

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

ZITO MEDIA, L.P.,

Complainant,

v.

PENNSYLVANIA ELECTRIC COMPANY,

Respondent.

File No.

POLE ATTACHMENT COMPLAINT

Respectfully submitted,

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Zito Media, L.P. (“Zito”) respectfully submits this 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 (“Commission”) Rules, 47 C.F.R. §§ 1.1401 *et seq.*

I. SUMMARY AND INTRODUCTION

Zito’s ability to attach communications facilities to utility poles in a timely and cost-effective manner is essential to the deployment of its broadband network. Congress, the Commission and Courts have recognized that existing utility poles are essential for the deployment of communications networks and that communications providers often have no reasonable or feasible alternative to attaching their facilities to existing utility poles.¹ As such,

¹ See *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1266, 1268 (11th Cir. 2000) (“[C]able television industry has attached its cables to the utility poles of power and telephone companies . . . because factors such as zoning restrictions, environmental regulations, and start-up costs have rendered

Congress directed the Commission to “regulate the rates, terms, and conditions of pole attachments to provide that such rates, terms, and conditions are just and reasonable.”² Additionally, the Commission has a duty to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”³

In an extensive rulemaking proceeding in the matter of *Implementation of Section 224 of the Act: A National Broadband Plan for Our Future*, the Commission took steps in an attempt to meet the objectives of Congress related to pole attachments by addressing the “prolonged, unpredictable, and costly” processes employed by utilities and to ensure that access to poles is not “more burdensome or expensive than necessary.”⁴ In the resulting *2011 Pole Attachment Order*, the Commission substantially revised its pole attachment rules to “to improve access to utility poles,” including the adoption of timeframes and the use of utility approved contractors.⁵ The Commission’s primary objective was “to improve the efficiency and reduce the potentially

other options infeasible. . . . [Additionally,] utility poles afforded [telecommunications providers] the only feasible means for stringing their wires.’), *rev’d sub nom. NCTA v. Gulf Power Co.*, 534 U.S. 327 (2002); S. Rep. No. 95-580 at 13 (1977) (“1977 Senate Report”), *reprinted in* 1978 U.S.C.C.A.N. 109, 121; *United States v. Western Elec. Co.*, 673 F. Supp. 525, 564 (D.D.C. 1987) (cable TV companies “do depend on permission from the Regional Companies for attachment of their cables to the telephone companies’ poles and the sharing of their conduit space. . . . In short, there does not exist any meaningful, large-scale alternative to the facilities of the local exchange networks”), *aff’d in relevant part*, 900 F.2d 283 (D.C. Cir. 1990); *General Tel. Co. of Southwest v. United States*, 449 F.2d 846, 851 (5th Cir. 1971) (construction of systems outside of utility poles and ducts is “generally unfeasible”).

² 47 U.S.C. § 224(b)(1).

³ 47 U.S.C. § 1302(a).

⁴ *Implementation of Section 224 of the Act: A National Broadband Plan for our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd. 5240, 5243 ¶ 6 (2011) (“*2011 Pole Attachment Order*”).

⁵ *Id.*, 26 FCC Rcd. at 5250 ¶ 19.

excessive costs of deploying telecommunications, cable, and broadband networks, in order to accelerate broadband buildout.”⁶

Yet, six years later, utilities like Penelec still are creating substantial barriers to the deployment of broadband by imposing unreasonable delays and excessive costs in the pole attachment process. Indeed, when the Commission adopted the Notice of Proposed Rulemaking in the currently-pending wireline broadband deployment proceeding, Chairman Pai acknowledged that “[u]nreasonably high costs and excessive delays to access poles and costly and cumbersome permitting processes can make it extremely difficult to deploy infrastructure.”⁷ In its recent draft Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, the Commission reiterated its goals to overcome these barriers, stating:

[R]emoving unnecessary impediments to broadband deployment . . . will enable carriers to more rapidly shift resources away from maintaining outdated legacy infrastructure and services and towards the construction of next-generation broadband networks bringing innovative new broadband services. And by reducing the costs to deploy high-speed broadband networks, we make it more economically feasible for carriers to extend the reach of their networks, increasing competition among broadband providers to communities across the country.⁸

Despite the Commission’s clearly stated objectives to remove barriers to broadband infrastructure deployment, Penelec’s pole attachment application process is “prolonged, unpredictable, and costly” and “more burdensome or expensive than necessary.”⁹ And, Penelec continues to use its leverage over the scarce pole asset to force Zito to pay unreasonably high

⁶ *Id.*, 26 FCC Rcd. at 5241 ¶ 1.

⁷ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, Statement of Chairman Ajit Pai, 32 FCC Rcd. 3266, 3327 (2017).

⁸ Draft Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, FCC-CIRC1711-04 at 3 ¶ 3 (circulated Oct. 26, 2017).

⁹ *Implementation of Section 224 of the Act; A National Broadband Plan for our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd. 5240, 5243 ¶ 6 (2011) (“*2011 Pole Attachment Order*”).

costs as a condition of access and to unfairly shift compliance costs to Zito, all while refusing to allow Zito to provide critical input into deployment decisions impacting Zito's network.

Specifically:

- Despite Penelec's unilateral hiring of a third party contractor to process pole attachment applications, perform pre-attachment surveys, and provide make-ready estimates, all at Zito's expense, Penelec is not meeting the Commission's prescribed timeframe for access to utility poles. Of the 78 pole attachment applications filed by Zito since 2016, Penelec has provided make-ready estimates for only 23, and those were provided well outside the prescribed timeframes. Penelec also refuses to allow Zito to make temporary attachments to its poles – despite allowing this construction method previously – unless Zito first pays its contractor's excessive and unsupported survey and make-ready estimates in full. Zito's deployment obligations to its customers have been delayed. As such, Penelec has effectively denied Zito access to its poles for reasons other than those allowed by Section 224 and Commission rules.
- In addition to effectively denying access, Penelec's contractor charges are excessive, and include charges for work that Penelec is performing for its own purposes and to satisfy its own state regulatory obligations. Its make-ready estimates also appear to include work to correct pre-existing non-compliance or for Penelec's own "betterment." The charges for both survey work and its make-ready estimates also far exceed the charges for similar work performed by other Pennsylvania utilities. Moreover, despite Zito's repeated requests, Penelec has not provided Zito with critical billing details required to substantiate its unreasonably high estimates. Zito is thus unable to verify whether the charges are reasonable. This complete lack of transparency has made it impossible to predict costs and plan network routes with any reasonable degree of certainty.
- The construction delays and excessive costs are further exacerbated by the fact that Zito was not involved in the selection or hiring of Penelec's contractor, Sigma, and that Sigma has effectively excluded Zito from the pre-attachment survey and make-ready estimate process. As a result, Zito has had no control over the quality or cost of the work being performed ostensibly on its behalf and undeniably at its expense. While Zito has sought to accompany Sigma on joint ride-outs – to ensure that its input is considered and that deployment decisions can be made in the field – Zito's requests have met with proposals to further increase costs but without corresponding benefit to Zito.

Clearly, Penelec is not prioritizing the Commission's important broadband initiatives and stated objectives to facilitate timely, cost-effective broadband deployment using existing utility pole infrastructure. Instead, Penelec continues to use its control of essential infrastructure to

dictate costly and inefficient make-ready processes and to shift its inspection and pole maintenance costs onto attaching entities such as Zito. Penelec's actions disregard Congress's mandate and the Commission's important policy objectives, and obstruct Zito's ability to deploy its network and fulfill its contracts for broadband services with schools, public safety bodies, and other customers. The Commission must take action to end Penelec's unjust and unreasonable practices and to compensate Zito for its forced payment of Penelec's unjust and unreasonable pre-attachment invoices.

II. JURISDICTION AND PARTIES

1. The Commission has jurisdiction over this action under the provisions of the Communications Act of 1934, as amended, including, but not limited to, Section 224 thereof, 47 U.S.C. § 224 (hereinafter "Section 224").

2. The Commission has the authority and the duty to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions." 47 U.S.C. § 224(b)(1); *see also* 47 C.F.R. § 1.1401.

3. Pursuant to Section 224(f), a utility must "provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. § 224(f)(1).

4. Pursuant to Section 224(b)(2), the Commission is charged with prescribing by rule regulations to carry out the provisions of Section 224. 47 U.S.C. § 224(b)(2).

5. The Commission has implemented rules governing a utility's obligations to provide access upon just and reasonable rates terms and conditions. *See* 47 C.F.R. § 1.1401 *et seq.*

6. Complainant Zito provides cable television, telecommunications services and broadband internet access to businesses and residents in Pennsylvania.¹⁰ Zito and its affiliates have constructed a fiber-optic network in 110 communities throughout 17 states. This fiber-optic network supports the provision of mobile backhaul and other high-speed services (including data, video, voice, and advanced E911 service) to businesses, households, public safety agencies and other critical community organizations and institutions.¹¹ The areas served by Zito and its affiliates generally are unserved or underserved rural communities, many of which are economically depressed. Zito has a general office address of 102 South Main Street, Coudersport, PA 16915.

7. Respondent Penelec is an investor-owned Pennsylvania electric utility operating subsidiary of FirstEnergy Corp. in the business of providing electric transmission and distribution services. Penelec owns or controls poles in the State of Pennsylvania that are used for wire communication. Penelec has a general business address of 311 Industrial Park Road, Johnstown, PA 15904.

8. Zito alleges, upon information and belief, that Penelec is not owned by any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

9. Zito is attached to poles owned and controlled by Penelec.

¹⁰ Attachment A, Declaration of James Rigas dated November 9, 2017 ("Rigas Decl.") ¶ 4.

¹¹ *Id.*

10. The Commonwealth of Pennsylvania, including its political subdivisions, agencies and instrumentalities, does not regulate pole attachments in the manner established by Section 224, which would preempt the jurisdiction of this Commission over pole attachments in Pennsylvania.¹²

11. Attached to this Complaint is a certificate of service certifying that Penelec and the Pennsylvania Public Utility Commission were served with copies of the Complaint.

