COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

LOUISVILLE GAS & ELECTRIC COMPANY'S AND KENTUCKY UTILITIES COMPANY'S INITIAL BRIEF IN SUPPORT OF THEIR REVISED POLE ATTACHMENT TARIFFS

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Louisville Gas & Electric Company ("LG&E") and Kentucky Utilities Company ("KU") (collectively, "the Companies") respectfully submit this brief in support of the Companies' revised pole attachment tariffs ("Proposed Rate PSAs").

I. INTRODUCTION

Section 3(7) of the Kentucky Public Service Commission's recently adopted pole attachment regulation required pole owners to file tariffs "conforming to the requirements of this administrative regulation" by February 28, 2022.[1] The Companies filed their Proposed Rate PSAs on February 28, 2022, to satisfy that regulatory obligation. In general, the Companies made substantive revisions only to those tariff provisions implicated by the Commission's new regulation. As such, most of the provisions in the Proposed Rate PSAs remain substantively unchanged from the current Rate PSAs, including the following provisions to which objections have been raised in this proceeding: (1) the definition of "attachment"; (2) the scope of cost recovery for make-ready pole replacements; (3) the indemnity requirement; and (4) the contractor insurance requirement.

The Kentucky Broadband and Cable Association ("KBCA"), an intervenor in this proceeding, initially raised objections to seven provisions within the Proposed Rate PSAs: (1) the scope of cost recovery for make-ready pole replacements; (2) the indemnity requirement; (3) the contractor insurance requirement; (4) the $75 per pole estimate for reviewing wireline attachment applications; (5) the timeline for completing one-touch make-ready; (6) the penalty for failing to timely correct non-compliant attachment installations; and (7) the requirements applicable to overlashing. AT&T Kentucky ("AT&T") raised objections to four provisions within the Proposed Rate PSAs: (1) the timeline for tagging existing, untagged attachments; (2) the definition of

[1] 807 KAR 5:015, Section 3(7).

"attachment"; (3) the "deemed withdrawn" provision for make-ready estimates; and (4) the cost recovery for evaluating proposed overlashes.

Notably, none of KBCA's or AT&T's objections is based on a potential conflict with the Commission's new regulation.[2] Instead, all of the objections are based upon the claim that the provisions—even those that have long been part of the Companies' pole attachment tariffs—are somehow "unjust or unreasonable." As explained below, these objections are unfounded. The terms and conditions of the Proposed Rate PSAs—the existing provisions, the revised provisions, and the new provisions—are fair, just, and reasonable. The Commission should accept the Proposed Rate PSAs as filed.

II. OVERVIEW OF THE PROPOSED RATE PSAs

The Companies were the first pole owners in the Commonwealth to file comprehensive pole attachment tariffs with the Commission. Since filing their original Rate PSAs in 2015, the Companies have continuously refined the processes and procedures applicable to third-party attachments on their poles. This has resulted in the filing of—and the Commission's approval of—three sets of revisions to their Rate PSAs since 2015.[3]

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[2] Though KBCA initially (and half-heartedly) claimed that the cost recovery provision for make-ready pole replacements "conflicts with the Commission's red-tagged pole framework," it later became apparent that KBCA was advocating, again, for the very same make-ready pole replacement cost allocation proposal that the Commission expressly rejected in its September 15, 2021 Statement of Consideration.

[3] *See* Louisville Gas and Electric Company Cable Television Attachment Charges, P.S.C. No. 10, Original Sheet No. 40 *et seq*. (effective Jul. 1, 2015) ("2015 LG&E Rate CTAC"); Kentucky Utilities Company Cable Television Attachment Charges, P.S.C. No. 17, Original Sheet No. 40 *et seq*. (effective Jul. 1, 2015) ("2015 KU Rate CTAC"); Louisville Gas and Electric Company Pole and Structure Attachment Charges, P.S.C. Electric No. 11, Original Sheet No. 40 *et seq.* (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 *et seq*. (effective Jul. 1, 2017) ("2017 KU Rate PSA"); Louisville Gas and Electric Company Pole and Structure Attachment Charges, P.S.C. Electric No. 12, Original Sheet No. 40 *et seq.* (effective May 1, 2019) ("2019

The Proposed Rate PSAs, in addition to conforming with the Commission's new pole attachment regulation, represent another step forward in this iterative process. Even with the revisions necessitated by the new pole attachment regulation, most provisions of the Proposed Rate PSAs are identical to the current Rate PSAs. The Commission has, therefore, already closely scrutinized the majority of the terms and conditions in the Proposed Rate PSAs, and, in four separate rate cases, found them to be fair, just, and reasonable.

Because this proceeding has largely focused on *contested* provisions within the Proposed Rate PSAs, little attention has been paid to the provisions that are *not* in dispute. The uncontested provisions constitute the vast majority of the Companies' Proposed Rate PSAs. To ensure the Commission has all the information it needs to find the Proposed Rate PSAs fair, just, and reasonable in their entirety, the Companies provide the following overview of certain key provisions that have not received considerable attention in this proceeding.[4]

A. "Definitions" Section

Most of the terms in the "Definitions" section of the Proposed Rate PSAs remain unchanged from the current Rate PSAs.[5] Where the Companies have made revisions, those

LG&E Rate PSA"); Kentucky Utilities Company Pole and Structure Attachment Charges, P.S.C. No. 19, Original Sheet No. 40 *et seq.* (effective May 1, 2019) ("2019 KU Rate PSA"); Louisville Gas and Electric Company Pole and Structure Attachment Charges, P.S.C. Electric No. 13, Original Sheet No. 40 *et seq.* (effective Jul. 1, 2021) ("Current LG&E Rate PSA"); Kentucky Utilities Company Pole and Structure Attachment Charges, P.S.C. No. 20, Original Sheet No. 40 *et seq.* (effective Jul. 7, 2021) ("Current KU Rate PSA").

[4] The Companies do not attempt here to explain each and every provision of the Proposed Rate PSAs. This would be an extremely cumbersome undertaking. Instead, the Companies are focusing on the substantively revised provisions.

[5] *See* Louisville Gas and Electric Company Pole and Structure Attachment Charges, P.S.C. Electric No. 13, First Revision of Original Sheet Nos. 40-40.3, "Definitions" (filed Feb. 28, 2022) ("Proposed LG&E Rate PSA"); Kentucky Utilities Company Pole and Structure Attachment Charges, P.S.C. No. 20, First Revision of Original Sheet Nos. 40-40.3, "Definitions" (filed Feb. 28, 2022) ("Proposed KU Rate PSA").

revisions primarily (1) incorporate verbatim the definitions utilized by the Commission's new regulation (*e.g.,* "broadband internet provider" and "telecommunications carrier"); (2) update existing definitions to comport with the new regulation (*e.g.,* revising threshold for "high volume application" to 1,000 poles); and (3) add new definitions to implement rights or concepts established under the new regulation (*e.g.,* adding definitions for "overlashing" and "larger orders"). To provide Attachment Customers with additional clarity on important concepts, the Companies have also revised a handful of existing definitions (*e.g.,* "communications space" and "service drops"). Neither intervenor has objected to any of the revised definitions. In fact, the only definition to which an objection has been raised—the definition of "attachment"—is identical to the definition utilized in the Companies' current Rate PSAs. *See* Section V.A. *infra* (addressing AT&T's objection to the definition of "attachment").

B. "Billing" Section

The "Billing" section defines the process by which attachment charges and all other charges due under the Rate PSAs are handled.[6] It requires Attachment Customers to pay attachment charges on a semi-annual basis. All payments due under the Rate PSAs, including attachment charges, are due within sixty (60) days of the bill's issuance, and a three percent (3%) fee is imposed on late payments. This framework is identical to the framework used in the prior three Rate PSAs.[7] The only substantive revision to the "Billing" section is the new requirement that Attachment Customers participate in the Companies' online invoicing system. The "Billing"

[6] *See* Proposed LG&E Rate PSA, First Revision of Original Sheet No. 40.3, "Billing"; Proposed KU Rate PSA, First Revision of Original Sheet No. 40.3, "Billing".

[7] *See, e.g.*, 2017 LG&E Rate PSA, P.S.C. Electric No. 12, Original Sheet No. 40.2-40.3, "Billing"; 2019 LG&E Rate PSA, P.S.C. Electric No. 13, Original Sheet No. 40.3, "Billing"; Current LG&E Rate PSA, P.S.C. Electric No. 14, Original Sheet No. 40.3, "Billing".

section, as revised, has drawn no objections. The purpose of the revisions is to make invoicing and payments more efficient for the Companies and Attachment Customers alike.

C. "Company Processes and Procedures" Section

The Proposed Rate PSAs have been revised to include a new section that expressly requires Attachment Customers to follow the Companies' policies and procedures.[8] The "Company Processes and Procedures" section has drawn no objections, perhaps because Attachment Customers have always been required to install and maintain their attachments in accordance with the Companies' policies and procedures. The new provision merely states this requirement in the tariff and affirms that the policies and procedures are subordinate to the terms and conditions of the Rate PSAs and the Commission's new regulation.

