

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ZITO CANTON, LLC,

Complainant,

v.

PPL ELECTRIC UTILITIES CORPORATION, ,

Respondent.

Proceeding No. 17-284
File No. EB-17-MD-005

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Date submitted: November 13, 2017

I.	SUMMARY AND INTRODUCTION	2
II.	JURISDICTION AND PARTIES	4
III.	BACKGROUND AND FACTS.....	7
IV.	DISCUSSION	18
V.	COUNTS	29
VI.	REQUEST FOR EXPEDITED REVIEW	31
VII.	RELIEF REQUESTED	32

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AMENDED POLE ATTACHMENT COMPLAINT¹

Zito Canton, LLC (“Zito”) respectfully submits this Amended Pole Attachment Complaint for denial of access and unreasonable terms and conditions of pole attachment against PPL Electric Utilities Corporation (“PPL” or “Pole Owner”) pursuant to Subpart J of the Federal Communications Commission (“Commission”) Rules, 47 C.F.R. §§ 1.1401 *et seq* and the Commission’s letter ruling in the captioned proceeding dated November 7, 2016.

¹ Per the Commission’s letter ruling dated November 7, 2017, Zito amends its Complaint filed October 12, 2017 to include a Pole Attachment License Agreement between the parties dated January 14, 1991 (“1991 Agreement”), which was provided by PPL counsel on November 6, 2017, to update certain facts and arguments to account for one term in the 1991 Agreement that materially differs from the parties’ Pole Attachment Agreement dated December 22, 1977 (“1977 Agreement”), and to reflect that the proper name for the Respondent is PPL Electric Utilities Corporation. The 1977 Agreement was previously included as an exhibit to the Declaration of Colin Higgin dated October 11, 2017. Both the 1991 and 1977 Agreements are now included as exhibits to the Declaration of Colin Higgin dated November 13, 2017.

I. SUMMARY AND INTRODUCTION

Zito’s ability to timely and affordably attach communications facilities to utility poles is essential to the deployment of its broadband network. Congress, the Commission and Courts have recognized that, due to factors such as zoning restrictions, environmental regulations, and start-up costs, utilizing space on existing poles is generally the only feasible means for network deployment.² As such, 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.”³ 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.”⁴

In an extensive rulemaking proceeding that spanned several years, 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

² 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 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”).

³ 47 U.S.C. § 224(b)(1).

⁴ 47 U.S.C. § 1302(a).

access to poles is not “more burdensome or expensive than necessary.”⁵ 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 time frames and the use of utility approved contractors.⁶ The Commission’s primary objective was “to improve the efficiency and reduce the potentially excessive costs of deploying telecommunications, cable, and broadband networks, in order to accelerate broadband buildout.”⁷

Yet, six years later, utilities like PPL 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.”⁸

In contrast to the Commission’s objectives in the *2011 Pole Attachment Order*, PPL’s pole attachment application process is “prolonged, unpredictable, and costly” and “more burdensome or expensive than necessary.” Specifically:

- In refusing to allow Zito to conduct pre-attachment surveys⁹ itself, or to agree to a “joint ride-out” with all entities attached to the pole, and instead requiring Zito to directly

⁵ *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*”).

⁶ *Id.*, 26 FCC Rcd. at 5250 ¶ 19.

⁷ *Id.*, 26 FCC Rcd. at 5241 ¶ 1.

⁸ *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).

⁹ The pre-attachment survey (also referred to as a pre-attachment inspection) exists to assess what work is required on the pole to accommodate an attachment consistent with governing construction and safety specifications, such as the NESC.

reimburse PPL for the unlimited and unpredictable costs of PPL's chosen third party contractors to perform pole surveys and engineering in fulfillment of PPL's own state-imposed obligations, PPL has escalated survey and engineering costs to unjust and unreasonable levels, in violation of the Commission's rules;

- PPL's refusal to allow Zito to participate in joint ride-outs or to require its third party contractors to do so or otherwise account for Zito's perspective concerning required make-ready work, including its need to avoid unnecessarily high cost routes, or consider safe, less costly construction alternatives, creates unjust and unreasonable expenses for make-ready work, in violation of the Commission's rules; and
- PPL's "take it or leave it" invoicing, which PPL requires to be paid in full before any work, including work on unrelated applications and work to correct pre-existing non-compliance, may proceed, unreasonably leaves Zito with no option other than to pay PPL's unsubstantiated charges. As such, PPL has effectively denied Zito access to its poles for reasons other than those allowed by Section 224 and Commission rules.

Clearly, PPL refuses to prioritize the Commission's important broadband initiatives and stated objectives to facilitate network deployment using existing pole infrastructure. Instead, PPL 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. PPL'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 and other customers. The Commission must take action to end PPL's unjust and unreasonable practices and to compensate Zito for its forced payment of PPL'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. Pursuant to Section 224(b), the Commission is charged with ensuring that pole owning utilities provide telecommunications carriers with non-discriminatory access to distribution poles upon just and reasonable rates, terms and conditions.

3. Under Section 1.1403(b) of the Commission's rules, a utility may deny access only on a nondiscriminatory basis, where there is insufficient capacity, and for reasons of safety, reliability and generally applicable engineering purposes.

4. 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).

5. Complainant Zito provides cable television, telecommunications services and broadband internet access to businesses and residents in Pennsylvania.¹⁰

6. Zito has a general office address of 102 South Main Street, Coudersport, PA 16915.

7. Respondent PPL is an investor-owned electric utility in the business of providing electric transmission and distribution services. PPL has a general business address of 827 Hausman Road, Allentown, PA 18104-9392.

