

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

**APPLICATION OF KENTUCKY UTILITIES)
COMPANY FOR AN ADJUSTMENT OF ITS) CASE NO.
ELECTRIC RATES AND FOR CERTIFICATES) 2016-00370
OF PUBLIC CONVENIENCE AND NECESSITY)**

and

In the Matter of:

**APPLICATION OF LOUISVILLE GAS AND)
ELECTRIC COMPANY FOR AN ADJUSTMENT) CASE NO.
OF ITS ELECTRIC RATES AND FOR) 2016-00371
CERTIFICATES OF PUBLIC CONVENIENCE)
AND NECESSITY)**

**DIRECT TESTIMONY AND EXHIBITS OF MARK PETERS
ON BEHALF OF AT&T**

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1 **TESTIMONY OF MARK PETERS**
2 **ON BEHALF OF AT&T**
3
4

5 **I. WITNESS INTRODUCTION AND QUALIFICATIONS**

6 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

7 A. My name is Mark Peters. My business address is 1116 Houston Street, Room 738, Fort
8 Worth, TX 76102.

9 **Q. BY WHOM ARE YOU EMPLOYED, AND WHAT IS YOUR JOB TITLE?**

10 A. I am employed by AT&T Services, Inc. as Area Manager-Regulatory Relations.

11 **Q. WHAT ARE YOUR RESPONSIBILITIES IN THAT POSITION?**

12 A. I support all AT&T affiliates (both landline and wireless) with respect to regulatory,
13 legislative, and contractual matters involving utility poles, conduit, and ducts. This
14 support involves matters related to pole and conduit ownership, as well as matters
15 pertaining to attaching entities.

16 **Q. PLEASE BRIEFLY DESCRIBE YOUR PROFESSIONAL BACKGROUND.**

17 A. I began working for Southwestern Bell Telephone Company as a Systems Technician in
18 1998. From 2000-2002, I filled engineering roles supporting digital loop carrier and fiber
19 multiplexer installations. I subsequently joined the national staff for the Construction and
20 Engineering department, working initially on application development as a business
21 client representative. In 2009, I became the national subject matter expert at AT&T with
22 respect to the ILECs' relationships with electric companies regarding the joint use of
23 utility poles. In this capacity, I was involved in developing joint use agreements and
24 addressing disputes regarding those agreements, addressing proposed legislation
25 concerning pole attachments, and establishing standards within AT&T's ILEC operations
26 regarding matters related to joint use. In 2013, I accepted my current position, in which I

1 am involved in matters related to providing utility pole and conduit access to third
2 parties, in addition to matters relating to joint use.

3 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

4 A. AT&T Kentucky and AT&T Mobility¹ have attached and/or want to attach equipment to
5 the poles and structures of Kentucky Utilities Company (KU) and Louisville Gas and
6 Electric Company (LG&E). Historically, contracts – Joint Use Pole Agreements for
7 wireline carriers and license agreements for wireless carriers – have governed these types
8 of entities’ attachments to poles owned by electric utilities. In the proposed tariffs they
9 filed in these proceedings, however, KU and LG&E propose to replace this contract-
10 based system over time. Specifically, they would require carriers to abide by the terms
11 and conditions of a tariff on Pole and Structure Attachment Charges (PSA Tariff) after
12 the carrier’s current agreement expires or is terminated (with an exception for incumbent
13 LECs if they can reach an agreement with KU or LG&E).²

14
15 As a threshold matter, AT&T recommends that the Commission reject the PSA Tariff
16 because it would be more appropriate to retain the established contract-based approach,
17 which has worked well for years and appropriately allows for differentiation between
18 differently-situated attachers. If the Commission nevertheless were to decide to allow
19 KU and LG&E to file a PSA Tariff, however, several modifications to the proposed PSA
20 Tariff are necessary, as I discuss below.

¹ I am testifying on behalf of both AT&T Kentucky and its affiliates, including AT&T Mobility. AT&T Mobility, formally known as New Cingular Wireless, PCS, LLC d/b/a AT&T Mobility, PCS, is a wireless services provider.

² Of course, if the Commission approves the proposed PSA Tariff as submitted by KU and LG&E (which, as explained below, contains unfair and unreasonable provisions that benefit these electric utilities to the detriment of potential attachers), it is highly unlikely that KU or LG&E would engage in any meaningful negotiations for a new or extended agreement with ILECs. Instead, KY or LG&E likely would insist on terms that mirror those tariffs.

1 **II. THE PSA TARIFF SHOULD BE REJECTED AND PARTIES SHOULD**
2 **CONTINUE TO USE A CONTRACT-BASED APPROACH**

3 **Q. PLEASE EXPLAIN WHY THE COMMISSION SHOULD REJECT THE PSA**
4 **TARIFF.**

5 A. Small cell architecture, which AT&T witness Kevin Early discusses in his testimony, is
6 the wave of the future for wireless service. It is critical for expanding wireless capacity
7 and for quickly and efficiently deploying the wireless broadband technologies and
8 capabilities that Kentucky consumers and businesses crave. Pole and structure
9 attachments are essential for small cell architecture, but attaching carriers likely will
10 differ from one another and require different arrangements with the pole owners – the
11 type of arrangements that have worked well so far. The proposed PSA Tariff, however,
12 would remove flexibility for individual situations and impede deployment of small cell
13 architecture and future nascent technologies. Moreover, if there were a need to address
14 pole attachments on a comprehensive basis (which AT&T does not believe there is at this
15 juncture), the Commission should only do so in a generic proceeding involving all
16 stakeholders, rather than in this proceeding, which is focused primarily on electric rate
17 issues for only two of the pole-owning entities in Kentucky.

