ATTACHMENT B

the common practice of rearranging attachments within an existing space to expanding the space on an existing pole. Cox demands *new* facilities – underground, and physically separated from the poles on which Cox seeks to attach. Therefore, the legal precedent on which Cox relies does not support the extraordinary relief that Cox demands. The Commission has not ordered that existing pole space be expanded under Section 224(h), Section 224(i), or *any* other provision of the Pole Attachment Act and certainly should not do so based on the facts presented here.

II. BACKGROUND AND FACTS

A. The Parties.

1(a)

Dominion maintains its corporate headquarters at 120 Tredgar Street, Richmond, Virginia 1(b) 23219. The primary business of Dominion is providing electric transmission and distribution services throughout the Commonwealth of Virginia, including within the City of Virginia Beach. 1(c) Dominion owns and operates wires, poles, and other infrastructure within Virginia supporting its core electric utility business.

2(a)

Upon information and belief, Cox is a franchised cable operator offering competitive video, voice, and data services to businesses and residences within the Commonwealth of 2(b) Virginia.[1] Cox has a general office address of 1341 Crossways Boulevard, Chesapeake, Virginia 23320.[2]

B. The Parties' Pole License Agreement.

3(a)

Dominion and Cox are parties to a Pole License Agreement, dated September 1, 1984.[3] 3(b) The Agreement expressly reserves Dominion's right to maintain its poles and to operate facilities on its poles in the manner that is best suited to fulfilling the service requirements of its core

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1 Complaint ¶ 3.

2 *Id.* ¶ 4.

3 Complaint, attached Declaration of James Ruel, Exhibit 1 (Pole License Agreement, dated September 1, 1984 ("Agreement").

electric transmission and distribution business.[4] 3(c) Under the Agreement, Dominion has no financial obligation to pay Cox for any interference with Cox's operation of its communications attachments arising from Dominion's use of its own poles to support its core electric transmission and distribution business.[5]

4(a)

On the contrary, the Agreement obligates Cox to, at all times, maintain its attachments in accordance with applicable electrical safety and reliability codes, including, but not limited to the requirements and specifications of National Electric Safety Code ("NESC") and the Reliability Standards of North American Electric Reliability Corporation ("NERC").[6] 4(b) Consistent with the Pole Attachment Act, Dominion can refuse to permit any attachment by Cox that conflicts with these standards.[7] 4(c) The Agreement also entitles Dominion to require Cox, at Cox's sole cost and expense, to remove or relocate any attachment that interferes with Dominion's use of its poles, or facilities on its poles, or that otherwise is not in accordance with any applicable codes, specifications, or practices related to Dominion's electric transmission and distribution operations.[8]

C. The Shore Drive Pole Locations.

5(a)

The dispute between Dominion and Cox relates to two (2) pole locations along Shore Drive, in Virginia Beach, Virginia. 5(b) At the first pole location, 3601 Shore Drive ("SD-I"), Dominion plans to update the current configuration of its electric distribution line in order to conform to NERC Reliability Standards.[9] 5(c) At the second pole location, 3657 Shore Drive ("SD-II"), Dominion plans to construct a new "intermediate" pole supporting its existing electric

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4 *Id.* ¶ 8.
5 *Id.*
6 *Id.* ¶ 3.
7 *Id*; *see also* 47 U.S.C. § 224(f)(2).
8 *Id.* ¶ 4(a).
9 Declaration of Michael Graf ¶ 5, attached hereto as Exhibit 1 ("Graf Declaration")

5(d)
distribution line.[10] Cox currently has an attachment at SD-I but not at SD-II, at which its cable
5(e)
currently traverses the location. As to both SD-I and SD-II, Dominion and Cox agree that the poles will not provide sufficient space to accommodate Cox's attachments going forward in consideration of NESC, NERC Reliability Standards, and other applicable codes, rules, and
5(f)
safety specifications.[11] The parties further agree that relocating Cox's attachment now at SD-I, and Cox's aerial cable now traversing the location of the new SD-II,[12] to new *underground* facilities is the most cost-effective means of enabling Cox to maintain its communications cables in the vicinity of the affected pole locations.[13]

D. The Work of Undergrounding Cox's Communications Cables.

6(a)
Unlike rearrangements, and other make-ready work that Dominion, as well as Cox and other attachers, routinely undertake to create additional space on an existing pole, converting an aerial communications attachment to underground requires constructing new facilities (off the existing pole), for the sole purpose of maintaining communications cables where pole attachments
6(b)
cannot otherwise be accommodated.[14] At the Shore Drive pole locations, the undergrounding process may include several of the following tasks, *all of which must be performed by Cox*: engineering, obtaining permissions from all affected landowners, boring, trenching, installing new conduit or ducts, removing and relocating Cox's communications cables from their current
6(c)
locations, and then establishing connections to Cox's above-ground network.[15] The new

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10 *Id.*

11 *Id.* ¶¶ 8–10.