D. Section 4 – "Transfer of Rights"

Section 4 of the Proposed Rate PSAs describes the limitations on an Attachment Customer's ability to transfer its rights under the tariff and/or a contract. The Companies made only one revision to Section 4—striking the language requiring approval by the Companies before an Attachment Customer allows a third party to overlash the Attachment Customer's existing attachments. As revised, Section 4 now treats all overlashing as if it belongs to the Attachment Customer (even where the overlashing is made by a third party). Overlashing is covered comprehensively in Section 11 of the Proposed Rate PSAs. Section 4, as revised, has drawn no objections.

[8] *See* Proposed LG&E Rate PSA, First Revision of Original Sheet No. 40.4, "Company Processes and Procedures"; Proposed KU Rate PSA, First Revision of Original Sheet No.40.4, "Company Processes and Procedures".

E. Section 6 – "Franchises and Easements"

Section 6 of the Proposed Rate PSAs requires Attachment Customers to secure any necessary rights-of-way, easements, licenses, franchises or permits before constructing their attachments on the Companies' poles. Under the current Rate PSAs, Section 6 outlines a process by which Attachment Customers can request, and the Companies can elect to provide, information about the person or entity who owns the rights to the property underlying the Companies' poles. Since the foregoing language was non-binding, the Companies have stricken it from the Proposed Rate PSAs. Nevertheless, the Companies and Attachment Customers can still agree to share this information if they so desire. Section 6, as revised, has drawn no objections.

F. Section 7 – "Attachment Applications and Permits"

Section 7 of the Proposed Rate PSAs establishes a clear and comprehensive permitting process for attachments. While Section 7 is the longest and most heavily revised section in the Proposed Rate PSAs, objections have been raised in response to only three of the eleven subsections (subsections c. (per pole estimate for application review), e. (withdrawal of make-ready estimates) and f. (cost allocation for make-ready pole replacements). *See* Sections IV and V *infra* (addressing KBCA's and AT&T's objections to Section 7). The revisions to Section 7 are primarily designed to conform the Companies' application and permitting processes to the Commission's new regulation. For example, Section 7 has been revised to incorporate the Commission's advance notice requirement for "larger orders"—*i.e.*, requiring an Attachment Customer to provide at least sixty (60) days' advance notice before submitting an application involving more than three hundred (300) poles.[9]

[9] *See* 807 KAR 5:015, Section 4(7)(f).

To comply with the spirit of the Commission's regulation, the Companies also have revised Section 7 to: (1) expressly reserve the Companies' right to require prepayment for application review; and (2) provide a per pole estimate for application review.[10] The Companies also have incorporated the Commission's new timelines for completing application review and make-ready work into Section 7, and the Companies have included these timelines in charts for ease of understanding. Finally, Section 7 has been revised to expressly recognize an Attachment Customer's right to perform self-help surveys, along with providing a roadmap for how and when this new right can be exercised. Except for the three narrow objections identified above and addressed in detail in Sections IV.A., IV.B. and V.B. below, the revised Section 7 has drawn no objections.

G. Section 8 – "One-Touch Make-Ready"

The Proposed Rate PSAs incorporate the Commission's new one-touch make-ready ("OTMR") framework in a new Section 8. Consistent with the OTMR rule, the new Section 8 limits OTMR to new attachments that require only "simple make-ready" and require that the "simple make-ready" be performed by an approved contractor[11]. Finally, Section 8 fills a gap in the Commission's OTMR rule by imposing timelines on the completion of OTMR that are consistent with the Commission's other make-ready timelines. While Section 8 is comprised of six subsections, only subsection e. (imposing a timeline on the completion of one-touch make-ready) has drawn an objection. *See* Section IV.C. *infra* (addressing KBCA's objection to the Rate PSAs' timelines on completion of OTMR).

[10] *See id*. at Section 4(2)(b)6.a.

[11] *See id*. at Section 4(10).

H. Section 11 – "Overlashing of Cable"

Section 11 of the Proposed Rate PSAs, which defines the process and requirements applicable to overlashing, has been substantively revised to conform to the Commission's new overlashing rule.[12] Specifically, the Companies have revised the advance notice requirement to thirty (30) days (the notice period identified in 807 KAR 5:015, Section 3(5)) and removed the exceptions to the advance notice requirement. These revisions not only conform to the Commission's new overlashing rule, but also promote the safety and reliability of the Companies' electric distribution facilities by providing the Companies with sufficient time to review overlash proposals and determine whether any make-ready work is required to safely accommodate the proposed overlash.

Section 11 also clearly outlines the Companies' right to recover the costs they incur in evaluating overlashing proposals, which ensures that the overlashing party (the cost causer)—and not the Companies' electric ratepayers—bears such costs. In addition, Section 11 has been revised to incorporate the timelines embedded in the new overlashing rule, including the timeline within which Attachment Customers are required to provide notice of completed overlashes to the Companies. *See* Proposed Rate PSAs, Section 11.c. (requiring a notice of completion to be provided to the Companies within 15 days of completion of an overlash).

Finally, Section 11 fills a gap in the new overlashing rule by clarifying that, if make-ready is required to safely accommodate a proposed overlash, the make-ready shall be completed in accordance with the standard make-ready process. *See* Proposed Rate PSAs, Section 11.c. The objections to Section 11 are limited to the make-ready provision and the provision setting forth the Companies' right to recover the costs they incur in evaluating a proposed overlash. *See* Sections

[12] *See id.* at Section 3(5).

IV.E, V.D. *infra* (addressing KBCA's and AT&T's objections to Section 11 of the Proposed Rate PSAs).

I. Section 12 – "Maintenance of Attachments and Structures"

Section 12 of the Proposed Rate PSAs outlines an Attachment Customer's obligation to maintain its attachments in good repair and in a manner that does not interfere with, or cause damage to, other entities' equipment and property. Though it generally tracks the language of the current Rate PSAs, the Companies have revised Section 12 as required by the new regulation. Specifically, the Companies struck the second sentence of Section 12, which set forth a broad non-interference requirement, because it could be construed as limiting an Attachment Customer's right to perform self-help and OTMR. The Companies also expanded the limitation of liability provision in the final sentence of Section 12 to protect the Companies and their ratepayers from liability arising from the new self-help remedy and OTMR framework. Section 12, as revised, has drawn no objections.

J. Section 13 – "Electronic Notification Systems"

Section 13.a. of the Proposed Rate PSAs closely tracks Section 13 of the current Rate PSAs and requires Attachment Customers to utilize the National Joint Utilities Notification System ("NJUNS"), which is a web-based system that facilitates joint use communications and notifications. To facilitate the Commission's new transfer rule,[13] Section 13.a. includes a new provision that makes clear that all transfer-related notices must flow through NJUNS. The Companies also added a new Section 13.b. that requires all Attachment Customers to utilize the Companies' electronic pole attachment application and notification system, Katapult. The purpose of these revisions to Section 13 is to further standardize the application and notification process,

[13] *See id.* at Section 6(3).

thereby reducing the burden and costs the Companies incur from administering third-party attachments on their poles. Section 13, as revised, has drawn no objections.

K. Section 14 – "Inspections/Audits"

Section 14 of the Proposed Rate PSAs outlines the Companies' right to periodically inspect (subsection a.) and audit (subsection b.) pole attachments on their poles. These provisions remain unchanged from the Companies' current Rate PSAs and have drawn no objections. Section 14 of the Proposed Rate PSAs only differs from the current Rate PSAs in that it includes a new subsection c.:

> In accordance with 807 KAR 5:006, Company inspects all Distribution Poles on a circuit-by-circuit basis every two (2) years for deterioration and damage. Company identifies, by pole number, any deficient Distribution Pole and the corrective action taken (or prescribed) with respect to such Distribution Pole in a PSC Regulatory Inspection Form. If a dispute arises with Attachment Customer regarding the condition of a Distribution Pole, the following shall be sufficient to overcome the negative presumption in Section 7(7)(b) of 807 KAR 5:015: (1) records indicating that the Distribution Pole in dispute was inspected as part of a circuit inspection, and (2) the absence of a PSC Regulatory Inspection Form showing that the Distribution Pole in dispute is deficient and in need of replacement.[14]

The purpose of subsection c. is to avoid potential disputes involving the interpretation of Section 7(7)(b)2 of the Commission's new pole attachment regulation, which states:

> The commission may presume that a pole replaced to accommodate a new attachment was red tagged if:
>
> > There is a dispute regarding the condition of the pole at the time it was replaced; and
> >
> > **The utility failed to document and maintain records that inspections were conducted pursuant to 807 KAR 5:006 and that no deficiencies were found on the pole or poles at issue, or if inspections of poles are not required pursuant to 807 KAR 5:006, the utility failed to periodically inspect and document the condition of its poles**.[15]

[14] Proposed LG&E Rate PSA, Section 14.c.; Proposed KU Rate PSA, Section 14.c.

[15] 807 KAR 5:015, Section 7(7)(b)2 (emphasis added).

