kentucky Power poles.

Because of the differences between ILECs and other attaching entities, ILECs are not entitled to mandatory access rights under federal law. The federal Pole Attachments Act explicitly excludes ILECs from the definition of a "telecommunications carrier" entitled to mandatory access. 47 U.S.C. § 224(a)(5) ("For purposes of this section, the term 'telecommunications carrier' does not include any incumbent local exchange carrier…"); *see also In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, CS Docket No. 97-151, 13 FCC Rcd 6777, 6781 at ¶5 (Feb. 6, 1998) ("Because, for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier, an ILEC must grant other telecommunications carriers and cable operators access to its poles, even though the ILEC has no rights under Section 224 with respect to the poles of other utilities.").

Second, it would not make any sense for ILECs to have mandatory access rights to electric utility poles but not vice versa. But this anomaly would, in fact, be the case under the proposed rules. This would undermine the bargained-for exchange at the heart of joint use agreements. Further, no discernable policy goals would be served by disturbing the equilibrium between electric utilities and ILECs because ***the Commission already has jurisdiction over joint use agreements***. *See In the Matter of Ballard Rural Telephone Cooperative Corporation, Inc., Complainant v. Jackson*

Purchase Energy Corporation, Defendant, Case No. 2004-00036, Order, 2005 Ky. PUC LEXIS 277, *9-10 (Mar. 23, 2005) (finding it "unquestionable" that the Commission has jurisdiction over pole attachments made pursuant to a joint use agreement). Thus, if an ILEC (or an electric utility) feels aggrieved by a rate, term or condition in a joint use agreement, it can already seek relief through the Commission's existing processes. Accordingly, the Commission should revise its proposed definitions for "broadband internet provider" and "telecommunications carrier" to explicitly exclude ILECs (similar to the exclusion of ILECs from the definition of "new attacher" in Section 1(9)). If, however, the Commission intends to provide ILECs with a mandatory right of access, then Kentucky Power urges the Commission to make that right reciprocal, *i.e.*, provide electric utilities with a corresponding mandatory right of access to poles owned by ILECs.

Subsection (3). "Communication Space."

Subsection (3) should be revised as follows to more clearly define the communication space:

> "Communication space" means the lower usable space on a utility pole **above minimum grade clearance and below the communication worker safety zone**, which is typically reserved for low voltage communications equipment.

Reasoning: The rationale behind Kentucky Power's proposed revision to subsection (3) is to clearly define the lower and upper boundaries of the "communication space." The National Electrical Safety Code ("NESC"), Department of Transportation ("DOT"), and Kentucky Power's own distribution construction standards mandate that wireline attachments comply with minimum grade clearance requirements. *See* NESC Rule 232 and Table 232-1; Kentucky Power's Construction Standards at DS 1821; *see also* Ky. Rev. Stat. Ann. § 278.042 (requiring the Commission to "ensure that each electric utility constructs and maintains its plant and facilities in accordance with accepted engineering practices as set forth in the commission's administrative regulations and orders and in the most recent edition of the NESC"). That is, no wireline attachments can lawfully be made below the minimum grade clearance (either at the pole or mid-span). Similarly, the NESC and Kentucky Power's distribution construction standards set forth the required clearances between communications lines and electric supply facilities. *See* NESC at § 235C.4. (defining clearance requirements for "communication worker safety zone" and stating that no "supply or communication facility" shall be located therein); Kentucky Power's Construction Standards at DS 1821. This required clearance is known as the communication worker safety zone (in that it protects communications workers). These "bottom up" and "top down" boundary descriptions will bring clarity to the proposed definition of "communication space."

Subsection (4). "Complex Make-Ready."

Subsection (4) should be revised to, *inter alia*, limit complex make-ready to make-ready within the communication space:

> "Complex make-ready" means any make-ready **within the communication space** 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~~** **rearrangements** or work relating to the attachment of wireless facilities.

Reasoning: The term "complex make-ready" should be limited to make-ready that is within the communication space, but which is not "simple make-ready." This is how the FCC pole attachment rules define the term. The Commission's proposed definition of "complex make-ready" would seemingly include make-ready within the electric supply space (and include pole replacements). This is important within the context of the Commission's proposed self-help remedy. Specifically, the proposed self-help remedy would allow a new attacher to perform complex make-ready if an existing attacher or utility fails to meet its make-ready deadline. *See* Section 4(9) of the Proposed Rules. As discussed in more detail below in connection with Section 4(9) of the proposed rules, the Commission should not extend the self-help remedy to make-ready above the communication space.

Subsection (11). "Simple Make-Ready."