12 Because no pole exists at SD-II, as noted Cox maintains no attachment at SD-II. Dominion advised Cox that the pole to be set at SD-II will have sufficient space to accommodate only Dominion's electric transmission and distribution lines, but will not have sufficient space to accommodate any communications attachments. *Id.* at ¶¶ 9–10.

13 The parties also considered the option of expanding Dominion's existing facilities by setting larger, transmission-type poles at the Shore Drive pole locations. However, this option proved to be far more expensive than relocating Cox's communications cables to new underground facilities. *Id.* at n. 8.

14 *Id.* ¶ 11.

15 *Id.* ¶ 12.

underground facilities, once constructed, will be owned and operated by Cox, and will not be accessed by Dominion for any purpose.[16]

7(a)

Dominion repeatedly has postponed, and must continue to postpone, critical enhancements to its electric facilities until Cox proceeds to remove its communications cables from the Shore Drive pole locations.[17] 7(b) Over the course of the past seven (7) months, Dominion emphasized to Cox the urgent nature of its work at the Shore Drive pole locations and the significant risk of NERC-imposed penalties in the event that such work could not be completed before the end of calendar year 2014.[18] 7(c) Although Cox first assured Dominion that it would promptly remove and relocate its communications cable at the Shore Drive pole locations, it was not until the requested deadline that Cox demanded full advance compensation, in the amount of $43,251.89, before it would proceed with the engineering, permitting, construction and relocation work.[19]

E. Escalation of the Parties' Dispute and Executive-Level Discussions.

8(a)

On July 11, 2014, Dominion requested that Cox remove and relocate from SD-II its aerial communications cable traversing Shore Drive.[20] 8(b) This request indicated a completion deadline of October 4, 2014, and included remarks that the work specified was essential to Dominion installing new electric distribution facilities at SD-II.[21] 8(c) The work requested, including undergrounding, was previously discussed between construction planners for each of the parties.[22]

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16 *Id.*
17 *Id.*
18 *Id.* ¶ 13.
19 *Id.*
20 *Id.* ¶ 14.
21 *Id.*
22 *Id.*

9(a)

On July 17, 2014, Dominion requested that Cox remove its attachment to the pole located at SD-I.[23] 9(b) Dominion's request indicated a completion deadline by Cox of October 1, 2014. Dominion emphasized that the work specified was essential to adjusting its electric distribution line before year end, as needed to conform to NERC Reliability Standards.[24] 9(c) The work requested, including undergrounding of Cox's communications cables, was previously discussed between construction planners for each of the parties.[25]

10(a)

On October 1, 2014, Maria Browne, counsel to Cox, submitted to Dominion a demand for compensation, in advance, for the full cost of undergrounding Cox's communications cables at the Shore Drive pole locations.[26] 10(b) Cox estimated that the work of: (1) removing its communications cables from the Shore Drive pole locations; (2) constructing alternate underground facilities at the Shore Drive pole locations; and (3) relocating its displaced communications cables would impose a total expense of $43,251.89.[27]

11(a)

Based on the demand, Dominion understood that Cox would not cooperate in promptly completing the work requested at the Shore Drive pole locations – *unless and until* Dominion paid substantial amounts to Cox. 11(b) Yet, Cox has not provided any contractual or statutory basis to demand this compensation payment from Dominion. 11(c) In the face of anything less than Cox's full and prompt cooperation, Dominion would be unable to complete critical adjustments to its electric distribution facilities as needed to conform to NERC reliability standards.

12(a)

On October 27, 2014, Horace P. Payne, Jr., Senior Counsel, Dominion, responded to Cox's demand, offering, in compromise, that Dominion would reimburse Cox for itemized costs

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23 *Id.* ¶ 15.

24 *Id.*

25 *Id.*

26 Complaint, attached Declaration of James Ruel, Exhibit 2 (Letter from Maria T. Browne, Davis Wright Tremaine to Kelly Mansfield, Dominion Virginia Power (Oct. 1, 2014))("Oct. 1st Browne Letter").

