COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC INVESTIGATION OF THE	)	CASE NO.
PROPOSED POLE ATTACHMENT TARIFFS OF	)	2022-00105
INVESTOR OWNED ELECTRIC UTILITIES	)	

LOUISVILLE GAS & ELECTRIC COMPANY'S AND KENTUCKY UTILITIES COMPANY'S COMBINED RESPONSE TO KENTUCKY BROADBAND AND CABLE ASSOCIATION'S AND AT&T KENTUCKY'S OBJECTIONS TO AMENDED POLE ATTACHMENT TARIFFS

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Louisville Gas & Electric Company ("LG&E") and Kentucky Utilities Company ("KU") (collectively, "the Companies") respectfully submit these responses to the objections to the Companies' amended pole attachment tariffs submitted by Kentucky Broadband and Cable Association ("KBCA") and AT&T Kentucky ("AT&T").

I. INTRODUCTION

The Companies introduced the Pole and Structure Attachment Rate Schedule ("Rate PSA") in their electric service tariffs beginning in 2016 (which first became effective in July 2017).[1] In doing so, the Companies became the first electric utilities in Kentucky to propose to make tariffed pole attachment service available to customers other than cable television providers. Since then, the Companies have proposed two additional modifications to the Rate PSAs, most recently in the versions that became effective on July 1, 2021.[2]

More recently, the Commission promulgated a new pole attachment regulation applicable to all pole owners and attachers. *See* 807 KAR 5:015. Pursuant to Section 3(7) of the Commission's regulation, the Companies were required to file new pole attachment tariffs that

[1] The Companies initially proposed to replace their then-existing CATV tariff schedules (which applied only to cable television providers) with the PSA tariff schedules (which applied to cable television providers and telecommunications carriers) in their base rate case proceedings in 2016. *See* Case Nos. 2016-00370 and 2016-00371. Several parties, including KBCA's predecessor entity and AT&T intervened in those proceedings. Ultimately the interested parties reached a settlement agreement on the complete terms of the Companies' Rate PSAs, which was approved by the Commission.

[2] The Companies proposed additional modifications to their Rate PSAs in their 2018 base rate case proceedings, including expanding the availability to governmental units. *See* Case Nos. 2018-00294 and 2018-00295. Several parties intervened in the cases, including Charter Communications Operating LLC, and the interested parties ultimately reached a settlement on the complete terms of the Companies' Rate PSAs. The Companies proposed additional minor modifications to their Rate PSAs in their 2020 base rate proceedings, which were ultimately approved by the Commission as part of a settlement agreement between the parties to the case. See Case Nos. 2020-00349 and 2020-00350.

conform to the new regulation. As required, the Companies carefully reviewed the current Rate PSAs for potential conflicts with the new regulation and updated certain provisions to account for the new rights and obligations the regulation created. On February 28, 2022, the Companies filed the amended tariffs ("Proposed Rate PSAs"). The Proposed Rate PSAs drew objections from only two stakeholders: KBCA and AT&T.

Rather than clearly explaining the basis for its objections, KBCA merely identifies the provisions of the Proposed Rate PSAs to which KBCA objects and categorizes, in conclusory fashion, certain provisions as either "in conflict with the rules" or "unreasonable." This makes it difficult for the Companies to provide substantive responses to KBCA's objections. In addition to these deficiencies, some of KBCA's objections target provisions—on grounds of alleged "unreasonableness" as opposed to an alleged conflict with the Commission's regulation—that are already part of the Companies' current Rate PSAs. KBCA has, in fact, only claimed that one provision within the Proposed Rate PSAs is actually in conflict with the new pole attachment regulation.

AT&T's objections are plagued with many of the same problems. But there is a more fundamental issue with AT&T's objections—the extent of AT&T's interest in the Proposed Rate PSAs. Most of AT&T's attachments on the Companies' poles are governed by joint use agreements, not the Companies' pole attachment tariffs.[3] In fact, of AT&T's 163,323 attachments

[3] This is a function of the Commission's new pole attachment regulation. Specifically, utilities "with an applicable joint use agreement" are expressly excluded from the new regulation. *See* 807 KAR 5:015, Section 1(2) (defining "broadband internet provider" as excluding "a utility with an applicable joint use agreement"); *id.* at Section 1(9) defining "new attacher" as excluding "a utility with an applicable joint use agreement"); *id.* at Section 1(11) (defining "telecommunications carrier" as excluding "a utility with an applicable joint use agreement"). In adopting these exclusionary definitions, the Commission rejected AT&T's argument in the underlying rulemaking proceedings that, notwithstanding its existing joint use agreement, AT&T should be

on the Companies' poles, only 3,459 (about 2%) fall under the Companies' pole attachment tariffs. Therefore, the weight accorded to AT&T's objections should take this into account, especially where AT&T's chief complaint is based on its volume of existing attachments.

II. RESPONSES TO KBCA'S OBJECTIONS

A. The Application Review Fee in Section 7.c. of the Proposed Rate PSAs Is Just and Reasonable.

Sections 4(2)(b)6.a&b of the new regulation provide, in pertinent part: "A utility's tariff may require prepayment of the costs of surveys made to review a pole attachment application…. If a utility's tariff requires prepayment of survey costs, the utility shall include a per pole estimate of costs in the utility's tariff…." 807 KAR 5:015, Section 4(2)(b)6.a-b. Section 7.c. of the Proposed Rate PSAs provides:

> Attachment Customer shall be responsible for all costs associated with the application, a Make Ready Survey, and Company's review of the application. Attachment Customer shall reimburse Company upon presentation of an invoice for such costs. Company may, in its sole discretion, require prepayment for Company's review of Attachment Customer's application. The current per pole estimates for application review are [$75/pole for Wireline Attachments].

