

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

ZITO CANTON, LLC,

Complainant,

v.

PENNSYLVANIA POWER & LIGHT
COMPANY,

Respondent.

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

**ZITO CANTON, LLC'S REPLY
IN SUPPORT OF AMENDED POLE ATTACHMENT COMPLAINT**

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EXECUTIVE SUMMARY

It is now undisputed that PPL charges *on average* **\$263.39** per pole for pre-attachment survey work,¹ about ten times the \$27.83 per pole average charged by other Pennsylvania pole owners and significantly more than several of PPL's other utility declarants. PPL's charges are even further out of step with the \$17.50 per pole charged by Zito's qualified contractor to complete the field survey and pole profile form accepted by PPL's joint-user Verizon on the very same poles, even if a reasonable charge is added for make-ready design. PPL used to accept the same standard pole profile form as Verizon until October 2012, when PPL instructed Zito that PPL would no longer accept field survey information from attachers; from that point forward, PPL would be conducting the survey work itself, and passing the full costs of the field survey and design work on to attachers.

Now, under its new online management program, PPL collects far more than is required to process Zito's applications. It charges Zito the entire cost to collect extensive information about PPL's own plant and about all other existing attachers, to collect and input detailed photographs to create an "interactive" mapping system for PPL's benefit, and to perform a needlessly-expensive load calculation as a *substitute* for its state PUC requirement to study its own poles.

Under well-established FCC cases, "an inspection designed to yield information about more than cable attachments and thus to benefit other pole users should not be paid for solely by

¹ As explained by PPL in its Response at 26, PPL's charges for pre-attachment survey work include field surveys performed by Katapult and engineering performed by another contractor (either Osmose or HMI). However, the invoices do not break out the charges and thus, it is impossible to discern what PPL is charging for field surveys as compared to what it is charging for engineering.

the cable company.”² The parties’ Pole Attachment Agreement does not even authorize PPL to charge Zito for PPL’s pre-attachment survey of its poles. The consequences of PPL’s defiance are clear: PPL’s charges are far above its peers, far above the rates tariffed by nearby PSCs, and even higher than the rates actually charged by the utilities from whom it has collected carefully-worded (but misleading) statements of support.

PPL has designed problems into its system and eliminated the key problem-solving opportunity by eschewing the traditional joint ride-out that allows parties to jointly identify the work required for attachment and to identify circumstances where make-ready can be simplified. The results are unnecessary (and unlawful) practices and charges: failing to discuss efficient construction techniques from the outset; excluding Zito from the design decisions; holding Zito to loading procedures that it does not apply to itself despite a PUC obligation to do so; burying the correction of pre-existing violations in invoices with unitemized pricing; and then charging Zito for the lot.

PPL tries to obfuscate the extraordinary scope of its charges by refusing to provide any billing detail. The supplemental information PPL offers in its Response does not indicate whether the work is necessary to accommodate the attachment or address pre-existing violations, and offers zero pricing information. PPL does not dispute that its charges are 10 times the charges assessed by similarly-situated utilities. It does not deny that it has invoiced Zito to correct pre-existing violations. Yet it still fails to provide the detail justifying its practices or charges. Instead, PPL resorts to the supposed defense that Zito has not presented the detail that

² *Newport News Cablevision, Ltd. Commc’ns, Inc. v. Virginia Elec. and Power Co., d/b/a Virginia Power*, 7 FCC Rcd 2610 ¶ 8 (1992). See also *Mile Hi Cable Partners, L.P. v. Public Service Co. of Colorado*, 15 FCC Rcd 11450, 11455-56 (Cable Serv. Bur. 2001); *Texas Cable & Telecommunications Ass’n v. Entergy Services, Inc.*, 14 FCC Rcd. 9138 (Cable Serv. Bur. 1999).

PPL controls and refuses to provide. And it offers the tired and long-refuted claim that applicants cannot be trusted to make safe engineering judgments. The reality is that Zito is clearly motivated to build its network safely and reliably: it relies upon PPL poles and power distribution plant, has service level agreements to reimburse its customers for any network down time, is contractually obligated to indemnify PPL for any damages from its attachments, and is experienced and qualified to provide input into the terms and conditions governing the scope or price of the work for processing Zito's applications. The Commission should consider PPL's failure to substantiate its charges and practices as an admission that they are indefensible, unjust and unreasonable.

Zito has tried to resolve this dispute. It has repeatedly sought mutually acceptable solutions and made good faith offers to settle the dispute, only to be met with PPL's stalwart refusal to make any change. It has repeatedly requested that PPL substantiate and support its invoices – to no avail. It has sought standard input into the make-ready design process, and been rebuffed. It has tried to resolve individual billing questions, and had its construction illegally shut down. It has tried to limit PPL to the terms of its contract and Section 224, and PPL refused to even divulge the contract. It has tried mediation at the FCC, without result. It has paid overcharges under protest, and it is now time for prompt for refund and specific FCC remedies.

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Zito Canton, LLC (“Zito”) respectfully submits this Reply in Support of Amended Pole Attachment Complaint for denial of access and unreasonable terms and conditions of pole attachment against PPL Electric Utilities Corporation (“PPL”) pursuant to Subpart J of the Federal Communications Commission (“FCC” or “Commission”) Rules, 47 C.F.R. §§ 1.1401 *et seq.*, and the Commission’s Letter Order dated November 7, 2017.