III. BACKGROUND AND FACTS

12. Zito requires access to Penelec owned or controlled poles to construct its network in Pennsylvania.¹³

13. On or about June 2, 2006, Zito entered into a Pole Attachment Agreement with Penelec pursuant to which Zito is authorized to attach to Penelec owned and controlled poles in Pennsylvania (“Agreement”).¹⁴

14. As required by the parties’ Agreement, when Zito seeks to attach facilities to Penelec poles, Zito submits a pole attachment application and Pole Profile sheets to Penelec.¹⁵ The application and Pole Profile sheets include information about the nature of the attachments as well as the particular poles to which attachment is sought, including the height and class of the pole and existing facilities on the pole.¹⁶

15. Pursuant to the application process established by Penelec, once Zito submits an application, Penelec (or its assigned contractor) is to conduct a pre-attachment survey of the

¹² See *Corrected List of States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 07-245, Public Notice, DA 08-653 (rel. Mar. 21, 2008).

¹³ Rigas Decl. ¶ 5; Higgin Decl. ¶ 4.

¹⁴ Attachment B, Declaration of Colin Higgin dated November 9, 2017 (“Higgin Decl.”) ¶ 5 & Exh. 1 (Pole Attachment Agreement).

¹⁵ Higgin Decl. Exh. 1 (Agreement at Exhibit D); Attachment C, Declaration of Todd McManus dated November 10, 2017 (“McManus Decl.”) ¶ 5.

¹⁶ *Id.*

poles included on the application to determine if attachment can be made according to Penelec's specifications, including the National Electrical Safety Code ("NESC"), or if any on-pole alterations or adjustments are required to accommodate the new proposed attachment ("make-ready").¹⁷ If Penelec (or its assigned contractor) determines that make-ready work is required, Penelec is to provide a cost estimate of such work to Zito.¹⁸ For work to move forward, Zito must then accept the charges in the cost estimate or, alternatively, modify its application to reflect adjustments to its proposed route to avoid costly make-ready work.¹⁹

16. Starting in early 2015, Zito began to experience significant delays in connection with its pole attachment applications to Penelec.²⁰ Penelec consistently failed to meet the timeframes prescribed by the Commission's rules for conducting its application review and pre-attachment survey and providing make-ready cost estimates to Zito and completing make-ready work.²¹

17. Zito repeatedly expressed its concerns to Penelec about the excessive delays, which in turn delayed Zito's ability to timely deploy its network on critical projects.²²

18. Penelec acknowledged that it was unable to timely process applications for attachment to its poles.²³ Accordingly, on or about December 15, 2015, Penelec and Zito entered into an agreement pursuant to which Penelec permitted Zito to install temporary attachments "in order to facilitate the timely completion of [Zito's] ongoing projects listed in Exhibit A" (the

¹⁷ Attachment D, Declaration of Kelly Ragosta dated November 10, 2017 ("Ragosta Decl.") ¶ 4.

¹⁸ *Id.*

¹⁹ *Id.* Starting in February 2016, Penelec began processing pole attachment applications using SPANs (Spatially-enabled Permitting and Notification system), a web-based application that is intended to serve as both a communications portal and workflow organization system. *Id.* n. 1.

²⁰ *Id.* ¶ 5.

²¹ *Id.*

²² *Id.* ¶ 6.

²³ *Id.* ¶ 7; Higgin Decl. ¶ 9.

“Temporary Attachment Agreement” or “TAA”).²⁴ Exhibit A to the Temporary Attachment Agreement included more than 50 then-pending applications by Zito for attachments to Penelec’s poles, for which Penelec had failed to timely provide make-ready estimates or complete make-ready work.²⁵ The TAA allowed Zito to make temporary attachments using extension arms to obtain necessary clearances where make-ready work would otherwise be required in order to make the attachment, but where Penelec had not completed the pre-attachment survey, make-ready estimate or make-ready work in accordance with the Commission’s prescribed timeframes.²⁶

19. Penelec’s inability to comply with the Commission’s prescribed application review, pre-attachment survey and make-ready timeframes with respect to Zito’s pole attachment applications continued throughout 2016.²⁷

20. On August 11 and 16, 2016, Zito requested that Penelec provide it with a list of approved contractors to conduct the pre-attachment inspection and engineering process on its outstanding applications.²⁸

21. On August 19, 2016, Penelec informed Zito that it had hired Sigma Technologies (“Sigma”) “for some of our larger make-ready projects.”²⁹ Effectively, Sigma became the contractor that is responsible for processing all of Zito’s applications for attachment to Penelec’s

²⁴ Higgin Decl. ¶ 9 & Exh. 2; Ragosta Decl. ¶ 7.

²⁵ Higgin Decl. ¶ 9 & Exh. 2 (TAA at Exhibit A); Ragosta Decl. ¶ 7.

²⁶ Higgin Decl. ¶ 9 & Exh. 2; McManus Decl. ¶ 6.

²⁷ Ragosta Decl. ¶ 8.

²⁸ Ragosta Decl. ¶ 9 & Exh. 1; McManus Decl. ¶ 7 & Exh. 1.

²⁹ Ragosta Decl. ¶ 10 & Exh. 1; McManus Decl. ¶ 8.

poles in its territory North of Interstate 80 (I-80).³⁰ In Penelec's territory South of I-80, Penelec continues to process Zito's applications without the use of a contractor.³¹

22. Penelec charges Zito for the full cost of the application review, survey and engineering.³² However, Penelec did not allow Zito to participate in the selection of the contractor hired to perform this work or to provide input into the terms and conditions governing the scope or price of Sigma's work.³³

23. Even after hiring Sigma, Penelec still is not meeting the Commission's prescribed timeframes for conducting the application review, survey, providing make-ready cost estimates, or performing make-ready work.³⁴

24. As detailed herein, the application process dictated by Penelec and executed by Sigma is inflexible and inefficient, and has resulted in further undue delay and excessive charges to Zito. For example, Penelec's contractor Sigma refuses to accept Zito's Pole Profile sheets and instead conducts an independent pre-attachment survey, in which it collects information beyond what is necessary to process Zito's application.³⁵ Upon information and belief, Sigma's analysis of the data exceeds what is necessary to accommodate Zito's attachment and is of significant benefit to Penelec in its fulfillment of responsibilities relevant primarily to its provision of

³⁰ Ragosta Decl. ¶ 10; McManus Decl. ¶ 8.

³¹ *Id.* Penelec's procedures South of I-80 are not the subject of this Complaint.

³² Ragosta Decl. ¶ 11.

³³ *Id.* Neither Penelec nor Sigma has provided Zito with a price sheet or schedule of charges regarding the work Sigma performs, nor is such information publicly available. *Id.*

³⁴ *Id.* ¶ 12. Indeed, on August 31, 2016, Penelec and Zito agreed to extend the Temporary Attachment Agreement to include 30 additional applications by Zito in Penelec's territory North of I-80, which applications had been pending without *any* review by Penelec since April and June 2016. Higgin Decl. ¶ 10 & Exh. 2 (TAA at Exhibit A-2); Ragosta Decl. ¶ 13. And, Penelec and Zito once again agreed to extend the TAA on February 2, 2017 to include nine additional applications by Zito for attachment to poles in Penelec's territory North of I-80 and on which neither Penelec nor Sigma had conducted any review since they were filed in August-November 2016. Higgin Decl. ¶ 11 & Exh. 2 (TAA at Exhibit A-3); Ragosta Decl. ¶ 13.

³⁵ McManus Decl. ¶ 9.

electrical service.³⁶ Upon further information and belief, Sigma makes decisions about required make-ready work without taking into account information provided by Zito.³⁷ As such, the make-ready cost estimates are higher than what they would be if Zito's input were considered.³⁸ Moreover, the make-ready cost estimates that Sigma provides to Zito do not provide sufficient details to enable Zito to assess the reasonableness of the charges.³⁹

Sigma's Application Review and Survey

25. Penelec's contractor Sigma refuses to use Pole Profile Sheets submitted by Zito and instead conducts its own survey collecting all data without utilizing or relying upon Zito's previous work for assistance.⁴⁰ Upon information and belief, as part of the survey, Sigma collects exhaustive information about the condition of the poles as well as information concerning Penelec's and other entities' facilities attached to the poles.⁴¹

26. Subsequently, upon information and belief, Sigma processes and analyzes the pole and attachment data and decides upon the required make-ready work.⁴² Upon information and belief, Penelec directs Sigma to conduct a full pole loading analysis for every pole in Zito's applications, regardless of the age and remaining strength of the pole or the facilities attached to the pole.⁴³

³⁶ *Id.*

³⁷ McManus Decl. ¶ 14; Ragosta Decl. ¶ 16.

³⁸ Ragosta Decl. ¶ 16.

³⁹ *Id.*

⁴⁰ McManus Decl. ¶ 9.

⁴¹ *Id.* Sigma only completes surveys of approximately 15 poles a day, whereas Zito is able to complete surveys of approximately 35 poles a day in connection with the preparation of its Pole Profile sheets. *Id.* ¶ 10.

⁴² *Id.* ¶ 10.

⁴³ *Id.* ¶ 11; Ragosta Decl. ¶ 14.

27. Upon information and belief, Penelec is using the pre-attachment survey to identify poles that it believes need to be replaced for its own “betterment.”⁴⁴ Zito has no way of verifying whether or to what extent Penelec is paying Sigma’s engineering charges associated with such betterment work.⁴⁵

28. Irrespective of Zito’s pole attachment applications, Penelec has an independent obligation to inspect its poles periodically and assess each pole’s remaining strength and load capacity. Pursuant to regulations adopted by the Pennsylvania Public Utilities Commission (“PA PUC”), electric utilities are required to inspect their poles at regular intervals.⁴⁶ A specific component of the pole inspections required by the regulation is the requirement to perform a load calculation to determine the structural integrity of the pole.⁴⁷ The requirement stems from the PUC’s jurisdiction over Penelec’s provision of electric service to Pennsylvania residents.⁴⁸

29. In fulfilling these and similar inspection obligations, utilities and third party contractors often employ less costly, more efficient methods to determine the estimated remaining strength and load capacity of a pole without having to undertake a costly and time consuming full pole loading analysis.⁴⁹

⁴⁴ Ragosta Decl. ¶ 17 & Exh. 2.