8. PPL owns or controls poles in the State of Pennsylvania that are used for wire communication.

9. Zito, through its predecessor entity, Retel TV Cable Co., Inc., entered into a Pole Attachment License Agreement dated January 14, 1991 ("1991 Agreement") with PPL in

¹⁰ Attachment A, Declaration of James Rigas dated November 13, 2017 ("Rigas Decl.") ¶ 4.

Pennsylvania pursuant to which Zito is authorized to attach to PPL owned and controlled poles (“1991 Agreement”).¹¹

10. Zito engaged in good faith executive level discussions with PPL in an attempt to resolve the parties’ pole attachment dispute.¹²

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

12. 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.¹³

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

¹¹ Attachment B, Declaration of Colin Higgin dated November 13, 2017 (“Higgin Decl.”) ¶ 5 & Exh. 1 (1991 Pole Attachment Agreement). The 1991 Agreement superseded the 1977 Agreement between the same parties. Other than a reorganization of the first three sections, the two agreements were materially similar in most respects. For example, Section 4.3 governing the licensee’s pre-attachment inspection is essentially the same in both agreements.

¹² Rigas Decl. ¶ 16 & Exh. 1 (October 15, 2017 Letter from James Rigas to Ryan Yanek, PPL Project Manager).

¹³ 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).

III. BACKGROUND AND FACTS

14. Zito's and its affiliates' fiber-optic network supports the provision of mobile backhaul and other high-speed services to businesses, households, public safety agencies and other critical community organizations and institutions.¹⁴

15. In particular, Zito and its affiliates provide a suite of data, video, and voice services, including advanced E911 service, through their integrated IP network to 110 communities throughout 17 states.¹⁵

16. Zito and its affiliates have deployed a fiber-optic network that delivers affordable broadband Internet service to residential and commercial customers.¹⁶

17. The areas served by Zito and its affiliates generally are unserved or underserved rural communities, many of which are economically depressed.¹⁷

PPL's Pole Attachment Process

18. Zito requires access to PPL owned or controlled poles to construct its network in Pennsylvania.¹⁸

19. As required by the parties' 1991 Agreement, when Zito desires to make attachment to PPL's poles, Zito submits a pole attachment application to PPL that specifies the nature of the attachments requested and the particular poles to which attachment is sought.¹⁹

20. The terms of the 1991 Agreement provide that, prior to attaching facilities to PPL poles, Zito is responsible for conducting a "pre-attachment inspection" to determine whether the

¹⁴ Rigas Decl. ¶ 5.

¹⁵ *Id.* ¶ 6.

¹⁶ *Id.* ¶ 4.

¹⁷ *Id.* ¶ 7.

¹⁸ Rigas Decl. ¶ 8; Higgin Decl. ¶ 4.

¹⁹ Higgin Decl. ¶ 6 & Exh. 1 § 1.2.

attachment can be made according to the specifications set forth in the 1991 Pole Attachment Agreement, 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”) and to design the work accordingly (“engineering”).²⁰ The 1991 Agreement also provides that PPL will conduct its own pre-attachment inspection but does not authorize PPL to charge the licensee, Zito, for PPL’s inspection.²¹

21. PPL engages third party contractors to perform an extensive pre-attachment inspection process, which includes a field survey of the poles included in Zito’s applications and any make-ready design work that PPL’s contractor determines is required.²² PPL charges for the full cost of the pre-attachment inspection process performed by PPL’s contractors.²³

22. PPL does not allow Zito to participate in the selection of the contractors it hires or to provide input into the terms and conditions governing the scope or price of the contractor’s work.

PPL’s Field Survey and Load Calculations

23. As part of the field survey, PPL’s contractor collects information about the poles as well as information concerning PPL’s and other entities’ facilities attached to the poles,

²⁰ *Id.* ¶ 7 & Exh. 1 § 4.2.

²¹ *Id.* at Exh. 1 § 4.7. Article VI of the 1991 Agreement, setting forth fees for which the licensee, Zito, is responsible, is limited to annual attachment fees (6.1), field inventory survey charges and unauthorized attachment fees (6.2), transfer fees (6.5), and a return trip fee (6.6). *Id.* at Exh. 1, Art. VI. Moreover, in contrast to Section 4.7 of the 1991 Agreement, the parties’ 1977 Pole Attachment included a post-attachment inspection provision at Section 4.7, which expressly stated that the licensee would pay the licensor \$2 per pole inspected. *Id.* at Exh. 2 § 4.7.

²² *Id.* ¶ 7.

²³ *Id.*

including multiple photographs of each pole, the surrounding area, and adjacent mid-spans.²⁴ The information about each pole is then transferred to a Google-earth-like interactive map which, along with electronic profiles of the poles, including metadata such as GPS coordinates, is uploaded to a PPL portal site (designed by a contractor for PPL).²⁵

24. Unlike other pole owners and counter to past practice, PPL's contractor does not utilize pole profile information (such as the height and class of the pole and the nature and location of facilities already attached to the pole) provided by Zito.²⁶

25. After the field survey of the poles is completed, another third party contractor hired by PPL analyzes the survey information and determines what make-ready work is required.²⁷ Upon information and belief, PPL directs its third party contractor 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.²⁸

26. Irrespective of Zito's pole attachment applications, PPL 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.²⁹ A specific

²⁴ *Id.*

²⁵ *Id.* ¶ 8; Attachment D, Declaration of Kelly Ragosta dated November 13, 2017 ("Ragosta Decl.") ¶ 6 & Exh. 2.

²⁷ Ragosta Decl. ¶ 6.

