

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

ZITO MEDIA, L.P.,

Complainant,

v.

PENNSYLVANIA ELECTRIC COMPANY,

Respondent.

Proceeding No. 17-316
File No. EB-17-MD-006

**ZITO MEDIA, L.P.'S REPLY
IN SUPPORT OF POLE ATTACHMENT COMPLAINT**

Zito Media, L.P.

Maria T. Browne
Leslie G. Moylan
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue, N.W., Suite 800
Washington, D.C. 20006
202-973-4281 (Direct Phone)
202-973-4481 (Direct Fax)
202-973-4200 (Main Phone)
202-973-4499 (Main Fax)
mariabrowne@dwt.com
lesliemoylan@dwt.com

Colin Higgin
Zito Media, L.P.

Date submitted: January 2, 2018

EXECUTIVE SUMMARY

It is now undisputed that where Penelec uses its contractor Sigma to process pole attachment applications in its territory north of I-80 (the subject of this complaint), the make-ready process is considerably more expensive, slower, and fails to meet FCC-prescribed timeframes. Yet Penelec refuses to follow the more efficient processes it uses south of I-80 or to provide Zito with a list of approved contractors as required by Commission rules.

Since Penelec abandoned the make-ready and joint ride-out processes that it used to follow north of I-80 – and that Verizon, Frontier and Windstream follow on the very same poles – it now charges *on average* **\$212.46** per pole for pre-attachment survey work – more than six times the average \$33.02 per pole Penelec charges for its poles south of I-80. Its charges are even further out of step with the \$27.83 per pole average charged by other Pennsylvania pole owners, and dramatically higher than the \$17.50 per pole charged by Map Masters, the qualified contractor whose survey measurements and pole profile sheets are accepted by PPL’s joint-users on the same poles but which Penelec will no longer accept north of I-80.

Since Penelec hired Sigma 18 months ago, it has completed work on less than one-third of Zito’s applications. None were completed within the Commission’s prescribed timeframes, and 27 applications remain unprocessed. Penelec also has yet to provide Zito with a list of approved contractors, despite Zito’s multiple requests and clear Commission rules requiring it to do so.

Penelec is charging Zito for collecting far more information about Penelec’s poles than is required for Zito’s applications, for Penelec’s benefit. It now admits to passing through certain “betterment” costs to Zito. It also recently told the Pennsylvania PUC that it looks to third-party attachers like Zito to perform expensive load calculations as a *substitute* for Penelec’s state PUC

requirement for pole inspection. Called to account for its overcharges in this case, Penelec now recants its sworn declaration filed in another FCC proceeding that it performs a loading analysis on every pole, yet still admits to charging attachers for some ill-defined set of “worst-case” loading analyses that it should have been conducting itself for the PUC. Under well-established FCC cases, “an inspection designed to yield information about more than cable attachments and thus to benefit other pole users should not be paid for solely by the cable company.”¹

Penelec asserts that any problems that Zito has encountered in attaching to Penelec poles are of Zito’s own making – that Zito improperly relies upon Penelec and Sigma to plan its network deployment routes, as evidenced by Zito’s removal of poles from its applications after receiving estimates. In fact, Zito carefully selects its network routes using a multi-phase collaborative process, puts great effort into selecting the ideal pole line (where more than one route is available), and strives to avoid congested power poles wherever possible. Moreover, as detailed herein, Zito has removed poles on only a small fraction of its applications processed by Sigma, and then only after experiencing excessive delays and/or exorbitant make-ready estimates. Zito has promptly paid any related invoices even if the poles were removed from the application.

Penelec has aggravated these problems in its pole attachment application process by abandoning a key problem-solving opportunity (north of I-80) -- the traditional joint ride-out that allows parties to jointly identify the work required for attachment and to identify circumstances where make-ready can be simplified. The results are unnecessary (and unlawful) practices and charges: failing to discuss efficient construction techniques from the outset; excluding Zito from

¹ *Newport News Cablevision, Ltd. Commc’ns, Inc. v. Virginia Elec. and Power Co., d/b/a Virginia Power*, 7 FCC Rcd 2610 ¶ 8 (1992). *See also Mile Hi Cable Partners, L.P. v. Public Service Co. of Colorado*, 15 FCC Rcd 11450, 11455-56 (Cable Serv. Bur. 2001); *Texas Cable & Telecommunications Ass’n v. Entergy Services, Inc.*, 14 FCC Rcd. 9138 (Cable Serv. Bur. 1999).

the design decisions; burying the inspection and correction of pre-existing violations and betterment in unitemized invoices; and then charging Zito for the lot.

Penelec tries to obfuscate the extraordinary scope of its charges by refusing to provide any billing detail to Zito (or to the FCC in its Response). Penelec does not dispute that its charges far exceed its own charges in its territory south of I-80, where it accepts Zito's pole profile sheets and conducts joint ride-outs. Penelec does not dispute that its charges far exceed those of other similarly situated utilities. Penelec does not deny that it includes certain "betterment" work in its pre-construction survey charges and that it only admitted to including such betterment work in the make-ready process when confronted by Zito. Penelec admits that its invoices are insufficient to enable Zito to discern how much of its charges include Penelec "betterment" work or to discern the cost of specific survey and make-ready tasks. Yet Penelec still fails to provide the detail justifying its practices or charges. Instead, Penelec resorts to the supposed defense that Zito has not presented the detail that Penelec controls and refuses to provide.

Penelec also offers the tired and long-refuted claim that applicants cannot be trusted to make safe engineering judgments, including by exploiting a pending personal injury lawsuit involving a Zito contractor who was injured when coming into contact with an improperly maintained Penelec guy wire located in an area accessible to the public at large. The reality is that Zito has ample incentives to build its network safely and reliably: it relies upon Penelec poles and power distribution plant, has service level agreements to reimburse its customers for any network down time, is contractually obligated to indemnify Penelec for any damages from its attachments, and is experienced and qualified to provide input into the terms and conditions governing the scope or price of the work for processing Zito's applications.

The Commission should consider PPL's failure to substantiate its charges and practices as an admission that they are indefensible, unjust and unreasonable.

Zito has tried to resolve this dispute, including through executive level discussions as certified in its Complaint and further described herein. It has repeatedly sought mutually acceptable solutions, only to be met with Penelec's still-unmet promises to make changes. It has repeatedly requested that Penelec substantiate and support its invoices – to no avail. It has sought standard input into the make-ready design process, and been rebuffed. It has paid overcharges under protest. It is now time for specific FCC remedies.