18 **Q. WOULD THE TARIFF-BASED APPROACH PROPOSED BY KY AND LG&E**
19 **BE DISRUPTIVE?**

20 A. Yes. For many years, the existing contract-based approach has yielded just, reasonable
21 and non-discriminatory access to electric utilities’ poles. KU and LG&E have not
22 presented any reason to jettison that approach, which allows for efficiency and flexibility
23 in making arrangements for pole attachments. Telecommunications technology changes
24 very rapidly, and attaching parties’ needs can change rapidly as well. The existing

1 contract-based approach allows for contracts to be amended or reworked as needed on an
2 ongoing basis.

3
4 Tariffs, by contrast, do not allow variation for differing circumstances among different
5 attachers. Pole sharing is a complex endeavor best addressed by communication and
6 cooperative policies and systems. Thus, as a first choice, parties should be permitted to
7 voluntarily negotiate all of the rates, terms, and conditions of access to poles, including
8 any penalties or damages that may be appropriate. The decision as to whether a
9 particular rate or term should be included in an agreement will carry differing degrees of
10 weight for each company depending on its particular circumstances. As such, it should
11 be left to the parties to include what is important to them in their particular agreement.

12 For these reasons, this Commission should reject the PSA Tariff.

13 **Q. DOES THE FCC FAVOR A CONTRACT-BASED APPROACH FOR**
14 **ATTACHMENTS TO TELECOMMUNICATIONS CARRIERS' POLES AND**
15 **STRUCTURE?**

16
17 A. Yes. In 2011, for example, the FCC reiterated that it “continue[s] to favor agreements
18 negotiated between utilities and attaching entities.”³

19 **Q. IF THE COMMISSION WANTED TO ADDRESS POLE ATTACHMENT**
20 **ISSUES, IS THERE A BETTER APPROACH THAN APPROVING THE**
21 **PROPOSED PSA TARIFF?**

22
23 A. Yes. Rather than approving two individual entities’ proposed tariffs addressing pole
24 attachments in an electric rate case involving so many other important issues, and in
25 which so few communications providers are participating, the better course would be for
26 the Commission to (i) decline to approve the PSA tariff for KU or LG&E, and (ii)

³ Report and Order and Order on Reconsideration, *Implementation of Section 224 of the Act*, FCC 11-50, ¶ 118 (Apr. 7, 2011).

1 instead, convene a generic administrative case proceeding to address pole attachment
2 requirements and policies across the board (rather than on a piecemeal basis) and with
3 input from all affected stakeholders. However, AT&T does not believe there is a
4 demonstrated need for such a proceeding at this point. As I noted above, the industry
5 already uses a contract-based system for making pole attachments, so denying the PSA
6 Tariff will not prejudice KU or LG&E, and addressing general attachment issues in a
7 focused proceeding, if it were needed, would lead to a more informed, modernized
8 approach for attachments in Kentucky. In any event, the end product of any such generic
9 proceeding should be a continuation of the contract-based system that favors negotiated
10 pole attachment agreements, with protections put in place to ensure that attachers are not
11 stymied in their efforts to deploy their facilities.

12 **III. IF THE COMMISSION WERE TO CONSIDER THE PSA TARIFFS, IT**
13 **SHOULD REQUIRE SEVERAL MODIFICATIONS TO THE TARIFFS**

14 **A. Limiting Access to Poles**

15 **Q. THE PROPOSED PSA TARIFF WOULD ALLOW KU AND LG&E TO DENY**
16 **ACCESS TO POLES NOT ONLY FOR SAFETY, ENGINEERING,**
17 **RELIABILITY, OR INSUFFICIENT CAPACITY, BUT ALSO FOR ANY**
18 **“OTHER GOOD REASON.” PSA TARIFF, SECTION 7(c). IF THE**
19 **COMMISSION ALLOWS A TARIFF-BASED APPROACH, SHOULD IT**
20 **APPROVE THIS “OTHER GOOD REASON” LANGUAGE?**

21 **A.** No. Although I am not an attorney, my understanding is that this approach is not
22 consistent with federal law. The federal Telecommunications Act of 1996 (47 U.S.C.
23 § 224) and the FCC’s implementing regulation (47 C.F.R. § 1.1403(b)) allow a utility to
24 deny access to its poles only “where there is insufficient capacity or for reasons of safety,
25 reliability and generally applicable engineering purposes.” This federal law also requires
26 the reasons for any denial to be stated specifically and in writing to show that the denial
27 falls within one of these categories. There is no catchall language allowing a utility to

1 deny access for any “other good reason,” nor to my knowledge is there any Kentucky law
2 or regulation allowing a utility to deny access to poles on that basis. Because access to
3 poles and structures is vital and pole space is limited, electric companies should not be
4 able to deny access for reasons other than insufficient capacity, safety, engineering, and
5 reliability. If they did, attaching parties would be left to the mercy of the pole owners
6 and their sole interpretation of “any good reason.” Accordingly, the “any good reason”
7 language should not be included in the PSA Tariff.

