

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

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In the Matter of: )  
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) CASE NO. 2023-00416  
ELECTRONIC INVESTIGATION OF POLE )  
ATTACHMENTS ) **KBCA REPLY COMMENTS**  
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**INTRODUCTION**

The Kentucky Broadband and Cable Association (“KBCA”) welcomes this opportunity to provide additional comments on the Kentucky Public Service Commission’s emergency regulations, 807 KAR 5:015E, following interested parties’ submissions and discussion on those submissions during the Commission’s recent informal hearing on December 13, 2024.

The Commission has made important progress in executing on the Governor’s and Legislature’s mandate to expedite rural broadband deployment through emergency regulatory action. As many of the parties have noted, although it is too early in the process to fully evaluate the operational effect of the emergency regulations, the Commission’s adoption of these changes, ongoing oversight of rural broadband deployment activity, and the resulting discussions between the parties, are having a positive impact. That is particularly critical given, as KBCA demonstrated during the last hearing, the dramatic increase and sustained nature of the high-speed broadband buildout that is set to occur over the coming years.

As such, the Commission’s efforts should remain focused on maintaining this momentum by refining the emergency regulations to provide greater clarity and further streamlining in the

Commonwealth's pole attachment process. KBCA asserts that, consistent with these critical policy objectives, there are a number of areas where the Commission can implement modest amendments that will further streamline the application and construction process, remove needless administrative burdens and delays, and promote timely and cost-effective rural deployment.

Additionally, the Commission should reject utility calls to turn back-the-clock and replace the regulatory framework it has painstakingly implemented with novel and untested proposals that will sow confusion, create uncertainty, cause disruptions, and inject unnecessary delay and increase the costs of rural broadband deployment. Rather, we strongly believe that the Commission should stay its course by building upon its existing regulations, not abandoning the progress it has made at this critical time.

### COMMENTS

#### **I. The Commission Should Adjust Its Emergency Regulations To Further Accelerate Timely And Efficient Rural Broadband Deployment.**

*Clarify Breadth of Pole Access.* Pole attachers are properly entitled to attach to distribution poles, even if they also happen to have transmission facilities on them. *See Southern Co. v. F.C.C.*, 293 F.3d 1338, 1345 (11th Cir. 2002) (holding “local distribution facilities, festooned as they may be with transmission wires, are plainly” within the jurisdiction of the regulating agency); *In The Matter Of Implementation Of The Local Competition Provisions In The Telecommunications Act Of 1996*, FCC 99-266, Order on Reconsideration, 14 FCC Rcd. 18,049, ¶ 27 (1999) (“We reaffirm our decision in the Local Competition Order that electric transmission facilities are not exempted from the pole attachment provisions of section 224.”).

However, KBCA members have experienced some issues wherein they have been denied access to so-called “transmission” poles, even though the poles house distribution facilities and are part of the utility's distribution network. These situations have led to confusion, disputes, and

delays in pole access. 47 C.F.R. § 76.309(c)(2)(i). The Commission can and should address these issues by making it clear that attachers have a right to attach to all utility poles, even if those poles are in part used for transmission purposes.

Additionally, the Commission should not amend its regulations to announce that service drops are subject to standard permitting procedures. Windstream Comments at 1; 807 KAR 5:015E § 1(1). It is not practical or appropriate to treat such light-weight, customer service “drop” attachments, which do not involve typical through bolts (used for mainline attachments), as standard permitted attachments, because an attacher cannot practically identify the need for a drop until it arrives to install service to a customer. Given that practical reality, the industry practice is for attachers to provide notice of drop attachments after the fact.

***Expedited Review of Resubmitted Applications Correcting Specifically-Identified Issues.***

Currently, the Commission’s emergency regulations contain a timeframe for utilities to review an application for completeness, but do not provide any timeline for utilities to review applications that have been resubmitted by an attacher to address a specifically identified issue. We recommend that the Commission close that gap (and align its regulations with those of the Federal Communications Commission) by providing that utilities must review any resubmitted application for completeness within five (5) business days. *See* 47 C.F.R. § 1.1411(c)(1)(ii). That timeframe is appropriately shorter than the period of time allowed to review a new application, given the utility has already reviewed the re-submitted application once, and that the utility need only perform a narrow/targeted review of the attacher’s correction of the issue(s) that it had previously specifically identified. To facilitate prompt utility review, the Commission should make clear that pole attachers must identify any specific changes made in a resubmitted application. This short

and efficient process will benefit both parties by ensuring that the review of a re-submitted application does not needlessly delay the permitting process.

***Red Tag Pole Transparency.*** The Commission should ensure that its existing red tag pole regulations function properly (and that attachers can benefit from them) by requiring utilities to notify attachers as soon as reasonably practicable of any red tagged poles involved in a given application. While utilities have asserted that attachers can identify red tag poles in the field, that is not the case, given that utilities inherently are far better positioned to have more complete information regarding the state of their poles than attachers. In particular, they have a better understanding than any attacher whether a given pole has been “designated for replacement ... for any reason unrelated to a new attacher’s request for attachment.” 807 KAR 5:015E § 1(10). It is fair, reasonable, and not an undue burden for utilities to share that available and vital information with attachers as soon as they can so attachers can budget and plan buildouts accordingly. Without this information, under the operation of the current regulations, KBCA members do not generally know whether their projects involve red tag poles and thus the extent of their responsibility to bear the cost of pole replacements. *In re Accelerating Wireline Broadband Deployment By Removing Barriers To Infrastructure Investment*, FCC 23-109, Fourth Report And Order, Declaratory Ruling, And Third Further Notice Of Proposed Rulemaking, ¶ 23 (Dec. 12, 2023) (requiring utilities to tell attachers “whether any of the affected poles have been red-tagged” and “strongly encourag[ing] utilities to voluntarily share pole-related information . . . both before and after receiving attachment applications”).