⁴⁵ *Id.* ¶ 17. When Zito identified a pole replacement on a pole with only power attached, Penelec acknowledged that the replacement was for its own betterment and stated that the costs for the replacement and the engineering were not passed through to Zito. However, Zito has no way of verifying this to be true. *Id.*

⁴⁶ *Revision of 52 Pa. Code Chapter 57 Pertaining to Adding Inspection, Maintenance, Repair, and Replacement Standards for Electric Distribution Companies*, Pennsylvania Public Utilities Commission, Final Rulemaking Order, Docket No. L-00040167 (May 22, 2008). 52 Pa. Code § 57.198(n)(2).

⁴⁷ See 52 Pa. Code § 57.198(n)(2)(vi).

⁴⁸ See 66 Pa. Code § 501.

⁴⁹ McManus Decl. ¶ 11. For example, one third party contractor that performs work for PPL, Osmose, states that it can utilize software to estimate pole load, which identifies “poles that are clearly less than fully loaded and poles that are most probably overloaded.” *Pole Loading & Clearance Analysis*, Osmose, available at <http://www.osmose.com/pole-loading-clearances> (last

30. Despite the benefit to Penelec of the loading analysis, including fulfillment of Penelec's own regulatory responsibilities, Penelec requires Zito to reimburse it for the full cost of Sigma's pre-attachment survey and make-ready design, including the full pole loading analysis.⁵⁰

Sigma's Make-Ready Determinations

31. Penelec's contractor Sigma refuses to allow Zito to provide any input when Sigma conducts the survey of the poles and makes certain decisions regarding make-ready work.⁵¹

32. Historically (and as remains the process in Penelec's territory South of I-80), Zito and Penelec conducted a "joint ride-out" during which representatives of each party travelled to and physically inspected each pole included on an application to determine whether and what make-ready work was necessary.⁵² In Zito's experience, conducting a joint ride-out is an efficient and common method for determining what make-ready work is required to accommodate an attachment.⁵³ A joint ride-out allows for make-ready decisions that account for the integrity and safety of the pole and attached facilities, while at the same time taking into account whether the proposed make-ready work is cost-effective.⁵⁴ A joint ride-out also allows the participating parties to identify pre-existing non-compliant conditions that would require

visited on Nov. 6, 2017). This software allows Osmose to reduce expenses by only conducting a comprehensive loading analysis on those poles that are "complex and borderline overloaded." *Id.*

⁵⁰ Ragosta Decl. ¶ 15.

⁵¹ McManus Decl. ¶ 13.

⁵² *Id.* ¶ 15.

⁵³ *Id.*

⁵⁴ *Id.* For example, there may be no need to replace a pole before the end of its useful life if existing facilities can be raised or lowered, if the attaching entity can safely use an extension arm, boxing or other approved construction technique to gain required clearances, or if the pole can be guyed to balance loads. Conversely, in some situations, the parties may agree during a joint ride-out that a pole clearly needs to be replaced, thus eliminating the time and expense associated with a later-conducted full loading analysis. *Id.*

correction (such as pole replacement) notwithstanding the applicant's proposed attachment and for which the applicant should not be charged.⁵⁵

33. On a single occasion, after multiple requests by Zito, Sigma participated in a joint ride-out with Zito.⁵⁶ Ultimately, Sigma's representative that participated in the joint ride-out was inexperienced and unable to meaningfully participate in any discussion about potential make-ready work.⁵⁷ After Zito expressed its dissatisfaction about the experience, Penelec stated that a Sigma supervisor could participate in the joint ride-out for \$88/hour (in addition to Sigma's usual charges to conduct a field survey), but that Sigma would continue to collect the same extensive information about each pole and that no make-ready decisions would be made in the field.⁵⁸ Given the futility and inefficiency of the conditions placed on the joint ride-out by Sigma, no further joint ride-outs have been conducted with Sigma on Zito's applications.⁵⁹

34. Zito has a vested interest in the safety and integrity of the poles to which it attaches, including poles owned and controlled by Penelec.⁶⁰ Zito's employees and contractors work on facilities attached to Penelec poles.⁶¹ Zito depends on the electricity drawn from the electric facilities on the pole in order to operate.⁶² Zito has contractually indemnified Penelec against "any and all claims and demands for damages to property . . . and injury or death to persons . . . which may arise out of or be caused by the erection, maintenance, presence, use or removal of [Zito's] attachments or any part thereof on the poles of [Penelec] or rearranging the

⁵⁵ *Id.*

⁵⁶ *Id.* ¶ 16.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* ¶ 17.

⁶⁰ *Id.* ¶ 18.

⁶¹ *Id.*

⁶² *Id.*

same or remove the same therefrom”⁶³ If permitted to do so, Zito could and would provide valuable input concerning how it can safely, efficiently and cost-effectively attach facilities to Penelec’s poles.⁶⁴

35. Instead of make-ready decisions being made jointly in the field, Sigma engages in an exhaustive survey process in which it makes decisions about required make-ready work without Zito’s input.⁶⁵ In Zito’s experience, more poles are replaced prematurely using this process, resulting in substantial additional estimated deployment costs.⁶⁶ Faced with such high costs, Zito often must opt to explore alternative deployment routes.⁶⁷ Moreover, because decisions are not made in the field but are instead delayed until after extensive additional processing and analysis is performed, Zito’s consideration of such alternative routes is unnecessarily delayed.⁶⁸

Sigma’s Estimates to Zito

36. Pursuant to the Commission’s Pole Attachment Rules, a pole owner has 45 days from the date of an attachment request to conduct a survey of the poles affected (or 60 days, in the case of larger orders) and 14 additional days to provide an estimate of any make-ready charges to the attaching entity. 47 C.F.R. § 1.1420(c) and (d).

37. The estimates provided to Zito by Penelec’s contractor Sigma are not timely under the Commission’s prescribed timeframes. In addition, the estimates lack sufficient

⁶³ Higgin Decl. Exh. 1, Art. VII.

⁶⁴ McManus Decl. ¶ 13.

⁶⁵ *Id.* ¶ 19.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

information about the make-ready work to be performed and attendant cost information to enable Zito to determine whether the charges are reasonable.⁶⁹

38. 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 – less than one-third of the total applications.⁷⁰ Although the estimates include separate lump sum dollar amounts for “engineering costs” and “make-ready labor and materials,” Sigma’s estimates do not provide sufficient detail to enable Zito to assess whether the charges are justified or reasonable.⁷¹ For example, the estimates do not delineate specific make-ready tasks or charges on a pole-by-pole basis.⁷²

Sigma’s Pre-Attachment Survey Charges

39. Sigma’s estimates for “engineering costs” do not provide sufficient detail for Zito to determine precisely what “engineering” tasks are being performed (such as collection of field survey data or analysis), and whether such tasks or the costs to complete them are reasonable or fairly attributable to Zito.⁷³

40. Based on the 23 estimates that have been provided to Zito by Sigma to date, on average, Sigma’s charge for the pre-attachment survey process is approximately \$212.46 per pole.⁷⁴ In numerous exchanges with Penelec, Zito disputed these charges as unreasonable.⁷⁵ Sigma’s charges for the pre-attachment inspection process far exceed the costs charged by other

⁶⁹ Ragosta Decl. ¶ 18.

⁷⁰ *Id.* ¶ 19.

⁷¹ *Id.*

⁷² *Id.* ¶ 22.

⁷³ *Id.* ¶ 19.

⁷⁴ *Id.* ¶ 20.

⁷⁵ *Id.* ¶ 20 & Exh. 4; Higgin Decl. ¶ 13; Rigas Decl. ¶¶ 14, 19, 21 & Exhs. 1 & 3.

pole owners in Pennsylvania.⁷⁶ The amount charged by other Pennsylvania investor-owned electric utilities and telecommunications companies for the pre-attachment inspection process is, on average, \$27.83 per pole.⁷⁷

41. Sigma's estimates do not provide sufficient detail for Zito to determine precisely what "engineering" tasks are being performed (such as collection of field survey data of analysis), and whether such tasks and the costs to complete them are reasonable.⁷⁸

42. Zito repeatedly has requested that Penelec provide more detailed information to substantiate and support the survey and engineering charges in its estimates; however, to date, Penelec has not provided Zito with the requested information.⁷⁹

Sigma's Make-Ready Charges

43. Before Sigma will issue a make-ready invoice, Zito is first required to "acknowledge" (i.e., accept the charges on) an estimate of the make-ready charges.⁸⁰

44. However, Sigma's make-ready estimates do not provide essential information necessary to enable Zito to verify whether the proposed make-ready construction charges are reasonable and thus make a reasoned decision as to whether to accept the charges.⁸¹ For instance, the estimate lists the pole number and includes a note stating "Rearrangement Required" or "Will Replace Pole," but no further information is provided about the pole or the

⁷⁶ Ragosta Decl. ¶ 21.

⁷⁷ *Id.* When Zito performs the survey itself in connection with its submission of a Pole Profile Sheet in Penelec's territory South of I-80, the cost is \$17 per pole. *Id.*

⁷⁸ *Id.* ¶ 19.

⁷⁹ *Id.* ¶ 21 & Exh. 5; Higgin Decl. ¶ 13; Rigas Decl. ¶¶ 14, 19, 21 & Exhs. 1 & 3. As set forth below, Mr. Chumrik provided certain limited details about the make-ready required for a single application, but he did not provide and 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. Ragosta Decl. ¶ 23 n. 3.

⁸⁰ *Id.* ¶ 22.