I. INTRODUCTION

It is now undisputed that PPL charges *on average* **\$263.39** per pole for pre-attachment survey work,³ many times the charges assessed by similarly-situated utilities and even more than the fees assessed by qualified contractors for similar work. Rather than substantiate and support its invoices, PPL’s response continues to obfuscate and raise tired, long-refuted claims that

³ See *supra* note 1.

applicants cannot be trusted to make safe engineering judgments or even judge engineering contractors. But the facts clearly demonstrate that PPL's charges and practices are unjust and unreasonable under Section 224 and it is time for prompt and specific FCC remedies.

II. PPL'S PRE-ATTACHMENT SURVEY CHARGES FAR EXCEED JUST AND REASONABLE RATES REQUIRED BY COMMISSION RULES

PPL relies primarily upon declarations of other utility pole owners to support its pre-attachment survey process and related charges.⁴ Certain of these declarants actually charge far less than PPL. Moreover, these declarants' reported practices are not representative of how utilities and contractors process pole attachment applications or charge for pre-attachment inspections.

A. PPL's Charges Far Exceed Qualified Contractor Charges To Complete The Pre-Attachment Field Survey Work and PPL Pole Profile Forms Accepted by PPL's Joint-Use Company, Verizon

Zito's contractor, Map Masters LLC, charges \$17.50 per-pole to perform the field survey work that PPL's joint-use partner, Verizon, fully accepts as complete and sufficient on the poles it uses jointly with PPL.⁵ Using PPL Pole Attachment Data Sheet Form 4792 ("PPL Pole Profile"),⁶ the same form created and previously accepted by PPL, Map Masters collects the pole number, street location, type and height of attachments on each pole, the height and class of pole,

⁴ Response at Att. D.

⁵ Attachment A, Reply Declaration of Kelly Ragosta ("Ragosta Reply Decl.") ¶ 7. Again, it is impossible to tell from PPL's invoices what it is charging for the field survey work as compared to make-ready design work. However, its own declarant, Dayton Power and Light Company (DP&L) reports that it "charges a fee of \$110 per pole to survey and collect pole data" and "a fee of \$55 per pole to engineer for make-ready work, for a grand total of \$165." Response, Att. D. Applying this same ratio to PPL's average charges (2/3 for field survey work and 1/3 for make-ready design) yields a charge of **\$173.84** to collect measurements and complete the form.

⁶ Ragosta Reply Decl. Exh. 2. As set forth herein, where PPL jointly owns poles with the telephone company, Zito is still required to and does submit the PPL Pole Profile sheets to the telephone company. *Id.* at ¶ 7.

and midspan clearances – the very same information collected by Katapult for PPL.⁷ For an extra \$5, Map Masters includes photographs of the pole.⁸

Verizon continues to accept this work and Map Masters’ completed PPL Pole Profile as standard and sufficient today, without collecting its own measurements.⁹ PPL did too, through the end of 2012, when its pre-attachment inspection charges averaged \$68 per pole.¹⁰ Prior to October 2, 2012, PPL accepted Zito’s field survey and its use of PPL’s pole profile Form 4792 and charged on average \$68 per pole for “Make Ready – Engineering” in connection with the pre-attachment survey process.¹¹ This is the practice that PPL accepted under the parties’ 1991 Pole Attachment Agreement for over 20 years (but which is now claims is insufficient).

But in 2012, everything changed when PPL instructed Zito that PPL would no longer accept survey information from attachers; from that point forward, PPL would be conducting the surveys itself, and passing the full costs on to attachers. As PPL informed Zito by email:

Our policy regarding submitting applications is changing. . . . You will only need to submit Form 4828 [the application] and a map if available. Form 4792 [the PPL Pole Profile] will no longer be completed by the attacher.¹²

Then in 2014, PPL switched to its current online management program, without bothering to inform Zito in advance.¹³ On March 6, 2014, Zito was informed by email that one of its applications had been rejected because it needed to be submitted through PPL’s new online

⁷ Attachment B, Reply Declaration of Todd McManus (“McManus Reply Decl.”) ¶ 6; Ragosta Reply Decl. ¶ 4 & Exh. 2.

⁸ *Id.* ¶ 4.

⁹ *Id.* ¶ 7 & Exh. 2.

¹⁰ *Id.* ¶ 5 & Exh. 4.

¹¹ *Id.*

¹² *Id.* ¶ 6 & Exh. 5.

¹³ *Id.* ¶ 8 & Exh. 6.

application management system.¹⁴ The email simply instructed Zito to “re-submit this request using the online system.”¹⁵ Whatever else PPL now suggests in its Response to the FCC¹⁶ (such as Zito remaining free to perform the field survey and submit its results to PPL) has, in reality, been specifically rejected by PPL in the field. There is no evidence that if Zito were to take PPL up on its suggestion that PPL would accept the field survey or stop charging Zito extravagantly for Katapult’s doing the same work.

It is now undisputed that PPL charges *on average* **\$263.39** per pole for pre-attachment survey work, about ten times the charges assessed by similarly-situated utilities, and significantly more than several of its own utility declarants.¹⁷ Applying the same ratio of charges for field survey work and make-ready design offered by DP&L, PPL is charging close to \$200 for the field survey work alone.¹⁸ Simultaneously, by departing from standard make-ready practices and refusing to conduct joint ride-outs, PPL has nullified Zito’s ability to provide timely input to the make-ready process, as described in more detail below. PPL insists that its way is the *only* way to process pole attachment applications, and that Zito must simply conform.