Subsection (11) should be revised to reference "rearrangements" instead of "transfers":

> "Simple make-ready" means make-ready where existing attachments in the communications space of a pole could be **~~transferred~~** **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.

Reasoning: Within the industry, the term "transfer" is used to describe the process by which communications attachments are removed from an existing utility pole and re-attached to a newly-set utility pole. For example, Kentucky Power uses the term "transfer" in its proposed new Section 6(3) below to describe the process of transferring communications attachments from an existing pole to a newly set replacement pole. In contrast, the term "rearrange" is used to describe the process by which existing attachers shift the position of their attachments on a pole (usually up or down) during make-ready to accommodate new or modified attachments.

Subsection (X). "Pole."

The Commission should include the term "pole" as a defined term within Section 1 of the proposed rules to promote clarity with respect to the applicability of the new rules:

> **"Pole" means a utility pole supporting electric supply facilities that operate at or below nominal maximum distribution voltage and does not include either (1) a pole that supports electric transmission facilities or (2) any pole, post, standard or other structure that is used primarily to support outdoor lighting.**

Reasoning: The term "pole" is used throughout the Commission's proposed rules. However, the lack of a definition of this term breathes ambiguity into Section 2(1)—*i.e.*, the proposed rules do not clearly identify which assets are subject to mandatory access rights, the timelines or other aspects of the rules. In the absence of a definition, an attaching entity might contend, for example,

that the rules apply to transmission structures and/or streetlights. In contrast, Kentucky Power's current pole attachment tariff clearly describes the scope of its applicability: "attachments of aerial cables, wires and associated appliances (attachments) to certain distribution poles of Kentucky Power Company." Kentucky Power Pole Attachment Tariff, Sheet No. 16-1 (emphasis supplied). Like the foregoing language from Kentucky Power's pole attachment tariff, a clear definition of "pole" would avoid any potential conflict about the scope of access rights under the proposed rules.

This potential conflict is not merely hypothetical, either. Attaching entities have been pushing at the federal level to extend the applicability of the FCC's pole attachment rules beyond distribution poles to other utility-owned assets, including electric transmission poles and streetlight-only poles. For example, while electric transmission poles are generally excluded from the meaning of "pole" under current federal regulatory law, *see Southern Company v. FCC*, 293 F.3d 1338, 1344 (11th Cir. 2002), attaching entities still regularly contend that the rules apply to certain types of electric transmission poles. Similarly, attaching entities are also seeking to extend the applicability of the FCC's pole attachment rules to lighting assets owned by electric utilities. *See Wireless Telecommunications Bureau and Wireline Competition Bureau Seek Comment on WIA Petition for Rulemaking, WIA Petition for Declaratory Ruling and CTIA Petition for Declaratory Ruling*, Public Notice, WT Docket No. 19-250, WC Docket No. 17-84, RM-11849, DA 19-913 (Sept. 13, 2019). Applying rules of general applicability to distribution poles might work. But applying the same rules to transmission structures or streetlights will not work because those types of assets involve additional stakeholders and present special challenges that are best addressed through individual tariffs or special contracts. Importantly, the definition of "pole" that Kentucky Power is seeking would not limit the Commission's jurisdiction; it would only limit the applicability of the one-size-fits-all rules. The Commission would still have jurisdiction over attachments to other structures through tariff approval, review of special contracts and complaint proceedings.

807 KAR 5:0XX – Section 3. Pole Attachment Tariff Required.

New Subsection (4): Terms and Conditions Can Deviate from Proposed Rules.

The Commission should add a new subsection (4) that provides:

> **A rate, term or condition within a tariff in effect on the effective date of this administrative regulation shall be presumptively fair, just and reasonable. A rate, term or condition within a tariff that takes effect after the effective date of this administrative regulation may deviate from the requirements of this administrative regulation for good cause shown.**

Reasoning: As a general matter, Kentucky Power objects to any proposed rule that conflicts with terms or conditions within its existing pole attachment tariff. Before any pole attachment tariff is approved by the Commission, it is subjected to rigorous regulatory scrutiny and scrutiny from interested parties. This ensures that the conditions of a pole attachment tariff are just and reasonable. For example, Kentucky Power revised its pole attachment tariff in 2017 and increased the pole attachment rates charged thereunder. See Electronic Application of Kentucky Power Company for (1) A General Adjustment of its Rates for Electric Service; (2) an Order Approving its 2017 Environmental Compliance Plan; (3) an Order Approving its Tariff and Riders; (4) an

