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**RE: Kentucky Public Service Commission Proposed Pole Attachment Rules**

Dear Mr. Chandler:

Enclosed please find and accept for filing Louisville Gas and Electric Company's and Kentucky Utilities Company's reply comments to the proposed pole attachment rules.

Should you have any questions regarding the enclosed, please contact me at your convenience.

Sincerely,

Rick E. Lovekamp

# LOUISVILLE GAS AND ELECTRIC COMPANY AND KENTUCKY UTILITIES COMPANY REPLY COMMENTS ON KPSC PROPOSED POLE ATTACHMENT RULES

## EXECUTIVE SUMMARY

- Several communications stakeholders argue for additions and revisions to the Commission's proposed pole attachment rules that would: (1) constrain the Commission's authority; (2) shift significant costs to electric customers; and (3) do nothing to actually promote broadband deployment. With very few exceptions, the proposals from communications commenters should be rejected. The Commission should instead adopt flexible rules that fairly balance the needs of all stakeholders while at the same time advancing the goal of broadband deployment in Kentucky.

- KBCA, for example, proposes a new rule that would require electric utilities and their customers to bear the vast majority of make-ready pole replacement costs. KBCA bases its proposal on the argument that all poles are eventually replaced, anyway. Even if true (which is not always the case due to undergrounding, line relocation and other initiatives), this argument misses two crucial points: (1) an electric utility cannot determine **today** what type of pole it will need at some undetermined point in the future; and (2) electric customers should not be forced to pay for new infrastructure **today** that is unnecessary for the provision of electric service.

  - The Commission's proposed definition of "new attacher" properly excludes "a utility with an applicable joint use agreement with the utility that owns or controls the pole." AT&T seeks to eliminate this exclusion and, more generally, to implement rules that would unravel joint use agreements (which enabled ubiquitous deployment of the first generation of communications infrastructure). AT&T's proposal would result in a massive cost shift to electric customers without any corresponding benefit to broadband deployment.

  - CTIA, for its part, seeks to impose the NESC as a "ceiling" on electric distribution constructions standards. The FCC has repeatedly rejected such a request. Perhaps more importantly, the NESC (by its own terms) is not a design code—it is a safety standard. CTIA's proposal is bad policy because it would hamstring an electric utility from meeting the evolving the needs of a robust and reliable electric distribution system. Moreover, the Commission already has jurisdiction to determine whether a particular electric distribution construction standard is unreasonable.

  - More generally, AT&T and CTIA urge the Commission to follow the FCC's pole attachment rules in lockstep—not only the FCC's current pole attachment rules, but also any rules or policies subsequently adopted by the FCC. This makes no sense for a state like Kentucky which reverse preempted the FCC's pole attachment jurisdiction many years ago and has actively regulated pole attachment since. The Commission should reject AT&T's and CTIA's proposal and instead retain the flexibility to craft solutions to meet the unique challenges of broadband deployment in the best interest of Kentuckians.

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**REPLY COMMENTS OF LOUISVILLE GAS & ELECTRIC AND KENTUCKY UTILITIES**

Louisville Gas & Electric Company ("LG&E") and Kentucky Utilities Company ("KU) (collectively "LG&E-KU") respectfully submit these reply comments on the Commission's proposed rules governing pole attachments.

## I. INTRODUCTION

LG&E-KU appreciate the opportunity to respond to the many sets of initial comments filed by other stakeholders in this matter. LG&E-KU have not addressed each and every point made by other stakeholders in this process. This reply instead focuses on the most significant issues raised in the initial comments by other stakeholders, most of which were raised in the comments filed by AT&T and the Kentucky Broadband & Cable Association ("KBCA"). LG&E-KU's silence on a particular issue should not be construed as acquiescence.

Many of the new proposals by KBCA and AT&T strike at the heart of matters already addressed in LG&E's and KU's pole attachment tariffs. These tariffs are not "take it or leave it" agreements. They were filed as proposed tariffs in public proceedings, subject to intervention by attaching entities, and ultimately subject to the Commission's jurisdiction to either approve or disapprove. In fact, Charter Communications, KBCA's primary constituent, participated in the most recent revisions to LG&E's and KU's pole attachment tariffs. And both KBCA (under its previous name, Kentucky Cable Telecommunications Association) and AT&T participated in the prior revisions to LG&E's and KU's pole attachment tariffs. As set forth in the initial comments submitted by LG&E-KU, any rulemaking proceeding initiated by the Commission should serve to supplement—not undermine—the existing, approved tariffs. *See* LG&E-KU Comments at 7-8.

## II. THE COMMISSION SHOULD RETAIN ITS ORIGINAL DEFINITION OF "NEW ATTACHER" IN SECTION 1(9) AND REJECT AT&T'S PROPOSAL TO SUBVERT THE COST SHARING OBLIGATIONS THAT LIE AT THE HEART OF JOINT USE AGREEMENTS.

The Commission's proposed Section 1(9) definition of a "new attacher" expressly excludes "a utility with an applicable joint use agreement with the utility that owns or controls the pole to which it is seeking to attach." AT&T proposes to delete this important exclusion and, more broadly, to "expressly mandate non-discriminatory pricing, even for entities that have or had joint use agreements…" AT&T Comments at 1. In other words, AT&T is proposing that the Commission replace the long-standing cost sharing arrangements between telephone and electric utilities (joint use agreements)—which have **always** been subject to the Commission's jurisdiction—with the tariffed rate. The Commission should reject AT&T's proposal because it is anti-competitive and because it would shift a significant portion of ILEC deployment costs onto the backs of electric customers.

