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Via PSCED@ky.gov

Administrative Regulations Working Group
Kentucky Public Service Commission
P.O. Box 615
Frankfort, Kentucky 40602-0615

Re: Reply Comments on PSC's Proposed Regulations and Amendments to Regulations, Access and Attachments to Utility Poles and Facilities, 807 KAR 5:0XX

Dear Administrative Regulations Working Group:

The Commission's goal in this proceeding should be to implement pole attachment rates, rules and regulations that are just, fair, reasonable and nondiscriminatory, so that telecommunications competition can continue to flourish. That competition, in turn, will help ensure that Kentucky consumers receive the best possible services at prices they are willing to pay. The Commission has already mandated nondiscriminatory pole attachment pricing in its 2007 decision in *Ballard Rural Telephone Cooperative corporation, Inc. v. Jackson Purchase Energy Corporation* (*Ballard*),[1] but to the extent some commenters in this proceeding want to question Ballard's applicability, the Commission can re-affirm in this proceeding the pro-competitive principles it established in that case. As to the methodology to be used to establish rates, terms and conditions, AT&T urges the Commission to adopt the Federal Communications Commission (FCC) pole attachment rules and regulations.[2] . Implementing those measures will promote competition and protect Kentucky consumers.

[1] KY. PSC Case No. 2004-0036, *In the Matter of Ballard Rural Telephone Cooperative Corporation, Inc. v. Jackson Purchase Energy Corporation (Ballard*), (December 27, 2007).

[2] 47 C.F.R. 1.1406(d)(2)

AT&T's recommendations are fully consistent with the Commission's obligations under Kentucky law to ensure pole attachment rates are just, fair and reasonable. Under the law, utilities "may demand, collect and receive fair, just and reasonable rates for the services rendered or to be rendered by it to any person"[3] subject to the limitation that

> "[n]o utility shall, as to rates or service, give any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage, or establish or maintain any unreasonable difference between localities or between classes of service for doing a like and contemporaneous service under the same or substantially the same conditions."[4]

While AT&T's recommendations are fully aligned with these foundational principles, the positions being advanced by some other commenters are not. These comments will respond to proposals that fail to adhere to Kentucky law and that fail to protect the competitive telecommunications market and Kentucky consumers.

The Pole Attachment Rates Imposed On ILECs, Such As AT&T, Should Be Fair, Just And Reasonable, And Non-discriminatory.

Some commenters wrongly suggest that the Commission ignore the statutory mandates that pole attachments rates be fair, just, reasonable, and non-discriminatory. Kentucky Power, for example, asks the Commission to exempt incumbent local exchange carriers (ILECs) from the Commission's new rules, so that power companies can continue to impose higher pole attachment rates on them.[5] There is, however, no valid justification for treating ILECs disparately under the rules, and the result, if the exemption were sanctioned, would be unjust, unreasonable, prejudicial and disadvantageous rates for ILEC attachments on power company poles.

- **Kentucky Power's assertion that ILECs possess a competitive advantage, and, therefore, should not enjoy the same non-discriminatory rates as other attachers, is unsubstantiated and plainly wrong.**

Kentucky Power asserts that ILECs enjoy some unquantified "advantage" over "other attaching entities"[6] because, historically, the ILECs have had access to power company poles through joint use agreements with "more-favorable provisions."[7] But nothing in those historic joint use agreements gives ILECs material advantages over other attachers. For one thing, those agreements impose reciprocal obligations on ILECs to make their poles available to the power companies – obligations other attachers do not have. When Kentucky Power claims, without any

[3] KRS 278.030(1)

[4] KRS 287.170

[5] Kentucky Power, pp. 2-4, and Louisville Gas and Electric Company and Kentucky Utilities Company (LG&E-KU), p. i; p. 13-16. Together, Kentucky Power and LG&E-KU are the "aligned power companies."

[6] Kentucky Power, p. 3.

[7] *Id*.

supporting evidence, to have invested in "much larger (and much more costly) poles than would have been necessary in the absence of ILEC attachments,"[8] it blatantly ignores (and apparently wants the Commission to also ignore) that it received something of value in return when, through the joint use agreements, ILECs also made reciprocal investments to accommodate power company attachments on ILEC-owned poles. And even if Kentucky Power has invested in larger, more costly poles – again, it presents no evidence to support that assertion – it is not as if those investments have been solely for the benefit of ILECs, or that Kentucky Power lacks other means to recover those costs. Kentucky Power's own computation of proposed CATV pole attachment rates in its last Commission rate case fundamentally assumed that *every one* of its poles has been built with enough space to accommodate one or more attachers, and that its proposed attachment rates should recover those costs.[9]

Unlike power companies (which have a captive customer base with regard to the monopoly power services they provide), neither ILECs in general, AT&T in particular, nor any of their myriad competitors have a captive base of customers for any of their services, and they simply do not possess any explicit or implicit advantage over other attachers. Accordingly, there is no valid reason to force them to pay pole attachment rates different than what other attachers pay. All attachers should be subject to the same just, reasonable and non-discriminatory attachments rates as their competitors, as is required by Kentucky law.