Order Approving Accounting Practices to Establish Regulatory Assets and Liabilities; and (5) an Order Granting All Other Required Approvals and Relief, Case No. 2017-00179 (Apr. 27, 2017). Kentucky Cable Telecommunications Association ("KCTA") filed a motion to intervene in the proceedings, Motion to Intervene of Kentucky Cable Telecommunications Association, Case No. 2017-00179 (Jul. 10, 2017), and challenged the proposed increase in Kentucky Power's pole attachment rates. See Direct Testimony of Patricia D. Kravtin Submitted on Behalf of KCTA, Case No. 2017-00179 (Oct. 3, 2017) (challenging the proposed increase in Kentucky Power's pole attachment rates). Following formal discovery and negotiations by both parties, KCTA and Kentucky Power entered into a settlement agreement regarding the increase in Kentucky Power's pole attachment rates. See Motion to Approve Settlement Agreement, Case No. 2017-00179 (Nov. 22, 2017). The Commission held an evidentiary hearing on the parties' settlement agreement and ultimately issued an order approving the parties' agreed-upon increase of Kentucky Power's attachment rates. See Order, Case No. 2017-00179 (Jan. 18, 2018) (approving, inter alia, the settlement agreement reached between KCTA and Kentucky Power).

Each term and condition in Kentucky Power's pole attachment tariff was subjected to the strict approval process outlined above. Therefore, Kentucky Power's pole attachment tariff is presumptively fair, just and reasonable. Kentucky Power's proposed subsection (4) would allow pole owners and attaching entities to continue relying upon previously approved terms and conditions—even if they deviate from the Commission's proposed rules. In other words, the proposed subsection (4) would provide continuity between the existing pole attachment framework, as defined in the current pole attachment tariff, and the Commission's proposed rules, thereby mitigating against sharp disruptions in the pole attachment process. The proposed subsection (4) is also forward-looking—it would allow pole owners and attaching entities to agree upon terms and conditions that deviate from the Commission's proposed rules even after they become effective. Communications technology is constantly evolving, and evolution renders static frameworks obsolete over time (e.g., advances in communications technology has required pole owners to continuously update their pole attachment tariffs). The proposed subsection (4) would inject flexibility into the Commission's proposed rules and provide pole owners and attaching entities with sufficient latitude to craft innovative solutions to tomorrow's deployment obstacles.

807 KAR 5:0XX – Section 4. Procedure for New Attachers to Request Utility Pole Attachments.

Subsection (2)(b)2. Survey and Application Review on the Merits.

Subsection (2)(b)2 should be deleted in its entirety:

> ~~**2. Participation of attachers in surveys conducted by a utility.**~~
>
> > ~~**a. A utility shall permit 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 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.~~

Reasoning: Subsection 2(b)2 would impose a burden on electric utilities to allow existing and new attachers to participate in field surveys during the application process. The field survey, though, is primarily a data collection event. The field survey is *not* where make-ready solutions are engineered or priced; that happens *after* the data collection. Because the field survey is primarily a data collection event of little value to existing or new attaching entities, attaching entities have generally declined to participate when given the opportunity by affiliates of Kentucky Power operating in states with a rule similar to proposed rule 4(2)(b)1. Further, imposing this burden on electric utilities would slow-down, rather than expedite, broadband deployment insofar as it adds another administrative notice layer (to say nothing of the coordination expectation it creates for attaching entities) to an already time-cramped process.

Subsection (3)(a). Payment of Make-Ready Estimates.

Subsection (3)(a) should be revised to omit the requirements of providing information on an "itemized" and "pole-by-pole" basis:

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

Reasoning: Kentucky Power already provides reasonably detailed make-ready estimates and, therefore, does not oppose a rule requiring that estimates be reasonably detailed. However, the proposed rules should not go so far as to allow new attachers to request that such estimates be broken down on a "pole-by-pole basis." The level of detail provided to attaching entities should be no greater than the level of detail provided to any other customer taking service from Kentucky Power.

There are a number of problems with providing estimates on a pole-by-pole basis. First, make-ready estimates do not always lend themselves to a per-pole breakdown because certain costs cannot be accurately assigned on a per-pole basis. Fixed costs—like traffic control, lock-out/tag-out, and rolling a truck to the work site—would ordinarily be priced into the total job (which almost always includes multiple poles). These fixed costs cannot be allocated on a pole-by-pole basis because the costs do not change just because one pole is removed from the job. Second, Kentucky Power's existing work order system does not allow it to break down make-ready costs on a per-pole basis. The Commission should not require electric utilities to implement estimating tools for pole attachment customers that are different from those already in use for their electric service customers.