As set forth in LG&E-KU's initial comments, the vast majority of ILEC networks have already been deployed through long-standing joint use agreements. In those joint use agreements, ILECs and electric utilities agreed to share their infrastructure for the distribution of their respective services. Both parties saved costs through a single, shared pole network in their overlapping service areas, as opposed to building separate, redundant networks. Under joint use agreements, ILECs deployed their networks with numerous operational advantages not enjoyed by their subsequent competitors. These competitive advantages include, but are not limited to, the following: (1) paying significantly lower make-ready costs; (2) avoidance of application and preapproval requirements; (3) avoidance of post-attachment inspection costs; (4) avoidance of obtaining rights-of-way from private landowners; (5) avoidance of electric facility relocation and rearrangement costs; (6) guaranteed space on a network of built-to-suit poles; and (7) paying lower

labor and material costs for things like installation of new poles. Even the FCC has consistently acknowledged that ILECs enjoy benefits under joint use agreements that are not available to their CATV and CLEC competitors under standard pole license agreements. *See, e.g., In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, WC Docket No. 17-84, WT Docket No. 17-79, 33 FCC Rcd 7705, 7768 at ¶ 124 (Aug. 3, 2018) (the "2018 Order") ("[J]oint use agreements may provide benefits to incumbent LECs that are not typically found in pole attachment agreements between utilities and other telecommunications attachers…"); *In the Matter of Verizon Florida, LLC v. Florida Power and Light Company*, Memorandum Opinion and Order, Docket No. 14-216, 30 FCC Rcd 1140, 1150 at ¶ 26 (Feb. 11, 2015) (noting that ILEC "received benefits under the [joint use agreement] that were not available to other attachers"); *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, 26 FCC Rcd 5240, 5336 at ¶ 217 (Apr. 7, 2011) (the "2011 Order") (acknowledging that "joint use agreements…implicate rights and responsibilities that differ from those in typical pole lease agreements"); *In the Matter of BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Florida Power and Light Company*, Memorandum Opinion and Order, Docket No. 19-187, 35 FCC Rcd 5321, 5329 at ¶ 14 (May 20, 2020) (finding that ILEC "receives significant benefits under the [joint use agreement] not afforded competitive LECs and cable attachers").

The Commission, unlike the FCC, has always exercised jurisdiction over joint use agreements between ILECs and electric utilities. Thus, it is impossible that existing joint use agreements are somehow "unfair" or improper because each party has always had recourse at the

Commission if it believed it was unable to obtain a just and reasonable deal through private negotiations. If the Commission grants AT&T's proposal and allows ILECs to avoid their cost sharing obligations under joint use agreements, while at the same time allowing ILECs to continue enjoying the superior rights and benefits under those joint use agreements, ILECs like AT&T will have an enormous competitive advantage over CATVs and CLECs. Further, it will place electric customers in the position of paying for a network of poles that is taller and stronger than necessary to supply electric service and that was specifically constructed to accommodate ILECs like AT&T.

Even if AT&T's proposal made sense for small ILECs, it does not make sense for large ILECs, like AT&T, which own a significant portion of the jointly used poles. As set forth in LG&E-KU's initial comments, LG&E and KU collectively share approximately 249,000 poles with AT&T. AT&T owns approximately 101,000 of the jointly used poles (more than 40%). *See* LG&E-KU Comments at 14. This is a balanced relationship. AT&T's proposal would not only create imbalance in the relationship (insofar as it would give AT&T new rights on LG&E-KU poles without LG&E-KU having corresponding rights), but it would also increase future revenue requirements for LG&E-KU.

Aside from the inequitable cost shifting AT&T's proposal would cause, it would also compromise broadband deployment by undermining the very arrangements (joint use agreements) upon which the first generation of ubiquitous communications infrastructure was deployed. If the Commission is seeking through its rules to **promote** broadband deployment, the Commission should **not** adopt rules that would undermine—and possibly unravel—joint use agreements.

## III. THE COMMISSION SHOULD REJECT THE ATTACHERS' REQUESTS TO AMEND SECTION 2 TO REQUIRE POLE OWNERS TO EXPAND CAPACITY UPON REQUEST AND TO UNFAIRLY SHIFT COSTS ONTO ELECTRIC RATEPAYERS.

### A. The Commission Should Not Revise Section 2(2)(a) to Require Pole Owners to Expand Capacity at an Attacher's Request.

Section 2(2), as proposed by the Commission, would allow a utility to deny access on a non-discriminatory basis for reasons of insufficient capacity, safety, reliability, or generally applicable engineering purposes. This proposed rule is appropriate as a matter of policy, and it is entirely consistent with both the federal Pole Attachments Act and the FCC rules implementing the federal Pole Attachments Act. *See* 47 U.S.C. § 224(f)(2) ("a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles…on a nondiscriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes"); 47 C.F.R. § 1.1403(a) ("a utility may deny a cable television system or any telecommunications carrier access to its poles…on a nondiscriminatory basis where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes"). KBCA, though, argues for an addition to the proposed rule that would restrict the right to deny access only to situations where capacity, safety, reliability and engineering limitations "cannot be remedied by make-ready." KBCA Comments at Exhibit 3, Section 2(2)(a). The definition of "make-ready" in the Commission's proposed rules includes "replacement of a utility pole." KBCA's proposal would, in essence, require a utility to expand capacity (*i.e.*, replace a pole) on-demand for attaching entities. KBCA's proposal would gut the purpose of proposed Section 2(2) and would conflict with the clearly stated (and recently approved) "right to deny access to any Structure based upon lack of capacity, safety, reliability or engineering standards" set forth in LG&E's and KU's existing tariffs. Louisville Gas and Electric Company Pole and Structure Attachment Charges Tariff, P.S.C. Electric No. 12, Original Sheet No. 40.7 at ¶ 7.c. (effective May 1, 2019); Kentucky Utilities Company Pole and Structure

Attachment Charges Tariff, P.S.C. No. 19, Original Sheet No. 40.7 at ¶ 7.c. (effective May 1, 2019) (hereinafter collectively referred to as the "LG&E-KU Pole Attachment Tariffs").