As noted in the underlying proceedings, the Companies are concerned that Attachment Customers will argue that Rule 7(7)(b)2 requires the Companies to produce a clean "bill of health" for a disputed pole in order to successfully rebut the presumption that the pole is a "red tagged pole."[16] The Companies do not collect or maintain, nor are they required to collect and maintain under 807 KAR 5:006, such granular documentation. The Companies believe that new Section 14.c. will decrease the instances of disputes regarding the condition of the Companies' poles. New Section 14.c. has drawn no objections.

L. Section 16 – "Rearrangement; Relocation of Structures; New Structures"

Section 16 of the Proposed Rate PSAs addresses, *inter alia*, the process and cost recovery for rearrangements and transfers of facilities on the Companies' poles. All of the substantive revisions to Section 16 were made to conform the Proposed Rate PSAs to the Commission's new pole attachment regulation. For example, to comply with Section 6(1) of the new pole attachment regulation, the Companies extended the notice requirement in Section 16.b. (*i.e.*, pertaining to the replacement, relocation or removal of poles on which Attachment Customers have installed attachments) from forty-five (45) days to sixty (60) days.[17] Similarly, the Companies revised Section 16.d. to incorporate the timelines established in Section 4(4) of the new regulation for existing attachers to complete make-ready in the communications space.[18] Finally, the Companies added a new subsection e. (*i.e.*, requiring an Attachment Customer to transfer its facilities within

[16] *See* Companies' Comments on the Revised Proposed Pole Attachment Rules ("Companies' July 30, 2021 Comments") at 12 (filed Jul. 30, 2021).

[17] *See* 807 KAR 5:015, Section 6(1) (requiring at least "60 days written notice prior to…[a]ny modification of facilities by the utility other than make-ready noticed pursuant to Section 4 of this administrative regulation, routine maintenance, or modifications in response to emergencies").

[18] *See id.* at Section 4(4)(a).

60 days of receiving notice from the Companies) that gives effect to the Commission's new transfer rule.[19] Section 16, as revised, has drawn no objections.

M. Section 19 – "Unauthorized Attachments"

Section 19 of the Proposed Rate PSAs defines an "unauthorized attachment" and establishes penalties to dissuade the installation of unauthorized attachments on the Companies' poles. The Companies have made two substantive revisions to Section 19. First, the penalty provision in Section 19 has been revised to impose heightened penalties on more dangerous types of unauthorized attachments. For example, Section 19 now imposes a $500/attachment penalty on unauthorized attachments installed on transmission poles or above the communications space on distribution poles. These types of unauthorized attachments are more severe because they expose the communications worker to a heightened risk of injury and death. Section 19 has also been revised to impose a $50/attachment penalty on unauthorized attachments made within the communications space as part of a "larger order." While this type of unauthorized attachment does not necessarily pose the same level of risk as unauthorized attachments above the communications space or on transmission poles, it nonetheless merits a heightened penalty because there is a greater temptation on the part of attaching entities to cut corners and skirt the Companies' permitting process during large deployments.[20] In addition, to comply with the Commission's new regulation, the Companies also extended the timeline within which Attachment Customers are required to

[19] *See id.* at Section 6(3).

[20] *See* Companies' Response to Commission Staff's First Request for Information, Item 13.b. (filed May 5, 2022) ("Because large buildouts are much more labor and time intensive than normal-sized attachment requests, there is a greater temptation on the part of attaching entities to cut corners and to violate the Companies' pole attachment process. This temptation is compounded by the fact that it is much more difficult for the Companies to timely detect unauthorized attachments made during large buildouts.").

submit applications for their unauthorized attachments to sixty (60) days.[21] Section 19, as revised, has drawn no objections.

III. BURDEN OF PROOF

KRS 278.030(2) permits a utility to "establish reasonable rules governing the conduct of its business and the conditions under which it shall be required to render service." The burden of demonstrating the reasonableness of a proposed rule or condition of service is upon the utility.[22] As to any provision in the Companies' Proposed Rate PSAs that are not found in their current Rate PSAs filed with the Commission, therefore, the Companies bear the burden to demonstrate by substantial evidence that those provisions are fair, just and reasonable. As to those provisions in the Companies' Proposed Rate PSAs that are set forth in their current Rate PSAs, however, those provisions are presumed to be reasonable. The party challenging those provisions bears the burden of demonstrating that they are unreasonable or unlawful.[23] Accordingly, here, KBCA and AT&T bear the burden when challenging a provision in the Proposed Rate PSAs that is already present in the existing, Commission-approved Rate PSAs.

IV. RESPONSES TO KBCA'S OBJECTIONS

As outlined above, KBCA initially raised objections to seven provisions within the Companies' Proposed Rate PSAs. However, KBCA did not pursue discovery or offer any

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[21] *See* Proposed LG&E Rate PSA, Section 19 (providing that if an Attachment Customer fails to submit an application for its unauthorized attachments within 60 days, the Companies have the right to remove the unauthorized attachments); *accord* Proposed KU Rate PSA, Section 19.

[22] *See Hardin County Water District No. 1*, Case No. 2007-00461 (Ky. PSC Aug. 14, 2008) at 3; *Kentucky-American Water Co.*, Case No. 2001-173 (Ky. PSC Sep. 28, 2001); *see also* KRS 278.190(3) (stating that the burden of proof to show that a proposed change of a rate is just and reasonable is upon the utility).

[23] *See East Clark Water District v. City of Winchester, Kentucky*, Case No. 2005-00322 (Ky. PSC Apr. 3, 2006) at 1; *see also Kentucky-American Water Co.*, Case No. 2005-00206 (Ky. PSC July 22, 2005) at 5 (finding that a "public utility's filed rates are presumed to be reasonable as a matter of law").

testimony to explain or support its objection to the timeline on completing OTMR. Furthermore, KBCA did not offer any testimony to explain or support its objections regarding: (1) the $75 per pole estimate for application review; (2) the penalty for failing to correct non-compliant attachments within a timely manner; or (3) the overlashing provision. For these objections, KBCA appears to be relying solely on the cursory arguments made in its initial objection filing.[24] For the reasons set forth below, none of KBCA's objections have any merit.

A. The Prepayment Amount for Application Review in Section 7.c. of the Proposed Rate PSAs is Fair, Just and Reasonable.

The Commission's new pole attachment regulation requires pole owners, as a precondition to requiring prepayment, to publish a per pole estimate of make-ready survey costs within their tariffs. To ensure that the Proposed Rate PSAs comply with the spirit of the regulation, the Companies have revised Section 7.c. to provide:

> 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 provided in the chart below: [25]

Scope of Work	Per Pole Estimate
Application Review – Wireline Attachments	$75.00
Application Review – Wireless Attachments	$200.00

As a preliminary matter, the black letter of the regulation applies only to prepayment requirements for make-ready surveys.[26] The Companies nonetheless included the per pole estimates for application review ("application review fees") to promote transparency and to preserve their right to require prepayment under the regulation. The application review fees are fair, just and reasonable because they are based on the actual costs the Companies incur for this

[24] *See* Objections of the Kentucky Broadband and Cable Association to Newly Filed Kentucky Tariffs ("KBCA's Objections") at 21-23 (filed Mar. 27, 2022).

[25] Proposed LG&E Rate PSA, Section 7.c.; Proposed KU Rate PSA, Section 7.c.

[26] *See* 807 KAR 5:015, Section 4(2)(b)6.b.

type of work. For example, in response to the Commission's second request for information, the Companies explained:

> The costs identified in the Companies' Response to Commission Staff's first Request for Information, Item 11, represent the amount the Companies paid to contract resources to review pole attachment applications that were submitted between 2018 to 2021. The figures assume that applications were submitted in the standard format required by the Companies prior to the existence of the new regulation. The Companies' review of a pole attachment application consists of the items listed below. The costs identified in the Companies Response capture the Companies' actual costs, in the aggregate, to perform these items. The Companies are not in possession of more detailed, unaggregated information regarding the cost of each of these items.
>
> - Initial review of the application for completeness and accuracy.
> - Field visit to the affected poles.
> - Review of proposed new attachment relevant to existing facilities and pole loading.
> - Evaluation of proposed make-ready solutions.
> - Creation of work order for Company construction (i.e., power space make-ready).
> - Communication with new attacher.
> - Post-construction inspection.[27]

Moreover, although the application review fees are new additions to the Companies Rate PSAs, the application review fees are actually a well-established component of the Companies' pole attachment practices. As the Companies explained in response to KBCA's initial objections, the "$75/pole application review fee has been in place for more than a year and no KBCA member has objected until now."[28]

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[27] Companies' Response to Commission Staff's Second Request for Information, Item 1 (filed Jun. 2, 2022); *see also* Companies' Response to Commission Staff's First Request for Information, Item 11 (providing the actual, per pole cost for reviewing applications for wireline attachments based on data from 2018-2021); *id*. (explaining that the application review fee for wireless attachments "significantly understates the actual cost the Companies incur in performing make-ready surveys for wireless attachments" because it "predates the proliferation of small cellular and 5G wireless attachments").

[28] Combined Response to the Objections of AT&T and KBCA to the Proposed Rate PSAs ("Companies' Response to Objections") at 4 (filed Apr. 14, 2022); *see also id*. at 4 n.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.").