Subsections (3)(c) and (3)(d). Payment of Make-Ready Estimates.

Subsections (3)(c) and (3)(d) should be replaced in their entirety with the following rules, which would automatically terminate stale make-ready estimates:

> **(3)(c) Upon receipt of a make-ready estimate, a new attacher shall have 21 days to accept and make payment therefor. A utility may not withdraw a valid make-ready estimate during this timeframe except for good cause.**
>
> **(3)(d) Unless otherwise agreed-upon between a utility and new attacher, a make-ready estimate shall be deemed withdrawn if it is not accepted by the new attacher within 21 days from the date the make-ready estimate was first presented to the new attacher.**

Reasoning: Subsections (3)(c) and (3)(d) of the proposed rules would allow a new attacher to accept a make-ready estimate at any time before it is formally withdrawn by an electric utility. This would impose an unnecessary burden on electric utilities to match outstanding estimates with other distribution work orders. Electric distribution systems are dynamic. For a variety of reasons (new electric customers, upgraded electric facilities, targeted undergrounding, etc.) a portion of the distribution system can change over a relatively short period of time. As a consequence, make-ready estimates are highly susceptible to time decay—their validity decreases rapidly over time. To avoid conflicts and delays in broadband deployment, a make-ready estimate should have a "lifespan" that applies in the absence an earlier-required withdrawal/revision or an agreed-upon extension.

Accordingly, the Commission should replace subsections (3)(c) and (3)(d) with the language proposed by Kentucky Power above, which would automatically terminate stale make-ready estimates. The proposed language would also benefit attaching entities by providing them with additional time to accept make-ready estimates—twenty-one (21) days versus fourteen (14) days in the current version of subsection (3)(c). Furthermore, the proposed language builds upon the protection afforded to new attachers in subsection (3)(c) by barring utilities from withdrawing make-ready estimates within twenty-one (21) days of presentation unless good cause is shown.

Subsection (4). Make-Ready.

Subsection (4) should be revised as follows to place the burden of issuing make-ready notices on the new attacher rather than the utility:

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

Reasoning: The problem with Subsection (4) isn't so much the obligation to provide preliminary notice of an impending make-ready project—Kentucky Power's existing platforms already

provide that type of notice—but the instead the level of detail within the notice as required by Subsections (4)(a) and (4)(b). This is an inefficient approach for several reasons. First, make-ready notices are an administrative burden that electric utilities should not be forced to bear. The make-ready is being done at the request of, and for the sole benefit of, the new attacher. Therefore, the new attacher should bear the administrative burden of issuing make-ready notices. Second, it is the new attacher, not the electric utility, that stands to benefit from having make-ready notices issued quickly. Thus, placing the burden of issuing make-ready notices on new attachers will align the action with the benefit of the action, thereby incentivizing the expedient issuance of make-ready notices. Third, the notice required by proposed Subsections (4)(a) and (4)(b) serve as the condition precedent to the new attacher's right to exercise self-help. When it comes to a new attacher's right to rearrange and existing attacher's facilities, the notice obligations in the proposed rules would force utility pole owners into the middle of a contentious issue between competitors.

If, however, the Commission intends to place the burden of issuing make-ready notices on utilities, then Kentucky Power urges the Commission to delete the requirement that such notices be issued within seven (7) days of payment of survey costs and make-ready estimates. This deadline is impractical, and even the FCC's pole attachment regulations (which are notoriously burdensome to electric utilities) do not impose a hard deadline on the issuance of make-ready notices. *See* 47 C.F.R. § 1.1411(e) ("Upon receipt of payment specified in paragraph (d)(2) of this section, a utility shall notify immediately and in writing all known entities with existing attachments that may be affected by the make-ready.").

Subsections (4)(a) and (4)(b). Make-Ready.

Subsections (4)(a) and (4)(b) should be revised to clarify that the different requirements are based on where make-ready is to be performed, rather than where the new attachments are to be made:

> (4)(a) For ~~**attachments**~~ **make-ready** in the communications space, the notice shall….
>
> (4)(b) For ~~**attachments**~~ **make-ready** above the communications space, the notice shall:….