²⁸ *Id.*; Attachment C, Declaration of Todd McManus dated November 13, 2017 ("McManus Decl.") ¶ 9. The NESC specifies certain strength and loading requirements based on the construction grade of the line and environmental loading district for the pole. A full pole loading analysis takes into account numerous factors necessary to determine whether the pole meets those NESC requirements.

²⁹ *Revision of 52 Pa. Code Chapter 57 Pertaining to Adding Inspection, Maintenance, Repair,*

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.³⁰ The requirement stems from the PUC’s jurisdiction over PPL’s provision of electric service to Pennsylvania residents.³¹

27. The PA PUC requires electric utilities to file biennial reports regarding their inspection, maintenance, repair, and replacement plans for the upcoming calendar year.³² In its 2016-17 Biennial Report filed with the PA PUC, PPL proposed deviating from the regulatory requirement to perform a load calculation for each pole inspected.³³ In making this request, PPL stated that 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.”³⁴ In support of its request, PPL told the PUC that it requires attaching entities to perform load calculations prior to attaching facilities to the pole.³⁵

28. 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.³⁶

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).

³⁰ 52 Pa. Code § 57.198(n)(2)(vi).

³¹ 66 Pa. Code § 501.

³² 52 Pa. Code § 57.198.

³³ Attachment E, *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*”). Electric utilities are permitted to deviate from the standards set forth in the regulation, provided that such deviation is justified by a utility based on its specific circumstances or a cost/benefit analysis. 52 Pa. Code § 57.198(c).

³⁴ *Id.* at 21.

³⁵ *Id.*

³⁶ McManus Decl. ¶ 9. 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

29. Despite the benefit to PPL of the loading analysis, including fulfillment of PPL's own regulatory responsibilities, PPL requires Zito to reimburse it for the full cost of its contractors' pre-attachment survey and make-ready design, including the full loading analysis.³⁷

PPL's Make-Ready Determinations

30. The make-ready work for an additional communications attachment may include raising or lowering existing attachments, the use of extension arms, opposite side construction or other space saving construction techniques, guying or re-guying the pole to balance the load on the pole, stubbing a pole, adding a pole extender, or, where inadequate space or pole strength exists to accommodate a new attachment, replacing the existing pole.³⁸

31. Replacing a pole is typically the most costly and time consuming make-ready option and can be avoided, in certain circumstances, using safe, less costly construction alternatives.³⁹

32. In Zito's experience, the most efficient and common method for determining what make-ready work is required to accommodate an attachment is through a joint ride-out during which representatives of the pole owner(s) and pole applicant travel to and physically inspect each pole in a given application to determine whether and what make-ready work is necessary.⁴⁰

33. A joint ride-out produces make-ready decisions that account for the integrity and safety of the pole and attached facilities, as well as ensuring that the work is cost-effective. For

clearly less than fully loaded and poles that are most probably overloaded." *Pole Loading & Clearance Analysis*, Osмосе, available at <http://www.osmosе.com/pole-loading-clearances> (last visited on Sept. 26, 2017). This software allows Osмосе to reduce expenses by only conducting a comprehensive loading analysis on those poles that are "complex and borderline overloaded." *Id.*

³⁷ Ragosta Decl. ¶ 8.

³⁸ McManus Decl. ¶ 10.

³⁹ *Id.*

⁴⁰ *Id.*

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.⁴¹ 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.⁴² A joint ride-out also allows the participating parties to identify pre-existing non-compliant conditions that would require correction (such as pole replacement) notwithstanding the applicant's proposed attachment and for which the applicant should not be charged.⁴³

34. PPL does not allow Zito to accompany PPL's contractor on a joint ride-out when the contractor conducts the survey of the poles and makes certain decisions regarding make-ready work.⁴⁴

35. Zito has a vested interest in the safety and integrity of the poles to which it attaches, including poles owned and controlled by PPL.⁴⁵ Zito's employees and contractors work on facilities attached to the poles. Zito depends on the electricity drawn from the electric facilities on the pole in order to operate. Zito has contractually indemnified PPL against "any and all losses ... arising out of, resulting from or in any manner caused by the presence of, its

⁴¹ McManus Decl. ¶ 11.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* ¶ 12.

attachments.”⁴⁶ If permitted to do so, Zito could provide valuable input concerning how it can safely, efficiently and cost-effectively attach facilities to PPL’s poles.⁴⁷

36. Instead of make-ready decisions being made jointly in the field, PPL’s contractors engage in a multistage pre-attachment inspection process in which PPL’s contractors make decisions about required make-ready work without Zito’s input.⁴⁸ In Zito’s experience, more poles are replaced prematurely using this process, resulting in substantial additional estimated deployment costs.⁴⁹ Faced with such high costs, Zito often must opt to explore alternative deployment routes.⁵⁰ Moreover, because decisions are not made in the field but are instead delayed until after additional back-office analysis is performed, Zito’s consideration of such alternative routes is unnecessarily delayed.⁵¹

PPL’s Invoices to Zito

37. After the pre-attachment inspection process is complete but before make-ready work commences, PPL invoices Zito for both “Make Ready – Engineering” (covering PPL’s pre-attachment survey and make-ready design process) and “Make Ready – Construction” (covering any required make-ready work).⁵²

38. PPL’s invoices only provide lump sum amounts for “Make Ready Engineering” and “Make Ready Construction” for all of the poles on an application.⁵³ As such, the invoices do not provide sufficiently detailed information to enable Zito to assess whether the work is

⁴⁶ Higgin Decl., Exh. 1, Art. 11.

⁴⁷ *Id.* ¶ 12.

⁴⁸ *Id.* ¶ 13.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Ragosta Decl. ¶¶ 4-5 & Exh. 1 (representative example of a PPL invoice to Zito).

