

**COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION**

*In the Matter of:*

<b>ELECTRONIC INVESTIGATION )</b>	
<b>OF POLE ATTACHMENTS )</b>	<b>CASE NO. 2023-00416</b>
)	

**KENTUCKY’S ELECTRIC COOPERATIVES’ COMMENTS TO THE  
PROPOSED EMERGENCY AMENDMENTS TO 807 KAR 5:015**

Kentucky’s electric cooperatives (the “Cooperatives”),<sup>1</sup> by counsel, respectfully submit the following comments to the emergency amendments to 807 KAR 5:015 (the “Pole Attachment Regulation”) proposed by the Kentucky Public Service Commission (the “Commission”) in the Notice of Filing of Agenda filed by Commission staff on May 15, 2024. In support of their comments, the Cooperatives state as follows.

**I. Self-Help Should Not Be Available for Pole Replacements.**

The Cooperatives’ guiding principle in this proceeding is to ensure the Commonwealth’s member-owned electric cooperatives remain capable of providing safe, reliable and affordable electric service to their local communities while utilizing existing infrastructure to promote the responsible proliferation of broadband. More than perhaps any other single proposed amendment, the Commission’s proposal to strike a prohibition against self-help pole

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<sup>1</sup> The following electric cooperatives are jurisdictional utilities that were made party to this case by Order: Big Rivers Electric Corporation; Big Sandy RECC; Blue Grass Energy Cooperative Corporation; Clark Energy Cooperative, Inc.; Cumberland Valley Electric, Inc.; East Kentucky Power Cooperative, Inc.; Farmers RECC; Fleming-Mason Energy Cooperative; Grayson RECC; Inter-County Energy Cooperative Corporation; Jackson Energy Cooperative Corporation; Jackson Purchase Energy Corporation; Kenenergy Corporation; Licking Valley RECC; Meade County RECC; Nolin RECC; Owen Electric Cooperative; Salt River Electric Cooperative Corporation; Shelby Energy Cooperative, Inc.; South Kentucky RECC; and Taylor County RECC. Although this filing speaks on behalf of the group’s common interests, each cooperative reserves the right to also address issues on an individual basis throughout this proceeding.

replacements upsets that delicate balance, and it would make Kentucky the lone state in the country allowing third-party attachers to replace the backbone of the electric grid: utility poles. Not even the FCC permits this activity,<sup>2</sup> and the Commission should reinsert the stricken language at Section 4(9)(d) of the regulation.<sup>3</sup>

More than any other type of make-ready associated with communication or broadband attachments, pole replacement is a uniquely and inherently dangerous activity. Attachers are not qualified to perform or supervise pole replacements; and the Commission's proposal to remove the prohibition raises serious safety concerns, including: (i) the safety of pole attachers who are not accustomed to replacing poles and adhering to proper safety measures in the supply space; (ii) the safety of utility personnel who would face significant dangers working on improperly installed poles; and (iii) the safety of utility customers and the general public from improper installation, grounding, tensioning, or other issues that could quite literally cause anything from power outages to death.

Moreover, while it appears as though the Commission's justification lies with a belief that use of a utility's ordinary contractors should insulate the public from safety risks associated with improper installation, that rationale does not hold true in practical application. Thus, requiring attachers to use a utility's contractors to perform pole replacements is not the answer. Not all of a utility's contractors are qualified and approved to replace poles; and even among approved contractors, not all of the contractor's construction crews have the proper training and qualifications to replace poles on the utility's system. Additionally, the Cooperatives have found that construction crews are more likely to adhere to the utility's procedures and safety guidelines

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<sup>2</sup> 47 CFR §1.1411(i)(3).

<sup>3</sup> For ease of reference and unless otherwise specified, the term "regulation" shall refer throughout to 807 KAR 5:015, as proposed to be amended.

when under the observation of the utility, rather than when under the direction of a third party.

Finally, this proposal appears to be a solution in search of a problem. As information that has been filed in the record by electric utilities indicates, the majority of any so-called “backlog” in broadband deployment rests presently with the attachers, whether due to their indecision, ever-shifting priorities, failure to pay, or other reasons. Regardless, there is no factual basis to believe that utility-performed pole replacements are impeding broadband deployment in any meaningful way. Furthermore, there is no factual basis to conclude that (i) allowing attachers to perform this inherently dangerous activity will improve the rate of broadband deployment; or that (ii) attachers even want to attempt this activity and thereby assume the significant liability risks associated with it. Similarly, the Commission’s complaint procedures and strict regulatory timeframes already adequately protect against any feared utility unresponsiveness in pole replacement matters.<sup>4</sup> While the Commission’s willingness to explore creative solutions is noted, this is an ill-advised proposal with risks to the public that far outweigh any potential benefit to the rate of broadband deployment.