Reasoning: Subsections (4)(a) and (4)(b) not only govern what type of information must be included within the make-ready notices issued to existing attachers, but also establish deadlines for completion of make-ready work. Subsection (4)(a) establishes the make-ready deadline for "attachments in the communications space" and subsection (4)(b) establishes the make-ready deadline for "attachments above the communications space." These proposed rules closely track FCC Rule 1.1411(e). This language can be easily misunderstood as referencing the location of the new attachment, rather than the location of the existing attachments that require make-ready. For example, some new attachments in the communication space will require make-ready work on existing attachments above the communication space, and some new attachments above the communication space will require make-ready work on existing attachments within the communication space. What matters—especially for purposes of determining the deadline for completing make-ready work—is **where the make-ready is performed**. To avoid the potential confusion created by FCC Rule 1.1411(e), the Commission should revise subsections (4)(a) and

(4)(b) as proposed above. Alternatively, the Commission could add the word "existing" before the word "attachments" to make clear the "attachments" referenced are not the new attachments.

Subsection (4)(b)2. Make-Ready.

Subsection (4)(b)2 should be deleted in its entirety:

> ~~**Set a date for completion of make-ready that is no later than 90 days after notification is sent (or 135 days in the case of larger orders, as described in subsection (7) of this section).**~~

Reasoning: The problem with subsection (4)(b)2 of the proposed rules isn't so much that it requires a utility to perform make-ready work within 90 days, but that it requires a utility to identify at the outset a certain "date for completion." It is challenging enough to complete make-ready work within a 90 day period, but identifying the precise date on which it will be completed is nearly impossible. The work order will go into the queue with a 90 day deadline, and the work may be completed on the 67th day or it may be completed on the 89th day. To be clear, Kentucky Power is not objecting to the 90 day deadline, so long as failure to meet the deadline does not trigger a right for new attachers for perform self-help make-ready on electric supply facilities (see proposed revisions to Subsection (4)(b)5 below). It is only objecting to a rule requiring it to "set a date for completion" rather than merely completing the actual work within the 90 day period.

Subsection (4)(b)5. Make-Ready.

Subsection (4)(b)5 should be revised to include the 90 day period for completion of make-ready work and to reference the Commission's complaint procedures, as opposed to the proposed self-help remedy, as a new attacher's remedy for delays in make-ready above the communications space:

> State that if make-ready is not completed ~~**by the completion date set by the utility**~~ **within 90 days after the notification referenced** in subparagraph 2 ~~**in**~~**of** this paragraph (or, if the utility has asserted its 15-day right of control, 15 days later), the new attacher may ~~**complete the make-ready specified pursuant to subparagraph 1 of this paragraph**~~ **file a complaint with the Commission pursuant to 807 KAR 5:001, Section 17.**

Reasoning: Consistent with Kentucky Power's comments in connection with Subsection (4)(b)2 above, the 90-day period for make-ready work should be reflected in this section (without reference to an arbitrarily established "completion date"). Subsection (4)(b)5 of the proposed rules also requires utilities to notify existing attachers of the new attachers' right to perform self-help above the communications space. As discussed in more detail below in connection with subsection (9), however, the Commission should not extend the self-help remedy to make-ready above the communications space but instead should allow an attaching entity to file a complaint.[1]

[1] The FCC had actually used this approach until it revised its pole attachment rules in 2018 to include a self-help remedy in the electric supply space. *See In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless Broadband*

Subsection (6)(a). Final Invoice.

Subsection (6)(a) should be replaced with the following language to make the issuance of a final invoice permissive:

> **If actual make-ready costs exceed the make-ready estimate, then a utility shall, within a reasonable period after a utility completes its make ready, provide the new attacher**:

Reasoning: Under Kentucky Power's existing processes, make-ready work is typically billed to new attachers based solely on the make-ready estimate. The only circumstances under which Kentucky Power does issue a final invoice is where actual make-ready costs meaningfully exceed the make-ready estimate. This approach avoids the administrative costs associated with issuing a second invoice that, in almost call cases, will mirror the make-ready estimate.

Subsections (6)(a)1 and (6)(a)2. Final Invoice.

Subsections (6)(a)1 and (6)(a)2 should be revised to omit the requirements of providing information on an "itemized" and "pole-by-pole" basis:

> (6)(a)1 A ~~**detailed, itemized**~~ **reasonably detailed** 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; and
>
> (6)(a)2 A ~~**detailed, itemized**~~ **reasonably detailed** final invoice~~**, on a pole-by-pole basis where 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.

Reasoning: Kentucky Power already provides reasonably detailed final invoices for survey and make-ready costs and, therefore, does not oppose a rule requiring that final invoices be reasonably detailed. However, for the same reasons noted in its comments to Section 4(3)(a) above, Kentucky Power does oppose any requirement that an invoice be "itemized" or broken down on a "pole-by-pole" basis. There are no such requirements in Kentucky Power's current pole attachment tariff, and Kentucky Power does not invoice any of its other customers in this manner. In fact, Kentucky Power's work order system does not allow it to break down its invoices on such a granular level. Furthermore, surveys and make-ready involve certain fixed costs that cannot be accurately assigned on a pole-by-pole basis.