Louisville Gas and Electric Company Pole and Structure Attachment Charges, P.S.C. Electric No. 13, First Revision of Original Sheet No. 40.6, Section 7.c. ("LG&E Proposed Rate PSA"); Kentucky Utilities Company Pole and Structure Attachment Charges, P.S.C. No. 20, First Revision of Original Sheet No. 40.6, Section 7.c. ("KU Proposed Rate PSA"). KBCA argues that the $75/pole application review fee is unreasonable to the extent that it "does not pay for the survey."

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entitled to the rights and protections of the Commission's new pole attachment regulation, as well as the rates afforded to other attaching entities under the Proposed Rate PSAs. *See* Statement of Consideration Relating to 807 KAR 5:015 ("Statement of Consideration") at 54 (describing AT&T's proposals to revise the definition of "new attacher" to include "a utility with an applicable joint use agreement" and to require existing joint use agreements to "conform their pricing to that in the tariffs"); *id.* at 56 (finding that "AT&T's comment does not support amending the regulation").

Objections of the Kentucky Broadband and Cable Association to Newly Filed Kentucky Tariffs ("KBCA's Objections") at 21, 23. While KBCA's one-sentence objection leaves much room for interpretation, KBCA seems to be arguing that the regulation does not permit the Companies to recover the costs incurred in reviewing an attachment application. The regulation does not support such an argument. In fact, the Commission explicitly acknowledged that pole owners are entitled to application review costs in its Regulatory Impact Analysis and Tiering Statement:

> The regulated entities will also incur costs in processing pole attachment applications and performing make ready, and such costs will be based on the size and frequency of new attachment projects. However, like the federal regulation, and **consistent with the cost causation principles the PSC applies when setting rates for other customers, utilities are able to recover the costs of processing pole attachment applications** and completing make-ready from the attaching entities that caused them to be incurred….

Regulatory Impact Analysis and Tiering Statement at 36, Section 4(b) (emphasis added).

Furthermore, the application review fee is a reasonable estimate of the costs the Companies incur in reviewing pole attachment applications. The $75/pole fee was calculated by dividing: (a) the total amount the Companies paid their contract labor force to review wireline pole attachment applications during 2019 and 2020 by (b) the total number of poles included in the wireline pole attachment applications reviewed during 2019 and 2020. This cost-based application review fee aligns with accepted cost-causation principles by allocating the incremental cost of pole attachments to the new attachers responsible for such costs. Moreover, this $75/pole application review fee has been in place for more than a year and no KCBA member has objected until now.[4]

[4] Even prior to the implementation of the $75/pole application review fee, there was a $65/pole application review fee in place since 2017 which , likewise, drew no objection.

B. The Make-Ready Pole Replacement Provision in Section 7.f. of the Proposed Rate PSAs Complies with the Commission's Regulation.

Section 7.f. of Proposed Rate PSAs, which is identical to Section 7.e. in the current Rate PSA, provides:

> 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 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 any invoice."

LG&E Proposed Rate PSA, Section 7.f.; KU Proposed Rate PSA, Section 7.f. KBCA objects "to the extent this requirement conflicts with the Commission's red-tagged pole framework" and further objects "to any provision requiring it to pay an unreasonable amount for a pole replacement." KBCA's Objections at 21, 22. KBCA does not identify an actual conflict with the Commission's red-tagged pole rules (or any other rule, for that matter), and KBCA stops well short of stating that the make-ready pole replacement provision is unreasonable. Instead, KBCA merely raises provisional objections based on an undefined, hypothetical conflict with the Commission's "red-tagged pole" rule at some point in the future.

But even setting aside the deficiencies of KBCA's objections, the black letter of the make-ready pole replacement provision should allay any concerns about a potential conflict with the Commission's "red-tagged" pole framework: the obligation to pay applies only when "an existing Structure is replaced or a new Structure is erected solely to provide adequate capacity for Attachment Customer's Attachments." LG&E Proposed Rate PSA, Section 7.f.; KU Proposed Rate PSA, Section 7.f. This language specifically *conforms* to the Commission's "red-tagged" pole framework, which is designed to ensure that attaching entities do not bear the cost of replacing poles that have already been identified for replacement by the utility. *See* 807 KAR 5:015, Section

4(6)(b)2. Moreover, as previously explained, the Companies already absorb the cost of replacing "red-tagged" poles—even if the replacement schedule for those poles is accelerated by a new attachment request. *See* Louisville Gas and Electric Company and Kentucky Utilities Company Comments on the Revised Proposed Pole Attachment Rules at 12 (Jul. 30, 2021). Therefore, to the extent KBCA is arguing that the Proposed Rate PSAs would pass on the cost of replacing "red-tagged" poles to new attachers, KBCA's argument is wholly without merit.

C. The Section 8.e. Timelines for Completing One-Touch Make-Ready Are Just and Reasonable.

The Commission incorporated a one-touch make-ready ("OTMR") option into its new pole attachment regulation. *See* 807 KAR 5:015, Section 4(10). To flesh this concept out, the Companies included an entirely new section in the Proposed Rate PSAs addressing OTMR. *See* LG&E Proposed Rate PSA, Section 8.a-g; KU Proposed Rate PSA, Section 8.a-g. Because the new regulation does not establish any timelines for the completion of make-ready identified in an OTMR application, the Companies incorporated clear timelines in Section 8.e. of the Proposed Rate PSAs:

> Attachment Customer shall complete all make-ready within thirty (30) days of the date on which Company approved Attachment Customer's OTMR application (or within forty-five (45) days in the case of a Larger Order), or Attachment Customer's OTMR application will be deemed closed.

LG&E Proposed Rate PSA, Section 8.e.; KU Proposed Rate PSA, Section 8.e. Without explanation, KBCA claims these timelines are "unreasonable" and argues that "[t]he deadlines should be the same as the utilities' deadlines to complete make-ready, including deviations from the schedule for good cause." KBCA's Objections at 22, 23.