Despite its claims to the contrary, KBCA's proposed addition would not be consistent with federal law. Interpreting section 224(f)(2) of the federal Pole Attachments Act, the Eleventh Circuit has expressly held that utilities are not required to expand capacity at the request of attaching entities. *Southern Co. v. FCC*, 293 F.3d 1338, 1346-47 (11th Cir. 2002). KBCA's proposed revisions to Section 2(2) would be especially harmful if paired with KBCA's proposal that electric utilities and their customers bear the vast majority of make-ready pole replacement costs. *See infra* Section V.A.

**B. The Commission Should Not Revise Section 2(3) to Require Pole Owners to Bear the Cost of Pre-Existing Violations that They Did Not Cause.**

KBCA argues in favor of a new Section 2(3) that would prohibit a utility from denying access "to any pole (including overlashing), duct, conduit, or right-of way based on a pre-existing violation not caused by any pre-existing attachments of the requesting attacher." KBCA Comments at Exhibit 3, Section 2(3). This proposed revision would, of course, conflict with the Section 2(2) right to deny access for reasons of existing safety, reliability, engineering or capacity violations (not to mention the similar right set forth in LG&E's and KU's recently approved tariffs). Though KBCA's proposed rule is similar in substance to recently adopted FCC rules, those rules were challenged on appeal, and the Ninth Circuit placed important limitations on the scope of the applicability of those rules. The court noted:

> The FCC confirmed at oral argument that the preexisting violation rule would not prevent utilities from rejecting proposed attachments that increase safety risks on a utility pole. The rule thus operates to prevent utilities from relying on preexisting violations pretextually to deny pole access to attachments that pose no greater safety risk than existing attachments.

*City of Portland v. United States*, 969 F.3d 1020, 1051 (9th Cir. 2020). The Commission can avoid this conflict entirely by rejecting KBCA's proposal. If the Commission believes it is appropriate to address the cost allocation for correction of pre-existing violations, it can do so through separate rules. But a rule that would require a utility to permit the exacerbation of an existing safety, reliability, engineering or capacity violation is inconsistent with the Section 2(2) right to deny access and dangerous.

## IV. THE COMMISSION SHOULD NOT REVISE SECTION 3 TO PLACE UNDUE RESTRICTIONS OR RIGID ADVANCE NOTICE REQUIREMENTS ON POLE OWNERS.

### A. The Commission Should Not Revise Section 3 to Impose Limitations on a Pole Owner's Ability to Establish Reasonable Construction Standards.

KBCA proposes a new Section 3(4) that would prejudge any electric utility distribution construction standard that limited the use of certain attachment techniques, such as boxing and extension arms. "Boxing" is a technique whereby a communications messenger strand is attached to both sides of a pole (*i.e.*, the pole is "boxed-in" by communications lines). Extension arms are horizontal brackets that extend outward from the communications space. Both techniques can complicate pole climbing, pole replacement and other operational issues. Though there are certain circumstances where these techniques may be allowed, a utility's right to restrict the use of these practices through non-discriminatory distribution construction standards should not be predetermined in a rule of general applicability. If an attaching entity takes exception to a particular utility's standard, or a particular utility's implementation of its standard, the attaching entity can present this exception on the particular facts, and the Commission can determine whether the utility's limitation is reasonable.

In a similar vein, KBCA argues, "[t]he Commission should require that any construction standards that exceed the NESC are demonstrably necessary for specific safety reasons that cannot

otherwise be achieved by following the NESC or other generally applicable standards and applied on a nondiscriminatory, prospective basis only." KBCA Comments at 24. KBCA, in essence, seeks a presumption that any standards that exceed the NESC are unreasonable. The NESC, though, is not a ceiling for electric distribution construction practices. Under Kentucky law, it is either a normative standard or a minimum standard. *See* Ky. Rev. Stat. Ann. § 278.042; 807 Ky. Admin. Regs. 5:04, Section 3; *see also In the Matter of: Jackson County Rural Electric Cooperative Corporation, Inc.; Alleged Failure to Comply with Commission Regulation 807 KAR 5:041, Section 3*, Case No. 1988-10094, Order at 4 (Jul. 11, 1988) ("We believe a failure to comply with the NESC is a violation of Commission Regulation 807 KAR 5:041, Section 3, which requires all electric utilities to use the NESC as the standard of accepted good engineering practice for the construction and maintenance of plant and facilities. This regulation prescribes **the minimum level of conduct necessary** for the protection of human life."). Perhaps even more importantly, the NESC is a safety code, not a design code. Different construction requirements may be necessitated for various reliability or engineering purposes. The NESC itself states: "This Code is not intended as a design specification or as an instruction manual." National Electrical Safety Code (NESC), IEEE Standards Association, Rule 010.C (2017). The FCC, for its part, has repeatedly rejected the request by attaching entities to convert the NESC into a ceiling for electric distribution construction standards. Most recently, the FCC stated:

> We decline the requests of certain commenters to establish limits on the construction standards and requirements that utilities adopt for their poles. We agree with those utility commenters who argue that one-size-fits-all national pole construction standards (even if they were based on the NESC or similar codes) are not a good idea, and the better policy is to defer to reasonable and targeted construction standards established by states, localities, and the utilities themselves where appropriate.