⁸¹ *Id.*

results of the inspection to substantiate the make-ready decision.⁸² Moreover, the make-ready estimate is provided as a lump sum estimate; the charges are not broken out on a per pole basis.⁸³ Without these essential details, Zito is unable to evaluate whether the make-ready work charges are reasonable or fairly attributable to Zito and thus, whether to proceed with the work, consider a less costly alternative route, or whether other safe, yet more cost-effective solutions should be pursued.⁸⁴

45. Zito repeatedly has requested that Penelec and Sigma provide more detailed information to substantiate and support the charges in its estimates; however, to date, Penelec has not provided Zito with the requested information.⁸⁵

46. For example, on October 19, 2017, more than three months after Zito “acknowledged” a make-ready estimate for a particular application Zito received an invoice from Penelec requesting payment in the amount of \$78,134.42 with no additional detail about the bases for the charges.⁸⁶ Likewise, Penelec’s SPANs portal did not provide any additional make-ready detail about the poles in the application other than that all of the poles were “Approved” with the exception of one pole that was “Denied.”⁸⁷ On October 19, 2017, Zito specifically requested that Penelec provide additional information regarding the total number of poles requiring make-ready work, the work to be prepared on each pole, the cost breakdown per pole

⁸² *Id.* & Exh. 3. As set forth below in paragraph 48, Penelec has provided *some* additional detail on a single invoice for a particular application in response to an inquiry by Zito; however, details regarding the specific work to be performed on each pole and the cost for each such task still has not been provided. *Id.* ¶

⁸³ *Id.*

⁸⁴ *Id.*; McManus Decl. ¶ 20.

⁸⁵ *Id.* ¶ 23 & Exh. 5; Higgin Decl. ¶ 13; Rigas Decl. ¶¶ 14, 19, 21 & Exhs. 1 & 3. *See supra* n. 82.

⁸⁶ Ragosta Decl. ¶ 24 & Exh. 6. This is the first and only invoice Zito has ever received from Penelec for an application processed by Sigma, despite Zito’s acknowledgment of Sigma’s estimates as far back as June 2017. *Id.*

⁸⁷ *Id.* ¶ 24.

requiring make-ready work, and the number of pole replacements being proposed in connection with that application.⁸⁸ On October 26, 2017, Penelec responded to Zito and acknowledged that the information in the SPANs portal did not match the invoice for that application and that the information in SPANs was provided in error.⁸⁹ Penelec then provided certain limited details about the make-ready work for this particular application, but it did not provide and still has not provided the cost breakdown for the specific make-ready work to be performed on each pole, which information is necessary in order for Zito to evaluate whether the invoice charge is reasonable.⁹⁰

47. By way of further example, after Zito researched the make-ready estimates provided by Sigma on two applications indicating “will replace pole” for ten poles, Zito discovered that there were no attachments other than power on all but one of the poles.⁹¹ Accordingly, Zito provided Penelec the photos it took of each such pole and requested that Penelec provide the engineering analysis to support the decision to replace those poles.⁹² Penelec responded to Zito that it needed to input its request for clarification to Sigma through the SPANs communication portal, and that failure to do so would “only delay the process.”⁹³ Zito responded to Penelec in an email dated September 28, 2017, stating: “While we understand your desire for the conversations regarding questionable poles to happen through SPANs, I want to point out that we have responded through SPANs on specific

⁸⁸ *Id.* ¶ 24 & Exh. 6.

⁸⁹ *Id.* ¶ 24 & Exh. 7. In the same response, Penelec noted that it discovered and would be correcting similar errors on estimates for nine other applications that had not yet been transmitted to Zito. Zito asked Penelec which nine applications were at issue, but has not yet received a response. *Id.*

⁹⁰ *Id.* ¶ 24 & Exh. 7.

⁹¹ *Id.* ¶ 17.

⁹² *Id.* ¶ 17 & Exh. 17.

⁹³ *Id.*

applications in the past and have yet to get a response back from Penelec,” and provided a list of applications on which Zito had transmitted questions through SPANs earlier in the year and to which it had not received a response.⁹⁴ One month later, on October 27, 2017, Penelec responded to Zito that in fact the poles at issue “were classified during engineering as Company betterment to Penelec.”⁹⁵ Performing Penelec betterment during the make-ready process unfairly delays attachment by Zito until after the pole is replaced.⁹⁶ Moreover, had Penelec’s plan to replace these poles as Company betterment been identified during a joint ride-out, or at the very least had the betterment been identified at the time of the estimate, Zito could have avoided the expenditure of time and resources investigating alternative routes while it waited for Penelec to provide its explanation.⁹⁷

48. Penelec’s email also stated that the estimates associated with Penelec betterment reflected a corresponding reduction in construction and engineering costs to Zito.⁹⁸ However, because of the lack of detail provided to Zito in connection with Sigma’s survey charges, Zito has no way of verifying this statement or knowing the extent to which such charges were reduced.⁹⁹

49. On June 22, 2017, Zito provided Penelec with an example of a sufficiently detailed make-ready estimate that Zito had received from another pole owner.¹⁰⁰ More than four

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ McManus Decl. ¶ 21.

⁹⁷ *Id.* The fact that the estimates reflected the removal of betterment-related charges further demonstrates that Sigma’s charges are otherwise excessive – before Zito was informed that the estimates did not include charges for Penelec betterment, Zito was under the impression that the estimates were high because they reflected charges to replace ten poles. Ragosta Decl. ¶ 17.

⁹⁸ *Id.* ¶ 17 & Exh. 2.

⁹⁹ *Id.*

¹⁰⁰ *Id.* ¶ 25 ¶ 8. The email also noted that the example demonstrated that the engineering and make-ready charges for that pole owner were significantly lower on a per-pole basis than those

months later, on October 27, 2017, Penelec responded to Zito that Penelec was “working with Sigma to develop a detailed engineering drawing package following the example you sent us.”¹⁰¹ Despite Penelec’s acknowledgement that its estimates are deficient and that more detail is required to enable Zito to assess the reasonableness of the proposed work and charges, Penelec still has not provided Zito with make-ready estimates containing the requisite details.¹⁰²

50. Based on the 14 estimates that have been provided to Zito by Sigma through SPANs and for which Sigma was able to determine the number of poles requiring make-ready work, on average, on a per pole basis, Sigma’s make-ready charges are more than 200% higher than those of other Pennsylvania investor-owned electric utilities and telecommunications companies.¹⁰³ Dividing the lump sum charges by the number of poles identified by Sigma as requiring make-ready work, Sigma’s average per-pole make-ready charge is \$3,303.56, whereas the average per-pole charge of other Pennsylvania investor-owned electric utilities and telecommunications companies is \$1,068.05.¹⁰⁴

51. Upon information and belief, Sigma charges for and requires Zito to pay to correct pre-existing non-compliant conditions on Penelec’s poles even though such work would be required regardless of whether Zito attaches to the pole.¹⁰⁵

Zito Repeatedly Has Expressed Its Concerns to Penelec About Sigma

52. Zito repeatedly has expressed its concerns to Penelec about Sigma’s inefficient, unreasonable, and unreasonably costly application process and estimates.

charged by Penelec. *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* ¶ 26.

¹⁰⁴ *Id.* Because Penelec has not provided Zito with the requested information to substantiate its invoices, Zito is unable to identify the exact charges per task that are excessive. *Id.*

¹⁰⁵ *Id.* ¶ 27; McManus Decl. ¶ 22.

53. In a series of calls between Zito and Penelec on May 1, June 7, and June 21, 2017, Zito explained in detail its concerns to Penelec about Sigma's application process.¹⁰⁶

54. Specifically, Zito explained to Penelec that Sigma's refusal to accept Zito's Pole Profile Sheets (as Penelec does for Zito's applications South of I-80) and instead its collection of information during the survey process that is not necessary to process Zito's application or that otherwise benefits Penelec and not Zito, results in undue delays and excessive charges.¹⁰⁷

55. Zito also explained to Penelec that Sigma's refusal to participate in a joint ride-out (or sending inexperienced personnel on the one joint ride-out that was conducted) drives up costs and results in inefficient and costly make-ready.¹⁰⁸

56. Zito also explained to Penelec that Sigma's estimates included no supporting detail and that Zito was unable to approve those charges without knowing what they represented. Zito specifically requested that the estimates be substantiated.¹⁰⁹

57. Zito also asked to make temporary attachments on the poles where the applications had exceeded required timeframes and for which Zito had time-sensitive deployment projects.¹¹⁰

58. On July 25, 2017, representatives of Penelec and Zito met in person in Erie, Pennsylvania to discuss the same issues outlined above.¹¹¹ One representative from Sigma was also present at the meeting, but did not contribute to the dialogue in any meaningful way.¹¹²

¹⁰⁶ Rigas Decl. ¶ 14; Higgin Decl. ¶ 13; Ragosta Decl. ¶¶ 20, 23; McManus Decl. ¶ 23. On April 28, 2017, Zito provided Penelec an agenda for the May 1 call, which outlined Zito's concerns. Ragosta Decl. Exh. 4.

¹⁰⁷ Higgin Decl. ¶ 14.

¹⁰⁸ *Id.* ¶ 15.

¹⁰⁹ *Id.* Decl. ¶ 16.

¹¹⁰ *Id.* ¶ 17.

¹¹¹ Rigas Decl. ¶ 14; Higgin Decl. ¶ 14; Ragosta Decl. ¶¶ 20, 23; McManus Decl. ¶ 23.

¹¹² Higgin Decl. ¶ 13.

59. After the meeting in Erie, through September 2017, Zito reiterated its concerns to Penelec, including by providing spreadsheets to illustrate its concerns about the timing and excessive estimates for specific applications, and again repeatedly requested that more information be provided to support the make-ready estimates.¹¹³

60. Zito also made repeated requests for temporary attachments on applications where Sigma had not provided adequate make-ready estimates within the FCC prescribed timeframes and on which Zito needed to prioritize its deployment.¹¹⁴ Penelec made it clear that it would not entertain any requests for temporary attachments if Zito had otherwise questioned a make-ready estimate.¹¹⁵

61. Penelec's previous agreements allowing Zito to employ temporary attachments were not conditioned on Zito's advance payment or acceptance of make-ready estimates.¹¹⁶ Indeed, for some of the applications associated with the previous temporary attachment agreements, Penelec never conducted the pre-attachment survey and engineering process.¹¹⁷

62. Nevertheless, in order to expedite the ability to make temporary attachments on certain priority projects, Zito made payment in full of the make-ready estimates on 12 of its applications, and reserved its right to seek revisions to the estimates and seek refunds for any workarounds or canceled requests.¹¹⁸ Zito again requested details for these estimates in order to make decisions about whether to proceed with the make-ready.¹¹⁹

¹¹³ Ragosta Decl. ¶ 23 & Exh. 5.