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	PENELEC’S CHARGES EXCEED JUST AND REASONABLE LEVELS REQUIRED BY LAW.....	2
A.	Penelec’s Charges for Sigma’s Pre-Attachment Survey Work Far Exceed Reasonable Benchmarks for Similar Work.....	2
1.	Penelec’s charges far exceed what it charges south of I-80, where it accepts Zito’s pole profile forms and conducts joint ride-outs.	3
2.	Penelec’s charges far exceed qualified contractor charges for survey work accepted by Penelec’s ILEC joint use partners.	3
3.	Penelec’s survey charges exceed those submitted by Penelec’s other utility declarants.....	4
4.	Penelec’s charges for the survey work far exceed other publicly available benchmarks.....	6
B.	Penelec Unreasonably Shifts Electric Plant Survey Burdens and Attendant Costs to Attaching Entities in Violation of FCC Rules	6
1.	Penelec is charging Zito far more than is necessary to process its attachment applications contrary to FCC rules.	6
2.	Penelec’s pre-attachment inspection process abandons the most useful steps for attachers, needlessly increases expenses and causes undue delay.	9
3.	Contrary to Penelec assertions, Zito carefully pre-selects its network routes and provides everything to Penelec that it says it will consider.....	12
C.	Penelec Obfuscates its Excessive Charges by Refusing to Provide Necessary Billing Detail.....	15
1.	Penelec Requires Zito to accept lump sum estimates for preconstruction survey work before the application will be processed.	15
2.	Penelec’s average make-ready charges are also excessive and similarly opaque.....	16
3.	Penelec has made clear it will deny access to its poles unless Zito adheres to its unfair charges	17
III.	PENELEC IS NOT MEETING THE COMMISSION’S PRESCRIBED TIMEFRAMES FOR PROCESSING POLE ATTACHMENT APPLICATIONS	18
A.	Penelec’s Contractor, Sigma, Has Not Met the Commission’s Prescribed Time Frames on a Single Pole Attachment Application.....	18
B.	Penelec Refuses To Provide Zito With a List of Qualified Contractors.....	19
IV.	ZITO REPEATEDLY HAS SOUGHT TO RESOLVE THIS DISPUTE INCLUDING THROUGH EXECUTIVE LEVEL DISCUSSIONS	21
V.	REQUESTED RELIEF.....	23

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

ZITO MEDIA, L.P.,

Complainant,

v.

PENNSYLVANIA ELECTRIC COMPANY,

Respondent.

Proceeding No. 17-316
File No. EB-17-MD-006

**ZITO MEDIA, L.P.’S REPLY
IN SUPPORT OF POLE ATTACHMENT COMPLAINT**

Zito Media, L.P. (“Zito”) respectfully submits this Reply in Support of Pole Attachment Complaint for denial of access and unreasonable terms and conditions of pole attachment against Pennsylvania Electric Company (“Penelec”) pursuant to Subpart J of the Federal Communications Commission (“FCC” or “Commission”) Rules, 47 C.F.R. §§ 1.1401 *et seq.*, and the Commission’s Letter Order dated November 21, 2017.

I. INTRODUCTION

It is now clear that Penelec charges Zito \$212.46 to conduct pre-construction surveys that include “company betterment” work and help fulfill Penelec’s state mandated inspection requirements. Despite having hired Sigma and increased Zito’s costs nearly six-fold, Penelec admits that since hiring Sigma it has not met FCC prescribed survey or make-ready timeframes. It also admits it has not provided a list of qualified contractors despite Zito’s requests, and that it

buries the details of its charges in opaque summary billing statements. Rather than substantiate and support its invoices, Penelec's response continues to obfuscate, refuses to accept responsibility for its failings and instead casts blame on Zito. But the facts clearly demonstrate that Penelec's charges and practices are unjust and unreasonable under Section 224 and it is time for prompt and specific FCC remedies.

II. PENELEC'S CHARGES EXCEED JUST AND REASONABLE LEVELS REQUIRED BY LAW

A. Penelec's Charges for Sigma's Pre-Attachment Survey Work Far Exceed Reasonable Benchmarks for Similar Work

Penelec does not dispute that it charges on average \$212.46 per pole for pre-attachment survey work in its territory north of I-80, where Sigma was hired to perform the work. It also does not explain how such charges can be just and reasonable when Penelec itself charges a small fraction of this amount – approximately \$33 per pole – in its territory located south of I-80. It does not explain how it can be just and reasonable to reject the measurements and other field data collected by Zito's qualified contractor, Map Masters, or refuse to conduct joint ride-outs when it accepts Map Masters' work and conducts joint ride-outs south of I-80. Instead, Penelec relies on declarations of other utility pole owners filed in another proceeding to justify its pre-attachment survey process and related charges.² However, certain of these declarants charge far less than Penelec. Moreover, these declarants' reported practices are not representative of how utilities, including Penelec itself south of I-80, and qualified contractors process pole attachment applications or charge for pre-attachment inspections.

² Resp. at Att. D.

1. *Penelec's charges far exceed what it charges south of I-80, where it accepts Zito's pole profile forms and conducts joint ride-outs.*

Penelec does not dispute that it does not rely upon a contractor for survey work in its territory south of I-80,³ where it charges, on average \$33.02 per pole to complete the pre-attachment survey work.⁴ In fact, there, Penelec continues to rely upon the pole profile sheets completed by Zito's qualified contractor, Map Masters.⁵ Similarly, Penelec does not dispute that south of I-80 it continues to conduct joint ride-outs with Zito, during which representatives of both companies travel to and physically inspect each pole included on an application to determine whether and what make-ready work is necessary.⁶ This is the efficient and reasonably priced process that Zito seeks to have restored by the Commission.

2. *Penelec's charges far exceed qualified contractor charges for survey work accepted by Penelec's ILEC joint use partners.*

Zito's contractor, Map Masters LLC, charges \$17.50 per pole to perform the field survey work that Penelec's joint-use partners, Verizon, Frontier and Windstream, accept as complete and sufficient on the poles they use jointly with Penelec.⁷ Using Penelec's Profile Sheet,⁸ the

³ See Compl. at ¶ 22 and Resp. at n. 32 (stating that Penelec intends to transition to using Sigma for work south of I-80).

⁴ This average reflects charges for 32 invoices for pre-attachment survey work paid by Zito since January 2015. Attachment A, Reply Declaration of Kelly Ragosta ("Ragosta Reply Decl.") ¶ 4.

⁵ *Id.* ¶ 5.

⁶ See Compl. at ¶ 32; Resp. at n. 32.

⁷ Ragosta Reply Decl. ¶ 6; Attachment B, Reply Declaration of Todd McManus ("McManus Reply Decl.") ¶ 8. As detailed in the Complaint and Ms. Ragosta's Declaration in support of the Complaint (Att. D) at 6-7, Penelec's SPANS estimates do not break out the charges for *field survey work* as compared to *make-ready design work*; instead the field survey and design charges appear to be lumped together as "Engineering Costs to Zito." See Compl., Att. D, Exh. 3. There is an additional charge for "Insp/Admin Fee to Zito," which may also be related to Sigma's pre-attachment survey work, as well as a lump sum amount for "Make Ready Billing to Zito." The final invoice provided to Zito after it "accepts" the estimate includes even less information – the invoice lists only a lump sum dollar amount for "Services – NT." See Compl., Att. D, Exh. 6. While Penelec does not break out its charges, one of the utility declarants included with

same form created and accepted by Penelec south of I-80, Map Masters collects the pole number, street location, type and height of attachments on each pole, the height and class of pole, and (in appropriate circumstances) midspan clearances – the very same information collected by Sigma for Penelec.⁹ For an extra \$5, Map Masters includes photographs of the pole.¹⁰ Verizon, Frontier and Windstream continue to accept this work and Map Masters' completed Penelec Profile Sheet as standard and sufficient today, without collecting their own measurements.¹¹ Verizon, Frontier and Windstream charge on average \$19.10 per pole, \$37.33 per pole and \$9.08 per pole respectively to complete the pre-attachment survey.¹²

3. *Penelec's survey charges exceed those submitted by Penelec's other utility declarants.*

Penelec's charges even exceed the rates charged by the utilities from which its counsel collected carefully managed statements of support for a different company in a different case.¹³

Penelec's Response, Dayton Power and Light Company ("DP&L"), reports that it "charges a fee of \$110 per pole to survey and collect pole data" and "a fee of \$55 per pole to engineer for make-ready work, for a grand total of \$165." Resp., Att. D. Applying this same ratio to Penelec's average charges (2/3 for field survey work and 1/3 for make-ready design) yields a charge of approximately \$140 for the survey work that Zito's qualified contractor does for \$17.50 per pole.