The Proposed Rate PSAs require new attachers to complete OTMR within thirty (30) days (or forty-five (45) days in the case of a Larger Order) of the Companies' approval of an OTMR

application. KBCA's objection ignores the fact that existing attachers are required to complete make-ready—including any necessary *complex* make-ready—within thirty (30) days of receiving notice from the Companies pursuant to the standard make-ready process. *See* 807 KAR 5:015, Section 4(4)(a)2 ("For make-ready in the communications space, the notice shall…[s]tate a date for completion of make-ready in the communications space that is no later than thirty (30) days after notification is sent (or up to seventy-five (75) days in the case of larger orders…"). Against this backdrop, KBCA's objection is particularly unfounded. OTMR is limited to *simple* make-ready—i.e., the simplest and least time-intensive form of make-ready. KBCA has failed to explain why it would be unreasonable to require new attachers to complete the *simple* make-ready identified in their OTMR applications within thirty (30) days, even though existing attachers are required to complete *complex* make-ready within the same timeframe.[5] But KBCA's objection is not just disjointed; it also undermines a key rationale for OTMR—i.e., expediting the deployment process.[6]

KBCA also advocates for the right to deviate from its (exceedingly long) proposed timelines for completing OTMR where "good cause" exists. KBCA's Objections at 22, 23. Setting aside the fact that completing *simple* make-ready should never require more than thirty (30) days, KBCA's proposal is unnecessary. The Proposed Rate PSAs already contain a force majeure clause

[5] Notably, KBCA did not raise any objections to the timelines for existing attachers to complete make-ready within the communications space (i.e., 807 KAR 5:015, Section 4(4)(a)2) in the underlying rulemaking proceedings.

[6] *See, e.g., Accelerating Wireline 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, 7706 at ¶ 2 (Aug. 3, 2018) ("OTMR speeds and reduces the cost of broadband deployment by allowing the party with the strongest incentive—the new attacher—to prepare the pole quickly by performing all of the work itself…."). Application of the supply space make-ready timeline to OTMR—as proposed by KBCA—would effectively make the OTMR timelines three times longer than the standard timeline for completing make-ready in the communications space. *See* 807 KAR 5:015, Section 4(4)(b)2.

that excuses non-performance where good cause exists. *See* LG&E Proposed Rate PSA, Section 28; KU Proposed Rate PSA, Section 28.

D. The Penalty Set Forth in Section 9.j., for Failing to Correct a Violation in a Timely Manner, Is Just and Reasonable.

Section 9.j. of the Proposed Rate PSAs, which is nearly identical to Section 8.j. of the current Rate PSAs, provides:

> If Attachment Customer fails to install any Attachment in accordance with the standards and terms set forth in this Schedule and Company provides written notice to Attachment Customer of such failure, Attachment Customer, at its own expense, shall make necessary adjustments within thirty (30) days of receipt of such notice. Subject to Section 15 of this Schedule, **if Attachment Customer fails to make such adjustments within such time period, Company may make the repairs or adjustments, and Attachment Customer shall pay Company for the actual cost thereof plus a penalty of 25% of actual costs within thirty (30) days of receipt of an invoice**.

KU Proposed Rate PSA, Section 9.j. (emphasis added); LG&E Proposed Rate PSA, Section 9.j. The only difference between Section 9.j of the Proposed Rate PSAs and Section 8.j. of the current Rate PSAs is the change from 10% to 25%.[7] KBCA generically objects "to any provision imposing penalties other than an unauthorized attachment fee charge on it following inspections" (KBCA's Objections at 22, 23) but ignores the fact that this penalty has been part of the Companies' Rate PSAs since May 2019. *See* Louisville Gas and Electric Company Pole and Structure Attachment Charges, P.S.C. Electric No. 12, Original Sheet No. 40.11, Section 8.j. (effective May 1, 2019) ("2019 LG&E Rate PSA"); Kentucky Utilities Company Pole and Structure Attachment Charges, P.S.C. No. 19, Original Sheet No. 40.11, Section 8.j. (effective May 1, 2019) ("2019 KU Rate PSA").

[7] Due to a drafting oversight, the penalty in Section 9.j. of LG&E's Proposed Rate PSA was not changed from 10% to 25%. *See* LG&E Proposed Rate PSA, Section 9.j. LG&E is submitting, as Attachment 1, an updated tariff sheet that conforms to Section 9.j. of KU's Proposed Rate PSA.

It is also worth emphasizing that the Companies originally sought to incorporate a 50% penalty into the current Rate PSA. *See Electronic Application of Kentucky Utilities Company for an Adjustment of Its Electric Rates; Electronic Application of Louisville Gas and Electric Company for an Adjustment of Its Electric and Gas Rates* (collectively, "*2019 Rate Cases*"), Case Nos. 2018-00294 and 2018-00295, Stipulation and Recommendation, Stipulation Exh. 1 at Original Sheet No. 40.12 & Stipulation Exh. 2 at Original Sheet No. 40.12 (Feb. 27, 2019). As explained in the Companies' stipulation testimony, the penalty "was intended to encourage attachment customers to adopt responsible maintenance practices and to promptly repair non-compliant attachments rather than delay or defer to the Companies to perform repairs." *See 2019 Rate Cases*, Case Nos. 2018-00294 and 2018-00295, Stipulation Testimony of John K. Wolfe at 6-7 (Mar. 1, 2019). However, the Companies ultimately agreed to reduce the penalty to 10% pursuant to a settlement agreement with, *inter alia*, Charter Communications (i.e., KBCA's largest member). Nevertheless, the Companies explained that they would "closely monitor the responses of attachment customers to non-compliance notices" and specifically "reserve[d] the right, should the evidence indicate that a 10 percent surcharge is insufficient to encourage [responsible maintenance practices and prompt repair of non-compliant attachments], to request increases in the magnitude of the surcharge in future rate proceedings." *Id.* at 7.