KBCA has objected to the $75/pole application review fee for wireline attachments (but not the $200/pole application review fee for wireless attachments) on the grounds that it would be unreasonable "if [it] does not pay for the survey."[29] KBCA subsequently reaffirmed its objection to the application review fee, even though KBCA has yet to articulate a single, substantive ground for its objection. In lieu of providing a foundation for its objection, KBCA—in response to the Companies' request for information—rattled off a handful of questions about the application review fee: "It is unclear what this fee covers, why it costs LGE-KU $75 to review a single application, whether this fee truly is cost-based, and on what basis LGE-KU requires pre-payment of the fee."[30] Though KBCA claims to be confused about what the application review fee covers, KBCA did not inquire about the application review fee in either set of its requests for information to the Companies.

Nevertheless, the record evidence in this proceeding answer all of KBCA's questions. As noted above, the record evidence demonstrates that the application review fee for wireline attachments is tied directly to the costs charged by the Companies' third-party contractors for application review. Thus, the record evidence demonstrates that the application review fee for wireline attachments is fair, just and reasonable, and that KBCA's cursory objection is entirely unfounded.

B. The Make-Ready Pole Replacement Cost Recovery Provision in Section 7.f. of the Proposed Rate PSAs is Fair, Just and Reasonable and Complies with the Commission's Regulation.

Section 7.f of the Proposed Rate PSAs, which is identical to the Companies' current Rate PSAs (and dates back to the Companies' 2015 Rate CTACs), provides:

[29] KBCA's Objections at 21, 23.

[30] KBCA's Responses to the Companies' First Request for Information, Item 2.a. (filed Jul. 7, 2022).

> If an existing Structure is replaced or new Structure is erected solely to provide adequate capacity for Attachment Customer's proposed Attachments, Attachment Customer shall pay a sum equal to the actual material and labor cost of the new Structure, as well as any replaced appurtenances, plus the cost of removal of the existing Structure minus its salvage value, within thirty (30) days of receipt of an invoice.[31]

Because this provision is part of the Companies' current Rate PSAs, it is presumptively fair, just and reasonable. KBCA thus bears the burden of demonstrating otherwise. KBCA has failed to carry this burden.

KBCA originally objected to Section 7.f. on grounds that it "conflicts with the Commission's red-tagged pole framework" and to the extent that it required KBCA members "to pay an unreasonable amount for a pole replacement."[32] KBCA appears to have moved-on from its red-herring "conflicts with the Commission's re-tagged pole framework" argument and now doubles-down on an issue that has already been thoroughly briefed, argued, considered and rejected in the underlying rulemaking proceeding—whether pole owners should bear the lion's share of make-ready pole replacement costs. KBCA attempts to support its objection with testimony from Patricia D. Kravtin. Ms. Kravtin alleges, *inter alia*, that: (1) pole owners should share in the cost of make-ready pole replacements—even for non-red-tagged poles—because pole owners are the "primary" and "direct" beneficiaries of such replacements; and (2) electric utilities are shifting pole replacement costs to Attachment Customers by "strategically under-identifying" red-tagged poles.

As a preliminary matter, the cost recovery provision for make-ready pole replacements has been a part of the Companies' pole attachment tariffs since 2015 and has been approved by the

[31] Proposed LG&E Rate PSA, Section 7.f.; KU Proposed Rate PSA, Section 7.f.; *see also* Current LG&E Rate PSA, Section 7.e.; Current KU Rate PSA, Section 7.e.

[32] KBCA's Objections at 21, 22.

Commission in at least four rate cases.[33] Furthermore, the Commission once again reaffirmed the Companies' right to recover the entire cost of a make-ready pole replacement from Attachment Customers when the Commission adopted its new regulation. The Commission did so by rejecting KBCA's proposed make-ready pole replacement cost allocation proposal—*i.e.*, the very same proposal that is being advanced by Ms. Kravtin in her direct testimony—and explaining:

> The amendment proposed by KBCA could result in electric rates that are not fair, just and reasonable. When reviewing utility rates and charges to determine if they are fair, just and reasonable and otherwise comply with statutory requirements imposed by KRS Chapter 278, the Commission generally attempts to ensure that costs are assigned to the party responsible for causing the utility to incur the cost. If a utility must replace a pole that does not need to be replaced with a larger pole or a pole of a different type to accommodate a new attachment, then the cost to replace that pole is caused by the new attacher.[34]

The premises cited by Ms. Kravtin as supporting KBCA's cost allocation proposal are also fundamentally flawed. For example, Ms. Kravtin claims that pole owners are the "primary" and "direct" beneficiaries of make-ready pole replacements.[35] However, the record in this proceeding is replete with evidence to the contrary. The Companies have explained that, unless a make-ready pole replacement coincides with their infrastructure improvement plan, the make-ready pole replacement will provide **no** benefit to the Companies. Specifically, Michael E. Hornung, Manager, Pricing & Tariffs for the Companies, testified:

> [U]nless a make-ready pole replacement coincides with the Companies' internal infrastructure improvement plan, the make-ready pole replacement will virtually never benefit the Companies or their electric ratepayers. There is no way for the Companies to know at the time of a make-ready pole replacement what type of pole their core electric service needs would require at the time the existing pole would

[33] *See* 2015 LG&E Rate CTAC, Section 5; 2015 KU Rate CTAC, Section 5; 2017 LG&E Rate PSA, Section 7.e.; 2017 KU Rate PSA, Section 7.e.; 2019 LG&E Rate PSA, Section 7.e.; 2019 KU Rate PSA, Section 7.e.; Current LG&E Rate PSA, Section 7.e.; Current KU Rate PSA, Section 7.e.

[34] Statement of Consideration Relating to 807 KAR 5:015 ("Statement of Consideration") at 47 (filed Sep. 15, 2021).

[35] *See* Direct Testimony of Patricia D. Kravtin on Behalf of KBCA at 8 (filed Jun. 9, 2022).

> have otherwise been replaced in the normal course. Due to this inability to forecast future service needs, the Companies—when performing make-ready pole replacements—only install poles that are incrementally tall and/or strong enough to accommodate the additional attachment. As a result, if five (5) years down the road the Companies' core electric service needs would require an even taller or stronger pole than what was previously installed pursuant to an Attachment Customer's make-ready pole replacement request, then the previously installed make-ready replacement pole would be of no use or benefit to the Companies. Yet, under Ms. Kravtin's cost allocation proposal, the Companies would: (1) lose the value and utility of the remaining useful life of the existing pole; (2) be forced to incur the vast majority of the cost for the make-ready replacement pole; and (3) also bear the entire cost of replacing the make-ready replacement pole with one that actually supports the Companies' core electric service needs. Even under the best of circumstances, this would require current electric ratepayers to fund infrastructure that is not currently needed (and will not be needed in the near future) to provide electric service.[36]

Kentucky Power Company and Duke Energy Kentucky also submitted expert testimony demonstrating—through quantitative analysis—that, even assuming make-ready pole replacement benefits electric utility pole owners (a flawed assumption), electric utilities would still incur **significant net losses** if they were required to allocate make-ready pole replacement costs as proposed by KBCA.[37]

Ms. Kravtin also claims in her testimony that electric utilities "strategically under-identify" red-tagged poles so that they can pass the cost of replacing red-tagged poles onto

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[36] Rebuttal Testimony of Michael E. Hornung on Behalf of the Companies at 5-6 (filed Jul. 11, 2022); *see also* Companies' Response to KBCA's Initial Request for Information, Item 4 (filed May 5, 2022); Companies' Response to Commission Staff's First Request for Information, Item 8 (filed May 5, 2022); Companies' Reply Comments on KPSC Proposed Pole Attachment Rules ("Companies' Reply Comments") at 14-20 (filed Oct. 19, 2020).

[37] *See* Rebuttal Testimony of Christopher F. Tierney on Behalf of Kentucky Power Company and Duke Energy Kentucky, Inc. at 8-9 (filed Jul. 11, 2022) ("[A]ny reliance on the remaining book value of poles to compensate a utility for premature pole replacements [i.e., KBCA's cost allocation proposal] would be deeply flawed and grossly undercompensate utilities. As a further illustration, under Ms. Kravtin's proposed approach, wherein utilities would pay for the total cost of a pole replacement, adjusted only for the remaining net book value of the existing pole, the utilities would be incurring significant losses with each make-ready pole replacement.").

attaching entities (i.e., through make-ready pole replacements).[38] Ms. Kravtin's contention is based on a comparison of "expected normal life-cycle pole replacement rates based on the utility's own depreciation parameters with the utility's reported red-tag rate."[39] As explained by the Companies in the testimony of Mr. Hornung, Ms. Kravtin's methodology is predicated on myopic and flawed datapoints:

> The Companies do not under-report red-tagged poles. In fact, Ms. Kravtin, in her response to the Commissions' request for information, acknowledged that there is no direct evidence of this. Instead, she doubled-down on the idea that expected life-cycle pole replacement rates and red-tag rates tell the whole story. This is incorrect for at least two reasons. First, for purposes of determining the "expected life-cycle pole replacement rates," Ms. Kravtin uses the asset life (or average service life) underlying the depreciation rates approved by the Commission. These service life figures, though, may be outdated or may be the result of a settlement. In any event, the life of a pole for depreciation purposes does not equate to the actual useful life of an individual pole—or even the average actual useful life of poles. Second, the "red-tag rate," which Ms. Kravtin derives by dividing the number of red-tagged poles each year with the total number of poles, is the wrong comparative value because it only captures poles identified for reinforcement or replacement through cyclical inspections. A more representative value would be the total number of poles actually replaced each year.[40]

The Companies further explained that Ms. Kravtin should have used the "total number of pole replacements each year" to calculate the "red-tag rate" because it is a more representative figure that "accounts for all pole replacements, including pole replacements for electric service, reliability, storms and other reasons—**which have the effect of avoiding a red-tag designation as a result of an inspection.**"[41] By utilizing this input for the "red-tag rate," the Companies demonstrated that their replacement rate actually exceeds the "expected life-cycle pole replacement rate" cited by Ms. Kravtin. Mr. Hornung testified:

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[38] *See* Direct Testimony of Patricia D. Kravtin at 29-32.