⁸ Ragosta Reply Decl. ¶ 5 & Exh. 2. As set forth herein, where Penelec jointly uses poles with Verizon, Frontier and Windstream, Zito still is required to and does submit the Penelec Profile Sheets to the telephone company. McManus Decl. ¶ 8.

⁹ McManus Reply Decl. ¶¶ 6-7; Ragosta Reply Decl. ¶ 5 & Exh. 2.

¹⁰ Ragosta Reply Decl. ¶ 5.

¹¹ *Id.* ¶ 7 & Exh. 2.

¹² McManus Reply Decl. ¶ 8.

¹³ Penelec repurposed several declarations that were filed by another electric utility represented by the same counsel in a separate pole attachment complaint proceeding filed by Zito Canton, LLC, FCC Proceeding No. 17-284, File No. EB-17-MD-005 (the "PPL Proceeding"). Resp. at Att. D. Each declaration is captioned for filing in the PPL Proceeding and each declarant states "I make this declaration in support of PPL Electric Utilities Corporation's Response to Pole Attachment Complaint in the above-captioned proceeding." See Resp. at Att. E. Even Penelec made a declaration in the PPL Proceeding (which, as discussed herein, it now contradicts in the instant proceeding).

For example, Penelec attached a declaration by a PECO representative in support of its assertion that its “pre-attachment application and engineering review process” is “similar in scope and cost” to the process followed by other utilities.¹⁴ However, not only is PECO’s reported charge of \$110 per pole¹⁵ approximately *half* the amount charged by Penelec, PECO’s charges to Zito have been closer to \$60 per pole for pole attachment applications.¹⁶

The declaration provided by DP&L states that the utility charges \$110 per pole to survey and collect pole data and \$55 per pole to engineer for make-ready work.¹⁷ While the \$110 per pole charge to perform field survey work is high, especially as compared to Map Masters and Penelec’s own charges south of I-80, the \$55 per pole to design any make-ready work is closer to the competitive rates charged by other utilities contractually allowed to impose such charges, though still higher than Penelec charges south of I-80.¹⁸

Moreover, as Zito explained in the Complaint, Sigma’s charges for the pre-attachment survey process far exceed the costs charged by other pole owners in Pennsylvania for pre-attachment survey work. The amount charged by other Pennsylvania investor-owned electric utilities and telecommunications companies for the pre-attachment survey process is, on average, less than \$28 per pole.¹⁹

¹⁴ Resp. at 17 &. Att. E, Gaiser Decl.

¹⁵ Resp. at Att. D, Gaiser Decl. ¶ 6.

¹⁶ Ragosta Reply Decl. ¶ 7 & Exh. 4. A few of PECO’s invoices for one to three poles and/or cabinets have been higher but appear to be skewed by a minimum charge for post construction inspection. *Id.* ¶ 7.

¹⁷ Resp. at Att. E, Brockman Decl. ¶ 3.

¹⁸ Penelec also attaches a declaration by Minnesota Power, but the claimed fee of \$250-350 is *not* for the pre-application inspection at issue in this case; it is for “combined pre-engineering and post-engineering” and after the fact “spot-checks.” Resp. at Att. E, Corrow Decl. ¶¶ 3, 10.

¹⁹ Compl., Att. D, Ragosta Decl. ¶ 21.

4. *Penelec's charges for the survey work far exceed other publicly available benchmarks.*

Penelec's undisputed average charge of **\$212.46** per pole also far exceeds rates tariffed by nearby PSCs. By comparison, in New York, Central Hudson Electric's tariffed pre-attachment survey fee is \$8.56 per attachment effective July 1, 2015, \$8.95 per attachment effective July 1, 2016, and \$9.29 per attachment effective July 1, 2017.²⁰ National Grid's New York schedule of pole attachment application fees includes a per-pole field survey fee of \$54.15.²¹

B. *Penelec Unreasonably Shifts Electric Plant Survey Burdens and Attendant Costs to Attaching Entities in Violation of FCC Rules*

By all objective measures, Penelec's pre-attachment inspection and make-ready engineering practices are unjust and unreasonable.

1. *Penelec is charging Zito far more than is necessary to process its attachment applications contrary to FCC rules.*

Penelec admits that Sigma collects more information during the pre-attachment inspection process than is required on Penelec's own Profile Sheets, which Penelec itself accepts as sufficient to process Zito's applications in its territory south of I-80.²² Penelec uses the pre-attachment inspection process:

²⁰ See *Petition of the Mid-Hudson Streetlight Consortium for Clarification*, Proceeding with Regard to Tariff Filings to Effectuate Amendments to Public Service Law – New Section 70-a (Transfer of Streetlight Systems), State of New York Public Service Commission, Case 15-E-0745 (filed Oct. 31, 2016); see also *Order Addressing Petition and Directing Tariff Revisions*, State of New York Public Service Commission, Case 15-E-0745 (issued and effective Feb. 23, 2017).

²¹ National Grid, Pole Licensing Process, https://www9.nationalgridus.com/niagaramohawk/attachments/non_html/2205/3rd%20Party%20Process%20Document%20For%20Applicants%20and%20JO's.docx (last visited Dec. 4, 2017).

²² Resp. at 16; Ragosta Reply Decl. ¶ 5.

- to collect extensive information about its own plant, including for its “company betterment” decisions, such as the need to replace failing Penelec equipment;²³
- to collect extensive information about all other existing attachers for its “work order management systems;”²⁴
- to collect and analyze information for poles it does not own;²⁵ and
- to perform a load calculation as a substitute for its state imposed obligation to perform loading calculations of its poles in connection with periodic inspections.²⁶ Penelec’s assertion that it does not use the loading studies to fulfill its acknowledged state required load calculations contradicts recent statements to the Pennsylvania Public Utility Commission (“PA PUC”) made by Penelec in its Biennial Inspection, Maintenance, Repair and Replacement Plan filed September 29, 2017. There, Penelec told the PA PUC that, “Rather than conducting load calculations as part of each [state required] pole inspection,” it gathers the information in the course of performing other work, *including during the third-party pole attachment process*.²⁷

²³ See Resp. at 23. Penelec admits that it instructs Sigma to look at Penelec plant during the pre-attachment survey, that it includes charges for this work in the amounts passed through to Zito (unless they are “substantial”) and that currently, Zito “cannot verify whether or to what extent it is paying Sigma engineering charges associates with such better work.” *Id.*

²⁴ Resp. at 24.

²⁵ McManus Reply Decl. ¶ 10. Penelec has directed Zito to submit applications for all poles occupied by Penelec, even poles that Penelec does not own, which Penelec then uses to engineer the poles, and charges Zito for such work. These poles are included in the per-pole average cost – if they were not, the average per-pole charge would be significantly higher than \$212.46.