⁵³ *Id.* ¶ 7.

necessary to accommodate its attachments or the reasonableness of the charges.⁵⁴ For example, the invoices do not identify specific tasks performed or charges by pole.⁵⁵

PPL's Pre-Attachment Survey Charges

39. PPL's invoices include charges for "Make Ready – Engineering," which appear to assess Zito for the full cost of PPL's contractors to perform the pre-attachment survey and any necessary make-ready work design, including a full loading analysis of every pole.⁵⁶

40. On average, PPL's charge for the pre-attachment inspection, i.e., "Make Ready – Engineering," is approximately \$195.58 per pole.⁵⁷ In 2017, to date, the per-pole average charge increased to \$263.39.⁵⁸ In numerous exchanges with PPL, Zito disputed these charges as unreasonable.⁵⁹ PPL's charges for the pre-attachment inspection process far exceed the amounts charged by other pole owners in Pennsylvania.⁶⁰ 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.⁶¹

41. PPL's invoices for the pre-attachment inspection process do not provide sufficient detail for Zito to determine precisely what tasks are being performed, and whether such tasks and the costs to complete them are reasonable.⁶²

⁵⁴ *Id.* ¶¶ 8, 9.

⁵⁶ Ragosta Decl. ¶¶ 5, 8.

⁵⁶ Ragosta Decl. ¶¶ 5, 8.

⁵⁷ *Id.* ¶ 5.

⁵⁸ *Id.* ¶ 12.

⁵⁹ *Id.*

⁶⁰ *Id.* ¶ 15, 18, 19; McManus Decl. ¶ 17; Higgin Decl. ¶¶ 10-11 & Exhs. 3-7; Rigas Decl. ¶¶ 13-16 & Exh. 1.

⁶¹ Ragosta Decl. ¶ 12.

⁶² *Id.* ¶ 8; McManus Decl. ¶ 14.

42. Zito repeatedly has requested that PPL provide information to substantiate and support the “Make-Ready Engineering” charges in its invoices; however, to date, PPL has not provided Zito with the requested information.⁶³

PPL’s Make-Ready Charges

43. PPL requires Zito to pay for any make-ready costs up-front – i.e., when PPL provides its make-ready estimate – before any required make-ready work is begun. However, PPL’s invoice charges for “Make Ready – Construction” do not provide essential information necessary to enable Zito to verify whether the proposed make-ready construction charges are reasonable.⁶⁴ For example, while PPL provides a lump sum estimate of the cost of make-ready work for all of the poles on an application, PPL does not list the labor and material cost for the specific make-ready tasks to be performed on each pole.⁶⁵

44. Without these essential details, Zito is unable to evaluate whether the make-ready work charges are reasonable 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.⁶⁶

45. Zito repeatedly has requested that PPL provide information to substantiate and support the “Make-Ready Construction” charges in its invoices; however, to date, PPL has not provided Zito with the requested information.⁶⁷

46. On a per pole basis, PPL’s make-ready charges are 58% higher than those of other Pennsylvania investor-owned electric utilities and telecommunications companies.⁶⁸ PPL’s

⁶³ See, e.g., Ragosta Decl. ¶ 18; Higgin Decl. ¶ 10 & Exhs. 3-7.; Rigas Decl. ¶ 13.

⁶⁴ Ragosta Decl. ¶ 9; McManus Decl. ¶ 15.

⁶⁵ Ragosta Decl. ¶ 9 & Exh 1.

⁶⁶ *Id.* ¶ 10; McManus Decl. ¶ 15.

⁶⁷ See, e.g., Ragosta Decl. ¶ 18; Higgin Decl. ¶ 10 & Exhs. 3-7; Rigas Decl. ¶ 13.

average per-pole make-ready charge is \$1,685.17, whereas the average per-pole charge of other Pennsylvania investor-owned electric utilities and telecommunications companies \$1,068.05.⁶⁹

47. Upon information and belief, PPL charges for and requires Zito to 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.⁷⁰

Zito's Payments to PPL

48. In early 2016, Zito began questioning PPL about the survey, engineering and make-ready charges on the invoices for the reasons set forth above.⁷¹

49. On May 16, 2016, PPL informed Zito via email that it would no longer accept or process any Zito pole attachment applications, including those that had already been accepted by PPL and for which Zito had already tendered payment, due to the billing dispute between the two parties regarding the questioned invoices.⁷² PPL stated that its decision was based on “Safety, Reliability and Engineering reasons,” but PPL did not otherwise explain its reasons, let alone provide any supporting evidence or information in support of its assertions.⁷³ Instead, PPL made clear that the actual reason underlying its refusal to process Zito’s applications was Zito’s having disputed the charges on PPL’s invoices.⁷⁴ Despite Zito’s offer to make a good faith payment of a portion of the disputed invoices, PPL reiterated its refusal to process any of Zito’s pending or

⁶⁸ Ragosta Decl. ¶ 13.

⁶⁹ *Id.* Because PPL 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.*

⁷⁰ *Id.* ¶ 14; McManus Decl. ¶ 16.

⁷¹ Higgin Decl. ¶ 10; Rigas Decl. ¶ 13.

⁷² Ragosta Decl. ¶ 16 & Exh. 3.