The Companies continue to experience significant delays in the correction of non-compliant attachments. For example, since July 1, 2019, the Companies have identified thirty-seven (37) applications as having some type of installation defect, and it took—on average—105 days (from the date of notice) for the attachers to correct their defective attachment installations. It thus appears that the 10% penalty is not serving as a sufficient incentive for attachers to timely correct violations. Furthermore, the new regulation is designed to increase the rate and volume of

pole attachments, as well as to provide new attachers with more latitude to perform surveys and make-ready on the Companies' poles. Increasing and expediting broadband deployment will almost certainly result in an increase in defective attachment installations and longer delays in the correction of defective installations. This not only places the Companies' electric distribution facilities at risk, but it also jeopardizes the safety of all personnel working within the communications space (and amongst non-compliant attachments). For these reasons, the Companies believe that the modest increase in Section 9.j.'s penalty is reasonable and warranted. Increasing the cost of non-compliance under the Proposed Rate PSAs also guards against the Companies becoming the *de facto* contractors for attachers, which diverts scarce resources from core electric service needs.

E. Section 11.a. of the Proposed Rate PSAs Conforms to, and Removes the Uncertainty Arising from, the Commission's Overlashing Rules.

Section 11.a. of the Proposed Rate PSAs provides:

> Attachment Customer shall provide Company with at least thirty (30) days' advance written notice, in the form and manner prescribed by Company, before Overlashing, or allowing a third-party to overlash, Attachment Customer's existing wireline Attachments. If Company determines that make-ready work is necessary to accommodate the proposed Overlashing, Company will notify Attachment Customer of the need for any such make-ready work and the parties shall follow the process set forth in Section 7.e. above. Attachment Customer may not proceed with Overlashing until any necessary make-ready work is completed. Attachment Customer shall reimburse Company for any costs incurred in evaluating the proposed Overlashing.

LG&E Proposed Rate PSA, Section 11.a.; KU Proposed Rate PSA, Section 11.a. KBCA does *not* contend that Section 11.a. conflicts with the Commission's new overlashing rule, 807 KAR 5:015, Section 3(5). Instead, KBCA raises three objections to the "reasonableness" of Section 11.a.

First, KBCA "objects to [the Companies] imposing the mainline make ready timeline on KBCA for proposed overlashing that requires make-ready." KBCA's Objections at 21-22, 23.

Because the new regulation is silent with respect to the process for performing make-ready necessitated by a proposed overlash, the Proposed Rate PSAs address this ambiguity by incorporating the standard make-ready process in Section 7.e., which closely tracks the Commission's make-ready rules.

Second, KBCA objects "to the extent any make ready would be required to correct a preexisting violation of another attacher." KBCA's Objections at 21-22, 23. KBCA's objection directly conflicts with the new regulation. Section 3(5)(b) of the regulation explicitly provides pole owners with this right:

> A utility may not prevent an attacher from overlashing because another existing attacher has not fixed a preexisting violation. A utility may not require an existing attacher that overlashes its existing wires on a pole to fix preexisting violations caused by another existing attacher, **unless failing to fix the preexisting violation would create a capacity, safety, reliability, or engineering issue.**

807 KAR 5:015, Section 3(5)(b) (emphasis added); *see also* 807 KAR 5:015, Section 3(5)(c) (requiring the "party seeking to overlash" to "address any identified issues before continuing with the overlash"). Furthermore, during the underlying rulemaking proceedings, the Commission specifically amended Section 3(5)(b) to make clear "that the general prohibition on preventing overlashing of an existing violation would not trump safety, reliability, capacity, or engineering concerns." Statement of Consideration at 51-52. Overlashing into a preexisting violation would almost certainly exacerbate an existing capacity, safety, reliability or engineering issue on a pole.

Third, KBCA "objects to the requirement that 'Attachment Customer shall reimburse Company for any costs incurred in evaluating the proposed Overlashing.'" KBCA's Objections at 22, 23. This, too, directly contradicts the new regulation. The first iteration of the Commission's proposed pole attachment rules did not specifically address overlashing. At KBCA's prompting, however, the Commission incorporated an overlashing rule into the second iteration of its proposed

regulation. The provision was largely based on language proposed by KBCA, but the Commission specifically stated:

> The Commission will also remove the prohibition on charging a fee to overlashers. Reviewing potential overlashing, like new attachments, will result in costs and there may be instances where an overlashing evaluation requires a more complicated review, such as an engineering study, and this is a cost that the overlasher, and not the utility's customers, should bear.

Statement of Consideration at 52.

F. The Indemnity Provision in Section 18 of the Proposed Rate PSAs, Which is Virtually Identical to Section 18 in the Current Rate PSAs, is "Just and Reasonable."

KBCA has raised an objection to Section 18 of the Proposed Rate PSAs, arguing that it "objects to any standard that makes an attacher responsible for the negligence of the pole owner." KBCA's Objections at 22, 23. Section 18 provides:

> Attachment Customer shall protect, defend, indemnify and save harmless Company, its Affiliates, their officers, directors, employees and representatives from and against all damage, loss, claim, demand, suit, liability, penalty or forfeiture of every kind and nature, including but not limited to costs and expenses of defending against the same, payment of any settlement or judgment therefor and reasonable attorney's fees that are incurred in such defense, by reason of any claims arising from Attachment Customer's activities under this Schedule, or the Contract, or from Attachment Customer's presence on Company's premises, or from or in connection with the construction, installation, operation, maintenance, presence, replacement, enlargement, use or removal of any facility of Attachment Customer attached or in the process or being attached to or removed from any Company Structure by Attachment Customer, its employees, agents, or other representatives, including but not limited to claims alleging (1) injuries or deaths to Persons; (2) damage to or destruction of property including loss of use thereof; (3) power or communications outage, interruption or degradation; (4) pollution, contamination of or other adverse effects on the environment; (5) violation of governmental laws, regulations or orders; or (6) rearrangement, transfer, or removal of any third party attachment on, from, or to any Company Structure.
>
> The indemnity set forth in this section shall include indemnity for any claims arising out of the joint negligence of Attachment Customer and Company; provided however, the indemnity set forth in this section, but not Attachment Customer's duty to defend, shall be reduced to the extent it is established by final adjudication or mutual agreement of Attachment Customer and Company that the liability to

> which such indemnity applies was caused by the negligence or willful misconduct of Company. If Attachment Customer is required under this provision to indemnify Company, Attachment Customer shall have the right to select defense counsel and to direct the defense or settlement of any such claim or suit.