²⁶ In the PPL Proceeding, Penelec’s Professional Engineer Robert Chumrik submitted a declaration stating that Penelec’s contractor performs a pole loading analysis on every pole in an application, which statement PPL relied upon in support of its assertion that its engineering process (which includes a pole loading analysis on every pole in an application) is reasonable. Penelec now states that “The Declaration of Robert Chumrik attached to PPL’s Response to Zito’s complaint incorrectly stated that Penelec performs a pole loading analysis on every pole...” Resp. at n. 57. Penelec states instead that it performs a complete loading study only “on representative worst-case poles in a proposal.” Resp. at 21. Still Penelec criticizes Zito for its suggestion that Osmose’s LoadCalc software (or similar) is an efficient means of determining the estimated remaining strength and load capacity of a pole without the need to conduct a full pole loading analysis. *Id.* at 20.

²⁷ See Resp. at 23. See also Attachment E, Biennial Inspection, Maintenance, Repair and Replacement Plan - Pennsylvania Electric Company for the period January 1, 2019 - December 31, 2020 Docket No. M-2009-2094773 (“Rather than conducting load calculations as part of each [state required] pole inspection ... Further, **as the Company receives requests from other entities to attach their facilities to Penelec’s poles, an assessment, ranging from a visual inspection to a full strength analysis, is performed** based on pole attachment guidelines, experience and the situation encountered.”) (emphasis added).

This is far more than the collection of information necessary to process Zito’s applications – as evidenced by the fact that Verizon, Frontier and Windstream accept Zito’s survey information as sufficient to process Zito’s applications for Penelec joint-use poles – yet Penelec’s needlessly more-extensive data collection and analysis is performed at Zito’s expense.²⁸

The Commission has rejected similar charges for excessive inspections as unjust and unreasonable. In *Newport News Cablevision, Ltd. Commc’ns, Inc. v. Virginia Elec. and Power Co., d/b/a Virginia Power*,²⁹ the Commission concluded: “an inspection designed to yield information about more than cable attachments and thus to benefit other pole users should not be paid for solely by the cable company.”³⁰ In that case, the Commission ultimately found that “the inspection practices were a benefit to non-cable pole users and owners, and thus, the costs of the inspection must be allocated among the beneficiaries.”³¹

In *Mile Hi Cable Partners, L.P. v. Public Service Co. of Colorado*,³² a utility had designed an audit for its own benefit “by providing a complete mapping of its system.”³³ The Commission stated: “The cost of an inspection of pole attachments should be borne solely by the cable company only if cable attachments are the sole attachments inspected and there is nothing in the inspection to benefit the utility or other attachers to the pole. . . . Respondent has made *no attempt to show that the survey was limited to cable attachments*.”³⁴

²⁸ See Ragosta Reply Decl. ¶ 6; McManus Reply Decl. ¶ 8.

²⁹ 7 FCC Rcd 2610 (1992).

³⁰ *Id.* at ¶ 8.

³¹ *Id.* at ¶ 9.

³² 15 FCC Rcd 11450, 11455-56 (Cable Serv. Bur. 2001).

³³ *Id.* at ¶ 7.

³⁴ *Id.* at ¶¶ 8-9.

In *Texas Cable & Telecommunications Ass’n v. Entergy Services, Inc.*,³⁵ the Commission struck down a pre-attachment survey charge that the utility was assessing in addition to annual rent. Entergy dropped its pre-attachment survey fee from \$50 to \$10 per pole plus \$10 to prepare a make-ready estimate, and still the charges were held to be unjust and unreasonable.³⁶

2. *Penelec’s pre-attachment inspection process abandons the most useful steps for attachers, needlessly increases expenses and causes undue delay.*

Penelec repeatedly asserts that the pre-attachment inspection process carried out by Sigma is “efficient” and that Sigma has improved the “speed of data collection.”³⁷ In reality, Penelec’s process using Sigma costs more,³⁸ is slower,³⁹ and omits the key problem solving forum where efficiencies are realized (the joint ride-out).⁴⁰ Penelec also asserts that it does not retain any of the data it collects in the field for future use by Penelec or other attachers because doing so would “cost more money than anything *Penelec* might save.”⁴¹ Significantly, Penelec’s efficiency calculus does not appear to account for the increased survey and make-ready costs being passed through to attachers or that Sigma’s failure to meet the FCC timeframes results in significant delays for attachers.

In the traditional pre-attachment survey process to identify make-ready, the applicant and the pole owner cooperate with one another. For example, south of I-80 the parties’ joint ride-out allows them to identify the work required for attachment and to identify circumstances where

³⁵ 14 FCC Rcd. 9138 (Cable Serv. Bur. 1999).

³⁶ *Id.* Even with intervening inflation, the charge held unreasonable would amount to less than \$30 today, far less than Penelec’s charges.

³⁷ *See, e.g.*, Resp. at 18, 25.

³⁸ *See e.g.*, Compl. ¶¶ 35, 40.

³⁹ *See e.g.*, Compl. ¶¶ 35, 47.

⁴⁰ *See infra* Section II.B.2.

⁴¹ Resp. at 24.

make-ready can be simplified, such as through the use of guying rather than with pole changeouts.⁴² The parties can resolve potential disputes in advance, such as agreeing that existing conditions include a pre-existing violation which should not be charged to the applicant when it is corrected.⁴³ Penelec asserts that its practice of unilaterally performing the pre-attachment inspection process is not uncommon;⁴⁴ however, a joint ride-out is the process Zito undertakes with other pole-owning utilities – including Penelec in its territory south of I-80.⁴⁵ Indeed, Sigma’s president, Ryan Hetrick, admits that a visual inspection of the poles provides “a beneficial perspective that numeric measurement cannot which facilitates pragmatic and safer

⁴² Compl. ¶¶ 32. *Accord* Cable Television Pole Attachments, 48 PUR 4th 567 (KY PSC 1982) (“The CATV operators ... generally were not dissatisfied with “make-ready” charges determined by agreement of the parties after a walk-through inspection of the proposed CATV system by representatives of the operator and the utility.”).

⁴³ Compl. ¶ 32. *See, e.g., Kansas City*, 14 FCC Rcd. at 11606-07 ¶ 19 (“Correction of the pre-existing code violation is reasonably the responsibility of KCPL and only additional expenses incurred to accommodate Time Warner’s attachment to keep the pole within NESC standards should be borne by Time Warner.”); *Southern Co. v. FCC*, 293 F.3d 1338, 1352 (11th Cir. 2002) (requiring utilities to bear a proportionate share of the costs associated with modernizing their plant pursuant to an attacher’s request for a modification); 47 U.S.C. § 224(i) (“An entity that obtains an attachment to a pole . . . shall not be required to bear any costs of rearranging or replacing its attachment, if such rearrangement or replacement is necessitated solely as a result of an additional attachment . . . sought by any other entity (including the owner . . .)”); 47 C.F.R. § 1.1416(b).

⁴⁴ Resp. at 13 & Att. D.