8 **Q. IF THE COMMISSION NEVERTHELESS DID APPROVE THE “OTHER GOOD**
9 **REASON” LANGUAGE, WOULD OTHER CHANGES BE NEEDED?**

10
11 A. Yes. If the Commission did approve the “other good reason language,” despite the fact
12 that it conflicts with federal law’s limits on the permissible reasons for denying a pole
13 attachment, the PSA Tariff should be modified to make the burdens clear. Specifically,
14 the PSA Tariff should be modified to specify that if KU or LG&E seeks to deny access to
15 a pole for any reason other than “insufficient capacity or for reasons of safety, reliability
16 and generally applicable engineering purposes,” KU or LG&E must obtain approval from
17 the Commission before denying pole access, and must allow access to the pole by the
18 requesting party until the Commission authorizes KU or LG&E to deny access for the
19 specified reason. This would properly keep the burden of proof on the pole owner to
20 justify any denial of access.

21 **Q. THE PROPOSED TARIFF ALSO PROHIBITS CONSTRUCTING OR**
22 **INSTALLING ATTACHMENTS THAT WOULD INTERFERE WITH KU’S OR**
23 **LG&E’S “PRESENT OR FUTURE” USE OF THEIR STRUCTURES. PSA**
24 **TARIFF, SECTION 8(b). SHOULD THE COMMISSION APPROVE THIS**
25 **LANGUAGE?**

26
27 A. No, not in its current unrestricted form, which prohibits interference with *any* “present or
28 future use” of structures by the electric company. KU and LG&E should only be able to

1 limit construction or installation of attachments that would limit KU's or LG&E's "future
2 use" of poles and structures for the provision of their core utility service, and also should
3 permit use of space until KU or LG&E actually needs it. This is analogous to the federal
4 requirement that allows an electric utility to reserve space on its poles only if (i) "such
5 reservation is consistent with a bona fide development plan that reasonably and
6 specifically projects a need for that space in the provision of its core utility service," and
7 (ii) the electric utility "permit[s] use of its reserved space by cable operators and
8 telecommunication carriers until such time as the utility has an actual need for that space.
9 At that time, the utility may reclaim the reserved space for its own use." *First Report and*
10 *Order*, ¶ 1169 (emphasis added).⁴

11
12 It makes sense to limit KU's and LG&E's ability to preserve space on poles and structure
13 "for future use" in the same ways as the FCC limits the right of electric utilities to
14 "reserve" space. Accordingly, if it were adopted, the PSA tariff should be modified to
15 include requirements that an electric utility cannot deny access to reserved space unless
16 "such reservation is consistent with a bona fide development plan that reasonably and
17 specifically projects a need for that space in the provision of its core utility service" and
18 that allow attaching parties to use space, with full knowledge of the timing of the
19 development plan, until KU or LG&E actually needs it. Any broader language would
20 allow these electric utilities to attempt to use the tariff to restrict use of space on a
21 structure based on a plan unrelated to their traditional electric utility service (for example,
22 to use the space for competitive communications service that would discriminate against

⁴ First Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 (1996) (subsequent history omitted).

1 attaching parties that provide such service and give electric utilities an unfair competitive
2 advantage). It would also give the utilities too much latitude to decide what constitutes
3 an acceptable “future use.”

4 **B. Termination Provisions**

5 **Q. SECTION 20 OF THE PSA TARIFF WOULD ALLOW KU OR LG&E TO**
6 **TERMINATE AN ATTACHMENT CUSTOMER AGREEMENT⁵ WITHOUT**
7 **CAUSE, AS LONG AS KU OR LG&E GIVES 60 DAYS’ NOTICE. IS THAT**
8 **APPROPRIATE?**

9 A. No. The first sentence of Section 20 states that “Either Company or Attachment
10 Customer may terminate an Attachment Customer Agreement by providing the other
11 written notice of termination at least 60 days prior to the end of the term of service.” KU
12 and LG&E have confirmed in response to AT&T discovery request 22 that the first
13 sentence of Section 20 would allow either party to terminate an attachment agreement “at
14 its discretion without cause.” Exhibit MP-1.

15
16 Wireless carriers, however, have a mandatory right to attach to the poles of investor-
17 owned utilities. 47 U.S.C. § 224(f)(1); *First Report and Order*, ¶ 1123. In light of that,
18 allowing an electric company to terminate an attachment agreement without cause would
19 be unreasonable and unfair, as it leaves the attaching party at the mercy of the electric
20 utility. It also would be pointless, since the attaching party could just apply to re-attach
21 the next day and the electric company would be required to allow that attachment. This
22 Commission has long recognized that a customer that attaches to a pole “must be allowed
23 to remain a customer by observing the usual customer obligations, such as payment of
24 bills and conformance to applicable safety standards.” *Adoption of a Standard*

⁵ An Attachment Customer Agreement is a written agreement provided by KU or LG&E that would be used to implement the PSA Tariff.