⁷³ *Id.*

⁷⁴ *Id.*

future applications until Zito paid the entire amount in dispute between the parties without PPL first providing the requisite details to assess the reasonableness of the charges.⁷⁵

50. In light of PPL's refusal to accept or process Zito's pole attachment applications without full payment of any questioned or disputed invoices, and given Zito's critical need for timely pole access to satisfy customer commitments and regulatory obligations, Zito paid in full and continues to pay in full the invoices sent by PPL, subject to a reservation of its rights to challenge the invoices and seek refunds from PPL.⁷⁶

51. Despite Zito's payments in full of the invoices, PPL still has not provided Zito with the requested details to substantiate the work being performed and related charges in its invoices.⁷⁷

52. PPL's requirement that Zito pay unsubstantiated, disputed invoices in full as a condition of processing Zito's applications (including unrelated applications) diverts critical capital which would otherwise be available to Zito for additional network deployment.⁷⁸

53. Zito has attempted on multiple occasions to resolve this matter through executive level discussions with PPL.⁷⁹

54. Zito also attempted to resolve this matter through mediation. From June to August, 2016, Zito participated in FCC staff-supervised mediation in an effort to resolve the

⁷⁵ *Id.* ¶ 16 & Exh. 4.

⁷⁶ Ragosta Decl. ¶ 17 & Exh. 5 (spreadsheet of disputed invoice charges and payments by Zito).

⁷⁷ *Id.* ¶¶ 17-18.

⁷⁸ Rigas Decl. ¶ 14.

⁷⁹ *Id.* ¶ 16.

parties' dispute. Ultimately, the mediation was not successful and the dispute remains unresolved.⁸⁰

55. 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

A. PPL's Charges for the Pre-Attachment Inspection Process are Unjust and Unreasonable

56. The Pole Attachment Act requires that pre-attachment survey and engineering charges be just and reasonable.⁸¹ Such costs should reflect only PPL's "actual cost of necessary engineering survey expenses"⁸² and should not include "expenses for which the utility has been reimbursed through the annual fee."⁸³ Further, "[s]urvey work should be done at a competitive rate in consonance with the nature of work to be done."⁸⁴ And, to the extent that inspection charges benefit the pole owners, "the costs of the inspection must be allocated among the beneficiaries."⁸⁵

⁸⁰ *Id.* ¶ 14; Higgin Decl. ¶ 11.

⁸¹ See 47 U.S.C. § 224(b)(1); see also *Implementation of Local Competition Provisions in the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd. 15499, 16097 ¶ 1214 (1996) ("1996 Local Competition Order") (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).

⁸² *Texas Cable & Telecommunications Ass'n v. Entergy Services, Inc.*, 14 FCC Rcd. 9138, 9140-42 ¶¶ 6-10 (Cable Serv. Bur. 1999) ("*Texas Cable*").

⁸³ *Id.* at 9139-40 ¶ 5.

⁸⁴ *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).

⁸⁵ 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

57. 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.”⁸⁶ The Commission took several steps “to improve the efficiency and reduce the potentially excessive costs of deployment telecommunications, cable and broadband networks,” including the adoption of time frames and the use of utility approved contractors where timeframes could not be met.⁸⁷

58. While PPL is using contractors to perform pre-attachment surveys and make-ready design ostensibly to assist in meeting the Commission’s prescribed pole attachment application timeframes, PPL’s process is so flawed and the charges are so outrageous that they undermine the objectives of the Commission’s April 2011 Order and fail to meet the Commission’s standards regarding just and reasonable charges.

59. Specifically, first, notwithstanding the language of the parties’ 1991 Agreement, which provides that the *Licensee* (i.e., Zito) will conduct a pre-attachment pole inspection,⁸⁸ PPL has excluded Zito from this process and instead requires that a third party contractor perform a costly pre-attachment inspection, which fails to account for valuable input from Zito and includes extensive data collection and analysis that far exceeds what is necessary to determine whether and where Zito’s attachments are feasible. While the parties’ 1991 Agreement provides that PPL will also conduct a pre-attachment inspection, it does not permit PPL to charge Zito for such

pole users and owners, and thus, the costs of the inspection must be allocated among the beneficiaries”).

⁸⁶ *2011 Pole Attachment Order*, 26 FCC Rcd. at 5243 ¶ 6.

⁸⁷ *Id.*, 26 FCC Rcd. at 5241 ¶ 1, 5250 ¶ 19.

⁸⁸ Higgin Decl. Exh. 1, 1991 Agreement § 4.2.

inspection.⁸⁹ Accordingly, PPL's charges to Zito for the inflated pre-attachment inspection process conducted by PPL's contractor exceed those permitted by the parties' 1991 Agreement and thus are unjust and unreasonable in violation of the Commission's rules.

60. Second, PPL requires Zito to reimburse it directly for the entire cost of the pre-attachment inspection process, despite the fact that PPL uses the survey process to obtain valuable information about its poles for its GPS mapping system⁹⁰ and to satisfy its own state regulatory obligations to periodically inspect its poles, including its obligation to conduct load calculations for each pole.⁹¹ As with periodic inspections, because the information collected by PPL's contractors during the pre-attachment survey process benefits PPL and other entities attached to the pole, such costs should not be borne wholly by Zito.⁹² Instead, the costs should be recovered

⁸⁹ In contrast, Section 4.7 of the 1977 Agreement – the section that was replaced by Section 4.7 of the 1991 Agreement – provided for a post construction inspection by PPL *expressly* at the Licensee's expense. Higgin Decl. Exh. 2 § 4.7. Thus, where PPL intended to charge the licensee for an inspection, it did so directly. Moreover, Article VI of the 1991 Agreement, which includes specific fees for which the licensee (Zito) is responsible under the 1991 Agreement, does not permit PPL to recover costs related to PPL's pre-attachment inspection. *Id.* Exh. 1 Art. VI. The Agreement should be construed strictly against PPL, which has “monopoly power in negotiating pole attachment agreements.” *See* 2011 Order at ¶ 119.