Deployment by Removing Barriers to Infrastructure Investment, Third Report and Order and Declaratory Ruling, WC Docket No. 17-84, WT Docket 17-79, 33 FCC Rcd 7705, 7751 at ¶ 96 (Aug. 3, 2018). Kentucky Power's affiliate, American Electric Power Service Corp., is currently challenging the FCC's electric supply space self-help remedy through an appeal in the Ninth Circuit Court of Appeals. *See Am. Elec. Power Serv. Corp. v. FCC*, Docket Nos. 18-72689, 19-70490 (9th Cir. 2019). Other electric utilities have asked the FCC to reconsider its electric supply space self-help remedy. *See Petition for Reconsideration of the Coalition of Concerned Utilities*, WC Docket No. 17-84, WT Docket No. 17-79 (Oct. 15, 2018).

Subsection (6)(b). Final Invoice.

Subsection (6)(b) should be revised make clear that utilities are not responsible for the costs of pre-existing violations caused by attaching entities:

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

Reasoning: Kentucky Power agrees that the cost of correcting pre-existing violations should be paid by the entity that caused the violation. But to avoid any ambiguity over this proposition—a proposition on which all stakeholders should agree—the rule needs to make clear that the utility only bears this cost when it is the cause of the pre-existing violations. In other words, under no circumstances should an electric utility be "on the hook" for the cost of correcting a pre-existing violation caused by a communications attachment. Of the three potential cost-bearers in this situations (the attacher who caused the violation, the new attacher and the electric utility) it makes the least sense for the electric utility to bear this cost given that the electric utility was neither the cause of the violation nor stands to gain access as a result of correcting the violation.

Subsection (7). Survey and Make-Ready Timelines.

Subsection (7) should be revised to omit the timelines applicable to attachment requests in excess of 300 poles:

> For the purposes of compliance with the time periods in this section:
>
> (a) A utility shall apply the timeline described in subsection (2) through (4) of this section to all requests for attachment up to the lesser of 300 poles or 0.5 percent of the utility's poles in the state.
>
> ~~**(b) A utility may add 15 days to the survey period described in subsection (4) of this section to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in the state.**~~
>
> ~~**(c) A utility may add 45 days to the make-ready periods described in subsection (4) of this section to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in the state.**~~
>
> **~~(d)~~(b) A utility shall negotiate in good faith the timing of all requests for attachment larger than ~~the lesser of 3000 poles or 5 percent of the utility's poles in a state~~ 300 poles or 0.5 percent of the utility's poles in the state, and any agreement reached shall be filed with the Commission as a special contract.**

~~(e)~~(c) A utility may treat multiple requests from a single new attacher as one request when the requests are filed within 30 days of one another.

Reasoning: Kentucky Power does not object subsection (7)(a), which imposes survey and make-ready timelines on attachment requests involving three hundred (300) or fewer poles. However, the incremental timeline extensions proposed in subsections (7)(b) and (7)(c) for much larger attachment requests are unrealistic and impractical. Specifically, under subsection (7)(a), an electric utility is afforded up to forty-five (45) days from receipt of a complete application to conduct a survey on three hundred (300) or fewer poles. However, subsection (7)(b) would only provide an electric utility an additional fifteen (15) days—or sixty (60) days in total—to complete a survey on as many as 3,000 poles. Similarly, subsection (7)(a) provides utilities with ninety (90) days to complete make-ready above the communications space on three hundred (300) or fewer poles, while under subsection (7)(c), an electric utility would be required to do ten times as much make-ready in less than half as much time (135 days). These *de minimis* extensions are simply not feasible, and subsections (7)(b) and (7)(c) become wholly unworkable in the event that an electric utility receives multiple large attachment requests in a short period of time. Further, even if an electric utility could survey and complete make-ready within the time allotted by subsections (7)(b) and (7)(c), it is highly unlikely that an attaching entity would want to incur the costs of (or even be capable of) constructing its facilities at a similar pace.

Therefore, the Commission should delete subsections (7)(b) and (7)(c). In lieu of placing rigid timelines on large attachment requests, the Commission should instead extend the approach used in subsection (7)(d) to include all attachment requests involving more than three hundred (300) poles.

Subsection (9)(a). Self-Help Remedy: Surveys.