1 *Methodology for CATV Pole Attachments*, Administrative Case No. 251, at 3 (Sept. 17,
2 1982) (“251 Pole Attachment Order”).

3 **Q. DO OTHER PROVISIONS OF THE PSA TARIFF PRESERVE KU’S AND**
4 **LG&E’S ABILITY TO TERMINATE AN ATTACHMENT CUSTOMER**
5 **AGREEMENT FOR CAUSE?**

6 A. Yes. Section 19 of the PSA Tariff allows KU or LG&E to terminate an agreement for
7 defaults or non-compliance with requirements. AT&T does not object to Section 19, or
8 to most of Section 20. Rather, AT&T objects to the broad language in the first sentence
9 of Section 20, which does not limit KU’s or LG&E’s right to terminate an agreement to
10 situations covered by Section 19 or other parts of Section 20.

11 **Q. HOW WOULD AT&T PROPOSE TO CHANGE SECTION 20 OF THE PSA**
12 **TARIFF?**

13 A. The first sentence of Section 20 should be revised to state that “Either Company or
14 Attachment Customer may terminate an Attachment Customer Agreement by providing
15 the other written notice of termination at least 60 days prior to the end of the term of
16 service. Company may terminate an Attachment Customer Agreement only for one of
17 the reasons covered by Sections 19 or 20 of this tariff.”

18 **C. Self-Insurance**

19 **Q. DOES THE PROPOSED PSA TARIFF ALLOW AT&T OR OTHER**
20 **ATTACHERS TO SELF-INSURE AGAINST POSSIBLE LIABILITY**
21 **ASSOCIATED WITH ITS USE OF ELECTRIC COMPANIES’ POLES?**

22 A. No. Instead, it requires attaching entities to obtain various kinds of insurance from third
23 parties at various levels of coverage. PSA Tariff, Section 22.

24 **Q. DOES AT&T OBJECT TO PROVIDING INSURANCE WHEN IT ATTACHES**
25 **TO UTILITY POLES?**

26 A. No, but it does object to being denied the right to self-insure.

27 **Q. WHAT DO YOU MEAN BY SELF-INSURE?**

1 A. I refer to AT&T electing to cover the risk of certain types of losses itself, rather than
2 paying higher costs to obtain insurance from a third party. For example, Kentucky allows
3 companies to self-insure for Automobile Liability and Worker’s Compensation purposes.
4 Companies seeking to self-insure those risks obtain confirmation from the State of their
5 authorization to self-insure. *See* 86 KAR 39:070(3)(7) and 803 KAR 25:021(3)-(4).

6 **Q. WHY DO KU AND LG&E OPPOSE ALLOWING SELF-INSURANCE?**

7 A. In response to AT&T discovery request 20, they stated that allowing self-insurance
8 would expose them to too much risk if the self-insured customer became insolvent or
9 bankrupt. Exhibit MP-2. But of course that is a risk of doing business with any company
10 (including insurance companies), and the risk can vary greatly between a small or new
11 company and a company with the resources, performance history, and abilities of AT&T.

12
13 Moreover, there are ways to protect against risk and still allow self-insurance by
14 companies like AT&T that have the size and financial wherewithal to self-insure some
15 risks. For example, a provision requiring a self-insuring Attachment Customer to have a
16 certain net worth would protect KU and LG&E. AT&T would propose that the PSA
17 Tariff include a requirement that an Attachment Customer self-insuring for general
18 liability, or its parent company, maintain a net worth of at least \$250 million. AT&T also
19 proposes amendments to the tariff to address the ability to self-insure for Commercial
20 Automobile Liability and Workers’ Compensation.

21 **Q. HOW DOES AT&T KENTUCKY PROPOSE TO AMEND THE PSA TARIFF TO**
22 **ALLOW SELF-INSURANCE?**

23 A. The PSA Tariff should be amended by adding new subsections h., i., and j. at the end of
24 Section 22 that state as follows:

- 1 h. Notwithstanding anything else in this Section 22, if the Attachment Customer or
 2 its parent company maintains a net worth of at least \$250,000,000, that
 3 Attachment Customer has the option to self-insure the Commercial General
 4 Liability coverage required above.
 5
- 6 i. Notwithstanding anything else in this Section 22, any Attachment Customer or its
 7 parent company can self-insure the coverage required above for Commercial
 8 Automobile Liability or Workers' Compensation. An Attachment Customer that
 9 elects to self-insure Commercial Automobile Liability or Workers' Compensation
 10 and shall provide Company with written acknowledgement from the State of
 11 Kentucky (if available) of the Attachment Customer's or its parent company's
 12 authorization to self-insure for Commercial Automobile Liability or Workers'
 13 Compensation.
 14
- 15 j. In the event that Attachment Customer elects to self-insure its obligation to
 16 include the Company as an additional insured, the following provisions apply.
 17 The Company shall:
 18
- 19 (i) promptly and no later than thirty (30) days after notice thereof provide
 20 Attachment Customer with written notice of any claim, demand, lawsuit, or the
 21 like for which it seeks coverage pursuant to this Section and provide Attachment
 22 Customer with copies of any demands, notices, summonses, or legal papers
 23 received in connection with such claim, demand, lawsuit, or the like;
 24
- 25 (ii) not settle any such claim, demand, lawsuit, or the like without the prior
 26 written consent of Attachment Customer ; and
 27
- 28 (iii) fully cooperate with Attachment Customer in the defense of the claim,
 29 demand, lawsuit, or the like.
 30