⁹⁰ PPL's contractors take multiple photos of each pole, the surrounding area, adjacent mid-sans, transfer information about each pole into a Google earth-like interactive map, which is uploaded to a PPL portal site (designed by its contractor for PPL) with electronic profiles of the poles, including metadata such as GPS coordinates. McManus Decl. ¶ 8; Ragosta Decl. ¶ 6 & Exh. 2. This mapping data is not necessary for Zito's attachment.

⁹¹ 52 Pa. Code § 57.198(n)(2); *see also PPL Biennial Report* at 20-21 (“PPL Electric hereby proposes a deviation from the requirement for a load calculation to be performed for each pole inspected. . . . PPL Electric requires entities attaching facilities to its poles to perform their own load calculations before making the attachment.”).

⁹² *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

by PPL 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.⁹³

61. 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.”⁹⁴ As explained by PPL in its 2014 Biennial Inspection Report to the Pennsylvania PUC, “[m]ost of the limited numbers of pole failures are aggravated by weather conditions such as trees being blown into lines, *so the potential risk reduction through a load calculation is insignificant.*”⁹⁵

62. Moreover, even if PPL’s contractor performed pre-attachment inspection 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, the average amount charged by PPL to Zito from 2015 to date for its pre-attachment inspection, i.e., “Make Ready – Engineering,” was on average, approximately \$195.58 per pole.⁹⁶ In 2017, to date, the per-pole average charge is \$263.39.⁹⁷ By

attachments should be borne by all attachers”).

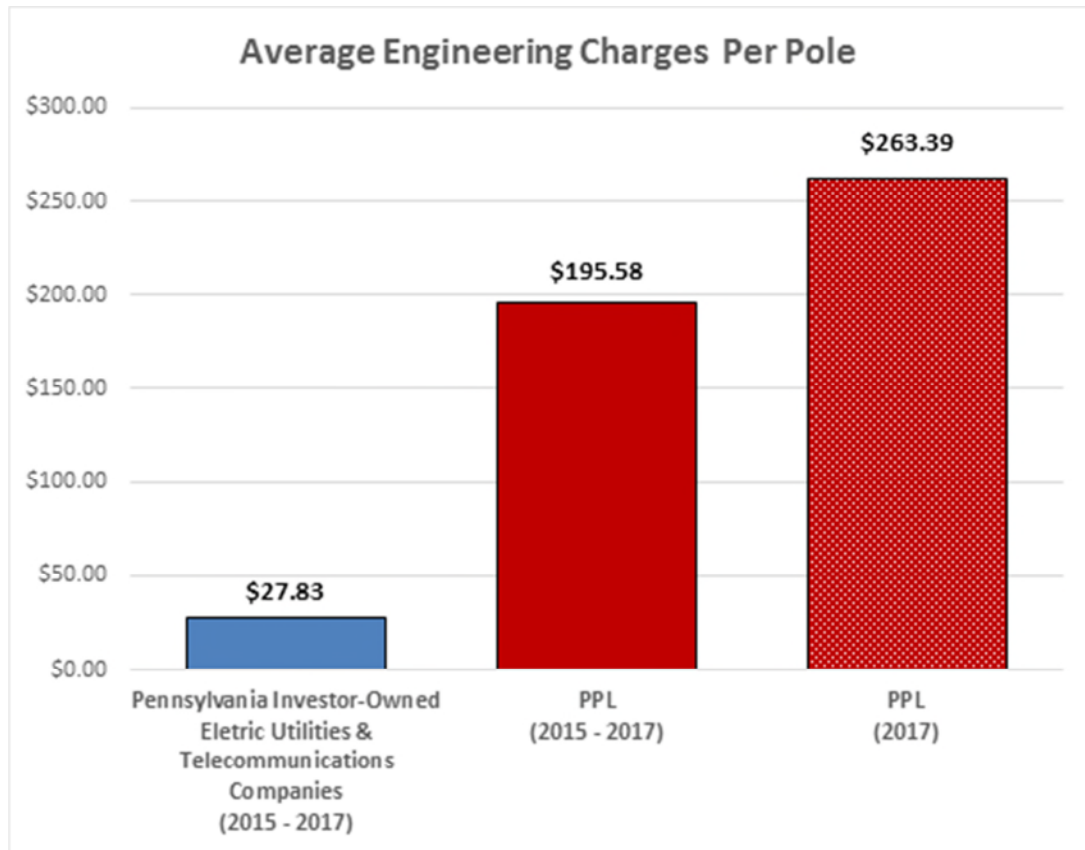
⁹³ See *Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, FCC Rcd. at ¶ 7 (2000) (“it is important to ensure that the attaching entity is not charged twice for the same costs, once for make-ready costs and again for the same costs if the business expense is reported in the 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 PPL 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.

⁹⁴ *Pole Loading & Clearance Analysis*, Osmose, available at <http://www.osmose.com/pole-loading-clearances>.

⁹⁵ Attachment E, *PPL Biennial Report* at 21.

⁹⁶ Ragosta Decl. ¶ 12.

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, \$27.83.⁹⁸



63. In sum, PPL’s pre-attachment inspection charges are not permitted by the parties’ 1991 Agreement, exceed PPL’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.

⁹⁷ *Id.*

⁹⁸ *Id.*

B. PPL’s Refusal to Allow Zito to Participate in its Pre-Attachment Inspection Process Is Unjust and Unreasonable

64. In refusing to allow Zito to participate in the field survey, such as through a joint ride out, PPL 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. Zito has a vested interest in the safety and integrity of PPL’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 PPL’s poles. It is unjust and unreasonable for PPL 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.⁹⁹

65. Without the ability to participate in the pre-attachment inspection 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.¹⁰⁰

66. 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

⁹⁹ 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 Partners v. Kansas City Power & Light Co.*, Consolidated Order, 14 FCC Rcd. 11599 (Cable Serv. Bur. 1999).