⁴⁵ McManus Reply Decl. ¶ 4 (stating that Verizon, Penelec south of Interstate 80, West Penn Power, Frontier, Windstream, Empire Access, National Grid, and all other co-ops with whom he has worked use this process). In addition, the documents collected at Attachment F hereto are evidence of other pole owners that conduct joint ride-outs with attaching entities. *See* Att. F at 2 (Georgia Power Pole Attachment Application, which affords the right of the attacher to request a joint ride-out for any pole); Att. F at 8 (Pole Attachment Agreement between Verizon, the Town of Princeton, and Charter, effective Nov. 14, 2017, at Section 3.2, expressly affording the right of the attacher to schedule a joint ride-out with the pole owner to determine whether make-ready is necessary); Att. F at 32 (Article 5.3 of pole attachment agreement between Time Warner Cable Southeast, LLC and Carteret-Craven Electric Membership Corp. expressly providing for joint ride-out); Att. F at 80 (letter to West Virginia Public Service Commission indicating that Frontier provides Lumos with the opportunity to conduct joint ride-outs to assess all of Lumos’ pole applications in West Virginia).

designs to accommodate the attachers' proposal."⁴⁶ Yet Penelec and Sigma have repeatedly rebuffed Zito's efforts to employ this widely accepted industry practice.⁴⁷

None of the so-called "joint ride-out options" Penelec asserts it offered to Zito provide any meaningful problem-solving opportunities or efficiencies. Penelec acknowledges that the Sigma technician that performs the field survey is simply "there to collect measurements" and "not qualified to make decisions about make-ready work to be performed."⁴⁸ It would thus be futile for Zito to accompany Sigma's admittedly "not qualified" technician during this process. Penelec admits that, even if Zito were to pay \$88/hour for a qualified technician to be present for a joint ride-out during the field survey, no make-ready decisions would be made in the field. Zito would still have to wait for Sigma's unilateral make-ready determinations – all developed at Zito's expense – and only *after* this drawn out process can Zito provide feedback or propose an alternative.

Penelec now also admits that it charges Zito to identify and correct its own pre-existing non-compliance.⁴⁹ Penelec asserts that it only charges Zito for such work when, in Sigma's opinion, the charges are "insubstantial" or "incidental," but admits that Zito has no way to verify Sigma's charges.⁵⁰ Moreover, Penelec only offered to provide additional billing detail concerning its "betterment" work after being confronted by Zito, but still has yet to do so.⁵¹

⁴⁶ Resp. at Att. C ¶ 5.

⁴⁷ Compl. ¶¶ 33, 55, 66.

⁴⁸ Resp. at 12.

⁴⁹ Resp. at 23 ("in the course of surveying the poles in Zito's application, Penelec instructs Sigma to note any Penelec equipment that is out of compliance with current standards.")

⁵⁰ Resp. at 23.

⁵¹ Resp. at 23-24. *See also infra* at n. 91.

3. ***Contrary to Penelec assertions, Zito carefully pre-selects its network routes and provides everything to Penelec that it says it will consider.***

Zito does not, as Penelec asserts, use Penelec's survey and design work to determine its network routes.⁵² Zito's careful route selection process is a multi-phase collaborative process among Zito's plant managers and engineering contractor, Map Masters.⁵³ Zito puts great effort into selecting the ideal pole line (where more than one route is available) and strives to avoid congested power poles.⁵⁴

Zito provides Sigma all the pole and route data that Penelec has stated it will consider. Penelec instructed Zito to stop providing pole profile sheets for Sigma-Engineered applications (north of I-80) in October 2016.⁵⁵ Moreover, certain information that Penelec claims is lacking is not requested on Penelec's pole profile form.⁵⁶ Sigma's self-serving declaration notwithstanding, Zito's pole profile sheets are accurate, complete and filled out with intended collaboration.⁵⁷ On crowded poles that require make-ready work, Zito requests an "engineering

⁵² Resp. at 7.

⁵³ McManus Reply Decl. ¶ 11.

⁵⁴ *Id.*

⁵⁵ Ragosta Reply Decl. ¶ 8. Penelec admits that it "allowed" Zito to stop submitting Pole Profile forms in emails dated August 1 and September 5, 2017. Resp. at 22. In fact, Penelec made it clear that Sigma would not use Zito's pole profile sheets long before the cited emails. Ragosta Reply Decl. ¶ 8.

⁵⁶ Penelec's profile form does not request tension or mid-span clearance information (or include a place to enter such information). However, Zito's contractor Map Masters includes mid-span measurements on the profile sheet in the notes section in appropriate circumstances (such as for road crossings). If Penelec actually wants Zito to collect additional information, Zito would welcome resumption of an arrangement in which Penelec agrees to rely upon measurements by Map Masters and does not charge Zito for duplication by Sigma. McManus Reply Decl. ¶ 7.

⁵⁷ Resp. at Att. C ¶¶ 8-19. Sigma claims that the issues it identifies demonstrate that "Zito was relying on Sigma to perform the full survey and design work" (*id.* at ¶ 9), but Sigma had not even been hired by Penelec at the time Zito submitted the application at issue, and thus could not have relied upon Sigma for its route selection. See McManus Reply Decl. ¶ 9. Additionally, prior to Sigma's processing of Zito's applications, Penelec had processed and approved many

check” to indicate that coordination on make-ready decisions is required.⁵⁸ Far from being an indication that Zito pole profiles are “deficient” as Sigma asserts, this notation illustrates Zito’s interest in reaching *joint* make-ready decisions. Where ownership is not clear, Zito errs on the side of including poles that are owned by Penelec’s joint use partners, understanding that Penelec knows best which poles it owns.⁵⁹ Additionally, as previously stated, Penelec has directed Zito to submit applications for all poles festooned with Penelec facilities, even those Penelec does not own.⁶⁰ These limited examples offered in Mr. Hetrick’s declaration do not support his claims that Zito’s pole profile forms include “deficient information.”

Rather than address its own inefficiencies, Penelec blames Zito’s “lack of due diligence” and willingness to participate in Penelec’s process for any delays and cost overruns.⁶¹ In fact, as set forth in Zito’s Complaint, even if Zito had continued to submit the Profile Sheets with its applications, Penelec has made clear that its contractor will not consider them.⁶² And, even if Zito were to accompany Sigma’s technical representative during the field survey, Penelec has made clear that none of the efficiencies of a traditional joint ride-out would be accomplished.⁶³

applications containing completed profile sheets requesting an “engineering check,” which issues were then resolved by the parties during joint ride-outs. *Id.*

⁵⁸ McManus Reply Decl. ¶ 9. Sigma points to five of 54 pole profile sheets on an application that indicated a need for an “engineering check.” Resp. at Att. C, at 2-3.

⁵⁹ Sigma notes that four of the 54 pole profile sheets were for poles not owned by Penelec. Resp. Att. C, at 2-3. Where pole tags do not exist and ownership is not clear, Zito errs on the side of including the pole in the application presuming that Penelec, as the owner, can easily identify poles it does not own. McManus Reply Decl. ¶ 10.

⁶⁰ McManus Reply Decl. ¶ 10.

⁶¹ Resp. at 5, 13.

⁶² Resp. at 9.

⁶³ Penelec explains Sigma’s technicians are “there to collect measurements and are not qualified to make decisions about make-ready work to be performed.” Resp. at 22. Accordingly, no decisions would be made in the field as in a traditional joint ride-out. Penelec also admits that, even if Zito did submit Penelec Profile Sheets, Zito would still be charged for Sigma to conduct

Penelec also takes issue with certain applications where Zito has chosen, after receiving excessive make-ready estimates, to re-route. Zito is not prohibited (under the parties' Agreement, FCC rules, or otherwise) from removing poles from its applications, or canceling entire applications altogether. Nor is it unreasonable for Zito to do so when Zito determines the proposed make-ready work to be excessive or unnecessary. Because Sigma will not participate in a traditional joint ride-out where make-ready decisions can be discussed in the field, Zito has no choice but to wait for Sigma's estimates before it can evaluate the basis and reasonableness of those estimates. In any event, of the 23 applications that Sigma actually has processed (reflecting 927 poles) Zito removed less than 60 poles from its applications.⁶⁴ Even where Zito ultimately removed poles from an application – thus eliminating the need for make-ready work on such poles altogether – it paid all of the charges associated with the application, including for the make-ready work never performed so that it could proceed with temporary attachments on other poles.⁶⁵

Moreover, Penelec's prime example relied upon to cast aspersion on Zito for removing poles from applications concerns applications filed over two years ago that pre-date Sigma's hiring and concern poles outside Sigma's territory for Penelec.⁶⁶ In fact, Zito's contractor Map Masters, not Sigma, performed the field survey and completed the Penelec Profile Sheets that were submitted with these applications.⁶⁷ In any event, Zito paid the invoices for each of those

the same work. *Id.* Finally, despite charging Zito \$212 per pole for an inspection, Penelec offers the ludicrous proposal that Zito could police Sigma's contractor and check its work with a re-survey of every single pole. The entire issues could be most efficiently resolved by Penelec resuming its reliance on Map Masters' work and the joint ride-out process.