31 **Q. ASIDE FROM ADDING SELF-INSURANCE, SHOULD THE COMMISSION**
 32 **ORDER OTHER CHANGES TO THE PSA TARIFF?**
 33

- 34 A. Yes, AT&T proposes a number of minor changes to Section 22, as follows:
 35
- 36 1. Section 22(a)(1)(d) – Delete part (d), “Broad Form All States Endorsement.”
 37 Although it does cover Kentucky, AT&T’s Workers’ Compensation policy does
 38 not have this all-states endorsement, nor does AT&T need it to show coverage in
 39 Kentucky.
- 40 2. Section 22(a)(2) Commercial General Liability Policy – add “on ISO policy form
 41 CG 00 01 or its equivalent” before the words “which shall...” The reference
 42 would ensure that the same requirements set forth in proposed section (j) above
 43 would apply.
- 44 3. Section 22(a)(4) – Add “Attachment Customer may meet this requirement by any
 45 combination of primary and umbrella/excess liability insurance.” This gives

1 attaching companies more flexibility in how they meet the insurance
2 requirements.

- 3 4. Section 22(a)(5) – Delete “including passenger liability coverage.” If a drone
4 (rotor craft aircraft) is used, there is no need for passenger liability coverage.
- 5 5. Section 22(d) – Delete “and the insurance carrier.” AT&T’s providing written
6 notice to KU or LG&E of any material changes to or cancellation of insurance
7 policies should be enough. Insurance companies themselves are not parties to the
8 tariff and should not face requirements under the tariff.
- 9 6. Section 22(e) – Delete “summary of coverage” and replace with “Certificate of
10 Insurance” to be more specific.
- 11 7. Section 22(f) – Delete everything from “and shall notify...” through the end of
12 the subsection.⁶ The language at issue would require AT&T to notify KU or
13 LG&E if claims against AT&T were reaching a point to potentially affect
14 coverage for KU or LG&E as an additional insured. Such a requirement is
15 unnecessary for a large company like AT&T and would require AT&T to
16 speculate about potential future claims.

17 **D. Surety Bond**

18 **Q. DOES THE PROPOSED TARIFF REQUIRE AT&T AND OTHER ATTACHERS**
19 **TO POST A SURETY BOND?**

20 A. Yes. PSA Tariff, Section 23 has several specifics regarding a required surety bond.

21 **Q. DOES AT&T OPPOSE THE SURETY BOND REQUIREMENT?**

22 A. Yes. The purpose of a bond requirement is to protect KU or LG&E from the risk that an
23 attaching company would lack the resources to remove its attachments when the time
24 comes, or to otherwise meet its financial obligations under the tariff. That type of risk
25 obviously will vary depending on the attaching company. For example, the risk might be

⁶ Specifically, Section 22(f) would be edited as follows:

f. Attachment Customer shall submit evidence of such coverage(s) to Company prior to the start of any work under the Attachment Customer Agreement, and shall notify Company, prior to the commencement of any work pursuant to any statement of work and/or purchase order, of any threatened, pending and/or paid off claims to third parties, individually or in the aggregate, which otherwise affects the availability of the limits of such coverage(s) inuring to the Company’s benefit.

1 greater, and a bond requirement more justified, for an entirely new company, or a
2 company without extensive financial resources or assets, or a company with a history of
3 payment problems. By contrast, the risk would be much lower for attachers like AT&T
4 Kentucky or AT&T Mobility, which have substantial financial resources and capabilities
5 to meet their obligations regarding pole attachments. Imposing a bond requirement on all
6 attaching companies unreasonably imposes an unnecessary financial cost on companies
7 like AT&T Kentucky or AT&T Mobility.

8 **Q. WHAT SOLUTION DO YOU PROPOSE?**

9 A. Rather than impose a one-size-fits-all bond requirement, the proposed tariff should be
10 amended to recognize differences between attaching companies. For example, a
11 provision could be added to state that the bond requirements do not apply to companies
12 that meet a minimum net worth threshold. To be consistent with AT&T's proposal on
13 self-insurance for general liability, AT&T proposes a net worth threshold of \$250
14 million. Thus, a subsection (e) could be added at the end of Section 23, stating as
15 follows:

16 (e) The bond requirements set forth above do not apply to an Attachment
17 Customer as long as that Attachment Customer maintains a net worth of at
18 least \$250,000,000.