For all of these reasons, the Commission should reinsert the prohibition on self-help for pole replacements in Section 4(9)(d).<sup>5</sup>

**(d) Pole Replacements. Self-help shall not be available for pole replacements.**

**II. Broadband Providers’ Failure to Timely Pay Is Delaying Broadband Deployment.**

As has been discussed at prior informal conferences, the Cooperatives are owed millions of dollars in outstanding payments for work performed and make-ready estimates. In an effort

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<sup>4</sup> Furthermore, the Cooperatives are unaware of a single complaint alleging untimeliness in pole replacement by a pole-owner.

<sup>5</sup> The proposed text is shown in bolded and underlined font.

to expedite the pole attachment process and deployment of broadband in their communities, the Cooperatives have even purchased materials and hired construction crews in anticipation of receiving payment from broadband providers. Quite simply, the Cooperatives want their unserved members to have access to broadband. However, the broadband providers' delays in accepting or rejecting estimates for make-ready, and in paying for make-ready, has caused some Cooperatives to dip into cash reserves while awaiting payment. This is not sustainable.

In addition to placing undue financial strains on the Cooperatives, delays in accepting make-ready estimates and paying for make-ready costs threatens the proposed timelines for deploying broadband in the Commonwealth. The Cooperatives cannot justify retaining construction crews (and passing on those costs to their members) if they do not have sufficient paid-for work for the crews to perform. If the broadband providers do not start timely paying for work performed and make-ready estimates, the Cooperatives will have to start releasing construction crews. Due to the nationwide shortage of qualified pole workers,<sup>6</sup> it is anyone's guess if and when the Cooperatives will be able to re-hire crews once they have been released. This is not merely a hypothetical scenario. Some of the Cooperatives are within a couple weeks of having to release construction crews due to lack of paid-for pole attachment work for them to perform.

In an effort to address the broadband providers' delays in responding to, and paying for, make-ready estimates, the Cooperatives propose to amend and clarify Section 4(3)(d) as follows:<sup>7</sup>

(d) A new attacher **shall accept or reject a valid make-ready estimate within fourteen (14) days after the estimate is presented. If a new attacher fails to either accept or reject the estimate within fourteen (14) days, it shall be deemed rejected. A new attacher shall pay for an accepted make-ready**

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<sup>6</sup> Will Feur, *The U.S.'s \$42.5 Billion High-Speed Internet Plan Hits a Snag: A Worker Shortage*, The Wall Street Journal, April 23, 2023. A copy of this article is attached as Exhibit 1.

<sup>7</sup> Proposed deletions are shown using bolded and strikethrough font, and proposed additions are shown using bolded and underlined font.

**estimate in accordance with the utility's tariff, but in no event later than thirty (30) days after acceptance of the estimate. Absent payment by the expiration of this period, the estimate shall be deemed rejected.**~~may accept a valid estimate and make payment any time after receipt of an estimate, except a new attacher shall not accept the estimate after the estimate is withdrawn.~~

### **III. Advance Notice Should Be Required for All Applications.**

The informal conferences in this proceeding have made one thing very clear: to meet the goal of safely deploying broadband in unserved and underseved areas, the parties must have access to qualified workers who have the knowledge, training, and skill to perform safe construction on utility poles. It is well documented that there is a nationwide shortage of workers needed to deploy broadband.<sup>8</sup> “The Fiber Broadband Association, an industry group promoting network expansion, estimates that more than 205,000 additional workers will be needed through 2026.”<sup>9</sup> The reality, therefore, is that Kentucky utilities are not just competing for resources with each other, but with utilities across the nation. As one of the Commissioners noted during the last informal conference, if the parties do not have access to resources, the work will not be completed, regardless of the timeline.

The Cooperatives recognize that the Commission cannot solve the worker shortage, any more than the Cooperatives can materialize qualified crews out of thin air. However, the Commission can give utilities more time to engage needed resources, particularly for the larger requests most likely to strain existing workforces. Under the current regulation, new attachers are only required to provide prior written notice if the number of requests exceeds the lesser of three hundred (300) poles or zero and one half of one percent (0.5%) of the utility's poles in Kentucky. In light of the worker shortage and the real-life difficulties in obtaining the anticipated

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<sup>8</sup> See n. 6, *supra*.