[39] *Id*. at 30.

[40] Rebuttal Testimony of Michael E. Hornung at 9-10.

[41] *Id*. at 10 (emphasis added).

> KU, based on historical data, anticipates red-tagging 1,738 distribution poles per year. This would equate to a red-tag rate of 1.3%. However, between 2019-2021, KU replaced 5,564 poles per year on average, which would equate to a replacement rate of 4.0%. In other words, KU is actually replacing 4.0% of its pole inventory each year, which doubles Ms. Kravtin's "expected life-cycle pole replacement rate." These replacements for reasons other than deterioration have the effect of reducing the number of red-tagged poles identified through cyclical inspections.[42]

The bottom line is there is no evidence that the Companies are strategically under-identifying red-tagged poles, and Ms. Kravtin's claim to the contrary—though packaged as empirical analysis—is just false innuendo.

Even if Ms. Kravtin's testimony has persuaded the Commission to reconsider KBCA's previously-rejected make-ready pole replacement cost allocation proposal, it would be inappropriate to do so here. The record evidence is clear: KBCA's proposal would shift the vast majority of make-ready pole replacement costs to electric utilities and their rate payers.[43] In fact, Christopher F. Tierney, the third-party expert who submitted testimony on behalf of Kentucky Power Company and Duke Energy Company, determined that KBCA's proposal could result in electric utilities bearing more than 95% of the cost of make-ready pole replacements:[44]

	[A]	[B]	[C = B / A]	[D = A - B]	[E = D / A]
Utility	Average Current Pole Replacement Cost (2022 $)	Average Net Bare Pole Cost (2022 $)	Remaining Book Value As A % Of Pole Replacment Costs	Average Current Pole Replacement Cost Net Of Remaining Book Value (2022 $)	Percent of Make-Ready Pole Replacement To Be Paid By Utility Under Kravtin Proposal
Duke Energy Kentucky	$ 11,394	$ 557	4.9%	$ 10,837	95.1%
Kentucky Power	9,159	490	5.3%	8,669	94.7%

[42] *Id.*

[43] *See* Companies' Reply Comments at 14-20; Companies' July 30, 2021 Comments at 11.

[44] Rebuttal Testimony of Christopher F. Tierney at 8 (Table 2).

Because KBCA's cost allocation proposal would shift significant costs to electric utilities and their ratepayers, the proposal should be reconsidered, if at all, during the Companies' rate cases.[45] This proceeding is necessarily narrow in scope (*i.e.*, limited to whether the terms and conditions of the Proposed Rate PSAs are fair, just and reasonable to the Companies' Attachment Customers) and does not sufficiently take into account the impact KBCA's proposal would have on the Companies' electric rate payers.[46]

C. The Timeline for Completing OTMR in Section 8.e. of the Proposed Rate PSAs, which Mirrors the Timeline in the Commission's Regulation for Completing Standard Make-Ready, Is Fair, Just and Reasonable.

Section 8.e. of the Proposed Rate PSAs provides:

> 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.[47]

The purpose of this provision is to fill a gap in the Commission's regulation, which does not specify the period of time within which OTMR must be completed. The Companies therefore incorporated the nearest proxy with the Commission's regulation—the timelines for completion of "regular" make-ready within the communications space.

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[45] *See* Rebuttal Testimony of Michael E. Hornung at 8 ("Because Ms. Kravtin's cost allocation proposal would effectively shift make-ready pole replacement costs from Attachment Customers to the Companies' electric customers, the cost allocation proposal should be considered, if at all, during the Companies' rate cases[.]").

[46] The absence of certain entities in this proceeding underscores this point. During the Companies' last rate case, numerous entities intervened on behalf of the Companies' electric ratepayers, including, *inter alia*, the Office of the Attorney General, the Kentucky Industrial Utility Consumers, Kroger Co., Walmart Inc., Metropolitan Housing Coalition, and the Department of Defense. These entities are highly sensitive to rate increases—which would result from any kind of reallocation of make-ready pole replacement costs—yet none of them are participating in this proceeding.

[47] Proposed LG&E Rate PSA, Section 8.e.; Proposed KU Rate PSA, Section 8.e.

KBCA objects to the proposed timelines for completing OTMR, alleging that they "are unreasonable." KBCA's Objections at 22, 23. KBCA advocates for the much longer timelines applicable to power space make-ready to be applied to OTMR. *See id.* KBCA did not seek any discovery relating to the proposed OTMR timelines or provide any testimony in support of its objection. As a consequence, there is nothing in the record supporting KBCA's claim that the proposed OTMR timelines are unreasonable.

By all accounts, KBCA appears to have abandoned its objection, and for good reason. The Companies' Proposed Rate PSAs adopted the standard make-ready timelines for communications space make-ready—timelines that apply to both simple *and complex* make-ready.[48] There is simply no sound policy justification for applying longer timelines to the completion of OTMR, which is (1) limited to *simple* communications space make-ready and (2) intended to be a more expedient form of make-ready than the standard process.[49]

D. The Penalty for Failing to Timely Correct Non-Compliant Attachment Installations in Section 9.j. of the Proposed Rate PSAs Is Fair, Just and Reasonable.

Section 9.j. of the Proposed 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

[48] *See* 807 KAR 5:015, Section 4(4)(a) (requiring existing attachers to complete make-ready in the communications space within thirty (30) days of receiving notice from the pole owner).

[49] *See* Companies' Response to Objections at 7 ("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 application within thirty (30) days, even though existing attachers are required to complete *complex* make-ready within the same timeframe. But KBCA's objection is not just disjointed; it also undermines a key rationale for OTMR—*i.e.*, expediting the deployment process.").

> adjustments, and Attachment Customer shall pay Company for the actual cost thereof plus a penalty of 25% of actual cost within thirty (30) days of receipt of an invoice.[50]

As a preliminary matter, the Companies are not proposing a new penalty; instead, the Companies are seeking to incrementally increase the existing penalty, which was adopted pursuant to a settlement agreement and designed to encourage "responsible maintenance practices" and "prompt[] repair [of] non-compliant attachments," from 10% to 25%.[51] The Companies explained that the incremental increase in the penalty is justified because "the Companies continue to experience significant delays in the correction of non-compliant attachments":

> Despite incorporating a 10% penalty into their Rate PSAs in May 2019, the Companies continue to experience significant delays in the correction of non-compliant attachments. *See* Companies' Response to KBCA's Objections at 9 ("[S]ince 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 invoice) for the attachers to correct their deficient attachment installations."). This indicates that the existing 10% penalty is not serving as an effective incentive for Attachment Customers to timely correct violations. The primary purpose of the increase in the penalty from 10% to 25% is to provide an even greater incentive for Attachment Customers to timely correct non-compliant attachment installations.[52]

Moreover, the penalty provision only applies in limited circumstances—*i.e.*, where (1) an Attachment Customer makes a non-compliant attachment installation; (2) the Attachment Customer is notified of the non-compliant installation; and (3) the Attachment Customer thereafter fails to correct the installation in a timely manner.

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[50] Proposed LG&E Rate PSA, Section 9.j.; Proposed KU Rate PSA, Section 9.j.

[51] *See* Companies' Response to KBCA's First Request for Information, Item 7 (noting that the existing penalty for failing to correct non-compliant attachment installations was "adopted pursuant to a settlement agreement…to which Charter Communications Operating LLC (*i.e.*, KBCA's largest member) stipulated as being 'fair, just, and reasonable'," and that the penalty was designed to encourage "responsible maintenance practices and to promptly repair non-compliant attachments") (internal citations omitted).

[52] *Id*.

KBCA initially objected on grounds that penalties are not permissible outside the context of "unauthorized attachments,"[53] but KBCA has not provided any testimony in support of its objection. KBCA's objection—that any penalty is unreasonable—has no legal basis. That is, the Companies' current Rate PSAs, which were previously approved by the Commission, already impose a penalty on Attachment Customers that fail to correct non-compliant attachment installations. The only issue now is the *amount*. The record evidence identified above also demonstrates that an incremental increase in the existing penalty is not only fair, just and reasonable, but that it is also necessary to protect the safety and reliability of the Companies' electric distribution facilities. KBCA presented no evidence to the contrary.