19 **E. Indemnification**

21 **Q. ARE THE PROPOSED TARIFF'S INDEMNIFICATION PROVISIONS**
22 **REASONABLE?**

23 A. No. The indemnification provision in Section 17 of the PSA Tariff is unreasonably one-
24 sided. The provision requires an Attaching Customer to provide complete indemnity to
25 KU and LG&E for "any claims arising from Attaching Customer's activities under this
26 Schedule, or from Attachment Customer's presence on the Company's premises, or from

1 or in connection with the construction, installation, operation, maintenance, presence,
2 replacement, enlargement, use or removal of any facility of Attachment Customer
3 attached or in the process of being attached to or removed from any Company Structure
4 by Attachment Customer, its employees, agents, or other representatives.” Section 17
5 also requires an Attaching Customer to indemnify the electric company for “any claims
6 arising out of the joint negligence of the Attachment Customer and Company.”

7
8 As written, this provision appears to require an Attaching Customer to completely
9 indemnify the electric company even for harms that are entirely or partially the fault of
10 the electric company. But there is no logical justification for requiring AT&T to fully
11 indemnify KU and LG&E for claims arising out of the “joint negligence” of AT&T and
12 the electric utility. Nor is there any logical justification for requiring AT&T to fully
13 indemnify KU or LG&E for claims that are entirely the result of the electric company’s
14 own negligence or willful misconduct. In the *251 Pole Attachment Order* (at 6-7), for
15 example, the Commission stated that “the Commission will approve only tariff provisions
16 which require insurance or a bond (at CATV’s option) to protect the utility and the public
17 against claims for liability arising out of the negligence of the CATV operator or the joint
18 negligence of the CATV operator and the utility.”

19
20 Although that language addresses insurance or a bond, the same logic applies to
21 indemnification provisions. The Commission recognized this when it rejected similar
22 proposed indemnification requirements in a case involving cable company attachments to
23 the poles of Big Rivers Electric Corporation, stating as follows:

1 KCTA objects to indemnification and hold harmless provisions
2 which require indemnity from the CATV operator even when Big
3 Rivers is solely liable. This is a reasonable objection, and should
4 be corrected in the tariff. Big Rivers may require indemnification
5 and hold harmless provisions in cases of alleged sole or joint
6 negligence by the CATV operator, but cannot require same merely
7 because of the existence of CATV attachments and equipment on
8 Big Rivers poles.

9 *The CATV Pole Attachment Tariff of Big Rivers Electric Corp.*, Administrative Case No.
10 251-50, at 2-3 (May 27, 1983).

11
12 Similarly, in *The CATV Pole Attachment Tariff of Cincinnati Bell, Inc.*, Administrative
13 Case No. 251-4, at 6 (June 1, 1983), the Commission found that a pole owner could not
14 use a tariff provision to force a customer to indemnify it against the pole owners' own
15 negligence or misconduct:

16 At pages 19-20, section 2.3.4.D, and in any similar provision in the
17 tariff, the Commission advises Bell that it may require protection
18 against claims for compensation resulting from negligence on the
19 part of a CATV company. However, Bell cannot require
20 protection against "any and all claims, demands, causes of action
21 and costs" that might arise simply because a CATV company has
22 made a pole or anchor attachment, or installed in conduit.
23 Furthermore, in the event of a dispute between Bell and a CATV
24 company, liability for any claim for compensation would be a
25 matter for judicial determination.

26
27 **Q. HOW WOULD YOU PROPOSE TO CHANGE THE INDEMNITY LANGUAGE?**

28
29 A. Any indemnity provision should strike a fair balance between the affected parties. As
30 written, the proposed indemnity provision is entirely one-sided and unfair. It should be
31 rewritten to require the electric utilities to bear the cost of claims arising from their own
32 negligence or willful misconduct. AT&T Kentucky proposes the following language to
33 replace Section 23:

1 To the extent permitted by law, Attachment Customer and Company shall each
2 indemnify, protect, save and hold harmless the other from and against any and all
3 loss, cost, damage, injury, claim, demand, action, suit, judgment, reasonable
4 expenses, reasonable attorney's fees and reasonable court costs, including, but not
5 limited to, any and all claims for damages to property and injury to or death of
6 persons and claims made under any Workers' Compensation Law, occasioned or
7 caused by, or arising out of the indemnifying party's or its employees',
8 contractors' or agents' negligence or misconduct. This provision does not apply
9 to losses, damages or liabilities arising out of the indemnitee's or its employees',
10 contractors' or agents' sole, concurrent or contributory negligence.