2018 Order, 33 FCC Rcd at 7772, ¶ 133 (internal citations omitted).

LG&E-KU emphatically reject KBCA's contention that LG&E-KU would use its construction standards to "undermine or circumvent established requirements." KBCA Comments at 23. LG&E-KU's standards are developed to ensure the safety of the public and the thousands of employees and contractors who work on or near the electric distribution system, as well as to provide reliable, life-sustaining electric service. LG&E-KU proactively reviews its standards on a regular basis to ensure their synergy with current equipment and materials. Occasionally, operations personnel also request standards review. Any revisions that occur result from careful deliberation by engineers and engagement with operations teams. LG&E-KU's construction standards relate directly to LG&E-KU's dual obligations of safety and reliability, and changes to them receive the highest levels of care and consideration. The notion that LG&E-KU would use its standards to thwart broadband deployment projects is simply unfounded. The Commission should not adopt a regulation that limits LG&E-KU's ability to set its own reasonable construction standards, even when they exceed the standards of the NESC.

### B. The Commission Should Not Revise Section 3 to Impose Rigid Advance Notice Requirements on Electric Utilities.

AT&T proposes a new Section 3(7) that would require utilities to provide "at least 60 days advance notice of the intent to make changes to its tariff." AT&T Comments at 3 (proposing a new Section 3(7)). This is an unnecessary interference in a utility's regulatory affairs. First, as a practical matter, attaching entities have plenty of time to intervene, object and submit comments after a proposed tariff revision is filed with the Commission. The Commission has already promulgated filing requirements that apply to all proposed tariff revisions—not just those affecting particular classes of customers. *See, e.g.,* 807 KAR 5:011, Section 6. Existing notice requirements adequately protect the interests of LG&E-KU's customers when a tariff change is proposed. *See id*. at Section 8. There is no compelling reason to provide pole attachment customers with

"special" notice that is not afforded to other customers. Finally, AT&T's proposed notice requirement also raises logistical concerns because revisions to pole attachment tariffs are often filed in tandem with other proposed revisions to the electric service tariff.

## V. THE COMMISSION SHOULD REJECT THE ATTACHERS' PROPOSED REVISIONS TO SECTION 4 THAT WOULD UNFAIRLY SHIFT THE COST OF BROADBAND DEPLOYMENT TO ELECTRIC RATEPAYERS OR INHIBIT AN ELECTRIC UTILITY'S ABILITY TO SAFEGUARD ITS DISTRIBUTION INFRASTRUCTURE.

### A. The Commission Should Not Require Electric Utilities to Share in the Cost of Make-Ready Pole Replacements that Are Necessitated Solely by an Attaching Entity's Need for Additional Capacity.

In its initial comments, KBCA argues that the Commission "should ensure that utilities do not use pole replacements to shift their own infrastructure betterment and upgrade costs onto new attachers." KBCA Comments at 13. KBCA then provides two "common scenarios" in which utilities allegedly shift the cost of pole upgrades onto attachers: (1) when utilities discover "existing issues" with a pole or a third-party attachment while they are performing surveys in conjunction with attachment requests; and (2) when additional capacity is required to host a new attachment, and utilities require the new attacher to replace the existing pole with a taller, stronger pole that is capable of hosting the additional attachment. *Id*. at 14.

To mitigate against the first "scenario," KBCA proposes revisions to Proposed Rule 4(6)(b) that would clarify that new attachers are not required to bear the cost of pre-existing violations caused by either third-party attachers or utilities. LG&E-KU do not oppose KBCA's proposed revisions. In fact, in their initial comments, LG&E-KU stated that they "agree with the Commission's policy stance—*i.e.*, requiring the at-fault party to bear the cost of its own violations." LG&E-KU Comments at 23. However, LG&E-KU stress that under no circumstances should an electric utility be forced to bear the cost of correcting pre-existing violations caused by another party. As explained in LG&E-KU's initial comments, "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." *Id*. at 24. Therefore, LG&E-KU reiterate that the following sentence be added to the end of Proposed Rule 4(6)(b): "In no event shall a utility be required to bear such cost unless the utility was the cause of such non-compliance."

To mitigate against the second "scenario"—*i.e.*, that pole owners are shifting the costs of upgrades and betterment onto new attachers—KBCA proposes the adoption of a new Section 4(6)(b)(2) that would require pole owners to share in the cost of make-ready pole replacements:

> With respect to make-ready consisting of a pole replacement, an attacher that causes the need for such replacement is responsible only for (i) the difference, if any, between the cost for the replacement pole and the cost for a new utility pole of the type and height the utility would have installed in the same location in the absence of such attachment, plus (ii) a reasonable estimate of the net book value of the pole and supporting equipment, if any, which has been replaced.

KBCA Comments at Exhibit 3, Section 4(6)(b)(2). LG&E-KU strongly oppose KBCA's cost allocation proposal, as it would shift the vast majority of make-ready pole replacement costs onto electric ratepayers.

As a preliminary matter, KBCA borrowed its proposed cost allocation rule from Maine. KBCA Comments at 16-17 (citing 65-407-880 Me. Code R. § 5.C). Maine is an outlier jurisdiction whose pole attachment rules overwhelmingly favor attachers at the risk and expense of electric utilities. The Maine rule is at odds with the approach taken by the vast majority of other state public service commissions that have addressed this issue. *See, e.g.*, **Arkansas:** 126-03 Ark. Code R. § 028, Rule 4.03(b)(1) (requiring attacher to "pay for the replacement cost of [the new] pole, including the cost of removing the old pole, less any salvage value plus the costs of transferring the facilities of all other attachers"); **Ohio:** Ohio Admin. Code 4901:1-3-04(E) (only requiring pole owners to share in the cost of a pole replacement if the pole owner either "adds to" or

"modifies" its existing attachments after receiving notice of the proposed pole replacement); **Utah:** *In the Matter of an Investigation into Pole Attachments; In the Matter of the Consolidated Applications of Rocky Mountain Power for Approval of Standard Reciprocal and Non-Reciprocal Pole Attachment Agreements*, Report Recirculating "Safe Harbor" Pole Attachment Agreement, Docket No. 04-999-03, Docket No. 10-035-97, 2010 Utah PUC LEXIS 264, at *23-24 (Oct. 7, 2010) (requiring the attacher to "reimburse the [p]ole [o]wner for all costs, including, but not limited to the cost in (sic) replacing the new pole, the remaining life value of the existing pole, lower and haul of the existing pole…and topping of the existing pole when performed as either an accommodation to [the attacher] or as required by NESC").