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

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

¹⁴ *Id.* PPL mistakenly states in its Response that Zito’s first attachment request was made in December 2014, calling into question the reliability of other factual assertions included in PPL’s pleadings. *See* Response at 8, Silverio Decl. at 1.

¹⁵ *Id.*

¹⁶ Response at 6-9.

¹⁷ *See* Am. Compl., Ragosta Decl. ¶ 12 (“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).

¹⁸ *See infra* at note 4.

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

Since its departure from standard make-ready practices,¹⁹ PPL has used its new processes to collect far more than is required for Zito’s applications. PPL uses the pre-attachment inspection process:

- to collect extensive information about its own plant;²⁰
- to collect extensive information about all other existing attachers;²¹
- to upload detailed photographs of each pole for use by PPL employees at their workstations (rather than in working with attaching parties in a conventional joint ride-out);²²
- to create an “interactive” mapping system for the benefit of PPL and other attachers;²³ and
- to perform a load calculation as a substitute for its state requirement to perform loading studies of its pole. As PPL now tacitly admits, PPL specifically explained to the PUC that it planned to not perform its obligatory load analysis unless it had the opportunity to charge third party applicants.²⁴

This is far more than the collection of information necessary to process Zito’s applications – as evidenced by the fact that Verizon accepts Zito’s survey information as sufficient to process

¹⁹ PPL explains that it now uses at least two contractors to process applications: “PPL preferred Katapult’s process for data collection, and liked both Osmose and HMI for the engineering duties.” Response at 26.

²⁰ See Am. Compl., Ragosta Decl. at Exh. 2 (Katapult screen shots); Response at 13.

²¹ *Id.*

²² Response at 13, 14 (“The data collection process ensures that designers can spend their time at their workstations, rather than collecting data in the field.”).

²³ See Resp. at 5 (describing the “interactive map that Zito and other prospective attachers can zoom into and locate the PPL poles”); 13-14.

²⁴ See Response at 15. See also Am. Compl. 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*”).

Zito's applications for Verizon PPL joint-use poles – yet it is all performed at the expense of Zito.²⁵

It is also far more than what is permitted to be charged to attachers under FCC authority. In *Newport News Cablevision, Ltd. Commc'ns, Inc. v. Virginia Elec. and Power Co., d/b/a Virginia Power*,²⁶ the Commission concluded: “an inspection designed to yield information about more than cable attachments and thus to benefit other pole users should not be paid for solely by the cable company.”²⁷ In that case, the Commission ultimately found that “the inspection practices were a benefit to non-cable pole users and owners, and thus, the costs of the inspection must be allocated among the beneficiaries.”²⁸

In *Mile Hi Cable Partners, L.P. v. Public Service Co. of Colorado*,²⁹ a utility had designed an audit for its own benefit “by providing a complete mapping of its system.”³⁰ The Commission stated: “The cost of an inspection of pole attachments should be borne solely by the cable company only if cable attachments are the sole attachments inspected and there is nothing in the inspection to benefit the utility or other attachers to the pole. . . . Respondent has made ***no attempt to show that the survey was limited to cable attachments***.”³¹

In *Texas Cable & Telecommunications Ass'n v. Entergy Services, Inc.*,³² the Commission struck down a pre-attachment survey charge that the utility was assessing in addition to annual

²⁵ See Am. Compl. ¶¶ 23, 26, 27, 29 & Ragosta Decl. at Exh. 2 (Katapult screen shots).

²⁶ 7 FCC Rcd 2610 (1992).

²⁷ *Id.* at ¶ 8.

²⁸ *Id.* at ¶ 9.

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

³⁰ *Id.* at 7.

³¹ *Id.* at ¶¶ 8-9.

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

rent. Entergy dropped its pre-attachment survey fee from \$50 to \$10 per pole plus \$10 to prepare a make-ready estimate, and still the charges were held to be unjust and unreasonable.³³

Here PPL has made no attempt to show that its pre-attachment survey is limited to the collection of information necessary to process Zito's applications and, indeed, it admits that it collects much more than that for its own benefit (including satisfying its Pennsylvania PUC obligations) and the benefit of other attachers (including extensive mapping database).³⁴

2. PPL's charges for the survey work far exceed other publicly available benchmarks.

PPL's charges are also far above rates tariffed by nearby PSCs. PPL does not dispute Zito's calculation of PPL charges for pre-attachment survey work of **\$263.39** per pole in 2017 (up from an average per pole amount of \$195.38).³⁵ Nor does PPL explain why it charged \$1,527 for one Zito application that only covered two PPL poles, only one of which required make-ready for a total of **\$763.50** per-pole for pre-attachment survey work.³⁶ By comparison, in New York, Central Hudson Electric's tariffed pre-attachment survey fee is \$8.56 per attachment effective July 1, 2015, \$8.95 per attachment effective July 1, 2016, and \$9.29 per attachment effective July 1, 2017.³⁷ National Grid's New York schedule of pole attachment application fees includes a per-pole field survey fee of \$54.15.³⁸

³³ *Id.* Even with intervening inflation, the charge held unreasonable would amount to less than \$30 today, far less than PPL's charges.

³⁴ Response at 13-14. One utility declarant, Dayton Power & Light, admits that it relies on maps created by attaching entity rather than duplicating the work where possible. Resp., Att. D, Brockman Decl. at ¶ 4.