11
12 NOTWITHSTANDING ANY PROVISION TO THE CONTRARY, IN NO
13 EVENT SHALL EITHER ATTACHMENT CUSTOMER OR COMPANY BE
14 LIABLE TO THE OTHER IN CONTRACT, TORT, UNDER ANY STATUTE,
15 WARRANTY, PROVISION OF INDEMNITY OR OTHERWISE, FOR ANY
16 SPECIAL, INDIRECT, INCIDENTAL, OR CONSEQUENTIAL, PUNITIVE,
17 OR EXEMPLARY DAMAGES SUFFERED BY THE OTHER OR ANY
18 CUSTOMER OR THIRD PARTY OR ANY OTHER PERSON FOR LOST
19 PROFITS OR OTHER BUSINESS INTERRUPTION DAMAGES OF SUCH
20 PARTY'S CUSTOMERS, ADVERTISERS, USERS, CLIENTS, LICENSEES,
21 CONCESSIONAIRES, OR ANY OTHER PERSON, FIRM, OR ENTITY, AND
22 ATTACHMENT CUSTOMER AND COMPANY AGREE TO INDEMNIFY
23 AND HOLD EACH OTHER HARMLESS IN SUCH REGARD.
24

25 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

26 A. Yes. As I explained at the outset, the Commission should reject the PSA Tariff in its
27 entirety, allowing parties to continue using the contract-based approach. And while the
28 remainder of my testimony addressed specific changes to the particular terms of the PSA
29 Tariff *if* such a tariff were adopted, my proposals also reinforce the larger point that there
30 should be no tariff at all. Issues like notice requirements, bonds, insurance, etc. can be
31 approached differently and have different significance depending on the individual
32 characteristics of the attaching entity. The current contract-based approach allows parties
33 to deal with such differences in a flexible, mutually agreeable way, but a tariff does not.

AT&T EXHIBIT

MP-1

LOUISVILLE GAS AND ELECTRIC COMPANY

CASE NO. 2016-00371

**Response to AT&T's Initial Data Requests for Information
Dated January 11, 2017**

Question No. 22

Responding Witness: Robert M. Conroy

- Q-22. The proposed tariff (Section 20, Original Sheet No. 40.15) provides that LG&E “may terminate an Attachment Customer Agreement by providing [the Attachment Customer] written notice of termination at least 60 days prior to the end of the term service,” and that upon termination, the Attachment Customer must “remove all Attachments and Structures and other Company property within 180 days.” Does LG&E contend that it can terminate an Attachment Customer Agreement without cause? If so, please identify any federal or state statutes, rules, orders, or decision that support LG&E’s contention that it can terminate an attachment agreement of this nature without cause.
- A-22. The PSA Rate Schedule permits LG&E to terminate an Attachment Customer Agreement at its discretion at the end of the contract term if it provides the required 60 day notice.

KRS 278.030(2) permits LG&E to “establish reasonable rules governing the conduct of its business and the conditions under which it shall be required to render service.” KRS 278.160(1) requires LG&E to file with the Commission “schedules showing all rates and conditions for service established by it and collected or enforced.” The Commission has held that “KRS 278.160 requires a utility to provide utility service in accordance with the terms of its filed rate schedules.” *North Marshall Water District*, Case No. 2007-00275 (Ky. PSC Dec. 5, 2007) at 2. The proposed PSA Rate Schedule establishes a term of service and further provides the Attachment Customer and LG&E the right to terminate the contract under certain specified conditions. For LG&E, these conditions include an Attachment Customer’s failure to “pay any undisputed fee required, perform any material obligations undertaken or satisfy any warranty or representation made under the Attachment Customer Agreement or with any of the provisions of . . . [the PSA Rate] Schedule or default in any of its obligations under this Tariff and shall fail within 30 days after written notice from Company to correct such default or non-compliance.” . See Subsection 19 of Terms and Conditions of Attachment Section. Subsection 20 permits either party to the Attachment Customer Agreement to voluntarily terminate the Agreement at its discretion without cause.

KENTUCKY UTILITIES COMPANY

CASE NO. 2016-00370

**Response to AT&T's Initial Data Requests for Information
Dated January 11, 2017**

Question No. 22

Responding Witness: Robert M. Conroy

- Q-22. The proposed tariff (Section 20, Original Sheet No. 40.15) provides that KU “may terminate an Attachment Customer Agreement by providing [the Attachment Customer] written notice of termination at least 60 days prior to the end of the term service,” and that upon termination, the Attachment Customer must “remove all Attachments and Structures and other Company property within 180 days.” Does KU contend that it can terminate an Attachment Customer Agreement without cause? If so, please identify any federal or state statutes, rules, orders, or decision that support KU’s contention that it can terminate an attachment agreement of this nature without cause.
- A-22. The PSA Rate Schedule permits KU to terminate an Attachment Customer Agreement at its discretion at the end of the contract term if it provides the required 60 day notice.

KRS 278.030(2) permits KU to “establish reasonable rules governing the conduct of its business and the conditions under which it shall be required to render service.” KRS 278.160(1) requires KU to file with the Commission “schedules showing all rates and conditions for service established by it and collected or enforced.” The Commission has held that “KRS 278.160 requires a utility to provide utility service in accordance with the terms of its filed rate schedules.” *North Marshall Water District*, Case No. 2007-00275 (Ky. PSC Dec. 5, 2007) at 2. The proposed PSA Rate Schedule establishes a term of service and further provides the Attachment Customer and KU the right to terminate the contract under certain specified conditions. For KU, these conditions include an Attachment Customer’s failure to “pay any undisputed fee required, perform any material obligations undertaken or satisfy any warranty or representation made under the Attachment Customer Agreement or with any of the provisions of . . . [the PSA Rate] Schedule or default in any of its obligations under this Tariff and shall fail within 30 days after written notice from Company to correct such default or non-compliance.” . See Subsection 19 of Terms and Conditions of Attachment Section. Subsection 20 permits either party to the Attachment Customer Agreement to voluntarily terminate the Agreement at its discretion without cause.