27 Complaint, attached Declaration of Greg Patterson, Exhibit 4 (Attachment A to Letter from Maria T. Browne, Davis Wright Tremaine to Kelly Mansfield, Dominion Virginia Power (Oct. 1, 2014)).

incurred to *remove* (but not relocate) its communications cables from the Shore Drive pole locations.[28] 12(b) However, on the basis of current law, Dominion indicated that it would not compensate Cox for any costs associated with constructing new underground facilities as an alternate to further use of the poles.[29] 12(c) Dominion also requested that Cox confirm an extended completion deadline of December 1, 2014, for all work at the Shore Drive pole locations.[30] 12(d) Dominion reiterated that enhancements to its electric distribution facilities mandated by NERC could not be completed until Cox's communications cables at the Shore Drive locations were removed.[31]

13(a) On November 17, Maria Browne, counsel to Cox, responded to Dominion's letter, rejecting Dominion's comprise offer, and again insisting that completion of the work requested at the Shore Drive pole locations was conditioned on Dominion compensating Cox, in advance, for the full cost of undergrounding Cox's displaced communications cables.[32]

14(a) On November 20, Brett Heather Freedson, counsel to Dominion, responded to Cox's letter, suggesting that the parties' engage in executive-level discussions, pursuant to 47 C.F.R. 1.1404(k), prior to resorting to mediation or complaint proceedings before the Commission.[33] 14(b) The executive-level meeting between Dominion and Cox occurred on December 16, 2014.[34]

15(a) The parties reached an agreement on December 16. 15(b) This agreement was documented in a letter dated December 18, 2014, from Brandon Stites of Dominion, to Maria Browne, counsel

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28 Complaint, attached Declaration of James Ruel, Exhibit 3 (Letter from Horace P. Payne, Jr., Senior Counsel, Dominion Virginia Power to Maria T. Browne, Davis Wright Tremaine (Oct. 27, 2014)) ("Payne Letter").

29 *Id.*

30 *Id.*

31 *Id.*

32 Oct. 1st Browne Letter, *supra* note 26.

33 Complaint, attached Declaration of James Ruel, Exhibit 5 (Letter from Brett Heather Freedson, Eckert Seamans Cherin & Mellott, LLC to Maria T. Browne, Davis Wright Tremaine (Nov. 20, 2014)).

34 Graf Declaration ¶ 18.

15(c)
to Cox.[35] The parties agreed that Cox shall complete all work requested at the Shore Drive pole
15(d)
locations, before March 1, 2015. In turn, Dominion guaranteed compensation to Cox for such work, of an amount up to $43,000.00, upon a final legal determination that Dominion is liable for the cost of constructing alternate underground facilities for those communications cables
15(e)
displaced from the Shore Drive pole locations.[36] Cox has not disputed any representation made in the December 18, 2014 letter.

III. ARGUMENT

A. Dominion's Pole Attachment Practices are Just and Reasonable.

1. Cox Fails to Carry Its Burden of Proof.

The Commission's regulations and precedent make plain that the burden of proof is squarely on Cox.[37] The Commission very recently reaffirmed this standard, concluding that the complainant in a pole attachment complaint proceeding failed on several grounds to meet its burden of proof.[38] Here, Cox has the burden of proving all of the bases for its claims for relief and it has failed to carry that burden.

2. Dominion is Not Obligated to Expand its Existing Plant for the Sole Benefit of Cox.

Under the Pole Attachment Act, and well settled federal court and Commission precedent, a pole owner has no obligation to expand its existing facilities where it is agreed, upon consideration of all applicable safety and reliability codes, that "insufficient capacity" exists to accommodate any request for pole access. In *Southern Co. v. FCC*, 293 F.3d 1338, the 11th

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35 Complaint, attached Declaration of James Ruel, Exhibit 6 (Letter from Brandon E. Stites, Director Electric Distribution Design, Dominion Virginia Power to Maria T. Browne, Davis Wright Tremaine (Dec. 18, 2014)).

36 *Id.*

37 *See* 47 C.F.R. § 1.1404(f) (complainant alleging that a term in pole attachment agreement is unjust and unreasonable must specify "all information and argument relied on to justify said claim."); *Knology v. Ga. Power*, 18 FCC Rcd. 24615, 24635 (2003).

38 *See Verizon Florida LLC v. Florida Power and Light Co.*, DA 15-187, 2015 WL 569211, ¶¶ 21-25 (EB-14-MD-003, rel. Feb. 11, 2015).