³⁵ Am. Compl. ¶ 40.

³⁶ Am. Compl., Ragosta Decl. Exh. 5. As shown in Exhibit 5 to the Ragosta declaration, Zito paid a total of \$1,527 in engineering charges for Application 202172, which covered two PPL poles. The average per-pole charge for Application 202172 was thus \$763.50.

³⁷ See *Petition of the Mid-Hudson Streetlight Consortium for Clarification*, Proceeding with Regard to Tariff Filings to Effectuate Amendments to Public Service Law – New Section 70-a

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

PPL's charges are also far above the rates charged even by the utilities from whom it has collected carefully managed statements of support.³⁹

For example, PPL offers a declaration from Penelec asserting that Penelec hires engineering contractors to perform make-ready surveys and engineering design work.⁴⁰ It critically fails to inform the Commission that in a significant portion of Penelec's service territory, located South of Interstate 80, Penelec performs the pre-attachment survey work itself.⁴¹ And there, it conducts joint ride-outs with Zito at a charge of approximately \$33.02 per pole.⁴²

PPL also offers support through a PECO declarant. However, not only is PECO's reported charge of \$110 per pole⁴³ *less than half* the amount charged by PPL, PECO's charges to Zito have been closer to \$60 per pole for pole attachment applications.⁴⁴

(Transfer of Streetlight Systems), State of New York Public Service Commission, Case 15-E-0745 (filed Oct. 31, 2016); *see also Order Addressing Petition and Directing Tariff Revisions*, State of New York Public Service Commission, Case 15-E-0745 (issued and effective Feb. 23, 2017).

³⁸ National Grid, Pole Licensing Process, https://www9.nationalgridus.com/niagaramohawk/attachments/non_html/2205/3rd%20Party%20Process%20Document%20For%20Applicants%20and%20JO's.docx (last visited Dec. 4, 2017).

³⁹ PPL also offers a declaration by Minnesota Power, but the claimed fee of \$250-350 is *not* for the pre-application inspection at issue in this case; it is for "combined pre-engineering and post-engineering" and after the fact "spot-checks." Resp. at Att. D, Corrow Decl. ¶¶ 3, 10.

⁴⁰ Response, Att. D, Chumrik Decl. at ¶ 3.

⁴¹ Ragosta Reply Decl. ¶ 9.

⁴² *Id.* ¶ 9 & Exh. 7. Penelec's use of a contractor to perform survey work in portions of its service territory North of Interstate 80 are the subject of a separate pole attachment complaint filed by Zito Media L.P. in FCC Proceeding No. 17-316, File No. EB-17-MD-006.

⁴³ Resp. at Att. D, Gaiser Decl. ¶ 6.

The declaration provided by Dayton Power and Light Company states that the utility charges \$110 per pole to survey and collect pole data and \$55 per pole to engineer for make ready work.⁴⁵ While the \$110 per pole charge to perform field survey work is high, especially as compared to Map Masters, the \$55 per pole to design any make-ready work is closer to the competitive rates charged by other utilities contractually allowed to impose such charges (and by PPL before it switched to its Online Management Tool).⁴⁶

4. *PPL's pre-attachment inspection process abandons the most useful steps for attachers in favor of collecting information for PPL's own purposes.*

In the traditional pre-attachment survey process to identify make-ready, the applicant and the pole owner cooperate with one another. For example, a joint ride-out allows parties to jointly identify the work required for attachment and to identify circumstances where make-ready can be simplified, such as through the use of guying rather than with pole changeouts.⁴⁷ The parties can resolve potential disputes in advance, such as agreeing that existing conditions include a pre-existing violation which should not be charged to the applicant when it is corrected.⁴⁸ PPL

⁴⁴ Ragosta Reply Decl. ¶ 10 & Exh. 8. A few of PECO's invoices for 1 to 3 poles or cabinets are higher but appear to be skewed by a minimum charge for post construction inspection. Ragosta Reply Decl. at ¶ 10.

⁴⁵ Resp. at Att. D, Brockman Decl. ¶ 3.

⁴⁶ Moreover, the Dayton P&L declarant states that all of this work is completed by a single contractor. *Id.* at ¶ 7. As a result, although not addressed in the declaration, it is likely that a joint ride-out with Dayton P&L's contractor would be more fruitful than PPL's suggestion that Zito could accompany its contractor (who is merely taking measurements to be handed over to another contractor) during the field survey.

⁴⁷ Am. Compl. ¶¶ 32-33. *Accord* Cable Television Pole Attachments, 48 PUR 4th 567 (KY PSC 1982) ("The CATV operators ... generally were not dissatisfied with "make-ready" charges determined by agreement of the parties after a walk-through inspection of the proposed CATV system by representatives of the operator and the utility.").