AT&T EXHIBIT

MP-2

LOUISVILLE GAS AND ELECTRIC COMPANY

CASE NO. 2016-00371

**Response to AT&T's Initial Data Requests for Information
Dated January 11, 2017**

Question No. 20

Responding Witness: Robert M. Conroy

- Q-20. Does the proposed tariff allow for an attacher to self-insure? If so, please describe in detail all conditions or limitations LG&E would apply to an attacher's ability to self-insure and cite to specific language in the proposed tariff supporting your response. If not, please explain in detail why it does not.
- A-20. The proposed PSA Rate Schedule provides no option for self-insurance. It requires the Attachment Customer to provide and maintain stated levels of insurance. Subsection 22d of Terms and Conditions of Attachment Section provides in pertinent part: "All policies shall be written by insurance companies that are licensed to do business in Kentucky and that are either satisfactory to Company or have a Best Rating of not less than 'A-'." Similarly, the current CTAC Rate Schedule makes no provision for self-insurance and requires that policies be maintained "in an Insurance Company(s) authorized to do business in the Commonwealth of Kentucky." See LG&E Tariff, P.S.C. Electric No. 10, Original Sheet No. 40.3. The Commission has previously found that a pole owner may "require insurance or a bond (at CATV's option) to protect the utility and the public against claims for liability arising out of the negligence of the CATV operator or the joint negligence of the CATV operator and the utility." *The Adoption of A Standard Methodology for Establishing Rates for CATV Pole Attachments*, Administrative Case No. 251 (Ky. PSC Sept. 17, 1982). Permitting self-insurance would expose the public and the Company to financial risk in the event of the insolvency or bankruptcy of the self-insured Attachment Customer, largely defeating the purpose for requiring insurance in the first place.

KENTUCKY UTILITIES COMPANY

CASE NO. 2016-00370

**Response to AT&T's Initial Data Requests for Information
Dated January 11, 2017**

Question No. 20

Responding Witness: Robert M. Conroy

- Q-20. Does the proposed tariff allow for an attacher to self-insure? If so, please describe in detail all conditions or limitations KU would apply to an attacher's ability to self-insure and cite to specific language in the proposed tariff supporting your response. If not, please explain in detail why it does not.
- A-20. The proposed PSA Rate Schedule provides no option for self-insurance. It requires the Attachment Customer to provide and maintain stated levels of insurance. Subsection 22d of Terms and Conditions of Attachment Section provides in pertinent part: "All policies shall be written by insurance companies that are licensed to do business in Kentucky and that are either satisfactory to Company or have a Best Rating of not less than 'A-'." Similarly, the current CTAC Rate Schedule makes no provision for self-insurance and requires that policies be maintained "in an Insurance Company(s) authorized to do business in the Commonwealth of Kentucky." See KU Tariff, P.S.C. Electric No. 10, Original Sheet No. 40.3. The Commission has previously found that a pole owner may "require insurance or a bond (at CATV's option) to protect the utility and the public against claims for liability arising out of the negligence of the CATV operator or the joint negligence of the CATV operator and the utility." *The Adoption of A Standard Methodology for Establishing Rates for CATV Pole Attachments*, Administrative Case No. 251 (Ky. PSC Sept. 17, 1982). Permitting self-insurance would expose the public and the Company to financial risk in the event of the insolvency or bankruptcy of the self-insured Attachment Customer, largely defeating the purpose for requiring insurance in the first place.

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

**APPLICATION OF KENTUCKY UTILITIES)
COMPANY FOR AN ADJUSTMENT OF ITS) CASE NO.
ELECTRIC RATES AND FOR CERTIFICATES) 2016-00370
OF PUBLIC CONVENIENCE AND NECESSITY)**

and

In the Matter of:

**APPLICATION OF LOUISVILLE GAS AND)
ELECTRIC COMPANY FOR AN ADJUSTMENT) CASE NO.
OF ITS ELECTRIC RATES AND FOR) 2016-00371
CERTIFICATES OF PUBLIC CONVENIENCE)
AND NECESSITY)**

VERIFICATION OF MARK PETERS

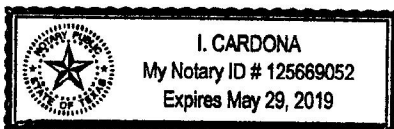
STATE OF TEXAS)
)
COUNTY OF TARRANT)


Mark Peters, being duly sworn, states that he has read the foregoing prepared testimony and that he would respond in the same manner to the questions if so asked upon taking the stand, and that the matters and things set forth therein are true and correct to the best of his knowledge, information and belief.



Mark Peters

The foregoing Verification was signed, acknowledged and sworn to before me this 2 day of March, 2017, by Mark Peters.





NOTARY PUBLIC, Notary # 125669052
Commission expiration: 5/29/19