E. The Overlashing Provision in Section 11.a. of the Proposed Rate PSAs, to Which KBCA Has Seemingly Abandoned Its Objection, Is Fair, Just and Reasonable.

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.[54]

KBCA initially raised three objections to the foregoing overlashing provision. First, KBCA objected to the application of the "mainline make ready timeline on…proposed overlashing that requires make ready."[55] Second, KBCA objected to Section 11.a. "to the extent any make ready

[53] KBCA's Objections at 22, 23 ("KBCA objects to any provision imposing penalties other than an unauthorized attachment fee charge on it following inspections.").

[54] Proposed LG&E Rate PSA, Section 11.a.; Proposed KU Rate PSA, Section 11.a.

[55] KBCA's Objections at 21-22, 23.

would be required to correct a preexisting violation of another attacher."[56] Third, KBCA objected to the requirement that "Attachment Customer shall reimburse Company for any costs incurred in evaluating the proposed Overlashing."[57] KBCA did not provide any testimony in support of these objections.

Though it is not entirely clear whether or why KBCA still objects to Section 11.a. of the Proposed Rate PSAs, the record nonetheless demonstrates that Section 11.a. is fair, just and reasonable. For example, the Companies explained in their response to KBCA's initial objections that Section 11.a. applies the standard make-ready timelines to make-ready necessitated by a proposed overlash to address a gap in the Commission's regulation.[58] The Companies also explained that KBCA's objection relating to the correction of preexisting violations is undermined by Section 3(5)(b) of the regulation, which states that an overlashing party can be required to correct preexisting violations before performing an overlash "if failing to fix the preexisting violation would create a capacity, safety, reliability, or engineering issue."[59] Finally, the Companies demonstrated how KBCA's objection to the cost recovery provision within Section 11.a. is undermined by the Commission's regulation itself—*i.e.*, while the Commission adopted KBCA's proposed overlashing rule, the Commission explicitly rejected the proposed language that would have prohibited pole owners from charging overlashers a fee.[60]

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[56] *Id*.

[57] *Id*. (quoting Proposed LG&E Rate PSA, Section 11.a.; Proposed KU Rate PSA, Section 11.a.).

[58] *See* Companies' Response to Objections at 11 ("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. [of the Proposed Rate PSAs], which closely tracks the Commission's make-ready rules.").

[59] *See id*. (quoting 807 KAR 5:015, Section 3(5)(b)).

[60] *See id*. at 12; Statement of Consideration at 52 ("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

F. The Indemnity Provision in Section 18 of the Proposed Rate PSAs Is Fair, Just and Reasonable and Conforms to the Commission's Longstanding Cost Causation Principles.

Section 18 of the Proposed Rate PSAs, which is virtually identical to the indemnity provision within the Companies' current Rate PSAs, 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.[61]

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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."); *see also* Rebuttal Testimony of Jason P. Jones on behalf of the Companies at 11 (filed Jul. 11, 2022) (agreeing with the Commission's rationale in rejecting KBCA's proposed prohibition on overlashing fees and stating that "where the Companies incur costs to evaluate a proposed overlash, those are costs that would not be incurred but for the existing attachment and the proposed overlash," and therefore, "[t]hose costs should be borne by the entity that caused the costs").

[61] Proposed LG&E Rate PSA, Section 18; Proposed KU Rate PSA, Section 18.

The only revisions to this section removed superfluous language. As such, KBCA bears the burden of demonstrating that this provision—which is the product of compromise between the Companies and KBCA's predecessor—is unjust or unreasonable. KBCA has not met its burden. KBCA never explained, through testimony or otherwise, why it objects to this provision. Instead, KBCA argues that it objects "to any standard that makes an attacher responsible for the negligence of the pole owner."[62]

KBCA has yet to address any of the Companies' arguments in support of the indemnity provision in their Proposed Rate PSAs. For instance, KBCA has yet to address the fact that Section 18 of the Proposed Rate PSAs is virtually identical to the indemnity provision within the Companies' current Rate PSAs.[63] KBCA also has yet to address the fact that the indemnity provision in the Companies' current Rate PSAs is the product of a settlement agreement with, *inter alia*, Kentucky Cable Telecommunications Association (i.e., KBCA's predecessor).[64] These facts

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[62] KBCA's Objections at 22, 23; *see also* Direct Testimony of Jerry Avery on Behalf of KBCA at 11 (filed Jun. 9, 2022) ("In sum, just as it would be unreasonable for a pole owner to be responsible for any KBCA member negligence, it would be unfair and inappropriate for any KBCA member to be responsible for a pole owner's negligence.").

[63] *See* Current LG&E Rate PSA, Section 18; Current KU Rate PSA, Section 18; *see also* Rebuttal Testimony of Michael E. Hornung at 3 ("[T]he indemnity provision in the proposed tariffs is virtually identical to the indemnity provision in the existing tariffs.").

[64] *See* Rebuttal Testimony of Michael E. Hornung at 3-4. Mr. Hornung's testimony references stipulation testimony from the following proceeding: *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,* Case Nos. 2016-00370 & 2016-00371, Second Stipulation Testimony of Robert M. Conroy at 4-5 (May 4, 2017). The stipulation testimony provides, in relevant part, as follows:

> 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 and willful misconduct. The recommended revision will also permit the Attachment Customer to select the defense counsel and to direct the defense or settlement of any such claim or suit

demonstrate that both the Commission and KBCA (by way of its predecessor) found the indemnity provision to be fair, just, and reasonable at the time it was introduced into the Companies' tariffs.

KBCA also glosses over the important (and dispositive) fact that the indemnity provision does *not* require attachers to indemnify the Companies for liability arising out of the Companies' negligence or misconduct. The indemnity provision states:

> The indemnity provision 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**.[65]

Rather, as noted above, the indemnity provision in the Companies' Proposed Rate PSAs expressly states that an Attachment Customer'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.

Finally, even without the carve-out discussed above, the indemnity provision would still be fair, just, and reasonable because it is limited to claims "arising from Attachment Customer's activities under this Schedule, or the Contract, or from Attachment Customer's presence on Company's premises."[66] In other words, the indemnity requirement "is limited to claims that would not have occurred in the first place but for the Attachment Customer."[67] Against this

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> for which it is required to indemnify the Companies. 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 from the Companies' conduct and by permitting the Attachment Customer greater control over the defense of any claim for which it is financially and legally responsible.

[65] Proposed KU Rate PSA, Section 18; Proposed LG&E Rate PSA, Section 18 (emphasis added).

[66] *Id*.

[67] Rebuttal Testimony of Michael E. Hornung at 2.

backdrop, it is reasonable and congruent with the Commission's cost causation principles for an Attachment Customer to indemnify the Companies for liability arising under the Proposed Rate PSAs—even where the Companies are jointly negligent. "Otherwise, the result is electric ratepayers bearing risk that would not exist but for the Companies' accommodation of third-party attachments."[68]

G. The Contractor Insurance Requirement in Section 23.b. of the Proposed Rate PSAs, which Is Already Part of the Current Rate PSAs, Is Fair, Just, and Reasonable.

Section 23.b. of the Proposed Rate PSAs provides, in pertinent part: "Attachment Customer shall require its Contractors and subcontractors to provide and maintain the same insurance coverage as required of Attachment Customer."[69] This provision is identical to the corresponding provision in the current Rate PSAs. KBCA objected to the contractor insurance requirement on the grounds that "KBCA…is ultimately liable to the pole owner" and that it "has existing contracts with its contractors[] [that] may contain different requirements."[70] KBCA offered testimony in support of its objection, arguing that the contractor insurance requirement is unreasonable because: (1) KBCA member contracts already impose "robust" insurance requirements on third-party contractors;[71] (2) it would be too difficult for KBCA members to change their contracts based on

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[68] *Id*.

[69] Proposed LG&E Rate PSA, Section 23.b.; Proposed KU Rate PSA, Section 23.b.

[70] KBCA's Objections at 22, 23.