LG&E Proposed Rate PSA, Section 18; KU Proposed Rate PSA, Section 18. Notably, the foregoing provision is virtually identical to Section 18 of the Companies' current Rate PSAs. *See* Louisville Gas and Electric Company Pole and Structure Attachment Charges, P.S.C. Electric No. 13, Original Sheet Nos. 40.17-40.18, Section 18 (effective Jul. 1, 2021) ("2021 LG&E Rate PSA"); Kentucky Utilities Company Pole and Structure Attachment Charges, P.S.C. No. 20, Original Sheet Nos. 40.17-40.18, Section 18 (effective Jul. 1, 2021) ("2021 KU Rate PSA").

Furthermore, contrary to KBCA's objection, Section 18 does not require attachers to indemnify the Companies for liability arising out of the Companies' negligence or misconduct. Section 18 expressly states that an attacher's indemnity obligation shall be reduced by the extent to which the Companies' negligence or willful misconduct is determined to have contributed to the underlying liability:

> The indemnity set forth in this section shall include indemnity for any claims arising out of the joint negligence of Attachment Customer and Company; **provided however, the indemnity set forth in this section, but not Attachment Customer's duty to defend, shall be reduced to the extent it is established by final adjudication or mutual agreement of Attachment Customer and Company that the liability to which such indemnity applies was caused by the negligence or willful misconduct of Company**.

LG&E Proposed Rate PSA, Section 18 (emphasis added); KU Proposed Rate PSA, Section 18. This language was incorporated into the Companies' prior Rate PSAs pursuant to a settlement agreement with, *inter alia*, Kentucky Cable Telecommunications Association (i.e., KBCA's predecessor). *See An Application of Kentucky Utilities Company for an Adjustment of Its Electric Rates and For Certificates of Public Convenience and Necessity; An Application of Louisville Gas and Electric Company for an Adjustment of Its Electric and Gas Rates and For Certificates of*

Public Convenience and Necessity (collectively, the "*2016 Rate Cases*"), Case Nos. 2016-00370 & 2016-00371, Second Stipulation and Recommendation, Exh. 1 at 16 & Exh. 2 at 16 (May 1, 2017); *see also 2016 Rate Cases*, Case Nos. 2016-00370 & 2016-00371, Second Stipulation Testimony of Robert M. Conroy at 4-5 (May 4, 2017) ("The Stipulating Parties recommend revisions to Term 18 (previously Term 17) that, while still requiring an Attachment Customer to indemnify the Companies for any acts of joint negligence, allow for a reduction in the amount of indemnity to reflect an assignment of liability to the Companies resulting from the Companies' negligence or willful misconduct…. While Term 18 will continue to provide significant financial and legal protection to the Companies from an Attachment Customer's negligence or willful misconduct, it will promote greater fairness by not subjecting an Attachment Customer to liability resulting from the Companies' conduct….").

Arguably, the indemnity provision **should** cover liability caused by the Companies' negligence so long as the liability "arose out of" Attachment Customer's activities under the Rate PSA or attachments on the Companies' premises because that liability would not exist but for an Attachment Customer's use of the Companies' poles. But for now, the Companies are not seeking to expand the scope of the indemnity provision; the Companies are only seeking to maintain the *status quo*.

G. The Contractor Insurance Requirement in Section 23.b. of the Proposed Rate PSAs, Which is Identical to Section 23.b. in the Current Rate PSAs, Is "Just and Reasonable."

KBCA has raised an objection to Section 23.b. of the Proposed Rate PSAs, which provides:

> Attachment Customer shall require its Contractors and subcontractors to provide and maintain the same insurance coverage as required of Attachment Customer.

LG&E Proposed Rate PSA, Section 23.b.; KU Proposed Rate PSA, Section 23.b. This exact insurance requirement has been a part of the Companies' pole attachment tariffs since July 2017.

See Louisville Gas and Electric Company Pole and Structure Attachment Charges, P.S.C. Electric No. 11, Original Sheet No. 40.18, Section 23.b. (effective Jul. 1, 2017) ("2017 LG&E Rate PSA"); Kentucky Utilities Company Pole and Structure Attachment Charges, P.S.C. Electric No. 18, Original Sheet No. 40.18, Section 23.b. (effective Jul. 1, 2017) ("2017 KU Rate PSA"). Against this backdrop, KBCA should not have any "existing contracts with its contractors" that "contain different requirements." KBCA's Objections at 22, 23. Furthermore, to the extent it is challenging the reasonableness of Section 23.b., KBCA's objection is unfounded. In the Companies' experience, attachers outsource most of their make-ready and installation work to third-party contractors. Therefore, in the absence of Section 23.b., the Companies would be largely unprotected in the event of property damage or bodily injury caused by an attacher's third-party contractor.

III. RESPONSES TO AT&T'S OBJECTIONS

A. AT&T's Objection to the Definition of "Attachment" Is Unfounded.

The Proposed Rate PSAs define the term "attachment" as follows:

> "Attachment" means the Cable or Wireless Facilities and all associated appliances including without limitation any overlashed cable, guying, small splice panels and vertical overhead to underground risers but shall not include power supplies, equipment cabinets, meter bases, and other equipment that impedes accessibility or otherwise conflicts with Company's electric design and construction standards.