The small cell legislation recently adopted by numerous states also requires the attaching entity, and not the pole owner (ordinarily the municipality), to bear the costs of make-ready pole replacements. *See, e.g.*, **Arkansas:** Ark. Code Ann. § 23-17-509(f)(3) (allowing pole owner to recover the actual costs of make-ready pole replacements); **Florida:** Fla. Stat. Ann. § 337.401(7)(f)(5)(c)-(d) (allowing pole owner to recover the "actual costs" of make-ready pole replacements); **Georgia:** Ga. Code Ann. § 36-66C-7(n) (requiring wireless provider to bear the costs of "any make-ready work necessary to enable the authority pole to support the proposed facility, including replacement of the pole if necessary"); **Hawaii:** Haw. Rev. Stat. § 206N-7(f) (allowing pole owner to recover the "actual costs" of make-ready pole replacements); **Illinois:** 50 Ill. Comp. Stat. Ann. 840/15(i)(4)(D) (noting that make-ready pole replacements shall be completed at the wireless provider's "sole cost and expense"); **Indiana:** Ind. Code § 8-1-32.3-26(d)(4)(A)-(B) (allowing pole owner to recover the "actual costs" of make-ready pole replacements); **Iowa:** Iowa Code § 8C.7A(3)(c)(3)(a)(iv)(B) (noting that wireless provider "shall pay or advance…the costs of modifying or replacing the utility pole…with a utility pole…that

would safely support the small wireless facility"); **Michigan:** Mich. Comp. Laws Serv. § 460.1319(4)(d) (allowing pole owner to recover the "actual costs" of make-ready pole replacements); **Missouri:** Mo. Rev. Stat. § 67.5115(5)(3) (allowing pole owner to recover the "actual costs" of make-ready pole replacements); **North Carolina:** N.C. Gen. Stat. § 160D-937(f)-(g) (allowing pole owner to recover the "actual costs" of make-ready pole replacements); **Ohio:** Ohio Rev. Code Ann. § 4939.0322(A) (noting that pole owner may "condition approval of the collocation on replacement or modification of the wireless support structure at the operator's cost"); **Oklahoma:** Okla. Stat. tit. 11, § 36-505(D) (allowing pole owner to recover the "actual costs" of make-ready pole replacements, including the cost of having a professional engineer "review the wireless provider's make-ready work plans"); **Nebraska:** Neb. Rev. Stat. § 86-1238(5)(a)&(c) (allowing pole owner to recover the "actual costs" of make-ready pole replacements); **Virginia:** Va. Code Ann. § 56-484.31(E) (allowing pole owner to recover the "actual costs" of make-ready pole replacements); **Wisconsin:** Wis. Stat. Ann. § 66.0414(4)(h) (allowing pole owner to recover the "actual costs" of make-ready pole replacements); **West Virginia:** W. Va. Code § 31H-2-3(a)(6) (allowing pole owner to recover the "actual costs" of make-ready pole replacements).

KBCA's pole replacement proposal is also at odds with Kentucky law. *See In the Matter of: The CATV Pole Attachment Tariff of Mountain Rural Telephone Cooperative Corporation, Inc.*, Case No. 1983-251-14, Order at 3 (Mar. 31, 1983) (finding that pole owners "may charge a CATV operator the entire cost of transferring or rearranging facilities to accommodate a CATV pole attachment; including the cost of pole replacement, less salvage value"). Moreover, because it would require pole owners to share in the cost of pole replacements that are necessitated solely by an attacher's need for additional capacity, KBCA's proposal also runs afoul of the

Commission's longstanding cost causation principles—*i.e.*, requiring the party who causes the cost to bear the cost. *See, e.g., In the Matter of: Adjustment of Rates for Wholesale Electric Power to Member Co-Operatives of East Kentucky Power Cooperative, Inc.*, Case No. 1983-8648, Order at 24 (Apr. 1, 1983) ("[T]he Commission is of the opinion that the guiding principle for allocating costs in a cost of service study should be cost causation. The customers responsible for capital investment decisions by a utility should bear the cost of that investment."); *In the Matter of: Adjustment of Gas and Electric Rates of Louisville Gas and Electric Company*, Case No. 1988-10064, Order at 85, (Jul. 1, 1988) (stating that it "recognizes that a fee [*i.e.*, disconnect and reconnection charge] of this type allocates the costs to cost causers and is a fair and reasonable component of an electric utility rate design").

For the same reasons, the FCC also does not require a pole owner to share in the cost of make-ready pole replacements unless the pole owner either "adds to" or "modifies" its existing attachments after receiving notice of the proposed pole replacements. *See* 47 C.F.R. § 1.1408(b); *see also* 2011 Order, 26 FCC Rcd at 5301, ¶ 143 (noting that under cost causation principles, pole owners are entitled to "recover[] the entire capital cost of a new pole through make-ready charges from the new attachers when a new pole is installed to enable the attachment"). KBCA's proposal is also inconsistent with LG&E-KU's current pole attachment tariffs, which provide:

> If an existing Structure is replaced or a new Structure is erected solely to provide adequate capacity for Attachment Customer's proposed Attachments, Attachment Customer shall pay a sum equal to the actual material and labor cost of the new Structure, as well as any replaced appurtenances, plus the cost of removal of the existing Structure, minus its salvage value, within thirty (30) days of receipt of an invoice.