[71] The Companies asked KBCA to "describe the insurance requirements that each KBCA or KCTA member has required each such contractor to maintain since 7/1/2018." Companies' First Request for Information to KBCA, Item 3.a. Hiding behind its status as a trade association, KBCA did not provide a substantive response to the Companies' request (or many other requests, for that matter) and, instead, merely stated that "KBCA does not have information within its possession, custody, or control that is responsive to this request." KBCA's Response to the Companies First Set of Requests for Information, Item 3.a. This is a strange position given that the initial objections to the Proposed Rate PSAs, which include the objection to the contractor insurance requirement, were submitted by "the [KBCA] and its members" who were specifically identified as "Access Cable,

a pole owner's insurance requirements; and (3) KBCA members are ultimately responsible for the actions of their contractors.[72]

There are at least two problems with KBCA's objection to the contractor insurance requirement. First, the contractor insurance requirement has been a part of the Companies' Rate PSAs since July 2017.[73] As explained by the Companies' witness Jason P. Jones, Manager, Distribution Systems Compliance and Emergency Preparedness, the contractor insurance requirement in the Proposed Rate PSAs should not require any KBCA members to revise their contracts with third-party contractors:

> The contractor insurance requirements in the Companies' proposed tariffs should not require any KBCA member to change any of their contractor agreements. The Companies' existing tariffs already require Attachment Customers to meet the exact same requirements as those Mr. Avery objects to now. So, unless a KBCA member has been in violation of the existing tariffs, the KBCA members should not have to make any change to their current practice in this regard.[74]

Second, KBCA's arguments miss the point of the contractor insurance requirement. While KBCA is correct that Attachment Customers are ultimately liable to the pole owner for the actions of their contractors, KBCA glosses over the specific risk the contractor insurance requirement is meant to mitigate—gaps in an Attachment Customer's insurance coverage for injury or damage caused by a third-party:

Armstrong, C&W Cable, Charter Communications, comcast, Inter Mountain Cable, Lycom Communications, Mediacom, Suddenlink, and TVS Cable." KBCA's Objections at 1 n.1. KBCA's response begs the following question: if KBCA has no information regarding the insurance its members require their third-party contractors to maintain, how could KBCA attest to its members imposing "robust" insurance requirements on their third-party contractors?

[72] *See* Direct Testimony of Jerry Avery at 9-10.

[73] *See* Companies' Response to Objections at 14-15; Companies' Response to KBCA's Initial Request for Information, Item 6; Rebuttal Testimony of Jason P. Jones at 2-3; Current LG&E Rate PSA, Section 23.b.; Current KU Rate PSA, Section 23.b; 2019 LG&E Rate PSA, Section 23.b.; 2019 KU Rate PSA, Section 23.b.; 2017 LG&E Rate PSA, Section 23.b.; 2017 KU Rate PSA, Section 23.b.

[74] Rebuttal Testimony of Jason P. Jones at 2-3.

> The purpose of [the contractor insurance requirement] is to mitigate against any potential gaps in insurance coverage based upon who is actually performing the Attachment Customer's work (*i.e.*, an Attachment Customer's employees versus a third-party contractor). For example, if an Attachment Customer utilizes a contractor to perform make-ready on the Companies' poles, and the third-party contractor either willfully or recklessly causes damage to the Companies' facilities, the Attachment Customer could potentially disclaim liability for the contractor's willful or reckless misconduct. In that case, the Companies might be forced to recover directly from the contractor. If the contractor is underinsured, the Companies might be left holding the bag.[75]

Put another way, "though it is true that KBCA members are ultimately responsible for the actions of their contractors, it is unclear whether or to what extent those actions are covered by KBCA members' insurance policies."[76] The contractor insurance requirement "is designed to ensure there is no gap in the insurance coverages that would shift risk to the Companies and their electric customers arising out of attachments made by Attachment Customers."[77]

V. RESPONSES TO AT&T'S OBJECTIONS

A. The Companies' Longstanding Definition of "Attachment" Is Fair, Just, and Reasonable and Has Never Resulted in a Billing Dispute.

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.[78]

[75] Companies' Response to KBCA's Initial Request for Information, Item 6.

[76] Rebuttal Testimony of Jason P. Jones at 2-3

[77] *Id*.

[78] Proposed LG&E Rate PSA, First Revision of Original Sheet No. 40, "Definitions"; Proposed KU Rate PSA, First Revision of Original Sheet No. 40, "Definitions".

This definition is identical to the definition of "Attachment" in the current Rate PSAs. AT&T objects to the definition, stating that "by rule, overlashing is not defined as an attachment."[79] AT&T subsequently provided much needed context for its objection in its direct testimony, wherein AT&T clarified that it only objects to the Companies' definition of "attachment" insofar as it relates to *billing*.[80] In other words, AT&T is arguing that because the Companies' Proposed Rate PSAs calculate rental on a per "wireline pole attachment" basis, the Companies' definition of "attachment" could lead to "exorbitant overcharges."[81] Thus, AT&T argues that the Companies' Proposed Rate PSAs should be revised to charge rental on an "occupied usable space basis."[82]

There are at least two problems with AT&T's objection. First, AT&T ignores the fact that the definition of "attachment" in the Proposed Rate PSAs has been a part of the Companies' pole attachment tariffs since at least 2017.[83] Furthermore, AT&T failed to point to a single billing issue arising out of the Companies' definition of "attachment." There is good reason for this—there haven't been any. Mr. Jones testified:

> I am not aware that the billing issue Mr. Rhinehart seems to be raising has ever been an issue with AT&T or any other attaching entity. Further, Mr. Rhinehart does not contend that the Companies have leveraged the definition in any improper

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[79] Comments of AT&T Kentucky in Response to March 2, 2022 Commission Order ("AT&T's Objections") at 19-20, 21 (filed Mar. 17, 2022).

[80] *See* Direct Testimony of Daniel Rhinehart on Behalf of AT&T at 7 (Jun. 9, 2022) ("These definitions frequently include a list of things considered to be attachments, which is practical in the sense that engineering and construction standards are applied to all attachments. However, a distinction should be made as to whether certain attachments, when made in conjunction with another attachment, are chargeable.").

[81] *See id.* at 8.

[82] *Id.*

[83] *See* 2017 LG&E Rate PSA, Original Sheet No. 40, "Definitions"; 2017 KU Rate PSA, Original Sheet No. 40, "Definitions"; *see also* Rebuttal Testimony of Jason P. Jones at 6 ("The definition of 'Attachment' in the Companies' proposed tariff is identical to the definition in the existing tariff.").

> way—e.g., billing AT&T for a riser. This is because the Companies already make the distinction between "Attachments" for billing purposes and for purposes of general compliance with the requirements of the Companies' tariffs.[84]

Second, setting aside the fact that AT&T's proposed revision is a solution in search of a problem, the proposed revision to the Companies' Proposed Rate PSAs (*i.e.*, modifying how rental is charged by basing it "on the amount of usable space encumbered on [the Companies'] poles") is not a workable solution. For example, the Companies explained that AT&T's proposed revision would require the Companies to fundamentally alter their billing practices.[85] This is no small matter: "Such a change to the Companies' billing practices would require the Companies to retool complex billing processes and specialized billing software."[86] Thus, AT&T's proposed revision makes no sense from a cost/benefit perspective, as it would require the Companies to institute significant and costly changes to their billing practices, even though these practices have not resulted in a single dispute.

B. The "Deemed Withdrawn" Provision in Section 7.e. of the Proposed Rate PSA Is Fair, Just and Reasonable and Comports with the Commission's Regulation.

Section 7.e. of the Proposed Rate PSAs provide:

> 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**.[87]

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[84] *See* Rebuttal Testimony of Jason P. Jones at 6-7.

[85] *See id.* at 7.

[86] *Id.*

[87] Proposed LG&E Rate PSA, Section 7.e. (emphasis added); Proposed KU Rate PSA, Section 7.e.

Although Section 7.e. has been revised to conform to the new pole attachment regulation, the "deemed withdrawn" closely resembles the "life cycle" of a make-ready estimate under the current Rate PSAs (*i.e.*, a provision that has been approved by the Commission in three prior rate cases).[88] Besides adjusting the "life cycle" of a make-ready estimate from fifteen (15) days to fourteen (14) days, the "deemed withdrawn" provision of the Proposed Rate PSAs only differs from the current Rate PSAs in that it includes an additional sentence emphasizing that make-ready estimates not paid within fourteen (14) days are deemed withdrawn.[89]

The Companies explained that the purpose of the "deemed withdrawn" provision is to eliminate "stale" make-ready estimates, which often give rise to costly disputes and deployment delays.[90] In particular, Mr. Jones testified:

> [T]he "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 with the current volatility in labor and material costs. Finally, electric distribution facilities are 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.[91]

The Companies also explained that, by eliminating "stale" make-ready estimates, the "deemed withdrawn" provision will also reduce the administrative burden associated with make-ready estimates. For example, Mr. Jones explained:

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[88] *See* 2017 LG&E Rate PSA, Section 7.d. (placing a 15-day "lifespan" on make-ready estimates by requiring Attachment Customer to "indicate approval" of the estimate "by submitting payment within 15 days"); *accord* 2019 LG&E Rate PSA, Section 7.d.; Current LG&E Rate PSA, Section 7.d.

[89] 807 KAR 5:015, Section 4(3)(c) (permitting pole owners to withdraw make-ready estimates after fourteen (14) days).

[90] *See* Companies' Response to Objections at 16-17; Rebuttal Testimony of Jason P. Jones at 8-9.

[91] Rebuttal Testimony of Jason P. Jones at 8-9.