⁴⁸ Am. Compl. ¶ 33. *See, e.g., Kansas City*, 14 FCC Rcd. at 11606-07 ¶ 19 ("Correction of the pre-existing code violation is reasonably the responsibility of KCPL and only additional expenses incurred to accommodate Time Warner's attachment to keep the pole within NESC

asserts that its practice of unilaterally performing the pre-attachment inspection process is not uncommon;⁴⁹ however, a joint-ride out is the process Zito undertakes with other pole-owning utilities.⁵⁰ Yet PPL has repeatedly rebuffed Zito’s efforts to employ this widely accepted industry practice.⁵¹

PPL has eliminated all of these problem-solving opportunities. PPL directs its field contractors only to collect data from the field, and then different contractor “designers can spend their time at their workstations” designing the make-ready – free from any input by the applicant.⁵² PPL claims that Katapult does not prohibit Zito from accompanying its contractor when it performs a field survey, but PPL’s field contractor is *not* responsible for making any decisions about make-ready design. In reality, because PPL refuses to engage in traditional joint

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 attachers’ request for a modification); 47 U.S.C. § 224(i) (“An entity that obtains an attachment to a pole . . . shall not be required to bear any costs of rearranging or replacing its attachment, if such rearrangement or replacement is necessitated solely as a result of an additional attachment . . . sought by any other entity (including the owner)”; 47 C.F.R. § 1.1416(b).

⁴⁹ Resp. at 13 & Att. D.

⁵⁰ McManus Reply Decl. ¶ 4 (stating that Verizon, Penelec South of Interstate 80, West Penn Power, Frontier, Windstream, Empire Access, National Grid, and all other co-ops with whom he has worked use this process). In addition, the documents collected at Attachment D hereto are evidence of other pole owners that conduct joint ride-outs with attaching entities. *See* Att. D at 2 (Georgia Power Pole Attachment Application, which affords the right of the attacher to request a joint ride-out for any pole); Att. D at 8 (Pole Attachment Agreement between Verizon, the Town of Princeton, and Charter, effective Nov. 14, 2017, at Section 3.2, expressly affording the right of the attacher to schedule a joint ride-out with the pole owner to determine whether make-ready is necessary); Att. D at 32 (Article 5.3 of pole attachment agreement between Time Warner Cable Southeast, LLC and Carteret-Craven Electric Membership Corp. expressly providing for joint ride-out); Att. D at 80 (letter to West Virginia Public Service Commission indicating that Frontier provides Lumos with the opportunity to conduct joint ride-outs to assess all of Lumos’ pole applications in West Virginia).

⁵¹ Am. Complaint, Att. A, Rigas Decl, Exh. 1 & Att. B, Higgin Decl. Exhs. 3-4.

⁵² Response, Att. 3, Magee Letter at 3.

ride-outs, Zito must wait for PPL's unilateral make-ready determinations – all developed at Zito's expense – before it can even propose an alternative.⁵³

The consequence is needless expense and discrimination. For example, PPL explained to the Pennsylvania PUC that an approach similar to the LoadCalc software offered by Osmose is an efficient means of determining the estimated remaining strength and load capacity of a pole without having to undertake a full pole loading analysis.⁵⁴ But PPL refuses the same for Zito, and insists on undertaking (and charging for) a full pole loading analysis.⁵⁵

And, PPL now admits that it sought to charge Zito to correct pre-existing non-compliance.⁵⁶ It only offered to reverse the charges when confronted by Zito's plant manager.⁵⁷

⁵³ PPL's Response claims that it welcomes Zito's input at any stage in the process. Because PPL has eliminated a joint ride-out and collaboration between Zito and PPL in the field, any such communication with PPL's designers occurs after PPL's designers have already designed the make ready work without any consideration of Zito's input – i.e., by that point, Zito already has incurred the expense for PPL to independently engineer the pole. Again, PPL's suggestion would result in further cost to Zito – Zito must pay for PPL to conduct an independent field survey, then Zito must pay for PPL to independently engineer the pole, and only then is Zito's feedback possibly considered by PPL and, if accepted, Zito must pay for any further work by PPL's contractor to re-design the make ready work.

⁵⁴ Am. Compl. ¶¶ 27- 28.

⁵⁵ PPL claims that LoadCalc is only intended for use in routine pole inspections with no proposed construction. Resp. at 16. However, Osmose does not place any such limitation on its LoadCalc software. As Osmose states, “[o]nly complex and borderline overloaded poles require a more comprehensive loading analysis to validate compliance with code requirements,” yet PPL insists on full loading analysis even on the most simple of attachments. In New York, National Grid's schedule of fees indicates that Osmose performs a loading analysis for \$27.12 per pole.

⁵⁶ Response at 10-11. PPL tries to minimize the issue as only related to an anchoring charge that Zito was able to catch before payment. But PPL's obfuscation of the details of other make-ready charges masks the prevalence of similar overcharges that may not yet have been detected. PPL provides only a lump sum estimate with no correlation to the make-ready work identified in connection with a particular application. See Am Compl. at ¶ 43 (“[W]hile 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.”). Zito has repeatedly requested that PPL provide information to substantiate and support the ‘Make-Ready Construction’ charges in its invoices – to no avail. Am. Comp. ¶ 45. And now, rather than submit any such detail for scrutiny, PPL hunkers down and instead seeks to challenge

In its Response, PPL tries to mask these problems with tired and long-refuted claims that applicants cannot be trusted to make safe engineering judgments or even judge engineering contractors.⁵⁸ The reality is that Zito relies upon PPL poles and power distribution plant to deliver Zito's services to customers. Zito's agreements with its customers include service level agreements that require Zito to pay significant monetary penalties for service interruptions.⁵⁹ Zito is contractually obligated to indemnify PPL for any damages arising from its attachments.⁶⁰ Zito is clearly motivated to build its network safely and reliably.⁶¹ It is clearly qualified to provide input into the terms and conditions governing the scope or price of the work performed by PPL's contractors that are processing Zito's applications.⁶²

Moreover, any claims by PPL that its past pre-attachment inspection process jeopardized pole safety is belied by its own statements to the PA PUC in its recent bi-annual report to the PA PUC. There, PPL told the PUC that based on data collected in 2013, PPL experienced pole failures on "*less than 1/100 of one percent* of PPL Electric's 880,000 wood distribution pole

Zito's allegations regarding pre-existing violations as "unsubstantiated" because they are "upon information and belief." The rules specifically invite allegations "upon information and belief" in such circumstances. 47 C.F.R. 1.721(a)(5). The Commission should consider PPL's failure to substantiate its charges as an admission that they are indefensible, unjust and unreasonable.