LG&E-KU Tariffs, Original Sheet No. 40.7 at ¶ 7.e.

KBCA argues that:

> The pole owner practice of demanding that new attachers pay the entire cost of pole replacements is unreasonable because it results in a windfall to the utility and is not reflective of the costs caused by the new attachment. Utilities regularly replace poles as part of cyclical investment schedules and to upgrade their facilities to meet new construction, engineering, and resiliency requirements. When a pole replacement is needed to accommodate a new attachment, therefore, the new attacher is not changing *whether* the pole is replaced, it is only advancing the schedule for *when* the pole is replaced.

KBCA Comments at 15 (emphasis in original). But this argument is premised upon mistaken facts. First, not all poles are eventually replaced. Some poles will never be replaced in the ordinary course because they will be removed from service as part of an undergrounding project prior to the end of their useful lives.

Second, though it is true that many poles will eventually be replaced (due to deterioration, damage, operational needs, etc.), it is impossible to know at the time of a make-ready pole replacement what type of pole will be required for such eventual replacement at some then-unknown point in the future. When a pole is replaced as part of make-ready, the new pole is only of sufficient height and strength to accommodate the new attachment. For example, if the existing pole is a 40-foot Class 5 pole, and the new attachment requires only two feet of vertical space and slightly more pole strength, then an electric utility would set a 45-foot Class 4 pole (in other words, the next size up). If, at the time the pole would have otherwise been replaced, the electric utility <u>actually</u> needs a 50-foot Class 2 pole, then the 45-foot Class 4 pole is of no use or benefit to the electric utility. This is true regardless of whether the pole would have been eventually replaced due to deterioration (where, for example, standards might require a conversion from 3-phases cross arm construction to vertical 3-phase construction) or the electric utility's own service needs (like the installation of a transformer or an additional phase).

Finally, even if KBCA's incorrect assumptions about pole replacements were true—*i.e.*, that a particular pole would be replaced with a new pole that was ideal for the utility's future use—

the pole replacement proposal would still require a capital investment earlier in time than if the utility had replaced the pole in its usual course. In this situation, the timing of the capital investment would be driven entirely by the attachment customer, not the utility's own development plan. If KBCA's proposal is adopted, then Kentucky's electric ratepayers would be forced to bear the cost of this infrastructure sooner than they otherwise would and for reasons completely unrelated to their electric service.

**B. If the Commission Adopts Rules relating to Overlashing, It Should Ensure that Those Rules Allows Electric Utilities to Maintain the Safety and Reliability of the Underlying Infrastructure.**

KBCA and Open Fiber request new rules relating specifically to overlashing. LG&E-KU do not object, generally, to rules that allow overlashing with advance notice and an opportunity (on the part of the utility pole owner) to ensure: (1) that the proposed overlash will not compromise the safety, reliability, engineering or capacity of the pole; and (2) that the proposed overlash will not exacerbate an existing safety, reliability, engineering or capacity issue. In fact, LG&E-KU already provide for extensive overlashing practices in their existing tariffs. To this end, LG&E-KU could accept KBCA's proposed rules, with two important revisions.

First, the second sentence of KBCA's proposed Section 4(11)(b) should be deleted. The second sentence of Section 411(b) states: "Such notice requirements may not include any quasi-application or quasi-approval requirements such as requiring engineering studies or requiring attachers to pay for a utility's review of the planned overlash." KBCA Comments at Exhibit 3, Section 4(11)(b). Aside from being vague, this sentence imposes an unreasonable restriction into the overlash process. An electric utility needs the ability to evaluate whether the proposed overlash will impact the safety and reliability of the distribution network. If this evaluation requires an engineering study (as is sometimes the case), then this is a cost the overlasher (not the electric

ratepayers) should bear. LG&E-KU's evaluation of the engineering impact of the proposed overlash is what the notice requirement makes possible. Without the ability to require further engineering studies, the notice requirement does not serve its function—*i.e.*, allowing LG&E-KU to ensure that any new burden on the electric infrastructure is safe and will not jeopardize the provision of reliable service to electric customers.

Second, KBCA's proposed Section 4(11) should explicitly include a utility's right to deny access for reasons of safety, reliability, insufficient capacity or generally applicable engineering purposes. This addition would mitigate future disputes and bring the proposed rule in-line with federal overlashing policy. *See Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002) ("And a utility can also deny access to overlashers for reasons of insufficient capacity, safety or reliability as described in the Act.").

## VI. THE COMMISSION SHOULD NOT AMEND SECTION 6 TO INCORPORATE ANY RESTRICTIONS ON A POLE OWNER'S ABILITY TO ADAPT ITS STANDARDS OR GUIDELINES TO EVOLVING CONSTRUCTION PRACTICES AND ISSUES.

KBCA proposes a new Section 6(1)(c) that would require 60 days' notice of a change in construction standards and guidelines, and limit any such changes as follows:

> Any such changes permitted by a pole agreement or tariff must be nondiscriminatory, made on a prospective basis, may not be made in an arbitrary manner, and may not impose materially greater burdens on or materially decrease the benefits available to attachers under previous versions of the standards or guidelines.

KBCA Comments at Exhibit 3, Section 6(1)(c). LG&E-KU do not object to the requirement that such changes be non-discriminatory, prospective and not arbitrary. LG&E-KU object, though, to: (1) the 60-day advance notice requirement; and (2) the language that would serve to undermine any revised standards that impose different burdens or requirements as compared to "previous versions of the standards or guidelines." Any revisions to the standards and guidelines are made

to address specific distribution construction issues and practices. These revisions may, or may not, alter what is expected of an attaching entity on a going forward basis. Though it may be appropriate to ensure that any such revisions do not materially conflict with an existing tariff or agreement, this is not what KBCA is seeking. KBCA is seeking, in essence, to "lock" utilities into their current electric distribution construction standards. The Commission should reject this proposal, as it would undermine LG&E-KU's ability to address changing needs within its distribution system. Moreover, the requirement that revisions to standards "not be made in an arbitrary manner" serves as sufficient protection against KBCA's alleged concerns.

