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Office of the Secretary
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, DC 20554

RE: Comments on FCC Notice of Proposed Rulemaking Addressing Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 (CC Docket No. 96-98, FCC 96-182) Access to Rights-of-way Provisions

Dear Sir or Madam:

In the above referenced Notice of Proposed Rulemaking (NOPR), you requested comments concerning the regulations that the FCC will promulgate with respect to the access to rights-of-way provisions in the Telecommunications Act of 1996 (the "1996 Act"). PECO Energy Company ("PECO Energy") submits an original and (16) sixteen copies of its comments.

PECO Energy is a Pennsylvania business corporation that serves as the electric utility for Philadelphia and several of its surrounding counties and as the gas utility for Philadelphia's Pennsylvania suburbs. As such, PECO Energy constitutes a "utility" for purposes of the Communications Act of 1934, as amended by the 1996 Act. PECO Energy owns and utilizes rights-of-way throughout the region. Accordingly, the 1996 Act and the regulations promulgated thereunder could have a substantial impact on the way in which PECO Energy does business and on the costs borne by PECO Energy's ratepayers in the course of operating and upgrading its transmission and distribution systems. PECO Energy has an obligation as a public utility to ensure reliable service and system integrity and cannot undertake any activity that would jeopardize these obligations. Affiliates of PECO Energy and its subsidiaries are also participants in ventures to develop and implement new telecommunications technologies, such as personal communications services

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("PCS") and competitive access services. Thus, PECO Energy is not unmindful of the needs of those entities seeking access to its existing infrastructure.

Given its dual perspective on the access to rights-of-way provisions discussed in the NOPR (paragraphs 220 through 225), PECO Energy respectfully submits the following comments in response to statements made and questions posed by the FCC:

1. PECO Energy is subject to the jurisdiction of numerous federal and state regulators such that FCC authority to regulate the use of transmission and distribution assets may be limited by the action of other agencies.

Local public utility commissions, the Federal Energy Regulatory Commission ("FERC"), the Nuclear Regulatory Commission and other federal and state agencies place an obligation on utilities to provide reliable and safe service as well as place controls on non-utility use of some utility assets, including existing telecommunications assets owned by utilities for utility operations, transmission facilities and those aspect of a utility's transmission and distribution systems that interface with nuclear plants. FCC regulations should make allowance for the fact that regulations issued by other regulators will overlap with the regulations promulgated under the 1996. In addition, use of utility facilities, particularly leases of such facilities, may be subject to approval by various federal and state utility commissions. A utility should be able to comply with those regulations and should be presumed to be acting reasonably to the extent they restrict access to rights-of-way in a manner consistent with such regulations.

2. NOPR Paragraph 222:

A) The FCC cannot require a utility to provide access to rights-of-way where the utility's rights are restricted by contract or operation of law.

Many utilities obtain rights-of-way for limited purposes. In Pennsylvania, electric utilities have the right of eminent domain, but can condemn property only for their own utility purposes. Certain privately negotiated rights-of-way are restricted to PECO Energy's utility use. Railroads are particularly restrictive in granting rights-of-way for utility purposes (railroads themselves are exempt from the access to right-of-way requirements contained in the Communications Act of 1934 as amended by the 1996 Act).

In current pole attachment agreements, PECO Energy requires attaching third parties to obtain their own rights-of-way before they can use the poles. The FCC regulations should not require that a utility occupying a right-of-way allow others to attach if the utility itself would not have the right to use the right-of-way for the same purpose.

B) The utility that owns the right-of-way should be permitted to dictate where and how third parties may gain "access" to the utility's right-of-way.

PECO Energy has encountered situations in which third parties attaching to its poles have modified poles in order to maximize the number of cables that they can treat as a single attachment. PECO Energy believes that multiple attachments to a pole, via an unauthorized bracket or extensive overlashing, permits an attaching third party to avoid its share of the costs associated with the pole. In addition, PECO Energy has encountered situations in which third parties granted access to ducts have installed their facilities in a manner that occupies a disproportionate amount of space. Finally, as discussed below with reference to transmission towers in particular, there are spaces where the utility should be able to dictate who does the work in a particular right-of-way if there are safety or system reliability concerns.

The regulations should provide that the utility that owns the right-of-way can dictate where and how an attaching entity's facilities attach to the utility's right-of-way in order to maximize the available space in the right-of-way, insure that each attaching entity bears a fair share of the costs of the right-of-way and minimize risks to safety and reliability. If an attaching party agrees to install a bracket to effect its attachment, the bracket should become part of the pole that the utility owns and may lease out to third parties.