¹¹⁴ *Id.* ¶ 28 & Exh. 9.

¹¹⁵ *Id.* ¶ 29.

¹¹⁶ *Id.* ¶ 30.

¹¹⁷ *Id.*

¹¹⁸ *Id.* ¶ 31.

¹¹⁹ *Id.*

63. On September 21, 2017, Zito tendered payment in the amount of \$446,349 to Penelec.¹²⁰ More than a month after Zito's payment in-full, on October 23, 2017, Penelec provided Zito with an amendment to the TAA authorizing the temporary attachments.¹²¹

64. As of the filing of this Complaint, Zito has 25 pending applications with Sigma on which no action has been taken and for which there is no agreement to allow Zito to employ temporary attachments.¹²² Two of those applications were filed in September 2016, 24 were filed in March, April and May 2017, one was filed in September 2017.¹²³

The Parties Have Engaged in Executive Level Discussions

65. In addition to the aforementioned calls, written correspondence and meeting between representatives of Zito and Penelec, Zito has engaged in additional good faith executive level discussions and exchanged written positions with Penelec regarding the issues set forth in this Complaint in an attempt to resolve the parties' pole attachment dispute.

66. On September 8, 2017, James Rigas (Co-President of Zito) sent a letter to Stephen F. Schafer (Manager, Joint Use & Cable Locating for Penelec) reiterating Zito's concerns about the pre-attachment survey and engineering process and charges imposed by Penelec and inviting Penelec to reconsider Zito's compromise solution, provide the requested detailed make-ready information, and allow Zito to make temporary attachments.¹²⁴

67. By letter dated September 20, 2017, Mr. Schafer responded to Mr. Rigas, setting forth Penelec's purported understanding of and response to Zito's concerns. The letter specifically acknowledged Zito's repeated requests for more detailed information concerning

¹²⁰ *Id.*

¹²¹ *Id.* ¶ 31; Higgin Decl. ¶ 12 & Exh 2 (TAA at Exhibit A-4).

¹²² Ragosta Decl. ¶ 32.

¹²³ *Id.*

¹²⁴ Rigas Decl. ¶ 19 & Exh. 1.

charges for the pre-attachment survey and engineering process and make-ready work and admitted that Sigma's estimates still "falls short of a pole-by-pole, piece-by-piece accounting."¹²⁵ Ultimately, however, Mr. Schafer's letter did not offer any reasonable compromise solution acceptable to Zito.

68. On October 5, 2017, Mr. Rigas responded to Mr. Schafer, specifically detailing Zito's disagreement with Mr. Schafer's attempts to re-characterize Zito's concerns and rejecting Penelec's suggestion that certain issues had been resolved or could be resolved on Penelec's unreasonable terms and conditions.¹²⁶

69. As of the date of this Complaint, the parties have been unable to resolve the dispute detailed herein.

70. Action by the Enforcement Bureau and expedited grant of the relief requested by this Complaint are necessary to ensure that Zito's federal rights of just and reasonable pole access are protected.

IV. DISCUSSION

71. In amending its pole attachment rules in 2011, the Commission sought to address "prolonged, unpredictable, and costly" processes employed by utilities and to ensure that access to poles is not "more burdensome or expensive than necessary."¹²⁷ The Commission took several steps "to improve the efficiency and reduce the potentially excessive costs of deploying telecommunications, cable and broadband networks," including the adoption of timeframes and providing for the use of utility approved contractors where its prescribed timeframes could not be

¹²⁵ *Id.* ¶ 20 & Exh. 2.

¹²⁶ *Id.* ¶ 21 & Exh. 3.

¹²⁷ *2011 Pole Attachment Order*, 26 FCC Rcd. at 5243 ¶ 6.

met.¹²⁸

72. While Penelec is using a contractor (Sigma) to perform surveys and provide make-ready cost estimates ostensibly to assist in meeting the Commission's prescribed pole attachment application timeframes, Penelec's contractor process is so flawed and the charges are so outrageous that they undermine the objectives of the Commission's *2011 Pole Attachment Order*.

73. Despite having hired Sigma, Penelec is not meeting the Commission's prescribed timeframes for access to utility poles. Moreover, the pre-attachment survey charges and make-ready cost estimates provided by Sigma on Penelec's behalf are unreasonably high and insufficiently detailed. They include charges for work that Penelec would have to undertake regardless of whether Zito sought attachment to Penelec poles – including pole inspections and loading studies required by the PA PUC in connection with Penelec's responsibilities as an electric service provider – and reflect a complete disregard for Zito's potential significant input into the terms governing Sigma's performance as well as Sigma's decisions about the required make-ready work solutions. Moreover, unless Zito pays the unreasonably high contractor charges in full, it is denied even temporary access to Penelec poles. Penelec's failure to process the applications or provide for temporary attachment constitutes an effective denial of access. For these reasons and as more fully set forth below, the Commission should grant Zito's requested relief.

A. Penelec's Failure to Provide Timely Access to its Poles in Accordance with the Timeframes Prescribed in Section 1.1420 of the Commission Rules or Provide Temporary Access Absent Full Payment of Unsupported Make-Ready Estimates Constitutes an Unreasonable Denial of Access

74. Access to poles, including the preparation of poles for new attachments, must be

¹²⁸ *Id.*, 26 FCC Rcd. at 5241 ¶ 1, 5250 ¶ 19.

timely in order to constitute just and reasonable access under Section 224 of the Pole Attachment Act.¹²⁹ As the Commission has recognized, “[t]ime is of the essence for requesting [attaching] entities, their investors, and their potential consumers.”¹³⁰

75. The Commission’s rules prescribe a four-stage timeline for requests to access the “communications space” on utility poles: application review and survey (45-60 days depending upon the size of the job), cost estimate (14 days), attacher acceptance (14 days), and make-ready (60-105 days depending upon the size of the job).¹³¹ Accordingly, under the Commission’s timeframes, a party must be permitted to attach its facilities within 133-208¹³² days of its initial application to the pole owner. Even after hiring Sigma, Penelec is not meeting the Commission’s prescribed timeframes. Of the 27 applications submitted by Zito that currently are pending with Sigma, 26 have been pending for more than 180 days without any action by Penelec.¹³³ Two of those applications have been pending for more than 400 days.¹³⁴ These 26 applications include requests for attachment for a total of 1,180 poles – well below the Commission’s 3,000-pole threshold triggering extended timeframes.¹³⁵ Even where Penelec has allowed Zito to make temporary attachments for applications that have not yet been processed, many of those temporary attachments were allowed well after the applicable timeframe for completion of attachment under the Commission’s rules. Indeed, each of the latest 12

¹²⁹ *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864, 11873 ¶ 17 (2010).

¹³⁰ *2011 Pole Attachment Order*, 26 FCC Rcd. at 5273 ¶ 69.

¹³¹ *Id.*, 26 FCC Rcd. at 5252 ¶¶ 22-23.

¹³² The maximum timeframe of 208 days takes into account the utility pole owner’s option to assert a “right of control” over completion of the make-ready work if the existing attachers do not complete their make-ready work within the applicable timeframe – when such “right of control” is asserted, the utility has an additional 15 days to complete make-ready. 47 C.F.R. § 1.1420(e)(1)(iv).

¹³³ Ragosta Decl. ¶ 32.

¹³⁴ *Id.*

¹³⁵ See 47 C.F.R. § 1.1420(g)(4).

applications reflecting 476 poles for which Zito was finally permitted to make temporary attachments were filed more than 200 days before the temporary attachments were allowed.

76. Moreover, Penelec unreasonably has conditioned Zito's ability to attach temporarily – i.e., using brackets to gain clearances prior to completion of make-ready work – upon Zito's acceptance and payment in full of the make-ready cost estimates. The Commission's rules limit the circumstances in which a utility may refuse to allow a specific construction technique – such as the use of bracketing – to circumstances not present here.¹³⁶ Indeed, Penelec has allowed the use of brackets to gain clearance temporarily but now is conditioning such access on the full payment of unsupported excessively high make-ready charges. Given the complete lack of detail concerning the proposed work and per-pole costs included in the make-ready estimates, Zito cannot reasonably approve the estimates. Nevertheless, Zito has had to accept the estimates and make payment in full to gain access to Penelec's poles.

77. Penelec's failure to meet the Commission's prescribed timeframes for access to utility poles is a violation of Section 1.1420 of the Commission rules, 47 C.F.R. § 1.1420.

78. Moreover, Penelec's failure to provide access to its poles on either a permanent or temporary basis using the approved and previously employed bracketing construction technique within the prescribed timeframes and unless Penelec accepts and pays its contractor's unsupported make-ready estimates in full constitutes an effective denial of access.

79. The Pole Attachment Act requires pole owners, such as Penelec, to provide nondiscriminatory access to its poles, conduits, and rights-of-way upon just and reasonable rates,

¹³⁶ See *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order and Further Notice Of Proposed Rulemaking, 25 FCC Rcd 11864, 11871-72 ¶¶ 13-14 (2010); see also *2011 Pole Attachment Order*, 26 FCC Rcd. at 5342 ¶ 236.

terms, and conditions. *See* 47 U.S.C. § 224(b)(1); 47 C.F.R. § 1.1401. The non-discriminatory access obligation is intended “to ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers.”¹³⁷

80. Utilities may only deny access for reasons of safety, reliability and generally applicable engineering standards.¹³⁸ “A denial of access, while proper in some cases, is an exception to the general mandate of section 224(f).”¹³⁹ Commission rules require that a utility’s denial of access “be specific” and “include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.”¹⁴⁰ To permit otherwise would not only undermine the principles embodied in Section 224 of the Act, but would also undercut the Commission’s goal to “accelerate the deployment of next-generation infrastructure.”¹⁴¹

¹³⁷ *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, First Report and Order, 13 FCC Rcd. 6777, 6777 ¶ 2 (1998), *aff’d in part, rev’d in part*, *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000), *rev’d*, *NCTA v. Gulf Power Co.*, 534 U.S. 327 (2002).