- **The FCC has determined that ILECs, such as AT&T, are entitled to just and reasonable attachment terms and conditions.**

The FCC's 2011 *Pole Attachment Order*, found that ILECs, including AT&T, are "entitled to pole attachment rates, terms and conditions that are just and reasonable."[10] For almost a decade in the 28 states governed by the FCC on pole attachment matters, AT&T has been entitled to "the same rate as [a] comparable provider" where it attaches to an electric utility's poles pursuant to materially comparable terms and conditions.[11] This industrywide, technology-agnostic approach makes sense: AT&T provides telephone, video, broadband, and other advanced services from facilities that occupy a similar amount of space on utility poles as its competitors: *e.g*. competitive local exchange carriers (CLECs) and cable companies that pay the FCC's telecom and cable rates; and, therefore, AT&T should be protected by the same right to "just and reasonable" rates under 47 U.S.C. § 224.

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[8] *Id*.

[9] *See, Order, In the Matter of: 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 Tariffs 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 (KY. PSC January 18, 2009).

[10] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5327-28, 5331 (¶¶ 202, 209) (2011) ("*Pole Attachment Order*").

[11] *Id.* at 5336 (¶ 217).

- **As telecommunications competition has evolved and intensified, and as consumers have abandoned traditional ILEC landline services for other options, the need to make pole attachment rates, terms and conditions equal across all attachers has become even more pronounced.**

In the earliest days of joint use agreements, the monopoly power and telephone companies were the only providers from whom their respective customers could receive power and telephone service. Both providers needed pole infrastructure, and both served a common set of customers on a monopoly basis in their respective service territories. Decades later, the Federal Telecommunications Act of 1996 opened the telecommunications market to competition, drastically changing the telecommunications services and pole attachment landscape, and intensifying the need for just, reasonable, and non-discriminatory pole attachment rates.

To understand the extensive changes that have occurred in the telecommunications, internet, cable TV, and broadband industries, one need only look at comments filed in this case. In the not-too-distant past, telephone, cable TV, and internet services were provided by distinctly separate entities, but because of the vibrant competition that has emerged in the communications marketplace as a result of the federal Telecommunications Act of 1996, any given competitor in the communications services arena is likely to provide a mix of these services. The Kentucky Broadband and Cable Association (KBCA), for example, describes itself as a group of "connectivity companies offering broadband, voice, mobile, and video services to more than 1,000,000 homes and businesses (serving approximately 800,000 homes and businesses) … across the Commonwealth."[12] It claims that these numbers approximate 80% of all Kentucky households.[13]

Other compelling evidence proves that the ILEC is nowhere near the sole-source provider of communications into homes or business that it was in decades past. Centers for Disease Control and Prevention (CDC) surveys show that in early 2003, only approximately 3.2 percent of households had only wireless service;[14] but by the end of 2019 approximately 61.3 percent of households had disconnected their ILEC landlines (if they ever had them in the first place) to become wireless only.[15] Wireline providers now serve less than 40 percent of households—which

[12] KBCA Comments, pp. 1-2

[13] *Id*.

[14] Wireless Substitution: Early Release of Estimates Based on Data From the National Health Interview Survey, July – December 2006 (Released May 14, 2007. Available at https://www.cdc.gov/nchs/nhis/erwirelesssubs.htm

[15] Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2019. Released September 2020. Available at: https://www.cdc.gov/nchs/nhis/erwirelesssubs.htm This same survey showed that in the South (which includes Kentucky) approximately 64.5 percent of adults are "wireless-only" and another 17.6 percent of adults are "wireless-mostly" users of telephones. Thus, approximately 82 percent of adults make little or no use of land-line telephone service, p. 5-6.

makes it abundantly clear that ILECs have no competitive advantage in the marketplace. This market shift has clear implications for pole attachment rates and regulations. The typical ILEC cannot and should not be made to bear disproportionately inflated pole attachment costs compared to their principal wireline competitors such as CLECs or members of KBCA.

The Commission's Holding In *Ballard* Clarifies That ILEC Attachers Should Receive The Same Non-discriminatory Treatment As Other Attachers.

The aligned power companies argue that the only relevant holding in *Ballard* is that an aggrieved ILEC may file a PSC complaint against a joint pole user power company.[16] That is not what *Ballard* says. In that decision, not only did the Commission assert its jurisdiction over joint use agreements between ILECs and power companies, it recognized that a telephone company pole attachment on a power pole is akin to a cable TV provider's attachment on that same power company pole.[17] *Ballard* acknowledges that typical CATV, CLEC and ILEC pole attachments are not substantially different from each other. Hence, (absent a unique, mutually agreed upon commercial agreement), pricing should be no different. Neither *Ballard*, nor anything else presented by commenters justifies effectively excluding ILECs from proposed new pole attachment rules.