Subsection (9)(a) should be revised to require new attachers to retain approved contractors, where required by a utility, to perform self-help surveys:

> Surveys. If a utility fails to complete a survey as specified 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. **If a utility maintains a list of contractors it authorizes to perform self-help surveys, then a new attacher must use a contractor from the utility's list to perform a self-help survey.**

Reasoning: Surveys are critical to maintaining safe and reliable electric distribution facilities. They serve a very similar purpose to the foundation of a building. The fit and quality of a building matter little if the foundation is compromised. The same rational applies to electric distribution facilities. If the underlying data is compromised, the engineering based upon that data will be compromised, and the soundness of an entire pole line could be compromised. Kentucky Power relies on accurate surveys and engineering to safeguard its electric distribution facilities. However, surveys and engineering are only as sound as the contractors who perform these vital steps. For this reason, Kentucky Power maintains a list of designated approved contractors that it trusts to perform surveys. Though Section 5 of the proposed rules appears to already require what

Kentucky Power is requesting, greater clarity on an issue of such importance is warranted. This clarity will not only safeguard the safety and reliability of the electric distribution system, but will also foster a more efficient pole attachment process. Furthermore, if self-help surveys are performed by utility-designated contractors, then utilities will be able to trust that the survey was performed correctly, thereby eliminating the need for utilities to closely vet every detail in the survey report and reducing the timeline for deployment.

Though it is important for attaching entities to use approved contractors to perform self-help surveys, this same concern does not exist with respect to make-ready work in the communication space. Kentucky Power does not approve contractors for purposes of work within the communication space, and does not believe it is in the best position to determine which contractors are best qualified to rearrange communication facilities and perform other make-ready within the communication space. The responsibility for determining who performs this work should lie with the new attacher.

Subsection (9)(b). Self-Help Remedy: Make-Ready.

Subsection (9)(b) should be revised to limit the self-help remedy to the communications space:

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

Reasoning: Kentucky Power opposes subsection (9)(b) to the extent that it extends the self-help remedy to the electric supply space. The FCC's corresponding rule, FCC Rule 1.1411(i)(2), is the subject of an appeal in the Ninth Circuit Court of Appeals and a Petition for Reconsideration with the FCC. *See Am. Elec. Power Serv. Corp. v. FCC*, Docket Nos. 18-72689, 19-70490 (9th Cir. 2019); Petition for Reconsideration of the Coalition of Concerned Utilities, WC Docket No. 17-84, WT Docket No. 17-79 (Oct. 15, 2018). But, regardless of whether the FCC's electric supply space self-help rule survives scrutiny, it is bad policy. The decision whether to allow third parties within the electric supply space should rest exclusively with the electric utility. Further, if an electric utility allows third-parties into the electric supply space for purposes of performing make-ready work, it should be on terms and conditions that rest with the utility's discretion (and subject to Commission review and approval through the tariff approval process).

The purpose of the electric supply space self-help remedy adopted by the FCC was allegedly to speed deployment by allowing new attachers to hire contractors to perform self-help make-ready in the power supply space where electric utilities failed to meet deadlines for such make-ready imposed by the FCC. *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, FCC 18-111, WC Docket No. 17-84, WT Docket No. 17-79, 33 FCC Rcd 7705, 7751 at ¶ 96 (Aug. 3, 2018).

However, electric utility make-ready is **not** what causes delays in the make-ready process; it represents a small minority of the overall work to be performed in that process. For example, data from Kentucky Power and its affiliated operating companies for the 2016-2017 time period indicate that the vast majority of "make-ready" poles require only communication space make-ready:

Make-Ready in the Communications Space Only	
Operating Company	**Percent**
Appalachian Power	75%
AEP Ohio	82%
AEP Texas	94%
Indiana Michigan Power	96%
Kentucky Power	83%
Public Service of Oklahoma	83%
Southwestern Electric Power	95%
AVERAGE	**87%**

Furthermore, there is no indication that electric utilities in Kentucky have routinely failed to meet electric supply space make-ready deadlines or that such self-help will meaningfully accelerate deployment. In other words, the risk/reward ratio weighs heavily against extending self-help above the communications space. While the risks of injury or damage are very high, the potential rewards (i.e., expediting broadband deployment) are negligible.

Subsection (10). One-Touch-Make-Ready Option.

As noted in the chart above, the majority of make-ready work involves solely the rearrangement of existing communications attachments. These delays are largely attributable to the disinterest and/or anti-competitive motive of existing attachers—i.e., existing attachers have zero incentive to quickly make room on Kentucky Power's poles for their direct competitors. Thus, by allowing new attachers to step in and perform this make-ready in their stead, the Commission's proposed OTMR rule would eliminate the most significant hurdle to expedient deployments. **Kentucky Power fully supports the Commission's interest in expediting make-ready work within the communications space**.