LG&E Proposed Rate PSA, First Revision of Original Sheet No. 40; KU Proposed Rate PSA, First Revision of Original Sheet No. 40. AT&T objects to this definition stating that "by rule, overlashing is not defined as an attachment." Comments of AT&T Kentucky In Response to March 2, 2022 Commission Order ("AT&T's Comments") at 19-20, 21. There are several problems with AT&T's objection.

First, this definition is used in the Companies' current Rate PSAs. *See* 2021 LG&E Rate PSA, Original Sheet No. 40; 2021 KU Rate PSA, Original Sheet No. 40. Therefore, to the extent it does not conflict with the Commission's new regulation, the definition for "attachment" is presumptively just and reasonable. And based on the Commission's broad definition for "attachment," there is no such conflict. The new regulation defines "Attachment" to mean "**any attachment** by a cable television system operator, telecommunications carrier, broadband internet provider, or governmental unit to a pole owned or controlled by a utility." 807 KAR 5:015, Section 1(1). Second, the regulation does not define the term "overlashing." Thus, AT&T's claim that "by rule, overlashing is not defined as an attachment" is just plain wrong—there is no "rule" that defines "overlashing" and the definition of "attachment" does not exclude overlashing. Third, to the extent AT&T is concerned that, by including overlashing within the definition of "attachment," the Proposed Rate PSAs would impose a permit requirement on overlashing, AT&T's concern is invalid. Section 11.a. of the Proposed Rate PSAs makes clear that overlashing is subject to a separate advance notification requirement, not the standard permitting requirement applicable to wireline and wireless attachments set forth in Section 7.a-d.

B. The "Deemed Withdrawn" Language in Section 7.e. of the Make-Ready Estimate Provision Is a Valid Exercise of the Companies' Rights Under the Commission's Rules.

Under the new regulation, pole owners "may withdraw an outstanding estimate of charges to perform make-ready beginning fourteen (14) days after the estimate is presented." 807 KAR 5:015, Section 4(3)(c). To exercise their right to withdraw stale make-ready estimates, the Companies incorporated the following "deemed withdrawn" provision within their Proposed Rate PSAs:

> Within fourteen (14) days of notifying Attachment Customer of the approval of its application, Company shall provide Attachment Customer a written statement of

> the costs of any necessary Company make-ready work, including but not limited to rearrangement of electric supply facilities and pole change out. Attachment customer shall indicate its approval of the statement of necessary Company make-ready work by submitting payment of the statement amount within fourteen (14) days of receipt. **If payment is not received by Company within fourteen (14) days, the statement of cost shall be deemed withdrawn**.

LG&E Proposed Rate PSA, Section 7.e. (emphasis added); KU Proposed Rate PSA, Section 7.e. AT&T objects to the "deemed withdrawn" provision and argues that it "does not comport with the spirit of the rule." AT&T's Comments at 19, 20.

Because the new regulation explicitly allows pole owners to withdraw a make-ready estimate fourteen (14) days after it is presented, the "deemed withdrawn" language actually conforms, rather than conflicts, with the "spirit of the rule." The Companies are merely exercising their regulatory right to withdraw make-ready estimates through the Proposed Rate PSAs. The "deemed withdrawn" language allows the Companies to avoid the significant administrative burden of tracking and affirmatively withdrawing individual make-ready estimates. Furthermore, the "deemed withdrawn" provision protects the Companies and attaching entities from stale make-ready estimates, which could be predicated on lower labor and material inputs than exist at the time of acceptance. This is an important safeguard, especially in light of the recent volatility in labor and material costs. Finally, electric distribution facilities are dynamic and prone to change even over a short period of time. This means that the validity of make-ready estimates can decrease rapidly following issuance. By imposing a "life span" on make-ready estimates, the "deemed withdrawn" provision mitigates against conflicts and delays in broadband deployment.

C. The Tagging Requirement in Section 9.c. Does Not Conflict with the Commission's Rules and Is Presumptively "Just and Reasonable."

The Proposed Rate PSAs require all existing attachments on the Companies' poles to be "tagged" within 180 days of the effective date of the Proposed Rate PSAs:

> Attachment Customer shall tag an Attachment at the time of construction. Any untagged Attachment existing as of the date of execution of the Contract or the effective date of this Schedule, whichever is earlier, shall be tagged by Attachment Customer within one hundred and eighty (180) days from the effective date of this Schedule.

LG&E Proposed Rate PSA, Section 9.c.; KU Proposed Rate PSA, Section 9.c.[8] Section 9.c. substantially conforms, in form and substance, to the tagging requirement in the Companies' current and prior Rate PSAs. The only substantive difference is that the current and prior Rate PSAs did not impose a backstop on tagging existing untagged attachments and instead required attachers to tag existing untagged attachments during the normal course of their operations. *Compare id. with* 2017 KU Rate PSA, Section 8.c ("Attachment Customer shall tag an Attachment at the time of construction. Any untagged attachment existing as of the date of execution of Attachment Customer Agreement or the effective date of this schedule, whichever is earlier, shall be tagged when Attachment Customer or its agents perform work on the Attachment.") *and* 2019 KU Rate PSA, Section 8.c. ("Attachment Customer shall tag an Attachment at the time of construction. Any untagged Attachment existing as of the date of execution of the Contract or the effective date of this Schedule, whichever is earlier, shall be tagged by Attachment Customer when Attachment Customer or its agents perform work on the Attachment.").

AT&T objects to the foregoing tagging requirement, arguing that "the requirement to tag all untagged attachments within 180 days is completely impractical and prohibitively expensive" because "[t]here could literally be tens of thousands of untagged attachments." AT&T's Comments at 20, 21. AT&T's objection is vastly overstated. Almost all of AT&T's attachments on the Companies' poles are governed by the parties' joint use agreements. According to the

[8] KBCA has not objected to the Proposed Rate PSAs' tagging requirement for existing attachments, even though there are significantly more KBCA member attachments subject to the tagging requirement than AT&T attachments.