¹³⁸ 47 U.S.C. § 224(f).

¹³⁹ *Implementation of Local Competition Provision in Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, 16100 ¶ 1222 (“1996 Local Competition Order”).

¹⁴⁰ 47 C.F.R. § 1.1403(b); *see also* 2011 Pole Attachment Order, 26 FCC Rcd. at 5244 ¶ 8 (“[I]f an electric utility rejects a request for attachment of any piece of equipment, it must explain the reasons for such rejection—and how such reasons relate to capacity, safety, reliability, or engineering concerns [citing 47 USC § 224(f)(2)]—in a way that is specific with regard to both the type of facility and the type of pole.”).

¹⁴¹ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd. 3266, 3268 ¶ 5 (2017). The Commission is currently in the process of reforming its pole attachment rules in order to speed access to effectuate broadband deployment.

81. Here, Penelec's failure to act on 26 applications for attachment by Zito for more than 180 days amounts to an effective denial of service.

B. Penelec's Contractor Charges for the Pre-Attachment Survey are Unjust and Unreasonable

82. The Pole Attachment Act requires that pre-attachment survey charges be just and reasonable.¹⁴² Such costs should reflect only Penelec's "actual cost of necessary engineering survey expenses"¹⁴³ and should not include "expenses for which the utility has been reimbursed through the annual fee."¹⁴⁴ Further, "[s]urvey work should be done at a competitive rate in consonance with the nature of work to be done."¹⁴⁵ And, to the extent that inspection charges benefit the pole owner or other entities attached to the pole, "the costs of the inspection must be allocated among the beneficiaries."¹⁴⁶

83. Specifically, first, notwithstanding the language of the parties' Agreement, which provides that Zito will conduct a pre-application survey of the poles and provide necessary information in Pole Profile Sheets submitted with its application,¹⁴⁷ Penelec has excluded Zito from this process. Instead Sigma performs a costly pre-attachment survey, which fails to account for valuable input from Zito and includes extensive data collection and analysis that far exceeds

¹⁴² See 47 U.S.C. § 224(b)(1); see also *1996 Local Competition Order*, 11 FCC Rcd. at 16097 ¶ 1214 (stating that attaching entities, especially small entities with limited resources, should bear only their proportionate costs of make-ready work and are not forced to subsidize other attaching entities)

¹⁴³ *Texas Cable & Telecommunications Ass'n v. Entergy Services, Inc.*, 14 FCC Rcd. 9138, 9140-42 ¶¶ 6-10 (Cable Serv. Bur. 1999) ("*Texas Cable*").

¹⁴⁴ *Id.* at 9139-40 ¶ 5.

¹⁴⁵ *Mile Hi Cable Partners, L.P. v. Public Service Co. of Colorado*, 15 FCC Rcd. 11450, 11455-56 ¶¶ 8-9 (Cable Serv. Bur. 2001) ("*Mile Hi Cable*") (citing *Texas Cable*, 14 FCC Rcd. at 9143 ¶ 14).

¹⁴⁶ See *Newport News Cablevision, Ltd. Commc'ns, Inc. v. Virginia Elec. & Power Co.*, Order, 7 FCC Rcd. 2610, 2611 ¶¶ 8-9 (1992) (finding "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").

¹⁴⁷ Rigas Decl. Exh. 1 (Agreement at Exhibit D).

what is necessary to determine whether and where Zito's attachments are feasible. Requiring a process that is more burdensome than the process set forth in the parties' Agreement is unjust and unreasonable, and thus a violation of Commission rules.

84. Second, Penelec requires Zito to reimburse it directly for the entire cost of the pre-attachment survey process, despite the fact that Penelec uses the survey process to obtain valuable information about its poles for its own purposes and to satisfy its own state regulatory obligations to periodically inspect its poles, including its obligation to conduct load calculations for each pole.¹⁴⁸ Indeed, Sigma recently conceded that during the pre-attachment survey, it collects information about the poles and existing facilities on the poles for Penelec's benefit, including for construction classified as "company betterment."¹⁴⁹ As with periodic inspections, because the information collected by Sigma during the pre-attachment survey process benefits Penelec and other entities attached to the pole, such costs should not be borne wholly by Zito.¹⁵⁰ Instead, the costs should be recovered by Penelec from attaching entities, if at all, through the rental rate, which allocates maintenance and administrative costs to attachers proportionate to the amount of pole space occupied.¹⁵¹

¹⁴⁸ 52 Pa. Code § 57.198(n)(2).

¹⁴⁹ Ragosta Decl. ¶ 17 & Exh. 2.

¹⁵⁰ See *Mile Hi Cable*, 15 FCC Rcd. at 11455-56 ¶¶ 8-9 ("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."); see also *Knology, Inc. v. Georgia Power Co.*, 18 FCC Rcd. 24615, 24627 ¶ 29 (2003) ("*Knology*") ("[T]he costs of a pole inspection unrelated to a particular company's attachments should be borne by all attachers.").

¹⁵¹ See *Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, FCC Rcd. (2000) at ¶ 7 ("it is important to ensure that the attaching entity is not charged twice for the same costs, once for make-ready costs and again for the same costs if the business expense is reported in the corresponding pole or conduit capital account"). Requiring utilities to collect excess survey charges through the rent rather than as a direct reimbursement also ensures that a new attacher does not bear the full expense of costs for work that will benefit future attachers, as required by the FCC rules. See 47 C.F.R. § 1.1416(b). Indeed, it is entirely possible that Penelec

85. Third, it is widely accepted that a comprehensive loading analysis is not required for every pole and can be limited to those poles that are “complex and borderline overloaded.”¹⁵² For example, PP&L Electric Utilities Corporation, in its 2016-17 Biennial Report filed with the PA PUC, proposed deviating from the regulatory requirement to perform a load calculation for each pole inspected stating load calculations are not necessary for safety reasons unless the estimated remaining strength of a given pole falls below established parameters and that “the potential risk reduction through a load calculation is insignificant.”¹⁵³

86. Moreover, even if Sigma’s pre-attachment survey charges could be justified as necessary and/or appropriately charged wholly to Zito, its charges far exceed reasonable levels, particularly when considered in comparison with other pole owners in Pennsylvania. As set forth above, based on the 23 estimates that have been provided to Zito by Sigma, on average, Sigma’s charge for the pre-attachment survey process is approximately \$212.46 per pole.¹⁵⁴ In stark contrast, as represented in the graph below, the fees charged by other Pennsylvania investor-owned electric utilities and telecommunications companies for this process for the 2015-2017 time period is, on average, \$27.83.¹⁵⁵

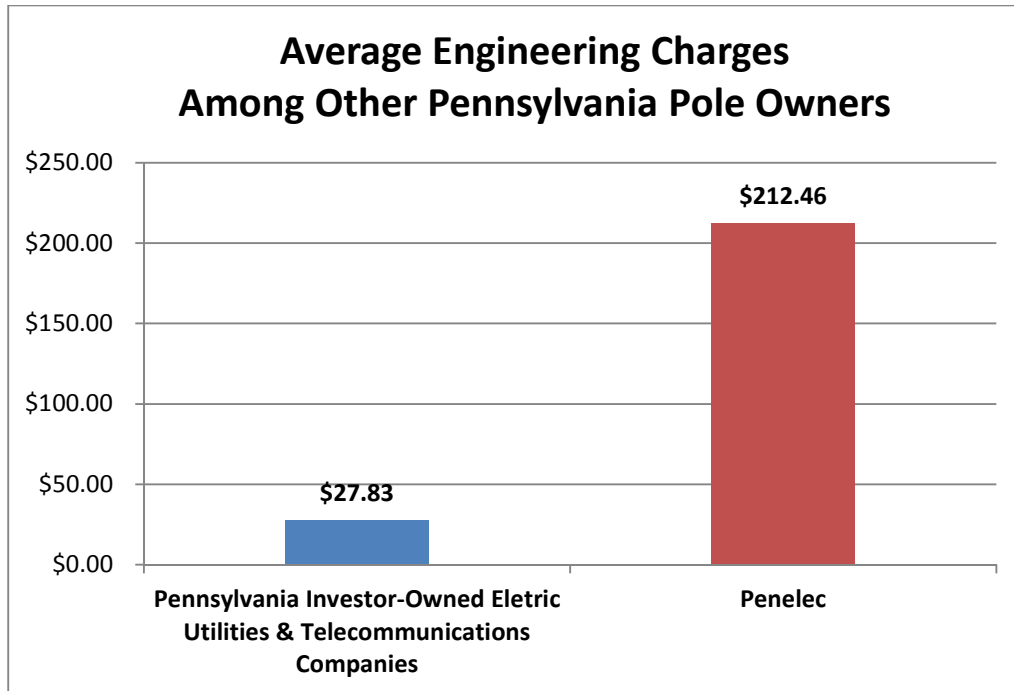
is booking these expenses to the FERC accounts for maintenance and administrative expenses that are used to derive the annual rental rate already. If so, the inspection charges also amount to impermissible double recovery.

¹⁵² *Pole Loading & Clearance Analysis*, Osmose, available at <http://www.osmose.com/pole-loading-clearances> (last visited on Sept. 26, 2017).

¹⁵³ *See Biennial Inspection, Maintenance, Repair and Replacement Plan for the Period January 1, 2016 – December 31, 2017*, PPL Electric Utilities Corporation, Docket No. M-2009-2094773, at 20-21 (filed Oct. 1, 2014) (“*PPL Biennial Report*”).