¹⁰⁰ McManus Decl. ¶ 15.

attachment consistent with governing safety requirements.¹⁰¹ Accordingly, PPL'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.

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

67. Where a pole already is out of compliance with governing standards prior to Zito attaching its facilities, it is PPL's responsibility, as the pole owner, to bring the pole into compliance.¹⁰² Holding an attacher responsible for costs arising from the correction of another entity's safety violations is an unjust and unreasonable term and condition of attachment in violation of 47 U.S.C. § 224.¹⁰³

68. Based upon PPL's invoices for Make-Ready Construction and other information made available to Zito, it appears that PPL is requiring Zito to pay to correct pre-existing non-

¹⁰¹ *Id.* ¶ 13.

¹⁰² *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*, 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).

¹⁰³ *See Knology*, 18 FCC Rcd. at 24629 ¶ 37 ("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.

compliance, including for pole replacements that is unrelated to Zito's proposed attachment.¹⁰⁴

Accordingly, PPL is in violation of Section 224 and the Commission's rules.

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

69. It is well-settled that utilities are required to provide attachers with detailed information in support of its charges for pre-attachment inspections and proposed make-ready work. A utility has "an obligation to provide a reasonable amount of information sufficient to substantiate its make-ready charges."¹⁰⁵

70. As set forth above, despite Zito's repeated requests, PPL's invoice charges for "Make Ready – Construction" do not provide essential information to substantiate and support such charges. PPL's invoices do not delineate unit cost or labor cost per hour, cost of itemized material and any miscellaneous charges for each make-ready task to be performed by PPL's contractors.¹⁰⁶

71. Zito must be provided an opportunity to review a detailed cost estimate before incurring make-ready charges, and that estimate must provide a reasonable amount of information sufficient to substantiate the make-ready charges. It is unjust and unreasonable for PPL to require Zito to pay its unsubstantiated invoices, often amounting to tens or even hundreds of thousands of dollars, as a condition of making attachments to its poles.¹⁰⁷

¹⁰⁴ See McManus Decl. ¶ 16.

¹⁰⁵ *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 (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.").

¹⁰⁶ See Ragosta Decl. Exh. 1.

¹⁰⁷ *Salsgiver Communications*, 22 FCC Rcd. at 20543 ¶ 22 (finding it is "unreasonable" for utility

72. Moreover, while Zito has paid certain disputed invoices in full, those invoices reflected improper and/or unreasonably excessive charges by PPL 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.¹⁰⁸

E. PPL’s Refusal to Process Zito’s Pole Attachment Applications Unless Zito Pays Unreasonable and Unsubstantiated Pre-Attachment Engineering and Make-ready Charges Constitutes an Unlawful Denial of Access

73. The Pole Attachment Act requires pole owners, such as PPL, to provide nondiscriminatory access to its poles, conduits, and rights-of-way upon just and reasonable rates, 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.”¹⁰⁹

74. Utilities may only deny access for reasons of safety, reliability and generally applicable engineering standards.¹¹⁰ “A denial of access, while proper in some cases, is an

to require attacher to “commit[] to costs in an unspecified amount, with no opportunity to review them in advance”).

¹⁰⁸ 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. 47 C.F.R. § 1.1416(b). Without the requested details to substantiate PPL’s make-ready invoices, Zito is effectively precluded from seeking any such reimbursements.

¹⁰⁹ *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), *reversed, NCTA v. Gulf Power Co.*, 534 U.S. 327 (2002).

¹¹⁰ 47 U.S.C. § 224(f).

exception to the general mandate of section 224(f).”¹¹¹ 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.”¹¹² 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.”¹¹³

75. Utilities may not “condition access on payment of a disputed claim.”¹¹⁴ The FCC has determined that “[d]ebt collection is not permissible grounds for denial of access.”¹¹⁵ The FCC’s policy recognizes that Zito is at the mercy of PPL given PPL’s “local monopoly ownership or control of poles” and “exclusive control over access to pole lines.”¹¹⁶

76. In this case, PPL is unlawfully conditioning access to its poles upon Zito’s agreement to pay excessive and unsubstantiated pre-attachment engineering charges.

77. PPL has refused to process any pole attachment applications, including new, unrelated applications, unless Zito pays for the third party contractor pre-attachment survey

¹¹¹ *1996 Local Competition Order*, 11 FCC Rcd. at 16100 ¶ 1222.

¹¹² 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 U.S.C. § 224(f)(2)]—in a way that is specific with regard to both the type of facility and the type of pole.”).

¹¹³ *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.

¹¹⁴ *Kansas City Cable*, 14 FCC Rcd. at 11606 ¶ 18.

¹¹⁵ *Id.*

¹¹⁶ *See 2011 Pole Attachment Order*, 26 FCC Rcd. at 5242 ¶ 4.

charges in full, without first receiving the requested detail to determine whether the charges are reasonable.¹¹⁷ As detailed above, after Zito began disputing PPL's excessive invoices and demanding that PPL substantiate the charges, PPL informed Zito via email that it would not accept or process any Zito pole attachment applications, even unrelated applications, unless Zito paid the disputed invoices in full. While PPL stated that its decision was based on "Safety, Reliability and Engineering reasons," it did not explain its position, let alone provide any supporting evidence or information in support of its assertions. Instead, PPL made clear that the actual reason underlying its refusal to process Zito's applications was Zito's having disputed the charges on PPL's invoices.¹¹⁸ As a result, given Zito's critical need for timely pole access to satisfy customer commitments and regulatory obligations, Zito has had no choice but to pay the disputed invoices in full, subject to a reservation of its rights challenge the invoices and seek refunds from PPL.¹¹⁹

78. Accordingly, PPL's demands that Zito pay the disputed exorbitant pre-attachment engineering invoices as a condition of the continued processing of Zito's pole attachment applications is unjust, unreasonable, and unlawful. And, its refusal to process applications, including new, unrelated applications, unless Zito pays the unsubstantiated amounts in full, unlawfully denies access upon reasonable rates, terms and conditions.