Companies' records, AT&T currently has 163,323 attachments on the Companies' poles, 159,774 (97.8%) of which are on the Companies poles located within AT&T's incumbent local exchange carrier ("ILEC") service territory—i.e., poles that are governed by the parties' joint use agreements, not the Companies' pole attachment tariffs.

Furthermore, as set forth above, the Companies' pole attachment tariffs have imposed tagging requirements on new and existing attachments since at least 2017. Moreover, the majority (approximately 2,400 of 3,549) of AT&T's non-ILEC attachments were made pursuant to a 1999 letter agreement ("Letter Agreement") between AT&T and the Companies, which specifically required AT&T's attachments "to be identified as to the owner of said facilities at each attachment location."[9] Between the requirements of the Letter Agreement and the current Rate PSAs, there should be very few (if any) untagged AT&T attachments.

Finally, the tagging requirement in Section 9.c. serves an important operational purpose: it allows the Companies and third parties to quickly identify who owns a particular attachment. This is particularly important for first responders, who do not have immediate access to the Companies' maps and records. It is also important to the process of deploying new communications facilities, especially in light of the Commission's new OTMR and self-help rules. For example, new attachers are required to provide advance notice to existing attachers before performing a survey or completing any make-ready identified in an OTMR application. Untagged attachments could slow this process down and make it difficult for new attachers to satisfy their obligations under the new OTMR framework.

[9] April 9, 1999 Letter Agreement, ¶3 (attached hereto as Attachment 2).

D. AT&T's Objection to Section 11.a. of the Proposed Rate PSAs (Regarding Overlashing) Is Too Vague and Ambiguous for the Companies to Meaningfully Respond.

The Proposed Rate PSAs require attachers to reimburse the Companies for the costs they incur in evaluating a proposed overlash: "Attachment Customer shall reimburse Company for any costs incurred in evaluating the proposed Overlashing." LG&E Proposed Rate PSA, Section 11.a.; KU Proposed Rate PSA, Section 11.a. AT&T raises two objections to this provision. First, AT&T claims that the language used "is ambiguous" and that the Companies need to "specify what costs are being included in the evaluation." AT&T's Comments at 20, 21. Second, AT&T argues that the Proposed Rate PSAs need to specify "the timelines for submitting costs." AT&T's Comments at 20, 21. The Companies do not understand AT&T's reference to the "timelines for submitting costs." This language could be referring to a potential deadline for the Companies to issue an invoice for an overlashing evaluation, or it could be a reference to the deadline for AT&T to pay the estimated costs of make-ready necessary to accommodate a proposed overlash. In any event, AT&T's objection is not clear enough to respond materially. If AT&T can explain its specific concerns with Section 11.a., the Companies will consider those concerns and respond appropriately.

IV. CONCLUSION

The Companies appreciate the Commission's attention to these matters and look forward to working further with the Commission and its Staff to gain final approval of the Proposed Rate PSAs.

Dated: April 14, 2022 Respectfully submitted,

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Counsel for Louisville Gas and Electric Company and Kentucky Utilities Company

CERTIFICATE OF SERVICE

In accordance with 807 KAR 5:001, Section 8, and the Public Service Commission's Order of July 22, 2021 in Case No. 2020-00085, I certify that this document was transmitted to the Public Service Commission on April 14, 2022 and that there are currently no parties that the Public Service Commission has excused from participation by electronic means in this proceeding

_____

Sara V. Judd
Counsel for Louisville Gas and Electric Company and Kentucky Utilities Company

Louisville Gas and Electric Company

P.S.C. Electric No. 13, First Revision of Original Sheet No. 40.14
Canceling P.S.C. Electric No. 13, Original Sheet No. 40.14

Standard Rate **PSA**

Pole and Structure Attachment Charges

g. Attachment Customer may use qualified contractors of its own choice to perform work below the Communication Worker Safety Zone. For any work in or above the Communication Worker Safety Zone that Attachment Customer is permitted to perform, Attachment Customer shall use an Approved Contractor who may, at Company's discretion, be required to be accompanied by a Company-designated inspector. For any work in Company's Ducts, Attachment Customer shall use an Approved Contractor, who must be accompanied by a Company-designated inspector. Company shall schedule a Company-designated inspector to accompany an Approved Contractor within fifteen (15) days of its receipt of such request for such inspector. Attachment Customer shall reimburse Company for the actual cost associated with providing inspection services within thirty (30) days of receipt of an invoice. T T T/D/N T T T T T T T T

h. Company may also monitor Attachment Customer's construction and installation of Attachments below the Communication Worker Safety Zone. If the need for a monitor is caused by Attachment Customer's failure to comply with the terms of this Schedule, the Contract, or any applicable law or regulation, Attachment Customer shall reimburse Company for the actual cost of any such monitoring within thirty (30) days of receipt of an invoice for such cost. For locations where Attachment Customer's construction and installation are within Company underground facilities, Attachment Customer shall reimburse Company for the actual cost associated with providing inspection services within thirty (30) days of receipt of an invoice. T T T T T T T T T T

i. Attachment Customer shall comply with all applicable federal, state, and local laws, rules and regulations with respect to environmental practices undertaken pursuant to the construction, installation, operation and maintenance of its Attachments. Attachment Customer shall not bring, store or utilize any hazardous materials on any Company site without Company's prior express written consent. To the extent reasonably practicable, Attachment Customer shall restore any property altered pursuant to this Schedule or the Contract to its condition existing immediately prior to the alteration. Company has no obligation to correct or restore any property altered by Attachment Customer and bears no responsibility for Attachment Customer's compliance with applicable environmental regulations. T T T T T T T T T T T T

j. If Attachment Customer fails to install any Attachment in accordance with the standards and terms set forth in this Schedule and Company provides written notice to Attachment Customer of such failure, Attachment Customer, at its own expense, shall make necessary adjustments within thirty (30) days of receipt of such notice. Subject to Section 15 of this Schedule, if Attachment Customer fails to make such adjustments within such time period, Company may make the repairs or adjustments, and Attachment Customer shall pay Company for the actual cost thereof plus a penalty of 25% of actual costs within thirty (30) days of receipt of an invoice. T T T T T T T T T/I T