¹⁵⁴ Ragosta Decl. ¶ 20.

¹⁵⁵ *Id.* ¶ 21.



87. In sum, Penelec’s survey charges exceed Penelec’s “actual cost of necessary engineering survey expenses,” appear to include expenses for which the utility has been or should be reimbursed, if at all, through the annual rental fee, and exceeds “a competitive rate in consonance with the nature of work to be done.” As such, the charges are unjust and unreasonable, and in violation of the Commission’s rules.

C. Requiring Zito to Pay to Correct Pre-Existing Non-Compliance Violates Section 224 and Commission Rules

88. Where a pole already is out of compliance with governing standards prior to Zito attaching its facilities, it is Penelec’s responsibility, as the pole owner, to bring the pole into compliance.¹⁵⁶ Holding an attacher responsible for costs arising from the correction of another

¹⁵⁶ See, e.g., 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); *Kansas City Cable Partners v. Kansas City Power & Light Co.*, Consolidated Order, 14 FCC Rcd 11599 ¶ 19 (Cable Serv. Bur. 1999) (“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

entity's safety violations is an unjust and unreasonable term and condition of attachment in violation of 47 U.S.C. § 224.¹⁵⁷

89. Based upon Penelec's make-ready cost estimates, it appears that Penelec is requiring Zito to pay to correct pre-existing non-compliance, including for pole replacements, that are unrelated to Zito's proposed attachment.¹⁵⁸ Accordingly, Penelec is in violation of Section 224 and the Commission's rules.

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).

¹⁵⁷ See *Knology, Inc. v. Georgia Power Co.*, Memorandum Opinion and Order, 18 FCC Rcd 24615 ¶ 37 (2003) ("It is an unjust and unreasonable term and condition of attachment in violation of [47 U.S.C. § 224], for a utility pole owner to hold an attacher responsible for costs arising from the correction of another attachers' safety violations."); see also *Pole Attachments*, NARUC Ad Hoc Group of the 706 Federal/State Joint Conference on Advanced Services, Report at 26 (July 2001) ("The new attacher should only be responsible for the costs of necessary make-ready changes and should not be held liable for any cost to correct pre-existing safety violations."), http://www.naruc.org/Publications/poleattachment_summer01.pdf.

¹⁵⁸ See McManus Decl. ¶ 16. Indeed, Penelec's coalition has urged the Commission to adopt a rule that, "If a new attacher seeks to attach to a pole that has pre-existing safety violations on it, then the new attacher pays for the make-ready." Comments of Coalition of Concerned Utilities at 19.

D. Penelec's Refusal to Substantiate its Make-Ready Charges is Unjust and Unreasonable

90. It is well-settled that a pole owning utility is required to provide attachers with detailed information in support of its charges for pre-attachment surveys and make-ready cost estimates. A utility has “an obligation to provide a reasonable amount of information sufficient to substantiate its make-ready charges.”¹⁵⁹

91. As set forth above, despite Zito's repeated requests, Penelec's make-ready cost estimates do not provide essential information required to assess whether the proposed make-ready work is reasonable or to substantiate and support the estimated charges for performing the work. Moreover, not only are the charges not verifiable, they are completely unpredictable, making it nearly impossible for Zito to plan or price its builds for its customers.¹⁶⁰ For example, Penelec's estimates do not delineate a schedule of charges or unit-cost pricing for the make-ready tasks performed (such as raise or lower a line on a pole or install a guy) nor do they provide other details about the basis for the overall charges, such as the labor cost per hour, the amount of time estimated for the make-ready task, or the cost of anticipated materials.¹⁶¹

92. In its pending Accelerating Wireline Broadband Deployment proceeding, the Commission asks whether it should “require utilities to provide potential new attachers with a schedule of common make-ready charges to create greater transparency for make-ready costs.”¹⁶²

¹⁵⁹ *Knology*, 18 FCC Rcd. at 24641 ¶ 61; *Salsgiver Communications, Inc. v. North Pittsburgh Telephone Co.*, 22 FCC Rcd. 20536, 20543 ¶ 22 (Enf. Bur. 2007); *see also* Order Adopting Policy Statement on Pole Attachments, 2004 N.Y. PUC LEXIS 306, at *23 (N.Y. PUC Aug. 6, 2004)(“The make-ready invoice shall include at a minimum: date of work, description of work, location of work, unit cost or labor cost per hour, cost of itemized material and any miscellaneous charges.”).

¹⁶⁰ Ragosta ¶ 22; McManus ¶ 20.

¹⁶¹ *Id.*

¹⁶² *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry and Request for Comment, 32

The Commission cites to concerns raised by companies such as INCOMPAS about the lack of transparency in pole owner make-ready pricing are very similar to Zito's concerns raised here.¹⁶³ Comments submitted by a utility coalition including Penelec (through its parent company, FirstEnergy) argue against such schedules, stating that "the fees charged for make-ready work depend too greatly on the requirements of each specific job," that if "make-ready estimates for one route are too expensive, attachers have access to information sufficient to determine whether an alternative route may be preferable," and that "most utilities already routinely provide attachers with estimates that specify the anticipated make-ready charges."¹⁶⁴

93. The fact that jobs may vary does not eliminate the possibility of providing pricing details for individual tasks. Indeed, other utilities and contractors do this already.¹⁶⁵ Moreover, if tasks are not priced on a unit basis, a detailed explanation of the labor rates, material charges and hours is essential. As demonstrated herein, Penelec does not provide any details about its pricing with its estimates. And, Zito is required to accept the estimates before Penelec will even provide it with an invoice, describing the charges in any detail. Consequently, contrary to the arguments by Penelec's utility coalition, Zito does not have sufficient information to determine whether alternate routes may be preferable until well after the Commission's prescribed timeframes have passed, and typically after Zito has already had to accept the charges to gain temporary access.

FCC Rcd. 3266, 3276-78 ¶¶ 32-37 (2017) ("*Wireline Broadband NPRM*").

¹⁶³ See *Wireline Broadband NPRM*, 32 FCC Rcd. at 3276 ¶ 33.

¹⁶⁴ June 15, 2017 Comments filed by Coalition of Concerned Utilities in *Wireline Broadband NPRM*— at 31.

¹⁶⁵ Ragosta Decl. ¶ 25.

94. Indeed, Zito recently had to pay a make-ready cost estimate of nearly half a million dollars to gain temporary access to Penelec's poles.¹⁶⁶

95. It is unjust and unreasonable for Penelec to require Zito to pay its unsubstantiated invoices, as a condition of making attachments to its poles.¹⁶⁷

96. Moreover, even though Zito has paid certain disputed invoices in full, those invoices reflected improper and/or unreasonably excessive charges by Penelec as set forth herein, and Zito is entitled to a refund for the difference between the amount it has paid and the amount the Commission determines to be reasonable.¹⁶⁸

E. Penelec's Refusal to Accept Input from Zito in the Selection and Management of its Third Party Contractor Solution is Unjust and Unreasonable

1. It is Unreasonable for Penelec to Exclude Zito from the Contractor Selection Process and Negotiation of Contractor Terms

97. Ostensibly, Penelec hired Sigma in response to Zito's request for a list of approved contractors to conduct the pre-attachment survey and engineering process on its outstanding applications after Penelec failed to meet the Commission's timelines for completing those tasks. By unilaterally hiring Sigma instead of providing Zito with a reasonably sufficient list of contractors that it authorizes to perform surveys or make-ready on its poles, Penelec

¹⁶⁶ *Id.* ¶ 31.

¹⁶⁷ *Salsgiver Communications*, 22 FCC Rcd. at 20543 ¶ 22 (finding it is "unreasonable" for utility to require attacher to "commit[] to costs in an unspecified amount, with no opportunity to review them in advance").

¹⁶⁸ Under the Commission's rules, Zito is also entitled to seek reimbursement from later attaching entities whose attachments were made possible by modifications paid for by Zito. *See* 47 C.F.R. § 1.1416(b). Without the requested details to substantiate Penelec's make-ready invoices, Zito is effectively precluded from seeking any such reimbursements.

deprived Zito of the opportunity to review and select a contractor itself, which self-help remedy is specifically prescribed by the Commission's rules.¹⁶⁹

98. The Commission requires utilities to identify and publish a list of authorized contractors for requesting entities to choose from after a prescribed timeframe has been missed.¹⁷⁰ In this case, Penelec did not provide Zito with a list of contractors, but instead unilaterally hired Sigma without any input from Zito. Penelec's hiring of Sigma in response to Zito's request for a list of authorized contractors – after Penelec had already failed to comply with the required timeframes – was unjust and unreasonable.

99. Moreover, it is entirely unclear what contractor qualifications Penelec considered in hiring Sigma. In adopting the requirement that pole owners offer attachers a list of approved contractors, the Commission declined to adopt “particular proposed regulations governing contractor qualifications,” citing the “substantial duties on utilities to act reasonably and nondiscriminatorily” with regard to the selection of third party contractors.¹⁷¹ Based upon Zito's experience, the personnel deployed by Sigma to conduct the pre-attachment survey are not qualified. Moreover, the charges imposed by Sigma far exceed the charges imposed for similar survey and make-ready tasks performed by other Pennsylvania entities. If Zito had been permitted to select a contractor from a list of approved contractors through a competitive bidding process, it could have controlled the quality and cost of the work being performed on its behalf, and for which it is being charged. Penelec's failure to include Zito in the selection of the

¹⁶⁹ 47 C.F.R. § 1.421(i) (giving operator right to hire contractor when timeframes are missed); § 1.1422(a) (requiring utility to make available and keep up-to-date a reasonably sufficient list of contractors).

¹⁷⁰ 47 C.F.R. § 1.1422(a).

¹⁷¹ *2011 Pole Attachment Order*, 26 FCC Rcd. at 5267-68 ¶¶ 55, 57.

contractor to fulfill responsibilities to Zito under the pole attachment rules was unjust and unreasonable in violation of the Commission's rules.