Moreover, to the extent a utility determines that it must provide the engineering and installation services within a specified right-of-way that it owns, the attaching third party must pay the cost of the service (including indirect costs such as an allocable share of overhead) and a reasonable return on the utility's resources.

C) There is a legitimate basis for distinguishing the "electric space" on wooden poles and transmission towers from other utility rights-of-way for purposes of permitting access.

The "Electric Space" on Wooden Poles

In accordance with the National Electric Safety Code ("NESC"), the nationally recognized safety standards for the electric utility industry, utilities reserve a portion at the top of a wooden pole as "electric space". Other parties are not permitted to attach in the electric space because (i) such attachments would pose safety hazards if untrained workers were permitted to attach cable in the vicinity of charged electric distribution and transmission cables and (ii) untrained workers would present a reliability hazard if they were working in the vicinity of active lines.

The regulations should continue to permit electric utilities to designate the top portion of the pole as "electric space" to which third parties are not permitted to attach.

Transmission Towers

Cellular and PCS Antennas. PECO Energy has recently received several inquiries regarding access to its transmission towers for purposes of siting cellular and PCS antennas. As a general policy, PECO Energy accepts applications for the leasing of space for antennas, but it provides all engineering and installation services. PECO Energy's workers are accustomed to working on the towers and are generally able to install antennas and platforms without requiring an outage for the lines on the tower. The regulations should provide that an electric utility can restrict the right of third parties to work on its towers in order to minimize safety and reliability concerns. Moreover, utilities should be permitted to charge both for the cost of its resources (including indirect costs such as an allocable portion of overhead) and for a reasonable rate of return on the use of those resources.

Fiber Optic Cable Build-Outs. PECO Energy has also received requests to use its transmission towers as corridors for fiber optic cable build-outs. During the fiber installation, The lines on the transmission tower must be de-energized. Transmission towers also have restrictions on the number of cables that can be installed to allow for wind and ice load. When PECO Energy has installed fiber optic cable on its towers for

its internal utility use, it has installed fiber optic cable in a replacement transmission cable or ground wire. PECO Energy typically waits for a scheduled outage on the transmission line to do the fiber installations. The installations themselves take a considerable allocation of resources over several days. In contrast, an antenna can be installed with a single crew working on a tower for less than a week.

PECO Energy has already leased out excess transmission tower fiber capacity to an affiliated entity and will continue to lease out excess fiber capacity to third parties on a non-discriminatory basis. However, it is PECO Energy's position that the regulation should not require access to transmission towers for cable optic fiber installation for non-utility uses. Utilities cannot permit untrained crews to install fiber cables on active transmission towers, nor should a utility be forced incur a transmission line outage or to allocate scarce resources to conduct a fiber build-out for another entity.

D) A utility should be required to provide "non-discriminatory access" *only to existing facilities and rights-of-way.*

The 1996 Act provides that a utility must provide cable television systems and telecommunications carriers with non-discriminatory access to any pole, duct, conduit or right-of-way owned or controlled by it. The regulations should expressly provide that the 1996 Act does not require, and cannot be used to compel, utilities to condemn or construct rights-of-way for purposes of facilitating access by telecommunication companies. As illustrated above with respect to fiber optic cable on transmission towers, there are certain activities in utility right-of-ways that can only be undertaken by the utility that owns the right-of-way. These utilities are not in the business of constructing fiber build-outs. The 1996 Act does not require that the utilities enter into a business or incur interruptions in their utility activities to facilitate the construction of telecommunication facilities.

3. NOPR Paragraphs 222 and 223: A utility should be presumed to be acting reasonably if it restricts access for safety reasons in accordance with the NESC or other nationally recognized industry safety standard.

The NESC and other industry safety and operational standards, such as the National Electric Code, already provide a reasonable basis on which utilities regulate their own use of right-of-ways. The regulations should provide that a utility is presumed to be reasonably restricting access for safety, reliability or other generally acceptable engineering reasons if it does so in accordance with such standards. The presumption should be irrebuttable. If the utility imposes restrictions that are not consistent with such standards, the utility should bear the burden of proving that the unique circumstances of a specific right-of-way dictate the imposition of a higher standard. The regulations should also outline how disputes will be handled given the fact that each request and any restriction will be based on the particular facts of each separate request.