DATE OF ISSUE: February 28, 2022

DATE EFFECTIVE: With Service Rendered
On and After March 31, 2022

ISSUED BY: /s/ Robert M. Conroy, Vice President
State Regulation and Rates
Louisville, Kentucky

One Quality Street Lexington, KY 40507-1462 Tel 606 367-1107 Fax 606 367-1199 robert.hewett@kuenergy.com
Robert M. (Bob) Hewett, President

Kentucky Utilities Company

April 9, 1999

Mr. Eddy Roberts
State President
BellSouth of Kentucky
601 West Chestnut St., Suite 408
Louisville, KY 40203

Dear Mr. Roberts:

Pursuant to discussions between our respective companies, KU understands that BellSouth wishes to start placing their attachments on KU's transmission and distribution poles and in the underground conduit system in the Lexington-Fayette County area. Kentucky Utilities Company is willing to agree to this request with the understanding that an agreement will be worked out between both companies. The following general terms are submitted to permit BellSouth to start.

1. **ATTACHMENT APPLICATION AND PERMITS**
Permittee shall make application and receive a permit before making an attachment to any pole or poles of KU or replacing, overlashing, modifying, adding to, enlarging or changing an existing attachment or cable of the Permittee in a manner that changes the pole space or strength requirements as defined by the National Electric Safety Code, current edition. The permit submitted by Permittee shall consist of drawings and associated descriptive matter which shall be adequate in all detail to enable KU to thoroughly check the proposed installation of the Permittee. Before the attachments and/or modifications are made, the permit must be approved by KU. KU will have the right to remove, at the Permittee's expense, unauthorized attachments or modifications to existing attachments or cables after notice has been given to the Permittee. BellSouth or a third party overlashing will not be allowed without an additional license fee. BellSouth is required to obtain all necessary permits and easements.

2. **PERMITTED ATTACHMENTS**

Each permitted attachment shall consist of one bolted attachment for tangent poles and two bolt attachments for corner poles. Any attachment other than to tangent poles must be properly braced with guys and anchors provided by Permittee to the satisfaction of KU. The use of existing KU anchors for this purpose will not ordinarily be permitted. BellSouth must obtain easements for its own anchors. All attachments shall be at such points and in such manner as KU or its employees direct.

3. **CONSTRUCTION AND MAINTENANCE REQUIREMENTS AND SPECIFICATIONS**

All facilities attached pursuant to this Agreement shall be erected and maintained in compliance with the requirements and specifications of the current National Electrical Safety Code, KU's construction practices, all as may be changed from time to time; with any rules, orders, or regulations now in effect or that hereinafter may be issued by the Public Service Commission of Kentucky; and with all existing applicable federal, state, or local laws, rules, regulations, orders and ordinances issued by any federal, state, or local authority and as may be changed from time to time. All facilities attached pursuant to an agreement shall be identified as to the owner of said facilities at each attachment location. In the event any part of Permittee's construction does not meet any of the above requirements, Permittee will correct same in fifteen (15) business days after written notification. If Permittee fails to correct same within fifteen (15) business days, KU may make such corrections and charge Permittee for the total costs incurred, which may include attorney's fees and court costs. Permittee, at all times, warrants compliance with all the requirements as set out above and assumes the continuing responsibility for such compliance in the future and assumes all responsibility for any damages, fines or penalties resulting from any noncompliance. KU undertakes no duty with respect to such compliance by requiring Permittee to meet any specifications or by requiring or failing to require any corrections, modifications, additions or deletions to any work or planned work by Permittee.

4. **INDEMNITIES**

Permittee and its contractor agree to protect, defend, indemnify and save harmless KU from all damage, loss, claim, demand, suite, liability, penalty or forfeiture of every kind and nature, including but not limited to costs and expenses of defending against the same, payment of any settlement or judgment therefore and reasonable attorney's fees, by reason of (a) injuries or deaths to persons, (b) damages to or destructions of properties, (c) pollution, contaminations of or other adverse effects on the environment or (d) violations of governmental laws, regulations or orders whether suffered directly by KU itself or indirectly by reason of claims, demands or suits against it by third parties, resulting or alleged to have resulted from negligent acts or omissions of Permittee, its employees, agents, or other representatives or from their presence on the premises of KU or otherwise from performance of this Agreement, or from or in connection with the construction, installation, operations, maintenance, presence, replacement, enlargement, use or removal of any facilities of Permittee attached or in the process of being attached or removed from any poles of KU.

5. **REACHING AGREEMENT**

BellSouth and KU agree to negotiate in good faith to reach an agreement on specific terms and conditions. If agreement is delayed beyond the point either party feels is reasonable, the parties agree to pursue the procedures in Section 252 of the 1996 Telecommunications Act to resolve any issues in dispute.

6. **OTHER**

Other specific terms and conditions to be negotiated and mutually agreed upon by BellSouth and KU within a reasonable time, including but not limited to the consideration to KU for said attachments.

If this agreement is acceptable to BellSouth, please sign below and return as acknowledgement of such acceptance. We look forward to working with you as this work progresses. Please feel free to call me at (606) 367-1107.

Very truly yours,

Robert M Hewett

Robert M. Hewett
President

BellSouth of Kentucky

By: Eddy Roberts
Eddy Roberts
State President

FORM APPROVED
DJC
ATTORNEY

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