2. Penelec's Refusal to Allow Zito to Participate in its Pre-Attachment Survey Process Is Unjust and Unreasonable

100. In refusing to allow Zito to participate in the field survey, such as through a joint ride out, Penelec does not account for Zito's need to deploy plant quickly and affordably, as well as safely – a need recognized by Congress and this Commission as legitimate and not inconsistent with utilities' concerns about the reliability of their networks. As the Commission has recognized, Zito has a vested interest in the safety and integrity of Penelec's poles to which it attaches – its facilities are attached to the pole, and further depend on the electricity drawn from the electric facilities on the pole in order to operate – and Zito has valuable input to provide regarding how it can safely, efficiently and cost-effectively make its attachments to Penelec's poles.¹⁷² It is unjust and unreasonable for Penelec to exclude Zito from the pre-attachment survey process, charge Zito for the entire process, and then seek to impose charges for make-ready work that may be unnecessary, excessive and/or unreasonably costly.¹⁷³

101. The Commission acknowledged the importance of reaching make-ready decisions “in the field” in its *2011 Pole Attachment Order*, stating that “where the attacher and an electric utility's representative disagree, they are obligated to try to reach an accommodation within a reasonable amount of time, and disputes should be escalated within the companies when no

¹⁷² “Indeed, competent performance of surveys and make-ready concerns not only utilities but also existing attachers and the general public, all of which rely on utility poles for delivery of vital services.” *2011 Pole Attachment Order*, 26 FCC Rcd. at 5267 ¶ 53.

¹⁷³ “Utilities are entitled to recover their costs from attachers for reasonable make-ready work necessitated by requests for attachment. Utilities are not entitled to collect money from attachers for unnecessary, duplicative, or defective make-ready work.” *Knology*, 18 FCC Rcd. at 24625 ¶ 26; *see also Kansas City Cable*, 14 FCC Rcd. 11599.

agreement is reached on the ground.”¹⁷⁴ Indeed, the utility coalition, which includes Penelec as a member, recently commented in the pending *Accelerating Wireline Broadband Infrastructure* proceeding that joint ride-outs are “necessary.”¹⁷⁵

102. Without the ability to participate in the pre-attachment survey process, particularly through a joint ride-out, Zito cannot timely evaluate whether the proposed make-ready work is reasonable under the circumstances, whether it should proceed with the work or re-route its facilities, or whether there might be solutions that are more efficient and/or cost-effective while still ensuring the safety and integrity of the pole and all of its attachments.¹⁷⁶

103. In addition, based upon Zito’s experience, in cases where utilities exclude attachers from the pre-attachment survey process, make-ready work more typically results in pole replacements rather than less costly and more efficient alternative means of accommodating an attachment consistent with governing safety requirements.¹⁷⁷ Accordingly, Penelec’s refusal to allow Zito to participate in the pre-attachment survey process, such as through a joint ride-out, has escalated Zito’s survey and engineering cost to unjust and unreasonable levels and has created unjust and unreasonable expenses for make-ready work.

V. COUNTS

Count I: Denial of Access

104. Zito incorporates by reference as if fully set forth herein paragraphs 1 through 103 of this Complaint.

¹⁷⁴ *2011 Pole Attachment Order*, 26 FCC Rcd. at 5269 ¶ 59. Although the Commission made this statement in the context of a contractor hired by the attaching party (not the utility), it nonetheless demonstrates that the Commission contemplated the usual practice of a joint ride-out where make-ready discussions can take place in the field in real time.

¹⁷⁵ Comments of Coalition of Concerned Utilities at 7 n.13.

¹⁷⁶ McManus Decl. ¶ 15.

¹⁷⁷ *Id.* ¶ 13.

105. Penelec's failure to process Zito's pole attachment applications within the timeframes prescribed by Section 1.1420 of the Commission rules constitutes a violation of Penelec's duty to provide non-discriminatory access to any pole it owns or controls, except in narrowly defined circumstances, which do not apply here. *See* 47 C.F. R. § 1.1403(a).

106. Penelec's demand that Zito pay all make-ready estimate charges in full to gain temporary access to Penelec's poles where the Commission's timeframes for access to utility poles prescribed by Section 1.1420 have been exceeded constitutes a violation of Penelec's duty to provide non-discriminatory access to any pole it owns or controls, except in narrowly defined circumstances, which do not apply here. *See* 47 C.F. R. § 1.1403(a).

107. Penelec's denial of access is not legitimately based on capacity, safety, reliability, or engineering concerns as to any particular pole, or in general.

Count II:

Unjust and Unreasonable Terms and Conditions of Attachment – Pre-Attachment Survey Process and Related Charges

108. Zito incorporates by reference as if fully set forth herein paragraphs 1 through 103 of this Complaint.

109. Penelec's unilaterally imposed requirement that Sigma perform and Zito directly reimburse Penelec for the entire fee for a costly pre-attachment survey, which includes the collection of valuable information about Penelec's poles for Penelec's own use and a full loading analysis that enables Penelec to fulfill its own state regulatory obligation, constitutes unjust and unreasonable terms and conditions of attachment in contravention of 47 U.S.C. § 224 and 47 C.F.R. § 1.1401 *et seq.*

110. Penelec's imposition of excessive charges for the survey in connection with Zito's pole attachment applications constitutes an unjust and unreasonable term and condition of attachment in contravention of 47 U.S.C. § 224 and 47 C.F.R. § 1.1401 *et seq.*

111. Penelec's imposition of excessive charges for make-ready work constitute unjust and unreasonable terms and conditions of attachment in contravention of 47 U.S.C. § 224 and 47 C.F.R. § 1.1401 *et seq.*

112. Penelec's refusal to require Sigma to participate in a joint ride-out with Zito without the imposition of unreasonable conditions and fees, which results in unnecessary and excessive make-ready work and that does not adequately account for input from Zito, constitutes unjust and unreasonable terms and conditions of attachment in contravention of 47 U.S.C. § 224 and 47 C.F.R. § 1.1401 *et seq.*

113. Penelec's imposition of make-ready requirements reflecting Sigma's make-ready designs that do not take into account less costly construction alternatives that would safely and efficiently expedite Zito's network deployment constitutes unjust and unreasonable terms and conditions of attachment in contravention of 47 U.S.C. § 224 and 47 C.F.R. § 1.1401 *et seq.*

114. Penelec's charges for and requirement that Zito pay to correct pre-existing non-compliant conditions on its poles, even though such work would be required regardless of whether Zito attaches to the pole, constitutes unjust and unreasonable terms and conditions of attachment in contravention of 47 U.S.C. § 224 and 47 C.F.R. § 1.1401 *et seq.*

115. Penelec's imposition of excessive costs and refusal to provide substantiating cost information for make-ready work it requires in connection with Zito's pole attachment applications constitutes unjust and unreasonable terms and conditions of attachment in contravention of 47 U.S.C. § 224 and 47 C.F.R. § 1.1401 *et seq.*

VI. REQUEST FOR EXPEDITED REVIEW

116. Zito seeks expeditious consideration of this Complaint due to the delays that Zito already has encountered as a result of Penelec's unjust and unreasonable actions detailed herein, and the harm that Zito will suffer absent expedited resolution of this dispute. Expedited review is consistent with the FCC's draft Report and Order and Further Notice of Proposed Rulemaking in the wireline broadband deployment docket (the "Draft Wireline Order" and "Draft Wireline FNPRM") which establishes a 180-day shot clock for pole access complaints.

117. Specifically, Zito requests that Penelec's response be due ten (20) days following service of this Complaint, with Zito's reply due five (10) days after service of Penelec's response. In addition, Zito requests that the Commission resolve the dispute on an expedited basis upon close of the proceedings.

118. As set forth herein, Penelec has altogether failed to act on 27 applications for attachment by Zito, 26 of which have been pending for more than 180 days.

119. In order for Zito to deploy its network and provide service to its customers in a timely and efficient manner and without further delay, it is necessary for this pole attachment dispute to be resolved as quickly as possible.

VII. RELIEF REQUESTED

Pursuant to Section 1.1410 of the Commission's rules, Zito respectfully requests an expedited order from the Commission:

- a. Finding Penelec's rates, terms, and conditions regarding the survey and make-ready cost estimates complained of herein to be unjust, unreasonable and unlawful;

- b. Requiring Penelec to allow Zito to conduct the pre-attachment survey and to accept and consider Zito's Pole Profile sheets as part of its make-ready work analysis, as required by the Agreement;
- c. Establishing reasonable rates, terms, and conditions regarding survey and make-ready cost estimates;
- d. Requiring Penelec to provide a list of approved contractors to Penelec and allowing Penelec to select and manage the third party contractor;
- e. Requiring that the cost of any pre-attachment survey conducted by Sigma or a third party contractor under Penelec's supervision be collected through pole rent only or, alternatively, that Zito should only be charged a reasonable amount for such process (\$27.83) as measured by charges imposed for the pre-attachment surveys conducted by other Pennsylvania investor-owned utility and telecommunications company pole owners;
- f. Directing Penelec to allow Zito to accompany Sigma or any contractor hired and managed by Penelec in a joint ride-out when Sigma or such Penelec-hired contractor conducts pole surveys;
- g. Requiring that Penelec provide sufficiently detailed cost information supporting the past and prospective survey and make-ready cost estimates imposed on Zito;
- h. Directing Penelec to promptly process all of Zito's pending and future applications for attachments;
- i. Prohibiting Penelec from requiring that Zito pay to correct pre-existing non-compliant conditions on Penelec poles where such work would be required regardless of whether Zito attaches to the pole;

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2017, I caused a copy of the foregoing 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
(original and four copies by hand delivery and filed through ECFS)

Pennsylvania Electric Company
311 Industrial Park Road
Johnstown, PA 15904
(service copies U.S. mail and email)

FirstEnergy Corp.
76 South Main Street
Akron, OH 44308
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Secretary's Bureau
Pennsylvania Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265
(service copies U.S. mail)

/s/ Maria T. Browne

Maria T. Browne