⁵⁷ Response at 10.

⁵⁸ Response at 23-26.

⁵⁹ Attachment C, Reply Declaration of James Rigas ("Rigas Reply Decl.") ¶ 4.

⁶⁰ Higgin Decl., Exh. 1, Art. 11.

⁶¹ Am. Compl. ¶ 35.

⁶² McManus Reply Decl. ¶ 5. Indeed, the Commission's contractor solution for make-ready delays is premised on the notion that cable operators are qualified to hire and manage contractors. *See also Cox Cable Corp. v. Gulf Power Co.*, 591 So.2d 627, 630 (Fla. 1992) (finding that the cable operator had satisfied its obligation under its pole attachment agreement to employ "contractors who are experienced in working with and around energized electrical conductors").

inventory.”⁶³ And, despite having just converted to the new pre-attachment survey process, PPL made no mention of any need to do so in that report. Instead, PPL explained that “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.*”⁶⁴

These practices – failing to discuss efficient construction techniques from the outset, excluding Zito from the design decisions, holding Zito to loading procedures that it does not apply to itself, burying the correction of pre-existing violations in unitemized invoices, and then charging Zito for the lot – are precisely the kinds of unnecessary (and unlawful) practices and charges that can be mitigated through joint ride-outs, but PPL has instead designed the problems into its system.

5. PPL obfuscates its excessive charges by refusing to provide necessary billing detail.

Perhaps most telling is how PPL tries to obfuscate the extraordinary scope of its charges by refusing to provide any billing detail. PPL provides lump sum charges for entire applications rather than itemized invoices.⁶⁵ The obscurity of its billing is not clarified by the “Make-Ready Summary” offered as an example attached to Mr. Silverio’s declaration.⁶⁶ The Summary Sheets list specific make-ready to be performed by PPL and foreign utilities but do not indicate whether

⁶³ Am. Compl. Attachment E, *PPL Biennial Report* at 20-21”).

⁶⁴ *Id.*

⁶⁵ While it is not clear from the invoices themselves, based upon PPL’s explanation in its Response at 26, PPL lumps together Katapult’s field survey with Osmose’s and/or HMI’s “engineering” services for all poles on an application, which charges are then listed as a single lump sum amount for “Make Ready – Engineering.” Similarly, estimated make-ready charges for an entire application are listed as a single lump sum amount for “Make Ready – Construction.” See Am. Compl., Ragosta Decl. Exh. 1 (invoice example).

⁶⁶ Response, Att. A at Exh. 3.

the work is necessary to accommodate the attachment or address pre-existing violations, and offers zero pricing information.

The estimate that Zito received for this very application⁶⁷ demonstrates the complete lack of correlation between what is being charged and the work that is being done. The estimate provides a single lump-sum “Make Ready – Construction” charge of \$89,012⁶⁸ for all 30 applied-for poles alleged to require make-ready work. There is no break-down of the make-ready charges associated with each pole, much less any detail as to the labor and materials charges for each specific make-ready task. Yet when Zito seeks relief at the Commission for charges that are 10 times the charges assessed by similarly-situated utilities, PPL claims that Zito has not presented the very detail that PPL refuses to provide.⁶⁹

6. PPL has made clear it will deny access to its poles unless Zito adheres to its unfair and unreasonable pre-inspection survey practices and charges.

These practices have resulted in an unjust and unreasonable denial of access. In what may be the height of disingenuity, PPL suggests that Zito manufactured its dispute about PPL’s unreasonable survey charges because it found a more affordable route and simply wanted to avoid the charges altogether.⁷⁰ In fact, when Zito complained about PPL’s nearly-quadrupled pre-attachment survey charges, withheld payment, and sought to revise the estimates to a more reasonable amount consistent with the parties’ past arrangement, PPL shut down the application

⁶⁷ Ragosta Reply Decl. Exh. 9.

⁶⁸ *Id.* In order to move forward with its deployment, Zito had no choice but to pay this unsubstantiated amount. Ragosta Decl. Exh. 5. This “Make Ready – Construction” estimate was later revised to \$67,054.00 after Zito removed one pole from the application. Ragosta Reply Decl. ¶ 11 & Exh. 10. Zito has yet to receive a refund of the additional \$21,958 it paid after receiving the initial estimate. *Id.* ¶ 11.

⁶⁹ Response at 23.