It is disingenuous, or logically inconsistent at best, for power companies to commend the Commission for including the *attachment by a cable television system operator, telecommunications carrier, broadband internet provider, or governmental unit* within the definition of "attachment,"[18] and yet inexplicably assert that companies like AT&T (likewise providing telecommunications, broadband internet service, and video service), should be excluded from just, reasonable and nondiscriminatory rates. Apparently, the power company's misguided concern is that an ILEC will somehow be afforded the right to attach to power company poles without power companies receiving corresponding rights to attach to ILEC-owned poles.[19] That concern is wholly unfounded. AT&T does not object to reciprocal mandatory attachment rights at rates based on the FCC's New Telecom Formula (47 C.F.R. 1.1406(d)(2)).

Similarly misguided is LG&E-KU's assertion that joint use agreements are presumptively reasonable and therefore *ex post facto* application of new rules would undermine important infrastructure cost sharing relationships over which the Commission already exercises oversight.[20] LG&E-KU further claims that ILECs already have a remedy against unreasonable rates, terms and conditions—they can file a complaint with the Commission[21] -- and nothing more needs to be said or done to protect the interests of ILEC attachers. Both assertions miss the mark. Instead, as

[16] Kentucky Power, p. 4. LG&E-KU, p. 15.

[17] "Jackson Purchase's witness testified that for the CATV customer, the pole attachment would be the 'metal gizmo with the bolt through the pole.' The Commission does not believe that an attachment bade by Ballard or Jackson Purchase should be viewed differently." *Ballard*, p. 7.

[18] Kentucky Power, p. 1.

[19] Kentucky Power, p. 3. LG&E-KU, p. 15.

[20] LG&E-KU, p. ii.

[21] LG&E-KU, p. 15.

AT&T suggested in its opening comments, Section 3, paragraph 9 of the draft proposed rules should be inserted to make the new rules applicable to new and renewed contracts. If the parties to an existing joint use agreement want to continue that agreement unchanged, they are free to re-ratify the agreement.

It is, however, irrational to insist that an ILEC waste both ILEC and Commission resources to prosecute a complaint case addressing pricing in an existing joint use agreement when it is well known that the existing rates are unjust and unreasonable. When attachers providing a like and contemporaneous service, under the same or substantially similar conditions, the attach rates should be the same. Indeed, any approach to pole attachment rates that treats similarly-situated attachers differently is clearly prohibited under KRS 287.170.

OpenFiber's Comments Are Too Narrow: Commission Rules Should Ensure That Tariff Rates Are Available For *All* New and Newly-Renewed Pole Attachment Agreements, Not Just Those For CLECs.

OpenFiber Kentucky, LLC (OpenFiber), like AT&T, urges the Commission to create a presumption that similarly situated telecommunications carriers and CLECs will receive comparable pole attachment rates from utilities. AT&T agrees.

OpenFiber then points to problems resulting from utilities proposing rates that are disproportionately high for CLECs.[22] The analysis, however, should not stop there. AT&T is also aware of utilities asserting that their tariffed rates, typically presented in a tariff for CATV attachments, are only available for CATV attachers. This position is patently discriminatory and should be rejected by the Commission through adoption of rules that make tariff rates fully available for newly negotiated and newly renewed pole attachment agreements equally across the full spectrum of the industry.

One-Touch Make-Ready Rules Should Provide Adequate Exceptions For Attaching Parties Operating Under Collective Bargaining Agreements.

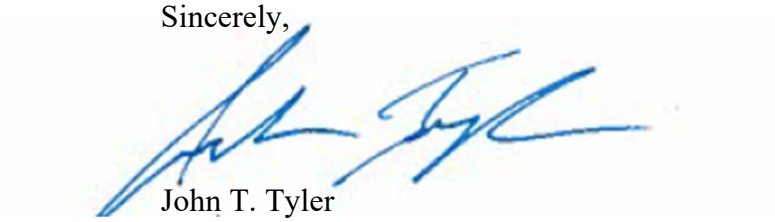
Within any new one-touch make-ready (OTMR) rules, the Commission should include an exception honoring attachers' collective bargaining agreements, thereby allowing employers, such as AT&T, which are parties to such agreements, to abide by pre-existing contractual obligations. AT&T's collective bargaining agreements obligate AT&T to have its unionized work force perform make-ready transfers. There is no sound justification for forcing AT&T, or any other similarly situated attacher, to impair its contractual obligations to meet unnecessarily stringent OTMR rules. On the contrary, sound public policy merits providing an exception within OTMR rules to allow attachers with pre-existing collective bargaining agreements to honor their commitments to organized labor.

[22] OpenFiber at 3.

The Commission should use this proceeding to promote competition, and thus protect Kentucky consumers, by establishing pole attachment rates, and terms and conditions that are just and reasonable and nondiscriminatory across the entire telecommunications industry. It can achieve that outcome by reinforcing its *Ballard* decision, and by adopting FCC rules and regulations for establishing pole attachment rates.

AT&T's Reply Comments are intended to address the most significant problems raised in the comments of other parties. To the extent it is necessary to do so, AT&T reserves the right to make addition comments or reply comments in the formal rulemaking process or at such other appropriate time.

Sincerely,



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