⁶⁴ Ragosta Reply. Decl. ¶ 10.

⁶⁵ *Id.*

⁶⁶ Resp. at 7-8; Ragosta Reply Decl. ¶¶ 11-16.

⁶⁷ Ragosta Reply Decl. ¶¶ 11-16.

applications within a week of receiving Penelec’s invoice, notwithstanding that Penelec took between 105 and 224 days to provide estimates for those applications – well beyond the FCC’s required timeframes.⁶⁸

C. Penelec Obfuscates its Excessive Charges by Refusing to Provide Necessary Billing Detail

1. Penelec Requires Zito to accept lump sum estimates for preconstruction survey work before the application will be processed.

Penelec admits that it does not provide sufficient billing detail in its SPANs estimates, and acknowledges that Zito’s requests for additional billing detail are justified.⁶⁹ Penelec’s “engineering charges” are also out of step with the actual work required on the poles and inconsistent from estimate to estimate. For instance, one estimate from Penelec for an application containing 49 poles, some of which included make-ready, included an average engineering charge of \$317.75 per pole.⁷⁰ Another estimate from Penelec for an application containing 4 poles, *none of which required make-ready*, included an average engineering charge of \$312.50 per pole.⁷¹ Such opaque, unpredictable and excessive charges unreasonably interfere with Zito’s ability to plan, design and deploy its network to customers.

Despite Penelec’s billing obfuscation, Zito caught Penelec charging it for “company betterment,” which Penelec now admits.⁷² Yet Penelec chastises Zito for filing its complaint,

⁶⁸ *Id.*

⁶⁹ Resp. at 26.

⁷⁰ Ragosta Decl. ¶ 17.

⁷¹ *Id.* ¶ 18.

⁷² Compl. ¶¶ 47-48; Ragosta Decl. at ¶ 17. Penelec claims that its estimates associated with any company betterment identified through the pre-attachment survey process reflect a corresponding reduction in construction and engineering costs to Zito, but, without any billing detail, Zito has no way of verifying this claim. *Id.* at ¶ 48. Penelec admits that Zito “cannot verify whether or to what extent it is paying Sigma engineering charges associated with such betterment work.” Resp. at 23. And Penelec admits that it does pass through certain betterment charges that, in

claiming the requested billing detail was forthcoming.⁷³ In reality, Penelec has yet to make any of the requested changes to its process and has only promised to do so after being confronted by Zito.⁷⁴ Zito has no basis to expect that any such changes have been made or are forthcoming unless the Commission orders such changes.

2. *Penelec's average make-ready charges are also excessive and similarly opaque.*

Penelec's make-ready estimates take the form of lump sum charges for entire applications.⁷⁵ Its invoices, provided only after the estimates are accepted, simply list "Services NT."⁷⁶ There is no break-down of the make-ready charges associated with each pole, much less any detail as to the labor and materials charges for each specific make-ready task. As such, Penelec can easily bury illicit charges, including work for its own betterment and to correct pre-existing safety violations, in its opaque, non-itemized bills.⁷⁷ Penelec withholds this critical billing detail from Zito but then, when Zito seeks relief at the Commission for charges that on *average* are over three times the per pole charges assessed by similarly-situated utilities, Penelec

Sigma's opinion, are "insubstantial" or "incidental." Resp. at 23. Again, without any billing detail, Zito is not even able to determine how much of Sigma's design includes betterment, let alone what is being charged for such work.

⁷³ Resp. at 26-27 ("intending to produce documents *soon* in response to Zito's request that Penelec follow the make-ready invoice process of Penelec's sister company Ohio Edison"). In fact, Zito provided the Ohio Edison example to Penelec six months ago. Compl. ¶ 49; Ragosta Decl. ¶ 25 & Exh. 8.

⁷⁴ As set forth in the Complaint, while Penelec provided certain limited details about the make-ready required for a single application, it still has not provided the cost breakdown for the specific make-ready work to be performed on each pole in order for Zito to evaluate whether the lump-sum invoice charge is reasonable. Compl. n. 79; Ragosta Decl. ¶ 23 n. 3.

⁷⁵ Compl. ¶ 44.

⁷⁶ Compl., Ragosta Decl. Exh. 6.

⁷⁷ Resp. at 23.

argues that Zito has failed to meet its burden of proof.⁷⁸ In fact, the Commission's rules are clear; a complaint will not be dismissed where information is not available "from the respondent utility after reasonable request."⁷⁹

3. *Penelec has made clear it will deny access to its poles unless Zito adheres to its unfair charges*

Penelec admits that it leverages its control over poles to induce Zito to pay disputed charges by conditioning access on prior payment.⁸⁰ This is not a permissible basis for denying access. Under Section 224(f), access may only be denied for safety or engineering reasons. And, contrary to Penelec's suggestion in its Response,⁸¹ neither underground construction nor fiber leasing are viable alternatives to aerial construction, especially in Pennsylvania, where boring through bedrock and restoration expenses combine to make underground construction cost prohibitive, and fiber leasing arrangements are too costly to sustain long-term.⁸² In holding

⁷⁸ Resp. at 29.

⁷⁹ 47 CFR § 1.1406.

⁸⁰ Resp. at 32-33.

⁸¹ Resp. at 10.

⁸² Attachment C, Reply Declaration of James Rigas ("Rigas Reply Decl.") ¶ 5; McManus Reply Decl. ¶ 12. "[I]n most instances underground installation of the necessary cables is impossible or impracticable. Utility company poles provide, under such circumstances, virtually the only practical physical medium for the installation of television cables." *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987). In enacting the federal pole attachment Act, Congress explained, "owing to a variety of factors, including environmental or zoning restrictions and the costs of erecting separate CATV poles or entrenching CATV cables underground, there is often ***no practical alternative*** to a CATV system operator ***except to utilize available space on existing poles.***" S. REP. NO. 580, 95th Cong. 1st Sess. 13 (1977) (emphasis added). *See also* 123 Cong. Rec. H35008 (1977) (statement of Rep. Broyhill, co-sponsor of Pole Attachment Act) ("The cable television industry has traditionally relied on telephone and power companies to provide space on poles for the attachment of CATV cables. Primarily because of environmental concerns, local governments have prohibited cable operators from constructing their own poles. Accordingly, cable operators are virtually dependent on the telephone and power companies. . . .").