807 KAR 5:0XX – Section 5. Contractors for Survey and Make-Ready.

Subsections (1) and (2).

Subsection (1) should be deleted in its entirety and subsection (2) should be revised as follows:

> ~~**(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 it 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 its 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 may not unreasonably withhold its consent.**~~

~~**(2)**~~**(1)** Contractors for ~~**simple work**~~ **self-help surveys and make-ready within the communication space**. A utility may, but is not required to, keep up-to-date a reasonably sufficient list of contractors it authorizes to perform **self-help** surveys and ~~**simple**~~ make-ready **(both simple and complex) within the communication space**. If a utility provides such a list, then the new attacher must 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 may not unreasonably withhold its consent.

Reasoning: As set forth above, the Commission should not extend its proposed self-help remedy to make-ready above the communications space. Consistent with Kentucky Power's proposed revisions to Section 4(9)(b), which would limit the proposed self-help remedy to make-ready within the communications space, Kentucky Power urge the Commission to omit subsection (1) from its proposed rules, which is dedicated largely to the selection of contractors for make-ready above the communications space. The Commission should also consolidate its proposed rules governing contractor selection into a single subsection that covers both "simple" and "complex" surveys and make-ready. Finally, to make clear that a new attacher's contractors are not permitted to perform work in the electric supply space, the Commission should revise subsection (2) to explicitly state that the utility-approved contractors are only authorized to perform work within the communications space. These proposed revisions are illustrated in Kentucky Power's proposed revisions to subsection (2) above. It also bears mentioning that these proposed revisions dovetail into Kentucky Power's proposed revisions to Section 4(9)(a), which would require new attachers to use utility-designated contractors when performing surveys. As explained above, however, this requirement would only apply if a utility explicitly designates contractors that should be used for surveys.

807 KAR 5:0XX – Section 6. Notice of Changes to Existing Attachers.

Subsection (1). Advance Notice Requirements.

Subsection (1) should be revised to honor advance notice requirements contained within existing pole attachment tariffs:

> Unless otherwise provided in a**n existing pole attachment tariff,** joint use agreement or special contract, a utility shall provide an existing attacher no less than 60 days written notice prior to:….

Reasoning: The advance notice requirements in subsection (1) conflict with the notice requirements contained within Kentucky Power's pole attachment tariff. For example, the current

pole attachment tariff allows Kentucky Power to remove an attaching entity's attachments for cause upon thirty (30) days' written notice:

> If Operator fails to comply with any of the provisions of this Tariff or defaults in the performance of any of its obligations under this Tariff and fails within thirty (30) days, after written notice from the Company to correct such default or non-compliance, Company may, in addition to all other remedies under this tariff forthwith take any one or more of the following actions: terminate the specific permits or permits covering the poles to which such default or non-compliance is applicable; remove, relocate or rearrange attachments of Operator to which such default or non-compliance relates, all at Operator's expense…

Kentucky Power Pole Attachment Tariff, Sheet No. 16-4. In contrast, pursuant to subsection (1)(a) of the proposed rules, Kentucky Power would be required to provide an attaching entity at least sixty (60) days' written notice before removing its attachments for cause. In other words, subsection (1) would dramatically increase the advance notice requirements imposed on Kentucky Power.

New Subsection (3). Transfers of Attachments.

The following provision should be added as subsection (3) to Section 6 of the proposed rules:

> **(3) Transfer of Attachments.**
>
> **(a) Unless an applicable tariff or special contract establishes a different timeframe, existing attachers shall transfer their attachments within 60 days of receiving written notice from the utility pole owner.**
>
> **(b) For good cause, a utility pole owner can deviate from the 60-day notice period required in subsection (3)(a) of this section where circumstances warrant an expedited transfer.**
>
> **(c) If an existing attacher fails to transfer its attachments within the applicable timeframe, a utility pole owner may transfer such attachments at the existing attacher's expense**.

Reasoning: The foregoing language would provide utilities with the right to transfer communications attachments under certain circumstances to mitigate against the pervasive and unsightly "double wood" problem. The "double wood" problem arises when a replacement pole is set next to an existing "stub" pole, and existing attachers fail—for long periods of time—to transfer their attachments to the replacement pole. This delays the removal of the stub pole and results in unnecessarily redundant pole lines that clutter rights-of-way.

* * *

Kentucky Power appreciates the opportunity to provide the foregoing comments regarding the proposed pole attachment rules.

Respectfully submitted.

Brian West
Director, Regulatory Services

Kentucky Power Company