4. NOPR Paragraph 223: A utility should be permitted to determine that a right-of-way has "insufficient capacity" whenever that right-of-way would be cost prohibitive for the utility to reproduce and a lease of capacity to a third party would not provide it with an adequate rate of return.

Paragraph 4 of the NOPR states, "This rulemaking is one of a number of interrelated proceedings designed to advance competition, to reduce regulation in telecommunications markets and at the same time to advance and preserve universal service to all Americans."

Paragraph 12 of the NOPR then provides,

> Consistent with this perspective on competition, we also note that the purpose and, given proper implementation, the likely effect of the unbundling and other provisions of the 1996 Act [such as access to rights-of-way] is not to ensure that entry shall take place irrespective of costs, but to remove both the statutory and regulatory barriers and economic impediments that inefficiently retard entry, and to allow entry to take place whether it can occur efficiently. This entry policy is competitively neutral; it is pro-competition, not pro-competitor.

These two paragraphs recognize that the 1996 Act is designed to foster competition in the telecommunication industry. With respect to the access to

rights-of-way provisions, Congress clearly sought to make available existing utility rights-of-way to the extent that those rights-of-way could be utilized by telecommunication providers in both an economically and operationally efficient manner. It is reasonable to infer that Congress wanted to prohibit access arrangements that would unreasonably burden the telecommunications industry by permitting owners of existing infrastructure to unreasonably limit access. However, it was not the intention of Congress to shift the cost of constructing infrastructure from new telecommunication service providers to existing utilities and their ratepayers.

As the FCC considers regulations under the 1996 Act regarding rights-of-way, PECO Energy urges it to conclude that utilities should not be penalized because they currently own valuable resources. Nor should their shareholders and ratepayers be forced to forgo reasonable returns on utility assets to further the economic objectives of other industries. The 1996 Act is designed to promote equal access to essential facilities but it should be implemented with the goal of allowing equitable returns to those companies who have already incurred imbedded costs to construct and maintain existing infrastructure.

This comment is not offered simply with regard to rates. It is PECO Energy's view that the 1996 Act's requirement that utilities provide "access to the poles, ducts, conduits and rights-of-way on a non-discriminatory basis" imposes its own economic burden. Thus, the question of what constitutes non-discriminatory access cannot be separated from the question normally associated with rates, i.e., what constitutes a fair rate of return on a utility's investment. For example, if capacity is available in a certain right-of-way, such as a duct in a congested downtown location, but that capacity is limited, does the 1996 Act require that the utility give that capacity to a third party telecommunications provider? The utility could, by reserving that capacity, forego substantial costs to its ratepayers in the future that might otherwise be incurred to construct a second duct for utility purposes. Alternatively, the utility, might be able to obtain a higher rate of return from an affiliate in which it holds an equity interest than it could from a third party telecommunications provider willing to pay the same rate to lease the space in the duct

If the FCC first addresses the issue of non-discriminatory access, it must later be prepared to consider the fact that some rights-of-way are virtually incapable of reproduction or capable of reproduction only at such substantial cost that it is inappropriate to limit the rate of return that a utility can expect from such an asset. Alternatively, the FCC should provide that in certain instances where capacity within a right-of-way is limited and that right-of-way cannot be

reproduced except at excessive cost, a utility should have an unrestricted right to reserve capacity within such right-of-way

5. NOPR Paragraph 225:

A) 30 days written notice of modifications to rights-of-way is sufficient for modifications to wooden poles.

In its existing pole attachment agreements, PECO Energy is obligated, by contract, to provide 30 days notice of proposed pole modifications to third parties attaching to the poles. Currently, the notice is designed to give the attaching party an opportunity to move their facilities in accordance with the proposed changes to the pole rather than to propose modifications to their own attachments. However, PECO Energy's experience indicates that the 30 day notice period is appropriate under both the current agreements and the 1996 Act. Utilities make change outs, particularly to poles, in accordance with detailed internal work plans. An extended notice period would prevent the owner of the right-of-way from scheduling crews and power distribution outages in an efficient manner, particularly if an attaching party has additional rights to negotiate further unplanned modifications once it responds to the first notice from the right-of-way's owner. In addition, if the notice period is extended it could have an adverse impact on planned upgrades to sections of the distribution system, therefore it could have an impact on system reliability.