## VII. THE COMMISSION SHOULD ENSURE THAT ANY REVISIONS TO SECTION 7 WILL NOT UNFAIRLY PREJUDICE POLE OWNERS, HINDER THE DISCOVERY OF UNAUTHORIZED ATTACHMENTS, OR UNLAWFULLY DIVEST ADMINISTRATIVE AUTHORITY TO THE FCC.

### A. If the Commission Reduces the Shot Clock in Proposed Rule 7(2), the Reduced Shot Clock Should Be Reasonable and Provide Additional Safeguards.

Section 7(2) of the proposed rules would require the Commission to "take final action" on a pole attachment complaint "within 360 days [of] the complaint being filed." LG&E-KU support the adoption of an objective dispute resolution timeframe (often referred to as a "shot clock") and further support the Commission's proposed 360-day shot clock because it would afford the Commission sufficient time to carefully evaluate the particular facts of each pole attachment complaint.

CTIA opposes the 360-day shot clock and proposes that it be reduced to a mere 7 days. CTIA Comments 6-8. Seven days is not sufficient time for a utility pole owner to prepare a response to a pole attachment complaint, especially if it raises complex engineering or regulatory accounting issues—to say nothing of the time period necessary for the Commission's to weigh the merits of the case. Moreover, a 7-day shot clock would provide attachers with an enormous tactical

advantage—*i.e.*, it would allow an attacher to spend months formulating an expansive and detailed pole attachment complaint and require an electric utility to respond in kind in less than 7 days.

In contrast to CTIA's 7-day proposal, AT&T is proposing a 180-day shot clock. While still much shorter than the shot clock used by the FCC, *see* 47 C.F.R. 1.740 (imposing a 270-day shot clock on pole attachment complaints not alleging a "denial of access"), LG&E-KU believe that a 180-day shot clock would not be unreasonable if the Commission also adopts some additional safeguards, including:

- **Pre-Complaint Obligations**: A rule requiring the complainant to notify the defendant—in writing—of the allegations forming the basis of its complaint and affording the defendant adequate time to respond before the complaint is filed with the Commission. This rule should also require the parties to engage in executive-level discussions concerning the possibility of settlement prior to the filing of a pole attachment complaint. The FCC has imposed similar pre-complaint obligations on pole attachment proceedings. *See* 47 C.F.R. § 1.722(g).

- **Pausing the Shot Clock**: A rule allowing the Commission to "pause" the shot clock under certain circumstances, including where: (a) the parties engage in significant discovery or briefing of the disputed issues that prolongs the complaint process; (b) the complaint involves large pole access requests of a complex nature that necessitate the Commission's requests for additional information from the parties in order to resolve the complaint; or (c) the parties decide to pursue informal dispute resolution or request a delay to pursue settlement discussions after a complaint has been filed. The FCC has adopted a rule allowing it to "pause" the shot clock under similar circumstances. *See In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, WC Docket No. 17-84, 32 FCC Rcd 11128, 11133-34 at ¶ 12 (Nov. 29, 2017).

KBCA, for its part, proposes that the Commission adopt an alternative 90-day shot clock for pole attachment complaints involving a denial of access ("pole access complaints"). KBCA Comments at 26-27. So long as it is strictly limited to true pole access complaints, LG&E-KU do not oppose KBCA's alternative 90-day shot clock. In its order adopting an accelerated shot clock for denials of access, the FCC defined "pole access complaint" as follows:

> A "pole access complaint" is a complaint filed by a cable television system or a provider of telecommunications service that alleges a **complete denial of access** to

> a utility pole…. This term **does not encompass a complaint alleging** that a utility is imposing **unreasonable rates, terms, or conditions** that amount to a denial of pole access.

*In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, WC Docket No. 17-84, 32 FCC Rcd 11128, 11132 at ¶ 9 n.21 (Nov. 29, 2017) (emphasis added). Should the Commission decide to adopt an accelerated shot clock for pole access complaints, the Commission should also adopt the foregoing definition of "pole access complaint" to ensure that the accelerated shot clock is not misapplied.

### B. The Commission Should Reject the Proposals to Regulate the Design and Performance of Attachment Inventories.

KBCA proposes a new Section 7 addressing pole attachment inventories. As an initial matter, the timing, process and cost allocation for pole attachment inventories should be addressed in an individual utility's tariff—not in a rule of general applicability. But if the Commission opts to include any portion of KBCA's proposed new Section 7, the Commission should reject Section 7(4), which would give attaching entities, among other things, the right to meddle in the "design and planning" of the inventory and the right to "approve the cost to be incurred" in conducting the inventory. *See* KBCA Comments at Exhibit 3, Section 7(4). These are not matters on which attaching entities are likely to agree, either with the utility pole owner or each other. These "rights" to derail the planning and implementation process would prevent an inventory from ever taking place, which may be KBCA's intent given that these inventories often reveal unauthorized attachments and carry financial consequences to the attaching entity beyond its pro rata share of the inventory costs.