⁷⁰ Response at 27.

process.⁷¹ And, contrary to PPL's suggestion in its Response,⁷² underground construction is not a viable alternative to aerial construction, especially in Pennsylvania, where boring through bedrock and restoration expenses combine to make underground construction cost prohibitive.⁷³ After a failed attempt at FCC mediation, Zito ultimately surrendered, paid all of the demanded charges, and was forced to resort to a very costly fiber leasing arrangement with PenTeleData at \$24,000 per month just to make its construction deadlines – a solution that is not tenable long term.⁷⁴

⁷¹ Am. Compl., Att. A, Rigas Decl. ¶ 15 & Att. D, Ragosta Decl. ¶ 16-17. By imposing a freeze on Zito rather than address Zito's objections to PPL's over-billing, PPL violated *Kansas City Cable Partners*, 14 FCC Rcd 11599, ¶ 18 (1999), where the Commission held that a utility cannot "condition access on payment of a disputed claim" and "[d]ebt collection is not permissible grounds for denial of access." PPL claims that *Salsgiver* provided authority for such a freeze, but Zito has not attached without make-ready – the conduct at issue in that phase of *Salsgiver* – and Zito has paid and sought refund, exactly as expected by the FCC. *Salsgiver Communications, Inc. v. North Pittsburgh Telephone Co.*, 22 FCC Rcd. 20536, 20540 ¶ 15 (Enf. Bur. 2007) (ordering pole owner to grant cable operator immediate nondiscriminatory access to poles).

⁷² Response at 29 n. 94.

⁷³ Rigas Reply Decl. ¶ 5; McManus Reply Decl. ¶ 7. "[I]n most instances underground installation of the necessary cables is impossible or impracticable. Utility company poles provide, under such circumstances, virtually the only practical physical medium for the installation of television cables." *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987). In enacting the federal pole attachment Act, Congress explained, "owing to a variety of factors, including environmental or zoning restrictions and the costs of erecting separate CATV poles or entrenching CATV cables underground, there is often ***no practical alternative*** to a CATV system operator ***except to utilize available space on existing poles.***" S. REP. NO. 580, 95th Cong. 1st Sess. 13 (1977) (emphasis added). *See also* 123 Cong. Rec. H35008 (1977) (statement of Rep. Broyhill, co-sponsor of Pole Attachment Act) ("The cable television industry has traditionally relied on telephone and power companies to provide space on poles for the attachment of CATV cables. Primarily because of environmental concerns, local governments have prohibited cable operators from constructing their own poles. Accordingly, cable operators are virtually dependent on the telephone and power companies. . . .").

⁷⁴ Rigas Reply Decl. ¶ 6.

III. THE PARTIES' POLE ATTACHMENT AGREEMENT DOES NOT ALLOW PPL TO CHARGE FOR PRE-ATTACHMENT SURVEY SURVEYS

The parties' Pole Attachment Agreement does not authorize PPL to charge Zito for PPL's pre-attachment survey of its poles.⁷⁵ PPL withheld this Agreement from Zito and the Commission throughout its prior FCC-sponsored mediation with Zito, declined to provide it after repeated requests, and only produced it when directed to do so by the Commission after Zito filed its complaint.⁷⁶ And it is no wonder PPL sought to keep the Agreement under wraps. The Agreement specifically sets forth the fees for which Zito *is* responsible: annual attachment fees (6.1), post-attachment field inventory charges and unauthorized attachment fees (6.2), transfer fees (6.5), and a return trip fee (6.6).⁷⁷ It does not provide for PPL to charge for the pre-attachment survey.

PPL does not deny that omission. It claims that it may collect such charges based simply on its "course of dealings" in the industry.⁷⁸ However, PPL's position ignores widely accepted principles governing contract interpretation, especially germane when pole owners seek to impose charges in excess of those authorized by their very own pole agreements.⁷⁹ The Commission has long recognized "the inherent unequal bargaining power of the parties to pole

⁷⁵ Am. Compl. ¶ 20.

⁷⁶ See November 7, 2017 Letter Order ("[S]taff directed PPL to email Zito and Staff a copy of the 1991 Agreement.").

⁷⁷ Am. Compl., Higgin Decl. at Exh. 1, Art. VI.

⁷⁸ Resp. at 19.

⁷⁹ See Wireline Broadband Deployment Order at ¶¶ 142-144 (relying upon traditional principles of contract interpretation, including the Restatement (Second) of Contracts § 203, in support of its decision that the express terms trump course of dealing); see Restatement (Second) of Contracts § 203 (1981) (establishing the standards of preference in interpretation as "(b) express terms are given greater weight than course of performance, course of dealing, and usage of trade . . .").

attachment agreements.”⁸⁰ Where the parties have unequal bargaining power, the contract should be interpreted against the agreement’s drafter.⁸¹ Accordingly, the law does not support reading a new payment obligation into the parties’ Agreement.⁸²

IV. PPL HAS REJECTED ZITO’S NUMEROUS ATTEMPTS TO RESOLVE THIS DISPUTE

Zito has tried to resolve this dispute. It has repeatedly communicated specific concerns about PPL’s pre-construction survey process to PPL in an attempt to find a mutually acceptable solution only to be met with PPL’s stalwart refusal to make any changes to its processes.⁸³

It has repeatedly requested that PPL provide information to substantiate and support its invoices – to no avail.⁸⁴ PPL’s failure to substantiate its charges even now should be considered an admission that they are indefensible, unjust and unreasonable.

It has sought standard input into the make-ready design process, and been rebuffed.⁸⁵

⁸⁰ *Mile Hi Cable Partners, L.P. v. Public Service Company of Colorado*, 13 FCC Rcd 13407 (1998) (citing *FCC v. Florida Power Corp.*, 480 U.S. 245, 247-248, 107 S.Ct. 1107, 1109-1110 (1987)). *See also* Notice of Proposed Rulemaking, 12 FCC Rcd 11725, ¶ 12 (1997) (stating that “in the 1996 Act, Congress recognized . . . that parties in a pole attachment negotiation do not have equal bargaining positions.”).