On the other hand, it has been PECO Energy's experience that third parties that attach to its poles also plan ahead any changes in their networks. When they receive notice that particular distribution corridors will be modified, a third party usually knows if it intends to alter its own use of that corridor. In fact, in cases where the third party would chose to modify the poles, it probably would have already discussed its plans with PECO Energy, without the notice. It seems highly unlikely that a telecommunications provider who is already on a pole or in a right-of-way would shoulder costs for a modification of the right-of-way without having a short term plant to modify its own attachments.

Electric utilities, in particular, constructed right-of-ways to facilitate electric service. Electric ratepayers pay for such services. If notice periods are extended beyond what PECO Energy and contracting third party attachers have found to be reasonable in the past, the electric use of the distribution facilities will essentially be forced to take a back seat to the requirements of telecommunication providers

PECO Energy concedes that the logistical difficulties and the greater expense associated with modifying or increasing certain rights-of-way such as ducts might warrant a more extended notice period than 30 days. PECO Energy would welcome additional participants in such undertakings and would have a longer lead time to incorporate the requirements of such participants.

B) An affirmative response to a notice of right-of-way modification should not convey the right to the attaching party to reserve space for future use.

The regulations should specifically provide that the notice is designed to permit third parties attaching to a pole the opportunity to modify their own attachments based on a proportionate cost of the entire modification, rather than forcing the attaching party at a later date to duplicate expenses to modify the right-of-way a second time. The regulations should further provide that a positive response to a notice and a willingness to pay for part of the noticed modifications does not convey to that third party the right to reserve or designate space on the right-of-way for future use. The third party, if it participates in a modification, should be required to modify its attachments within a reasonable period of time, such as six months, or forfeit the right to make the modification

PECO Energy is concerned that a third party with unspecified future needs would request that PECO Energy modify a series of 50-foot poles by replacing them with 60-foot poles, rather than the 55-foot poles PECO was planning on installing. If PECO Energy and the third party reach agreement on the sharing of costs, PECO Energy would expect the third party to alter its attachments within a reasonable period of time so that it could respond to any other inquiries regarding the use of excess capacity. PECO Energy does not believe it is practical from a legal or administrative standpoint to treat the additional five feet of space as space reserved for the third party that requested it, unless, in addition to paying for a share of the change out costs, the third party is willing to pay a lease fee to cover maintenance, insurance and other operational costs associated with the space it is not using. PECO Energy would be forced to carry those costs indefinitely if the third party could reserve the space.

C) A "proportionate share" of the costs of a modification should include a proportionate share of all of the costs of the change out, not just a proportionate share of the incremental costs over and above the owner's planned modifications.

The 1996 Act requires utilities to provide notice to third parties of planned modifications to rights-of-way to give them the opportunity to modify their own attachments, presumably at a lower cost than they would otherwise incur if they did additional modifications later. The 1996 Act does not provide that the third party modifications are to be subsidized by the utility. If the third party wishes to participate in the modification, the third party should bear a proportionate share of all of the costs of the change out. The costs allocated to the third party would still be less than the third party would have to bear if it required a modification on its own account.

It should be noted, with respect to wooden poles, that poles increase in size in five-foot increments. If a utility requires an additional two feet of space it will still add five feet. A third party has little or no incentive to participate in that modification unless it intends to use more than an additional three feet because it will be able to lease the space for less after the installation if it excess capacity. This might not be the case with other kinds of rights-of-way.

D) If the owner of a pole modifies a pole so as to create additional space for the production of revenue, the owner should not be forced to credit any part of those potential revenues against the costs borne by other attaching parties.

Utilities such as PECO Energy maintain poles in order to further their electric transmission and distribution businesses. They do not construct rights-of-way for the purpose of generating revenue, although like any prudent businesses, they look for ways to leverage existing assets to increase revenues. Nor do utilities deliberately incur additional costs to create pole capacity that the utility itself has no intention to use in the future. Regulations requiring utilities to offset costs borne by others with the prospect of possible revenues in the future would essentially put the utilities into the business of leasing space, to the point the point that utilities would be forced to carry additional space at their own cost (similar to inventory) until new users materialize. Utilities would be forced to develop marketing plans for their excess capacity in order to recover costs. This would detract from their core businesses

An alternative method of crediting attaching parties who helped pay for modifications would be to have some sort of credit back system each time a new party attaches to a pole. This is unwieldy and imposes accounting obligations on utilities that their computer systems and pole management resources cannot accommodate.

Respectfully yours,

Christine A. Reuther
Assistant General Counsel

CAR/cw

Enclosure

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