<sup>9</sup>*Id.*

resources that may be needed in certain territories, the Cooperatives propose that new attachers be required to give prior written notice for all applications, and longer notice for larger orders. This revision would be especially helpful for those Cooperatives who may receive attachment requests from multiple attachers across the Cooperative's service territory.<sup>10</sup> For these reasons, the Cooperatives propose to amend Section 4(7)(f) as follows:<sup>11</sup>

(f) As soon as reasonably practicable, but no less than sixty (60) days before the new attacher expects to submit an application ~~in which the number of requests exceed the lesser of the amounts identified in paragraph (a) of this subsection~~, a new attacher shall provide written notice to a utility in the manner and form stated in the utility's tariff that the new attacher expects to submit a ~~high volume~~ request. **The new attacher shall provide written notice no less than ninety (90) days in advance when the number of requests exceed the lesser of the amounts identified in paragraph (a) of this subsection.**

#### IV. Initial Review for Completeness.

The proposed amendments to the Pole Attachment Regulation give utilities ten (10) business days for the initial review of an application for up to five hundred (500) poles, and an additional two (2) business days for each additional 500-pole increment. The Cooperatives suggest the following language to proposed Section 4(2)(a)8 to clarify that the initial review is for completeness, and that the additional two business days for review are triggered by each successive partial or full 500-pole increment. Therefore, for example, a utility would have twelve business days to review an application for 501 poles or 1000 poles.<sup>12</sup>

8. A utility shall complete a review **for completeness** of an application of 500 poles or less within ten (10) business days after receipt of the application. A utility shall have an additional two (2) business to complete its review for each **successive full or partial** 500-pole increment in an application. **For example, a utility**

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<sup>10</sup> Owen Electric, for example, currently has two, soon to be three, active large volume attachers working within its service territory.

<sup>11</sup> Proposed deletions are shown using bolded and strikethrough font, and proposed additions are shown using bolded and underlined font.

<sup>12</sup> Proposed additions are shown using bolded and underlined font.

**would have twelve (12) business days to review an application for 501 poles or an application for 1000 poles.**

Any other interpretation of the threshold for applying the additional two (2) business days would effectively raise the standard ten (10) business day threshold from the already-increased 500 pole standard to an unreasonable 1000 pole standard.

**V. Section 4 (7) Adjustment to Time Periods.**

As with the Cooperatives' proposed amendment in Section IV above, the Cooperatives propose to amend the new language in Section 4(7) to clarify that the additional time periods are triggered by each successive partial or full 500-pole increment.<sup>13</sup>

(7) For the purposes of compliance with the time periods in this section:

(a) A utility shall apply the timeline as established in subsections (2) through (4) of this section to all requests for attachment up to the lesser of 500 poles or zero and seven and one half- tenths (0.75) percent of the utility's poles in the state;

(b) A utility may, for every **successive full or partial** 500-pole increment, add up to fifteen (15) days to the survey period established in subsection (4) of this section to larger orders up to the lesser of 3,000 poles or 3 percent of the utility's poles in Kentucky;

(c) A utility may, for every **successive full or partial** 500-pole increment, add up to twenty (20) days to the make-ready periods established in subsection (4) of this section to larger orders up to the lesser of 3,000 poles or 3 percent of the utility's poles in Kentucky;

**VI. Section 4 (8) Deviations from Make-Ready Timeline.**

Section 4(8) allows a utility to deviate from make-ready timelines for good cause shown. However, deviations are often the result of mutual agreement by the utility and the attacher. During certain times of the year, for example, pole access for construction work would damage

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<sup>13</sup> Proposed additions are shown using bolded and underlined font.

a farmer's crops. In that situation, the Cooperatives work with the farmer and the attacher to find a mutually agreeable arrangement, which could range from an added fee to compensate the farmer to the attacher deciding to postpone the attachment to avoid damaging the crops (or perhaps even simply to avoid the attacher having to pay the land-owner for damage to his/her property). To reflect this real-life situation, the Cooperatives propose the following amendment:<sup>14</sup>