***Application Certification To Expedite Completeness Review.*** KBCA has previously pointed out that the Commission’s new certification requirement is an additional administrative hurdle in the permitting process and does not serve any meaningful, practical purpose. 807 KAR

5:015E § 4(2)(a)(1). Utilities remain entitled to (and do) review “certified” applications for completeness regardless of any certification made by a new attacher. Moreover, the certification requirement causes confusion because each utility has adopted a different certification that attachers must search for on a utility’s website before filling out and submitting an application. This is particularly burdensome when an attacher is submitting applications to multiple utilities.

If the Commission intends to keep a certification requirement as part of its emergency regulations, it should simplify the requirement by providing that:

- An attacher certifies an application is complete and accurate to the best of its knowledge simply through the act of submitting the application. This revision will remove the time and confusion around utilities’ various certification approaches, or
- A certified application is deemed complete upon submission and not subject to further “completeness” reviews under the regulations, so that the certification requirement serves a useful purpose consistent with the policy objectives of the emergency regulations.

***Prompt Self-Help Notification.*** Just as the Commission requires attachers to give utilities 90 days’ notice of impending large orders, utilities should be required to notify attachers as soon as *reasonably practicable* when they know they will be unable to meet an applicable regulatory deadline. Because utilities receive advance notice of large applications, they should know early on when they cannot meet deadlines. Sharing that information with attachers as soon as reasonably practicable allows attachers to plan to exercise self-help, which, in turn, promotes timely and efficient construction.

***Further Clarify and Streamline Timelines.*** As KBCA noted during the Commission’s last hearing, the Commission should remove its 500-pole increment sliding scale for application completeness reviews, survey and engineering, and make-ready construction deadlines. The

Commission should instead rely on its permanent regulations that rightfully established a fixed timeframe for an order size. The Commission's sliding scale adds months to the timeline and is difficult to operationalize, placing it directly at odds with the legislative mandate to expedite rural broadband deployment.

- The emergency regulations give utilities 90 days' – **three months** – notice of large orders, plus 15 business days to determine whether an application for a large order is complete. 807 KAR 5:015E § 4(8)(g) & 4(2)(a)(8).
- For large orders utilities then have up to 120 days – **four months** – to complete a survey and perform engineering and grant or deny access. 807 KAR 5:015E §§ 4(2)(b)(1) & 4(2)(b)(4).
- Make-ready construction can then take up to an additional 120 days – **four months** – to complete in the communication space, and 165 days – **five and a half months** – to complete above the communication space. 807 KAR 5:015E §§ 4(4)(a)(2) & 4(4)(b)(2)).

Under this framework, the minimum amount of time it would take to get an attachment on a pole if it is part of a large order, assuming there is no make-ready construction necessary above the communication space, is *almost a year*. There is no evidence that utilities need or use this time to obtain necessary resources, and such lead-times will not help alleviate the existing backlog or ensure timely construction as deployment substantially ramps up over the coming years.

## **II. The Commission Should Not Overhaul Its Emergency Regulations Or Adopt Proposals That Will Not Promote Timely And Efficient Deployment.**

*Application Prioritization Promotes Timely Service.* The Commission should decline to rescind its regulation allowing attachers to reprioritize applications. Duke Comments at 2; 807 KAR 5:015E § 4(2)(a)(9). As the Commission recognized in implementing the emergency regulations, allowing attachers to reprioritize submitted applications enables attachers and utilities

to confer and deploy resources where they are most needed so that, for example, entire build-out projects are not impeded by a few poles that require additional attention. Contrary to Duke’s suggestion that attachers should prioritize their applications prior to submission, Duke Comments at 2, priority is not always apparent at the onset of the process – particularly where utility delay and the lengthy make ready timelines result in many months passing between the submission of an application and a new attachment on the pole. Moreover, it is important for attachers to have flexibility when needed to ensure timely customer service, and there is no evidence that attachers are overusing, or misusing, the right in a way that imposes undue burdens on utilities.

***“Enhanced” OTMR Will Not Promote Deployment.*** Now is not the time for the Commission to scrap its nascent emergency regulations in favor of an untested OTMR process that would *require* new attachers to perform *all* communication space make-ready on a pole. KU Comments at 1-2; 4-6. KU’s proposed “enhanced OTMR” proposal would create intolerable risk to existing attachers, including the potential to damage communications networks, endanger critical infrastructure, and risk an inability to control unplanned outages and customer service disruptions. It would also place additional burdens on new attachers to manage and/or perform work that is rightfully the responsibility of existing attachers, and would detract resources from being used to deploy facilities elsewhere. Such an approach would be highly problematic and represent a major step backwards at a time when buildout is set to substantially increase and the Commission’s efforts should be laser focused on ensuring its existing regulatory framework is as finely tuned as possible to promote timely and efficient rural broadband deployments.

***Make Ready Estimate Payments.*** KBCA disputes that its members are not making timely payments for make ready, or that Commission timelines should not apply if payment is not received within 14 days (where there is no current deadline for payment). KEC Comments at 3-

4. As this proceeding has made clear, there are many factors that contribute to payment delays, and the parties are making good progress working through and resolving those issues informally. As such, allowing utilities to delay make ready indefinitely based upon a single payment date would dramatically disrupt and delay the process. That said, in the spirit of compromise, KBCA is open to utilities adding survey charges to their make ready estimates (assuming the attacher has not previously performed the applicable survey) so they can obtain additional funding earlier in the process, provided that utilities allow attachers 30 days to pay a make-ready estimate before withdrawing it and requiring attachers to seek a new estimate.

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Respectfully submitted,

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