Zito's attachments hostage as a result of Zito's objections over Penelec's excessive and unsubstantiated estimates, Penelec is in violation of the law.⁸³

III. PENELEC IS NOT MEETING THE COMMISSION'S PRESCRIBED TIMEFRAMES FOR PROCESSING POLE ATTACHMENT APPLICATIONS

A. Penelec's Contractor, Sigma, Has Not Met the Commission's Prescribed Time Frames on a Single Pole Attachment Application

Penelec concedes that despite having hired Sigma and more than quadrupled its charges for pre-attachment surveys, it is still not meeting the Commission's prescribed timeframes for processing pole attachment applications.⁸⁴

Indeed, since Sigma was hired 18 months ago, it has completed work on less than one-third of Zito's applications and none were completed within the Commission's prescribed timeframes.⁸⁵ Sigma failed to even survey poles on 28 applications, leading Penelec to allow Zito to make temporary attachments using some of the very construction techniques that Penelec disparages in its Response.⁸⁶ Another 27 pending applications remain unprocessed without a

⁸³ In freezing Zito's access rather than addressing Zito's billing concerns, Penelec engaged in the same conduct found by the Commission to be unreasonable in *Kansas City Cable Partners*, 14 FCC Rcd 11599, ¶ 18 (1999). In that case, the Commission held that a utility cannot "condition access on payment of a disputed claim" and "[d]ebt collection is not permissible grounds for denial of access." Penelec claims that *Salsgiver* provided authority for such a freeze, but Zito has not attached without make-ready – the conduct at issue in that phase of *Salsgiver* – and Zito has paid and sought refund, exactly as expected by the FCC. *Salsgiver Communications, Inc. v. North Pittsburgh Telephone Co.*, 22 FCC Rcd. 20536, 20540 ¶ 15 (Enf. Bur. 2007) (ordering pole owner to grant cable operator immediate nondiscriminatory access to poles).

⁸⁴ Resp. at 35-36.

⁸⁵ Of the 78 total applications submitted by Zito that have been assigned to Sigma, Sigma has only provided make-ready cost estimates for 23 applications.

⁸⁶ Compl. Att. B, Higgin Decl., Exh. 2 at Exhibits A-2 & A-3; Ragosta Decl. ¶ 30. For the most recent extension of the parties' Temporary Attachment Agreement, Zito tendered payment to Penelec the full invoiced amount of \$446,349, despite the fact that Penelec had not conditioned the previous temporary attachment agreements on Zito's advance payment or acceptance of

temporary attachment agreement.⁸⁷ Penelec admits all of this but still insists its process is “efficient” and states it plans to begin using Sigma south of I-80.⁸⁸ Penelec urges the Commission to take action to ensure that Penelec complies with FCC prescribed timeframes and does not extend the same unreasonable costs and process to its territory south of I-80.

B. Penelec Refuses To Provide Zito With a List of Qualified Contractors

Penelec admits that, despite Zito’s multiple requests for a list of utility-approved contractors dating back to 2015,⁸⁹ Penelec still has refused to provide this information to Zito in clear violation of Commission rules.⁹⁰ As it does throughout its Response, however, rather than accept responsibility for this failure, Penelec blames Zito, stating that “after Penelec announced it had hired Sigma, Zito dropped its request” and “after Zito’s General Counsel executed the Temporary Attachment Agreement ... Zito evidently was content for some period.”⁹¹ In fact, since entering the first TAA, Zito made at least two additional requests for a list of approved contractors, neither of which was fulfilled.⁹²

Penelec tries to mask its failure with tired and long-refuted claims that applicants cannot be trusted to make safe engineering judgments or even hire or manage engineering contractors.⁹³

make-ready estimates. Compl. Att. D, Ragosta Decl. ¶ 31.

⁸⁷ Compl. Att. D, Ragosta Decl. ¶ 32. Two of those applications were filed in September 2016, 24 were filed in March, April and May 2017, and one was filed in September 2017.

⁸⁸ Resp. at n. 32.

⁸⁹ Resp. at 35-36.

⁹⁰ See 47 C.F.R. 1.1422 (“A utility shall make available and keep up-to-date a reasonably sufficient list of contractors it authorizes to perform surveys and make-ready in the communications space on its utility poles in cases where the utility has failed to meet deadlines specified in § 1.1420.”).

⁹¹ Resp. at 36.

⁹² Attachment D, Reply Declaration of Colin Higgin ¶ 4.

⁹³ Resp. at 23-26.

Specifically, Penelec asserts that an injury to one of Zito's workers now at issue in the pending Forlina litigation "proves" that Zito is insufficiently committed to safety "and renders any Zito advice about safety unreliable."⁹⁴ Penelec's attempt to exploit this personal injury incident is both shameful and misleading. As set forth in the Forlina Complaint, in an effort to climb an embankment, Mr. Forlina grabbed an improperly maintained Penelec guy wire, which became energized when it broke and was in an area accessible to the public at large.⁹⁵ No Zito facilities were on the pole, but Zito has implemented processes to avoid attachment to poles that have not yet been permitted.⁹⁶ The incident and the extent to which Zito's indemnification obligations covers Penelec's negligence remain in litigation. The pendency of that litigation is irrelevant to the claims in this case and to the relief requested.⁹⁷

The reality is that Zito has ample incentives to build its network safely and reliably: Zito relies upon Penelec poles and power distribution plant to deliver Zito's services to customers. Zito's agreements with its customers include service level agreements that require Zito to pay significant monetary penalties for service interruptions.⁹⁸ Zito is contractually obligated to indemnify Penelec for any damages arising from its attachments.⁹⁹ Zito is clearly motivated to

⁹⁴ Resp. at 11.

⁹⁵ Resp. Att. D, Second Amended Complaint at paras. 13-21.

⁹⁶ McManus Reply Decl. ¶ 13.

⁹⁷ Penelec attaches the initial pole profile sheet submitted for the subject pole to support its assertion that Zito cannot properly complete pole profile sheets on its own. Resp., Att. B, Gardner Decl. at Exh. 1. But Penelec omits the fact that Zito corrected its contractor's initial measurements during the joint ride-out conducted by the parties for this pole. McManus Reply Decl. ¶ 14. Penelec is well aware of this correction. Ragosta Reply Decl. ¶ 19 & Exh. 5. Thus, Mr. Gardner's field check and completion of a new profile sheet for this pole nearly two and a half years after the corrected pole profile sheet was submitted is not reflective of conditions at the time of Zito's application, and is thus irrelevant.

⁹⁸ Rigas Reply Decl. ¶ 4.

⁹⁹ Higgin Decl., Exh. 1, Art. 11.

build its network safely and reliably.¹⁰⁰ It is clearly qualified to provide input into the terms and conditions governing the scope or price of the work performed by Penelec’s contractors that are processing Zito’s applications.¹⁰¹

IV. ZITO REPEATEDLY HAS SOUGHT TO RESOLVE THIS DISPUTE INCLUDING THROUGH EXECUTIVE LEVEL DISCUSSIONS

In yet another attempt to further delay resolution of this dispute, Penelec requests the Commission to dismiss Zito’s Complaint by refusing to acknowledge the multiple executive level discussions that have taken place between Penelec and Zito since early 2015.¹⁰² After several attempts to resolve these issues in meetings, calls and correspondence, in full compliance with the Commission’s Rule 1.1404(k), on September 8, 2017, Zito’s Co-President, James Rigas, sent a certified letter to Steven Schafer, Manager, Joint Use & Cable Locating for FirstEnergy (Penelec’s parent company) setting forth all of the allegations that form the basis for the complaint that Zito ultimately filed with the Commission.¹⁰³ These allegations were not new to Penelec at the time of the letter, and they were not new to Penelec at the time of the Complaint.