¹¹⁷ Ragosta Decl. ¶ 18.

¹¹⁸ *Id.* ¶ 18 & Exhs. 4-5.

¹¹⁹ Ragosta Decl. ¶ 16 & Exhs. 3 & 4.

V. COUNTS

Count I:

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

79. Zito incorporates by reference as if fully set forth herein paragraphs 1 through 78 of this Complaint.

80. PPL's unilaterally imposed requirement that third party contractors perform, and Zito directly reimburse PPL for the entire cost of, a costly pre-attachment survey as well as make-ready engineering, which includes the collection of valuable information about PPL's poles for its GPS mapping system and a full loading analysis that has, according to PPL, an "insignificant" safety benefit but which enables PPL 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.*

81. PPL's imposition of excessive costs for survey and engineering fees 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.*

82. PPL's charges for the contractor-performed survey and make-ready design are not competitive as measured by the survey charges of other Pennsylvania utility pole owners, and thus 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.*

83. PPL's refusal to require its contractor to participate in a joint ride-out with Zito, 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.*

84. PPL's imposition of make-ready requirements reflecting its contractors' 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.*

85. PPL'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.*

86. PPL'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.*

87. PPL's refusal to process Zito's pole attachment applications unless Zito pays its unrelated disputed and unsubstantiated Make-Ready Engineering invoices 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.*

Count II:

Denial of Access

88. Zito incorporates by reference as if fully set forth herein paragraphs 1 through 78 of this Complaint.

89. PPL's refusal to accept or process Zito's pole attachment applications until Zito pays its disputed invoices for the third party contractor inspection and make-ready design in full constitutes a violation of PPL's duty to provide 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).

90. PPL's refusal to accept or process Zito's pole attachment applications until Zito pays its unsubstantiated, disputed make-ready invoices in full constitutes a violation of PPL's duty to provide 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).

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

VI. REQUEST FOR EXPEDITED REVIEW

92. Zito seeks expeditious consideration of this Complaint due to the delays that Zito has already encountered as a result of PPL's unjust and unreasonable actions detailed herein, and the harm that Zito will suffer absent expedited resolution of this dispute.

93. Specifically, Zito requests that PPL's response be due ten (10) days following service of this Complaint, with Zito's reply due five (5) days after service of PPL's response. In addition, Zito requests that the Commission resolve the dispute on an expedited basis upon close of the proceedings.

94. Approximately 18 months have passed since Zito first disputed PPL's excessive invoices, and it has been more than a year since Zito's unsuccessful attempt to mediate the dispute with the Market Disputes Resolution Division of the Enforcement Bureau. During that time, Zito has endured undue delays associated with PPL's unreasonable pre-attachment inspection process

and has had no choice but to pay PPL's excessive and unsubstantiated invoices as a condition of having its pole attachment applications processed.

95. 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 PPL's rates, terms, and conditions regarding the pre-attachment survey and engineering costs and make-ready fees charged to Zito, and complained of here, to be unjust, unreasonable and unlawful;
- b. Requiring PPL to allow Zito to conduct a pre-attachment inspection, as required by the 1991 Agreement, and not to charge Zito for an additional pre-attachment inspection performed by PPL, consistent with the parties 1991 Agreement;
- c. Establishing reasonable rates, terms, and conditions regarding survey and engineering costs and make-ready charges;
- d. Requiring that the cost of any pre-attachment survey process conducted by PPL's contractor 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 survey process by other Pennsylvania investor-owned utility and telecommunications company pole owners;

- e. Directing PPL to allow Zito to accompany PPL's contractor for a joint ride-out when the contractor conducts pre-attachment surveys;
- f. Requiring that PPL provide sufficiently detailed cost information supporting the past and prospective pre-attachment survey and engineering charges and make-ready charges imposed on Zito;
- g. Directing PPL to promptly process all of Zito's pending and future applications for attachments;
- h. Prohibiting PPL from requiring that Zito pay to correct pre-existing non-compliant conditions on PPL poles where such work would be required regardless of whether Zito attaches to the pole;
- i. Requiring PPL to refund to Zito the difference between the actual survey and engineering charges imposed on and paid by Zito (\$1,173,068.67) and the average amount charged by other Pennsylvania pole owners ($\$27.83 \times 5,998$ total poles = \$166,924.34), resulting in a total refund of \$1,006,144.33, or such amount as the Commission determines to be reasonable;
- j. Requiring PPL to refund to Zito the difference between the actual make-ready charges imposed on and paid by Zito (\$1,447,563.47) and the average amount charged by other Pennsylvania pole owners ($\$1,068.05 \times 859$ make ready poles = \$917,454.95), resulting in a total refund of \$530,108.52, or such amount as the Commission determines to be reasonable;
- k. Such other relief as the Commission deems just, reasonable and proper.

Respectfully submitted,

Zito Canton, LLC

_____/s/ Maria T. Browne

By its Attorneys

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Colin Higgin
Zito Canton, LLC

Date submitted: November 13, 2017

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2017, I caused a copy of the foregoing Amended Pole Attachment Complaint, exhibits and declarations in support thereof, to be served on the following (service method indicated):

Marlene J. Dortch, Secretary
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/s/ Maria T. Browne
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