> The "deemed withdrawn" language allows the Companies to avoid the significant and growing administrative burden of tracking and affirmatively withdrawing individual make-ready estimates. This burden will likely continue growing at a rapid pace, as the Companies are receiving more attachment requests each year.[92]

Nevertheless, AT&T has objected to the "deemed withdrawn" provision. Initially, AT&T argued that the "deemed withdrawn" provision "does not comport with the spirit of the rule."[93] However, AT&T subsequently conceded that the "deemed withdrawn" provision is not "contrary to the rules of the Commission."[94] The crux of AT&T's argument is that the "deemed withdrawn" provision will result in higher costs and impose a greater administrative burden on Attachment Customers.[95] As noted above, however, AT&T has it exactly backwards. The record evidence reveals that by eliminating "stale" make-ready estimates, the "deemed withdrawn" provision will actually reduce costs by avoiding costly disputes and deployment delays. It also reveals that the "deemed withdrawn" provision will actually reduce the administrative burden associated with make-ready estimates. Therefore, the record evidence, and the fact that the "deemed withdrawn" provision comports with the Commission's regulation and closely tracks the current Rate PSAs, strongly undercuts AT&T's objection.

C. The Tagging Requirement in Section 9.c. Is Not Only Fair, Just and Reasonable But Also Sorely Needed Based on the Condition of AT&T's Attachment Records.

Section 9.c. of the Proposed Rate PSAs provides:

> 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

[92] *Id.* at 8.

[93] AT&T's Objections at 19, 20.

[94] *See* Direct Testimony of Daniel Rhinehart at 4.

[95] *See id.* at 4, 6.

> Customer within one hundred and eighty (180) days from the effective date of this Schedule.[96]

The only new part of this provision is the requirement that existing untagged attachments be tagged within 180 days from the effective date of the Proposed Rate PSAs. Given the tagging requirement (to which AT&T has never previously objected) has been part of the Companies' Rate PSAs for more than five (5) years, there should be very few existing untagged attachments. AT&T objects to the 180-day timeline and argues that it is "completely impractical and prohibitively expensive" and that there "could be literally tens of thousands of untagged attachments."[97] Instead of the 180-day timeline, AT&T argues that Attachment Customers "should tag their untagged facilities any time they visit an untagged location to perform maintenance or other work."[98] There are a couple obvious problems with AT&T's argument.

First, unless AT&T has been deploying legions of unauthorized attachments on the Companies' poles, AT&T's objection is vastly overstated. As explained by Mr. Jones:

> Nearly 98% of AT&T's attachments to the Companies' poles are subject to the Joint Use Agreements (and thus not impacted by the tariffs). The Companies' most recent records indicate that AT&T has 3,549 attachments to the Companies poles that are subject to the tariffs. Approximately 2,400 of these attachments were made pursuant to a 1999 letter agreement, which specifically required AT&T's attachments "to be identified as to the owner of said facilities at each attachment location." Moreover, the current tagging requirement has been part of the tariff requirements since 2017. Between the requirements of the 1999 letter agreement and the existing tariffs, there should be very few (if any) untagged AT&T attachments unless AT&T has been out of compliance with the existing requirements.[99]

[96] Proposed LG&E Rate PSA, Section 9.c.; Proposed KU Rate PSA, Section 9.c.

[97] AT&T's Objections at 20; *see also* Direct Testimony of Daniel Rhinehart at 9 (claiming that the deadline for tagging existing attachments is "impractical").

[98] Direct Testimony of Daniel Rhinehart at 9.

[99] Rebuttal Testimony of Jason P. Jones at 9.

While the reference to "legions of unauthorized attachments" is made tongue-in-cheek, AT&T's responses to the Companies' requests for information have raised some questions about the accuracy of the estimates quoted above. AT&T's responses revealed that: (1) AT&T cannot identify how many of its attachments are governed by the Companies' current Rate PSAs; (2) AT&T does not know which portion of its attachments to the Companies' poles are untagged; (3) AT&T does not know how many attachments it has made pursuant to the Companies' Rate PSAs since July 1, 2017; and (4) AT&T does not know the number of attachments on which it has performed work since July 1, 2017.[100]

Second, even if AT&T's objection were taken at face value, it would collapse on itself. That is, AT&T is claiming that the proposed timeline for tagging existing attachments would be impractical and prohibitively expensive due to the sheer number of untagged attachments. AT&T leverages this (unsupported) allegation to argue for a different tagging requirement—*i.e.*, one that would only require Attachment Customers to tag existing attachments during the normal course of their operations. But AT&T ignores the tagging requirements contained in the Companies' current Rate PSAs.[101] In fact, this requirement has been a part of the Companies' tariffs since 2017.[102]

In other words, if there are currently "tens of thousands" of untagged attachments on the Companies' poles, then AT&T is making a strong case for the Companies' proposed 180-day tagging timeline by demonstrating that the current tagging requirement (which is identical to AT&T's proposal) does not work. But the real coup de grâce for AT&T's alternative proposal

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[100] *See generally*, AT&T's Response to the Companies' First Request for Information (filed Jul. 7, 2022).

[101] *See* Current LG&E Rate PSA, Section 8.c. ("Any untagged Attachments 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."); *accord* Current KU Rate PSA, Section 8.c.

[102] *See* 2017 LG&E Rate PSA, Section 8.c.; 2017 KU Rate PSA, Section 8.c.

(*i.e.*, essentially maintaining the status quo) is the fact that **AT&T does not have a maintenance or inspection cycle** for its attachments.[103] Thus, in the absence of a hard deadline, AT&T might very well never get around to tagging all of its existing, untagged attachments.

Finally, it is worth noting that AT&T has not disputed the important role tagging plays in facilitating joint use of the Companies' electric distribution infrastructure.[104] The Companies previously explained that the tagging requirement serves an important operational purpose. Mr. Jones testified:

> [I]t allows the Companies and third parties to quickly identify who owns a particular attachment. This is particularly important for first responders, who may not have immediate access to the Companies' maps and records. It is also important to the process of deploying new communications facilities, especially with 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 (thus slowing broadband deployment).[105]

D. The Cost Recovery Provision in Section 11.a. of the Proposed Rate PSAs (Regarding Overlashing) Is Consistent with the Commission's Regulation.

Section 11.a. of the Proposed Rate PSAs provide, in relevant part, as follows: "Attachment Customer shall reimburse Company for any costs incurred in evaluating the proposed Overlashing."[106] This provision is consistent with the Commission's regulation (as the Commission explicitly rejected proposed language in the underlying rulemaking proceeding that

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[103] *See* AT&T's Response to the Companies' First Request for Information, Item 5; AT&T's Response to the Commission Staff's Second Request for Information, Item 5.d. (filed Jun. 2, 2022).

[104] *See* Companies' Response to Objections at 19; *see also* Rebuttal Testimony of Jason P. Jones at 9-10.

[105] Rebuttal Testimony of Jason P. Jones at 9-10; *see also* Companies' Response to Objections at 19.

[106] Proposed LG&E Rate PSA, Section 11.a.; Proposed KU Rate PSA, Section 11.a.

would have prohibited pole owners from recovering the costs of an overlash evaluation).[107] Originally, AT&T raised two objections to the cost recovery provision in Section 11.a.—that it was "ambiguous" and failed to "specify what costs are being included in the evaluation."[108] In their response, the Companies stated that "AT&T's objection is not clear enough to respond materially."[109] Instead of clarifying its specific objections to the cost recovery provision, however, AT&T subsequently argued that the cost recovery provision should be removed entirely.[110]

AT&T's argument essentially boils down to "pole owners should not be permitted to recover the cost of evaluating a proposed overlash because it is not permissible under the FCC's pole attachment regulations." As explained in Section IV.E. *infra*, AT&T's argument is in direct conflict with the Commission's regulation.[111]

VI. CONCLUSION

For all the reasons set forth herein, as well as the reasons set forth in the Companies' responses to requests for information, the Companies' response to the initial objections filed by KBCA and AT&T, and the testimony of Mr. Hornung and Mr. Jones, the Companies respectfully request that the Commission approve the Proposed Rate PSAs as submitted.

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[107] *See supra* note 60.

[108] AT&T's Objections at 20, 21.

[109] Companies' Response to Objections at 20.

[110] *See* Direct Testimony of Daniel Rhinehart at 9-10 ("The Commission's rules closely follow the FCC's recently codified overlashing rules, and the FCC, realizing that allowing for charges for overlashing might be a barrier to broadband deployment, prohibits charging for engineering evaluation of overlashing notifications. I suggest that LG&E and KU tariffs (the end of Section 11.a) be amended to remove this requirement.").

[111] *See* Statement of Consideration at 52 (stating that "where the Companies incur costs to evaluate a proposed overlash, those are costs that would not be incurred but for the existing attachment and the proposed overlash," and therefore, "[t]hose costs should be borne by the entity that caused the costs"); *see also* Rebuttal Testimony of Jason P. Jones at 10-11.

Dated: October 11, 2022 Respectfully submitted,

Allyson K. Sturgeon
Vice President and Deputy General Counsel-Regulatory
PPL Services Corporation
220 W. Main Street
Louisville, Kentucky 40202
Telephone: (502) 627-2088
Email: asturgeon@pplweb.com

Sara V. Judd
Senior Counsel
LG&E and KU Energy LLC
220 W. Main Street
Louisville, Kentucky 40202
Telephone: (502) 627-4850
Fax: (502) 217-2483
Email: sara.judd@lge-ku.com

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 October 11, 2022 and that there are currently no parties that the Public Service Commission has excused from participation by electronic means in this proceeding

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