Indeed, Zito raised its concerns about the delays, Sigma’s pre-attachment inspection process, and Penelec’s excessive and unsubstantiated estimates almost immediately after Penelec

¹⁰⁰ Compl. ¶ 34.

¹⁰¹ McManus Reply Decl. ¶ 5. Indeed, the Commission’s contractor solution for make-ready delays is premised on the notion that cable operators are qualified to hire and manage contractors. *See also Cox Cable Corp. v. Gulf Power Co.*, 591 So.2d 627, 630 (Fla. 1992) (finding that the cable operator had satisfied its obligation under its pole attachment agreement to employ “contractors who are experienced in working with and around energized electrical conductors”).

¹⁰² Compl. ¶ 16.

¹⁰³ Compl. ¶ 66 & Rigas Decl. Exh. 1. Despite acknowledging the parties many discussions leading up to that point, Mr. Schafer’s September 20, 2017 letter in response refused to acknowledge either Mr. Rigas September 8 letter or the parties’ previous discussions as “executive-level discussions.” Rigas Decl. Exh. 2. Mr. Rigas responded by, inter alia, disagreeing with Mr. Schafer’s characterization of the parties’ exchanges. *Id.* Exh. 3.

hired Sigma. As Penelec acknowledges, Zito had demanded a list of qualified contractors from Penelec in November 2015, nearly a year before Sigma was actually hired, because of Penelec's failure to comply with Commission timeframes.¹⁰⁴

As detailed in the Complaint, there were multiple phone calls among representatives of Penelec and Zito to discuss the very issues that form the basis of the Complaint.¹⁰⁵ Mr. Schafer and Mr. Rigas, as well as Penelec's declarant Robert Chumrik, participated in the last such call on June 21, 2017.¹⁰⁶ During that call, it was Mr. Schafer that suggested a face to face meeting with Sigma, Zito and Penelec to discuss Zito's concerns.¹⁰⁷ Mr. Rigas was explicit that Zito was willing to participate in such a face to face meeting only if there was a meaningful chance for the parties to reach a mutually satisfactory resolution, but that it was otherwise prepared to file a complaint with the Commission.¹⁰⁸ Mr. Schafer responded: "That would be waste of time for all of us. I wouldn't suggest this meeting if I didn't believe we could find a solution."¹⁰⁹ That face to face meeting occurred on July 25, 2017, with the same individuals from the final call in attendance, as well as Wallace Cunningham (Engineering Manager, FirstEnergy) and Penelec's declarant Ryan Hetrick (President, Sigma).¹¹⁰

Zito's executive-level certified letter to Penelec alone satisfies the Commission's rule regarding executive level discussions, and it further serves to memorialize the series of executive

¹⁰⁴ Resp. at 35-36.

¹⁰⁵ Compl. ¶¶ 52-60.

¹⁰⁶ Rigas Reply Decl. ¶ 6.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

level discussions that already had occurred up to that date. Penelec's refusal to label these discussions as "executive level discussions" does not make it so.

V. REQUESTED RELIEF

It is time for prompt and specific FCC remedies.¹¹¹ Specifically, Zito seeks the following remedies:

The Commission should prohibit Penelec from charging directly for pre-attachment surveys,¹¹² which Penelec admits include work for Penelec's betterment and which help to satisfy Penelec's state mandated inspection and studies, and direct Penelec to refund to Zito the amounts already paid for survey work and engineering.

Alternatively, the Commission should direct Penelec to refund to Zito any amounts above what the Commission determines to be a reasonable survey charge. A reasonable range of rates is between the average of \$27.83 per pole charged by other Pennsylvania pole owners (which includes make-ready design work) and the \$17.50 unit cost charged by Map Masters plus some reasonable additional amount for make-ready design. This amount should not exceed the \$33 per pole amount charged by Penelec south of I-80.

¹¹¹ As a final Hail Mary, Penelec questions whether Zito even has pole attachment rights. Resp. at 38-39. Penelec offers no support for this statement or to refute Zito's statement in the Complaint that it provides cable television, telecommunications services, and broadband internet access to business and residents in Pennsylvania. However, the Commission recently warned utilities against using the classification of services as a barrier to pole access stating, "we caution pole owners not to use this Order as a pretext to increase pole attachment rates or to inhibit broadband providers from attaching equipment—and we remind pole owners of their continuing obligation to offer "rates, terms, and conditions [that] are just and reasonable." *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, WC Docket No. 17-108, FCC-CIRC1217-04, ¶ 182 (Draft Rel. Nov. 22, 2017).

¹¹² See *Texas Cable*, 14 FCC Rcd. at 9140-42 ¶¶ 10, 14 (utility could not recover survey costs through direct reimbursement rather than through annual fee); *Newport News*, 7 FCC Rcd 2610 ¶ 8 ("inspection designed to yield information about more than cable attachments and thus to benefit other pole users should not be paid for solely by the cable company"); *Mile Hi*, 15 FCC Rcd. at 11455-56 ¶¶ 8-9 (survey was not limited to cable attachments and charges not directly related to actual costs of conducting survey).

The Commission should order Penelec to refund all amounts charged to conduct pre-construction surveys of ILEC owned poles, as this is clearly not permitted by the parties' pole attachment agreement or Commission precedent.

The Commission should order that any reasonably priced engineering fee charged by Penelec include a joint field ride-out with an engineer capable of making make-ready decisions and evaluating less costly construction alternatives, and prohibit Penelec from charging Zito to correct pre-existing non-compliance.

The Commission should order that all of Penelec's invoices – including for pre-construction surveys and make-ready estimates – list itemized labor and material charges by pole and by task.

Penelec should be required to meet the Commission's timeframes, provide a list of qualified contractors, and permit Zito to continue using temporary attachments where Penelec cannot meet timeframes.

Respectfully submitted,

Zito Media, L.P.

/s/ Maria T. Browne

By its Attorneys

Maria T. Browne

Leslie G. Moylan

Davis Wright Tremaine LLP

1919 Pennsylvania Avenue, N.W., Suite 800

Washington, D.C. 20006

202-973-4281 (Direct Phone)

202-973-4481 (Direct Fax)

202-973-4200 (Main Phone)

202-973-4499 (Main Fax)

mariabrowne@dwt.com

lesliemoylan@dwt.com

Colin Higgin
Zito Media, L.P.

Date submitted: January 2, 2018

CERTIFICATE OF SERVICE

I hereby certify that on January 2, 2018, I caused a copy of the foregoing Reply in Support of Pole Attachment Complaint, exhibits and declarations in support thereof, to be served on the following (service method indicated):

Marlene J. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Room TW-A325
Washington, DC 20554
(ECFS)

Thomas B. Magee
Timothy A. Doughty
Counsel for Pennsylvania Electric Company
Keller and Heckman LLP
1001 G Street NW
Suite 500 West
Washington, DC 20001
magee@khlaw.com
doughty@khlaw.com
(via U.S. mail and email)

Michael Engel
Lisa Saks
Federal Communications Commission
Enforcement Bureau
445 12th Street, SW
Room TW-A325
Washington, DC 20554
Michael.Engel@fcc.gov
Lisa.Saks@fcc.gov
(via email and hand delivery)

Secretary's Bureau
Pennsylvania Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265
(via overnight mail)

/s/ Maria T. Browne
Maria T. Browne