(b) A utility may deviate from the time limits established in this section during performance of make-ready for good and sufficient cause that renders it infeasible for the utility to complete make-ready within the time limits established in this section. A utility that so deviates shall immediately notify, in writing, the new attacher and affected existing attachers and shall identify the affected poles and include a detailed explanation of the reason for the deviation and a new completion date. The utility shall deviate from the time limits established in this section for a period no longer than necessary to complete make-ready on the affected poles and shall resume make-ready without discrimination once the utility returns to routine operations, **or as otherwise agreed by the utility and the new attacher.**

## **VII. New Attachers Should Prioritize Applications *Prior* to Submitting Applications.**

As the Chairman observed during the informal conference on Friday, May 17, 2024, new attachers are “the masters of their own ship” as to when they submit applications. They can prioritize projects simply by choosing the order in which they submit applications to pole owners. For this reason, adding new section 4(2)(a)9 to allow new attachers to prioritize during the ten-business-day initial review period for completeness is unnecessary, and it adds unnecessary complication. New attachers already have the ability to prioritize by selecting the order in which they submit applications. The Cooperatives recommend that this new section be stricken, and the parties follow the non-discriminatory first-in – first-out policy.

Should the Commission decide to keep the proposed priority provision, however, the

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<sup>14</sup> Proposed additions are shown using bolded and underlined font.



language should be revised to state that de-prioritizing an application that was submitted first in time should reset the regulatory clock for that application. It is not sufficient to toll the time for a de-prioritized project because a utility cannot be expected to simply pick up where it left off in the review process, and there is no limit on how long an attacher can de-prioritize a project. Utility personnel will need to re-familiarize themselves with the project once the attacher lifts the suspension. Moreover, depending on how long the project is suspended, work performed or information submitted could become stale. Therefore, the utility should have the full regulatory time period for all suspended applications when the attacher notifies the utility that it wishes to resume processing its applications on a first-in – first-out basis.<sup>15</sup>

9. A new attacher if it submits an application while **one of its a** previous applications is still under review **for completeness** may prioritize the order in which a utility shall review the **attacher's** applications. Prioritizing an application suspends the review time for a new attacher's other applications currently under review. **Once the attacher notifies the utility that it is ready to resume processing the attacher's applications on a first-in – first-out basis, the regulatory time period for the de-prioritized applications will reset, and the utility will have the full regulatory time period to review the applications for completeness. Once an application is past the initial review stage for completeness, it cannot be unilaterally prioritized or de-prioritized by the attacher.**

### VIII. Special Contracts.

The Cooperatives support the Commission's proposal to have attachers and utilities negotiate special contracts for larger requests. The Cooperatives believe this provision will incentivize attachers to submit requests with greater regularity and uniformity in volume, which will assist pole owners in allocating and retaining resources, promote consistency in workflow, and generally improve efficiency in the pole attachment process. They also appreciate that the

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<sup>15</sup> Proposed deletions are shown using bolded and strikethrough font, and proposed additions are shown using bolded and underlined font.

threshold for special contracts is triggered by the lesser of a fixed number or a percentage of a utility's poles given the significant differences in resources between the Cooperatives and the investor-owned utilities. In light of the above, the Cooperatives suggest just a couple amendments to the Commission's proposed language for clarity:<sup>16</sup>

(d) A utility and a new attacher shall negotiate a special contract in good faith ~~the timing of~~ all requests for attachment larger than the lesser of 3,000 poles or 3 percent of the utility's poles in Kentucky, or upon receipt of three (3) separate applications ~~for~~ averaging the lesser of 1,000 poles or 13 percent of the utility's poles in Kentucky for any three (3) months over a five (5) month period.

#### **IX. Complaint Process.**

The Cooperatives believe the complaint process described in Section 7 of the regulation is reasonable and adequate, and they do not propose any amendments to that process.

#### **X. Conclusion.**

The Cooperatives thank the Commission for its continued attention to the propagation of measures to support statewide broadband access while ensuring electric system safety, reliability, and affordability.

This the 21<sup>st</sup> day of May, 2024.

Respectfully submitted,

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<sup>16</sup> Proposed deletions are shown using bolded and strikethrough font, and proposed additions are shown using bolded and underlined font.

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**Certification**

I hereby certify that a copy of this filing has been served electronically on all parties of record through the use of the Commission's electronic filing system, and there are currently no parties that the Commission has excused from participation by electronic means. Pursuant to the Commission's July 22, 2021 Order in Case No. 2020-00085, a paper copy of this filing has not been transmitted to the Commission.

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