### C. The Commission Should Not Wholesale Embrace the FCC's Current and Future Pole Attachment Rules.

AT&T's proposed new Section 7 would require compliance with current and future FCC pole attachment rules and policy. CTIA, for its part, asserts that the Commission's pole attachment rules "should mirror the FCC's current pole attachment regime…as closely as possible." CTIA Comments at 3. This would essentially render moot Kentucky's reverse preemption of FCC pole attachment jurisdiction. Notably, not even KBCA supports such a self-defeating proposal. The Commission is well equipped—and in fact better positioned than the FCC—to develop and implement pole attachment policy that balances the concerns of stakeholders and serves the interests of Kentuckians. CTIA, perhaps recognizing the logical disconnect in reverse preempting the FCC's pole attachment jurisdiction only to adopt the FCC rules wholesale, argues that "the Commission would still benefit from the advantages of reverse preemption - in particular, from the ability to settle disputes at the Commission and apply the rules more broadly to all pole owners under its jurisdiction." CTIA Comments at 4. This argument ignores an important fact, though—the rules themselves serve as a constraint on the Commission's exercise of authority and would limit the Commission's ability to craft solutions in the best interests of the stakeholders and Kentuckians. The Commission should **reject** any proposal to simply parrot the FCC's pole attachment rules.

Further, a proposal that not only cedes to the existing rules of the FCC but also to future rules of the FCC would violate Kentucky's Administrative Procedure Act, Kentucky Revised Statutes Sections 13A.010, *et* seq. Specifically, the Commission must comply with the Act's provisions governing rulemaking. *See, e.g.,* Ky. Rev. Stat. § 13A.350(1) ("The provisions of this chapter [*i.e.*, Kentucky's Administrative Procedures Act] shall apply to all grants of authority to promulgate administrative regulations and no administrative regulation shall be promulgated or adopted unless in conformity with the provisions of this chapter."); Ky. Rev. Stat. § 13A.010(2)

(defining "administrative regulation" to include amendments of existing administrative regulations); Ky. Rev. Stat. § 13A.270 (imposing notice and comment requirements on the promulgation of administrative regulations). By providing for the automatic adoption of future FCC rules and substantive amendments into the Commission's pole attachment rules, AT&T's and CTIA's request would violate Kentucky's Administrative Procedures Act. Moreover, the mechanism proposed by AT&T—*i.e.*, incorporating the FCC's existing and future pole attachment rules by reference—is explicitly prohibited under the Act. *See* Ky. Rev. Stat. § 13A.2261 ("Federal statutes and regulations shall not be incorporated by reference."). Accordingly, incorporating AT&T's proposed new Section 7 would not only be inadvisable; it would be unlawful.

## VIII. THE COMMISSION SHOULD REJECT KBCA'S PROPOSED NEW SECTION 8 BECAUSE IT WOULD INCENTIVIZE UNAUTHORIZED ATTACHMENTS.

KBCA's proposes a new Section 8 regarding unauthorized attachments. KBCA's proposal contains requirements that would defeat the purpose of permitting processes and impose undue burdens on utility pole owners.

First, proposed Section 8(2) would limit the financial consequences of unauthorized attachments to "a one-time Unauthorized Attachment fee the amount of which shall be no more than the annual pole attachment fee for the number of years since the most recent inventory or five years, whichever is less, plus interest." KBCA Comments at Exhibit 3, Section 8(2). This, in essence, reimburses the electric utility for the back rent the attaching entity should have already paid. It does nothing to deter violation of the permitting process which is designed to ensure that third-party attachments do not compromise the safety and reliability of the electric distribution system. Even the FCC has recognized the uselessness of limiting unauthorized attachment fees to back rent: "[T]here appears to be a well-founded concern that **an unauthorized attachment payment amounting to no more than back rent provides little incentive for attachers to follow**

**authorization processes**, and that competitive pressure to bring services to market overwhelms any deterrent effect." 2011 Order, 26 FCC Rcd at 5290-91 at ¶ 114 (emphasis added). Moreover, the *Mile Hi* decisions, which KBCA describes as "the FCC's standard" (KBCA Comments at 25), were expressly abandoned by the FCC in 2011 because that standard served no deterrent effect. The FCC stated: "To address the concerns implicated by unauthorized attachments, we explicitly abandon the *Mile Hi* limitation on penalties and instead create a safe harbor for more substantial penalties." 2011 Order, 26 FCC Rcd at 5291, ¶ 115. KBCA also seems to cite, with favor, the unauthorized attachment provision in LG&E's and KU's tariffs. KBCA Comments at 26 n.36. To be clear, these tariffs include both back rent **and** penalties. LG&E-KU Pole Attachment Tariff, Original Sheet No. 40.7 at ¶ 19.

Second, KBCA's proposed Section 8(3) would place an undue burden on utility pole owners and increase inventory costs for all parties. KBCA proposes:

> Utility shall specifically identify each Unauthorized Attachment for which it intends to charge an Unauthorized Attachment Fee by pole number and location so that the attacher can verify whether it owns that attachment and whether that attachment is unauthorized.

KBCA Comments at Exhibit 3, Section 8(3). This is inconsistent with how LG&E-KU currently conduct pole attachment inventories and is likewise inconsistent with LG&E's and KU's existing tariffs. LG&E's and KU's existing tariffs provide as follows:

> If the audit reveals that the number of Attachments exceeds the number of Attachments shown in Company's existing records, the excess number of Attachments shall be presumed to be Unauthorized Attachments. Attachment Customer shall have the right to rebut this presumption and demonstrate that the Attachments at issue were authorized.

LG&E-KU Pole Attachment Tariffs, Original Sheet No. 40.15 at ¶ 14. In other words, if the inventory reveals more attachments than permitted, those additional attachments are presumed to be unauthorized (subject to the attaching entity's right to rebut this presumption). This rebuttable

presumption approach, especially when considered alongside the requirement that LG&E-KU share its full audit results with each attacher, is not only more efficient, it appropriately assigns the burden of proof.

## IX. CONCLUSION

LG&E-KU appreciate the Commission's attention to these matters and look forward to working further with the Commission and its Staff on these issues of great importance to the stakeholders and their customers.

Respectfully submitted this 19th day of October, 2020.