⁸¹ *See Wireline Broadband Deployment Order* at ¶ 143 (“where applicable law demands that we construe the terms of a customer service agreement as against the agreement’s drafters, we would again do so”); *see also* Restatement (Second) of Contracts § 206 (“In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds”).

⁸² The 1979 rulemaking cited by PPL (Resp. at 19 (citing *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 72 FCC 2d 59 (1979)) has been displaced by more recent precedent cited herein (Newport News, Mile Hi, , and it is also contradicted by the parties’ Agreement and prior agreement. PPL cites no precedent to support its assertion that “any variance . . . would be highly unusual and require specific contract language prohibiting their recovery.” Resp. at 19 n. 57.

⁸³ *See, e.g.*, Am. Compl., Att. A, Rigas Decl. at Exh. 1 & Att. B, Higgin Decl. at Exh. 3. *See also* Response at 25 (“PPL has experienced two years of Zito providing input into the terms and conditions governing the scope and price of its contractor’s work.”).

⁸⁴ *See, e.g.*, Am. Compl. ¶¶ 42, 45, 51.

It has tried to resolve individual billing questions, and had its construction illegally shut down.⁸⁶ It has tried to limit PPL to the terms of its contract and Section 224, and PPL refused to even divulge the contract.⁸⁷

It has on several occasions engaged in executive-levels discussions with PPL.⁸⁸ It has made several good faith offers to settle the dispute between the parties.⁸⁹

It has tried mediation at the FCC, without result. It has paid overcharges under protest,⁹⁰ and is now seeking refund and relief.

V. REQUESTED RELIEF

It is time for prompt and specific FCC remedies.⁹¹ Specifically, Zito seeks the following remedies:

⁸⁵ See, e.g., Am. Compl. Att. A, Rigas Decl. at Exh. 1.

⁸⁶ *Kansas City Cable Partners*, 14 FCC Rcd 11599, ¶ 18 (1999) (a utility cannot “condition access on payment of a disputed claim” and “[d]ebt collection is not permissible grounds for denial of access”).

⁸⁷ See *supra* n. 71.

⁸⁸ Am. Compl., Att. A, Rigas Decl. at Exh. 1.

⁸⁹ *Id.*

⁹⁰ Am. Compl., Ragosta Decl. ¶ 17. See also *Salsgiver Communications, Inc. v. North Pittsburgh Telephone Co.*, 22 FCC Rcd. 20536 (Enf. Bur. 2007). While PPL concedes that this case allows for refunds, it inaptly cites this case to justify its refusal to process any applications until Zito pays all outstanding invoices, including those that are the subject of good faith disputes. See *supra* n. 66.

⁹¹ As a final Hail Mary, PPL questions whether Zito even has pole attachment rights. Response at 28-29. PPL offers no support for this statement or to refute Zito’s statement in the Amended Complaint that it provides cable television, telecommunications services, and broadband internet access to business and residents in Pennsylvania. However, the Commission recently warned utilities against using the classification of services as a barrier to pole access stating, “we caution pole owners not to use this Order as a pretext to increase pole attachment rates or to inhibit broadband providers from attaching equipment—and we remind pole owners of their continuing obligation to offer “rates, terms, and conditions [that] are just and reasonable.” *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, WC Docket No. 17-108, FCC-CIRC1217-04, ¶ 182 (Draft Rel. Nov. 22, 2017).

The Commission should prohibit PPL from charging directly for pre-attachment surveys⁹² and direct PPL to refund to Zito the amounts already paid for survey work and engineering.

Alternatively, the Commission should direct PPL to refund to Zito any amounts above what the Commission determines to be a reasonable survey charge. A reasonable range of rates is between the average of \$27.83 per pole charged by other Pennsylvania pole owners (which includes make-ready design work) and the \$17.50 unit cost charged by Map Masters plus some reasonable additional amount for make-ready design. This amount should not exceed the \$55 per pole amount charged by PPL's own utility declarant, DP&L, which is very close to the PPL \$68 average per pole charge prior to October 2012, when PPL stopped accepting Zito's field survey results.

At a minimum, the Commission should order PPL to refund any amounts charged to conduct pre-construction surveys of Verizon owned poles, as this is clearly not permitted by the parties' pole attachment agreement or Commission precedent.

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

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

⁹² See *Texas Cable*, 14 FCC Rcd. at 9140-42 ¶¶ 10, 14 (utility could not recover survey costs through direct reimbursement rather than through annual fee); *Newport News*, 7 FCC Rcd 2610 ¶ 8 (“inspection designed to yield information about more than cable attachments and thus to benefit other pole users should not be paid for solely by the cable company”); *Mile Hi*, 15 FCC Rcd. at 11455-56 ¶¶ 8-9 (survey was not limited to cable attachments and charges not directly related to actual costs of conducting survey).

PPL should be required to employ cost-saving construction techniques such as guying, extension arms, opposite side construction, and pole top extenders where it can do so consistent with governing safety requirements.

Respectfully submitted,

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Date submitted: December 11, 2017

CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2017, I caused a copy of the foregoing Reply in Support of Amended Pole Attachment Complaint, exhibits and declarations in support thereof, to be served on the following (service method indicated):

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